TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SAN FERNANDO

High Court Action No. S-1301 of 2005

In the matter of an application by Paula Barrimond for judicial review

and

In the matter of the decision by the Public Service Commission conveyed by letter of 3 May 2005 to appoint a disciplinary tribunal to hear and determine certain disciplinary charges against the applicant arising out of an incident that occurred on 21 July 1999

and

In the matter of the unreasonable and/or illegal delay in preferring disciplinary charges against the applicant and/or appointing a disciplinary tribunal to hear and determine same

and

In the matter of the illegal and/or unfair treatment of the applicant contrary to the principles of natural justice and section 20 of the judicial review act 2000

Between

PAULA BARRIMOND

Applicant

-And-

THE PUBLIC SERVICE COMMISSION

Respondent

Before the Honourable Mr. Justice James C. Aboud (Ag.)

Appearances:

Mr. Anand Ramlogan and Mr. Sheldon Ramanan instructed by Mr. Haresh Ramnath for the Applicant.
Ms. Rachael Thurab instructed by Ms. Nirmala Bansee for the Respondent

Dated: 29 May 2008

JUDGMENT

I. BRIEF SUMMARY OF FACTS AND FINDINGS OF THE COURT

(a) The applicant is a Customs Officer I in the Customs and Excise Division of the Public Service and seeks judicial review of the respondent's decision to prosecute or try three disciplinary charges preferred against her. The charges arise out of an incident on 21 July 1999 that occurred in the course of her duties as a customs officer. The respondent is the Public Service Commission, which, by virtue of Chapter IX of the Constitution, is vested with the sole and exclusive jurisdiction to appoint, transfer, promote, remove, and exercise disciplinary control over public officers within the jurisdiction of the PSC, which includes customs officers.

(b) On 14 December 1999 the applicant was informed of the appointment of an investigating officer. She was not suspended. On 5 August 2004, approximately four years and eight months later, the applicant was informed that disciplinary charges were preferred against her and on 3 May 2005, approximately seven months thereafter, she was informed that a disciplinary tribunal had been appointed to hear and determine the charges. The matter was called on some five occasions but adjourned on each occasion. Leave to apply for judicial review was granted on 27 July 2005, less than three months after the notice of the hearing was issued.

(c) The applicant complains that in making its decision to prosecute or try the disciplinary charges against her, the respondent acted unlawfully and/or illegally, contrary to the principles of natural justice. She says that it would be an abuse of process to prosecute her since the alleged offence occurred some five and a half years before the appointment of the tribunal. She claims to be prejudiced by the unreasonable and inordinate delay. The respondent denied these submissions and argued instead that

leave to apply for judicial review granted to the applicant on 27 July 2005 should be set aside on the ground of delay in making the application and that the applicant should have availed herself of the alternative remedy of appearing before the tribunal and taking a preliminary objection. The respondent also argued that the delay was not unreasonable nor did it prejudice her defence.

***Held**: The delay was unreasonable and an abuse of process. Further, the order granting leave to apply for judicial review could not be set aside, because the correct procedure to question the grant was not used. Finally, the right to appear before the tribunal was not an effective alternative remedy.*

II. FACTUAL BACKGROUND

1. The applicant has been a public servant for over 30 years. She joined the public service on 6 August 1975 as a Temporary Clerk I in the Ministry of Education. In or about 1978 she was transferred to the Customs and Excise Department. The applicant was there appointed a Customs Officer I with effect from 2 July 1982, from which date she continues to hold this office. She says that she has always performed her duties in a diligent and efficient manner and has never had a single adverse staff report during her career. She has also never been issued a letter of warning and apart from the instant matter she has never been the subject of disciplinary proceedings.

2. On 2 July 1999 the applicant was stationed at the Aeromarine Bond, Sea Lots, Port of Spain. She received applications for the release of three consignments of goods shipped in packages to three importers. The packages were stored inside the bonded warehouse. The importers presented her with Non-Trade Duty Entry Forms, invoices, and Bills of Sight. She interviewed the importers about the contents of the packages and, having examined the documentation and invoices, she

assessed the duties. She signed the Bills of Sight and directed them to pay the customs duties to the cashier. In her statement to the respondent's investigator she admitted that she did not examine the packages prior to signing the Bills of Sight. She said she was attempting to dispatch as many non-trade importers as possible in order to clear the waiting area.

3. The applicant said that she immediately notified the customs security guards at the warehouse that she had sent the importers to pay the duties but that she had not yet examined the goods. She asked them to notify her when the goods were retrieved from the warehouse so that she could conduct her examination. She said that she gave specific instructions that the goods were not to be released to the importers without her approval. She described this as the usual practice and procedure in her experience.

4. The applicant was then approached by one Anthony Chandler, an officer with the Preventive Branch in the Customs and Excise Division, who informed her that he had suspicions about the three importers. The applicant said she told him that she had not authorised delivery of the packages to them because she first had to examine them. She then handed all the documents pertaining to this transaction to Mr. Chandler who took charge of the delivery. It was subsequently discovered that the packages contained commercial goods of a value far in excess of that declared by the importers. The correct duties were paid and the importers took delivery of the goods. The applicant subsequently gave a statement to Mr. Chandler in August 1999.

5. On 14 December 1999 Mr. Keith Robinson, a Tax Officer of the Inland Revenue Division, was appointed under regulation 90 of the Public Service Regulations to investigate the incident. By letter of 17 December 1999 Mr. Robinson notified the applicant of his appointment and requested a written explanation from her. The applicant responded by letter of 22 December 1999 indicating that she had never authorised final delivery of the said goods. The applicant received no further word

on this matter until some five years later when she received a letter of 5 August 2004 from the Director of Personnel Administration indicating that three charges had been preferred against her. By letter of 7 October 2004 the applicant responded requesting that the respondent withdraw the charges against her, as it would constitute an abuse of process and be unfair for her to be asked to defend the charges after a lapse of five years. On 17 May 2005 the applicant received a letter dated 3 May 2005 from the Director of Personnel Administration informing her that a disciplinary tribunal had nonetheless been established to hear and determine the charges. The hearing was fixed for 18 May 2005. She attended in person indicating that she was ready to proceed but the respondent's prosecutor was in another court and the matter was adjourned. It was called on four other occasions and adjourned, every time on the application of the respondent's prosecutor.

6. On 15 July 2005, within 3 months of the notice of hearing, the applicant filed these proceedings. On 27 July 2005 Madam Justice Gobin granted leave to apply for the following judicial review reliefs:

    (a) an order permanently staying the disciplinary proceedings;

    (b) an order of *certiorari* to remove into this Honourable Court and quash the decision of the PSC to prosecute or try the disciplinary charges;

    (c) a declaration that the applicant has been treated unfairly and/or illegally, contrary to the principles of natural justice;

    (d) costs;

    (e) such further orders, directions, or writs as the court considers just and as the circumstances warrant.

    It is noteworthy that Gobin J did not expressly extend the time to apply although one year had elapsed between the preferment of the charges and the filing of these proceedings. The respondent did not make any interlocutory application to vacate the order granting leave to apply nor did it file a formal notice of intention to take a preliminary objection at the hearing of the substantive application. The relevance of these matters will become apparent in due course.

7. The applicant contended that the delay prejudiced her defence. She said that she had tried to maintain but lost contact with the three importers (who had promised to verify that the delivery of the goods was conditional on her examination of the packages) and could not trust the memory of the security guards to whom she gave her instructions not to release the consignments without her approval.

8. In its affidavit of 22 November 2005, the respondent admitted that there was prosecutorial delay but offered several explanations. It said that after receipt of the investigator's report on 18 January 2000 it forwarded the applicant's file to the Legal Unit of the Service Commissions Department on 9 February 2000. It sought their attorneys' advice and requested the preparation of charges. However, shortly after receiving the file, the Legal Unit embarked on what was described as a "file audit". This was said to be undertaken in order to improve efficiency by tracing and documenting the movement of numerous files through the Commission's departments. The exercise involved the return of all files to the various sections of the Service Commissions Department from where they had originated. The applicant's file, together with many other files, was returned to the respondent's Discipline Section. It remained there until 22 August 2001 when it was re-submitted to the Legal Unit. The legal advisor read the file and prepared draft charges in September 2001, but required clarification and further information from the investigator. On 15 October 2001 the respondent wrote the investigator seeking the further information. Not having a response it again wrote him on 6 December 2001, enclosing a copy of its request. Despite further memoranda and telephone calls, nothing further was heard from the investigator, or the department where he worked, until 16 April 2003. On that date, the respondent received a letter from the Chairman of the Board of Inland Revenue indicating that the investigator had been granted a two-year leave of absence without pay from 1 December 2000 to 30 November 2002, and had immediately thereafter resigned from the public service.

9. On 9 June 2003 the applicant's file was assigned to an attorney of the Legal Unit for finalisation of the charges. The Unit was then inundated with approximately

200 pending files, and understaffed. The attorney who prepared the draft charges had left the Legal Unit, leaving two attorneys to handle the workload, one of whom later went on leave. As of October 2003, three attorneys were hired on a temporary basis. By the time that the file had been re-submitted there were four attorneys assigned to the Legal Unit. The charges were finalised on 14 June 2004 and forwarded to the respondent. The decision to charge the applicant was taken on 27 July 2004 and the charges were preferred against the applicant by letter of 5 August 2004.

10. The regulation 90 investigation commenced on 14 December 1999 and the charges were preferred on 5 August 2005, a period of four years and eight months. It took another seven months after the applicant wrote her response to the charges for the notice of hearing to be issued. The applicant contends that this amounts to an inordinate and unreasonable delay such as to make it unfair and an abuse of the respondent's powers to prosecute or try the disciplinary charges.

11. The history of the proceedings can be divided conveniently into six discrete periods:

    (a) From the date of appointment of the investigating officer to the submission of his report (14 December 1999 to 18 January 2000), a period of 35 days;

    (b) From the date of delivery of the file to the Legal Unit to the date of the attorney's request to the investigator for further information (9 February 2000 to 15 October 2001), a period of one year and eight months;

    (c) From the date of the request for further information to the date that it was discovered that the investigator had been unavailable since 1 December 2000 (15 October 2001 to 16 April 2003), a period of one year and seven months;

(d) From the assignment of the file to finalise the charges to the settling of the charges (9 June 2003 to 14 June 2004) a period of one year;

(e) From the settling of the charges to the preferrment of the charges (14 June 2004 to 5 August 2004), a period of 52 days;

(f) From the date of the applicant's written response to the charges to the notice of the tribunal's first date of hearing (5 August 2004 to 3 May 2005), a period of nine months.

12. At the trial, the respondent's counsel argued that the delay in prosecuting the charges was neither inordinate nor unreasonable in the circumstances. The respondent's counsel further submitted that the applicant had unduly delayed in applying for judicial review as the charges were preferred on 5 August 2004 and the application for leave was filed almost one year later on 15 July 2005. Counsel made an oral application to set aside the leave granted by Gobin J on 27 July 2005. Alternatively, counsel argued that the applicant's undue delay went to the root of the application and that all relief could be refused at the substantive hearing of the application. The respondent's counsel further submitted that the applicant had an available alternative remedy, namely to submit to the jurisdiction of the tribunal and raise the issue of prosecutorial delay as a preliminary objection. In this way, it was argued, the delay could be canvassed as "punishment in itself", and the tribunal might be persuaded to dismiss the charges.

III. ISSUES

13. The issues to be decided are as follows:

(a) Whether the leave granted on 27 July 2005 to apply for judicial review should be set aside, or, alternatively, whether the substantive application should be dismissed at the trial on the ground of the applicant's undue delay in making the application;

(b) Whether the delay in prosecuting the disciplinary charges against the applicant constitutes an abuse of process or is unfair;

(c) Whether an alternative remedy is available to the applicant.

UNDUE DELAY IN APPLYING FOR JUDICIAL REVIEW

14. Section 11 of the Judicial Review Act, No. 60 of 2000, ("the JRA") provides as follows:

> (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.
>
> (3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters, as it considers relevant.
>
> (4) Where the relief sought is an order of *certiorari* in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision.

15. A respondent is undeniably entitled to rely on section 11 of the JRA, but at what stage is the right to raise delay exercisable? Subsection (2) confers a discretion on the court to refuse leave if there has been undue delay in making the application. The language in subsections (1) and (2) suggests that the issue is to be determined at the leave stage and not at the substantive application stage. If the application for leave is made at a contested *ex parte* or converted *inter partes* hearing then the appropriate place to take the objection is at the leave stage. However, most applications for leave are made *ex parte,* uncontested, and unless the delay is apparent enough to be recognised or is specifically drawn to the judge's attention by the applicant's counsel, and he expressly extends the time, the directive in the first limb of subsection (1) will appear to have been overlooked. Where the leave-granting judge expressly extends the time to make the application, the exercise of

his discretion is reviewable on appeal or by application to set aside. Sometimes, evidence of delay is unearthed after the extension is granted and a respondent will have recourse to interlocutory remedies before the leave-granting judge, or another judge, to reverse the grant. Cases arise where undue delay is apparent on the papers, but the judge has nonetheless granted leave without expressly extending time to make the application. In both cases, which is to say, on grants made *ex parte*, uncontested, where there is apparent delay and time is expressly extended or in cases where the order is silent, the question arises: what is the appropriate stage of the proceedings for the respondent to take the objection? More directly put, can the objection be taken at the substantive hearing, and, if so, by what procedure?

16. In *Yuclan Balwant v The Statutory Authorities Service Commission (unreported, decision of C. Hamel-Smith J (Ag.) dated 3 June 2002 in HCA No. 402 of 2001)* leave to apply for judicial review was granted *ex parte* despite a delay of almost 10 years. The order did not expressly extend time to make the application. The respondent filed a notice of intention to apply to set aside leave shortly after it was granted. The notice was in the usual form, indicating that the application would be made at the hearing of the motion. Normally, such applications are treated as preliminary objections to the hearing of the motion, and they are often determinative of the substantive matter. Mr. Justice Christopher Hamel-Smith (Acting) considered the reasoning of the House of Lords in *R. v. Criminal Injuries Board ex parte A [1999] 2 AC 330* and held that the leave-granting judge must have implicitly extended time. While recognising that section 11(1) restricted the consideration of timeliness to the application for leave stage, he regarded the respondent's notice of preliminary objection as a viable means of legitimising such an objection at the substantive hearing. The learned acting judge correctly appreciated that respondents are voiceless at the uncontested *ex parte* leave stage. In *Criminal Injuries Board ex parte A* the Law Lords recognised the existence of a microphone of complaint in the form of a separate application. I think they had in mind an interlocutory application to set aside the leave. C. Hamel-Smith J nonetheless equated the notice of preliminary objection with such an application, because, in his view, such a notice could rightfully be heard, at the request of either

party, or the court, on a date preceding the hearing of the substantive application. In that case, the question of the timeliness of the application, and the grant of leave, would be detached from the substantive issues of the application.

17. *Yuclan Balwant* was decided before the judgments of the Court of Appeal, and Privy Council in *Fisherman and Friends of the Sea v Environmental Management Authority and BP Trinidad and Tobago LLC (Court of Appeal: unreported, decision of Nelson JA in Civ. App. 106 of 2002; Privy Council, unreported, decision of Lord Walker of Gestingthorpe in Privy Council Appeal No. 30 of 2004).* The proceedings in the Court of Appeal and Privy Council were concerned with whether the leave-granting judge at a contested *ex parte* hearing correctly exercised his discretion in refusing to extend time under section 11 (1) of the JRA. One of the grounds of appeal was that the judge should have deferred the application for an extension of time to the substantive hearing. Both appellate courts agreed with Bereaux J's decision not to extend time, but the procedural effect of section 11 (1) and (2) was explained, and it sheds some light on this question. Mr. Justice Nelson JA (as he then was), in reviewing the exercise of the judge's discretion, said this:

> I must bear in mind the policy of the JRA was to have a filtering mechanism for applications for judicial review, and further, where such applications are not prompt or later than three months from the impugned decision a second filter, a discretionary extension of time, must be put in place. Thereafter, under our law, if the time for applying for leave has been extended, by section 11 (2), which deals only with the leave stage, the application for leave may be defeated if undue delay would cause substantial hardship or prejudice to third parties or detriment to good administration. (Para. 37)

Later on he said this:

> In Trinidad and Tobago we have copied section 31(6) of the UK Supreme Court Act in our section 11 (2), but with substantial changes. The effect of the changes is to disapply the concept of undue delay to applications for substantive judicial review. Section 11 (2) deals only with leave applications and not substantive applications. (Para. 46)

In the Privy Council, the Board specifically recognised that the judge could have "carried forward the issue of delay to a substantive hearing" (Para. 27). However, Nelson JA's statutory interpretation was not considered, as it was the judge's

discretion and not the Court of Appeal's appraisal that was under review. "Carrying forward" is another way of saying "deferring". The respondent relied on this statement to legitimise its right to take the objection at the substantive application. Lord Walker of Gestingthorpe must have meant that a judge has the discretion, in a contested *ex parte* or converted *inter partes* leave application, to defer the extension of time enquiry to the substantive hearing. However, this cannot mean that a shuttered window is suddenly unlocked at the substantive hearing for a respondent to review the issue of delay. The deferral Lord Walker spoke of must logically occur in proceedings in which both the leave and the substantive application are heard before the same judge, or proceedings (and this is conjecture) where the leave is granted subject to the *inter partes* representations of affected persons without notice of the leave application. A judge at a substantive hearing who is reviewing the *ex parte* grant of leave by another judge pursuant to a notice of preliminary objection, or, as in the instant case, on an oral application, would, in the absence of new factual developments or non-disclosure, be carrying out an appellate function within the unaccommodating structural confines of the JRA. In England the position is different. In *R. v Secretary of State for the Home Department, ex parte Chinoy 1991 TLR 16 April 1991* Bingham LJ (as he then was) asserted in the Divisional Court that in rare cases leave granted *ex parte* could be set aside on the *inter partes* hearing on grounds other than non-disclosure or new factual developments, namely, in cases where leave should plainly not have been granted. In that case, which was governed by the Rules of the Supreme Court, UK, and not the JRA, a motion to set aside was filed with supporting affidavits that introduced new facts, and a recent judgment had clarified the law governing one of the issues. The *Chinoy* approach was endorsed by Kangaloo JA in *Sanatan Dharma Maha Sabha v The Hon. Patrick Manning (unreported) Civil Appeal No. 74 of 2004, Judgment dated 14 October 2005,* but the respondent there had filed an application to set aside leave that was heard and determined as a separate application. Further, the undue delay was established and what fell to be determined was whether hardship or detriment could be resurrected as a ground to set aside the grant of leave. Those are not cases of general application. In Trinidad and Tobago the lines between the

leave stage and the application stage, as recognised by Nelson JA, are not blurred. The JRA plainly recognises two separate stages. There is a divergence of views to this troublesome question between Nelson JA and the *obiter* remarks of Kangaloo JA. Perhaps Parliament should have regard to the salutary advice of Kangaloo JA in the *Maha Sabha* Case and revisit the language of section 11. Until then, I am bound by *Fishermen and Friends of the Sea*.

18. In the matter before me the respondent did not file a notice of a preliminary objection so *Yuclan Balwant* is of no assistance. In any event, I doubt that such a notice is sufficiently detached from the substantive hearing to fall within the type of application contemplated by the House of Lords in *Criminal Injuries Board ex parte A*. To paraphrase Nelson JA, undue delay is disapplied from substantive applications, and a notice of a preliminary objection sustains its life only as an appendage of the substantive motion. In my view, barring cases where the issue of delay is deferred, if leave has been granted *ex parte* and the order is silent as to an extension of time, it must be presumed that the leave-granting judge extended time: an extension of time is implicit in the grant of leave. A respondent therefore should promptly make a separate interlocutory application to set aside leave. Such an application has an independent life and is not an appendage of the motion for substantive relief. It can be heard before or together with the substantive application. The right of appeal against a decision in the interlocutory application is independently preserved. In the event that an applicant has misrepresented the facts of his timeliness, the prospects of the interlocutory application would be strengthened. If all the evidence of delay is apparent on the papers filed in the leave application, the implied extension of time is made more resistant (but not impervious) to complaint.

19. I therefore refuse the respondent's oral application to set aside the leave granted by Gobin J, whether by way of preliminary application or as a submission at the substantive application. I should add in passing that applicants for leave have a duty, in cases where untimeliness is apparent on the *ex parte* application, to ensure that the order for leave expressly extends time. The implied grant of extensions of

time raises unseemly and problematic questions; it should not be allowed to develop into a practice. It may soon become necessary that costs wasted by respondents on applications to set aside leave are borne by applicants who seek and present imperfect draft orders at the *ex parte* stage.

20. Apart from the above reasons, I would still have been unwilling to dismiss the application on the ground of the applicant's undue delay. In my view, although on 5 August 2004 she became aware that charges had been preferred against her, she wrote the Director of Personnel Administration on 7 October 2004, complaining about the five-year prosecutorial delay and asking that the charges be withdrawn. In the absence of a reply she was entitled to believe that her request was being considered or entertained. On 17 May 2005 the appointment of the disciplinary tribunal came to her attention. That is when time began to run. The application for leave was made within three months of this event. I cannot take account of the four years and eight months preceding the preferrment of the charges, because the applicant was not aware that the matter was proceeding. Her right of complaint under the JRA would have been tenuous. Perhaps Gobin J had these matters in mind when she granted leave to apply.

UNREASONABLE PROSECUTORIAL DELAY: ABUSE OF PROCESS?

21. Regulation 90 of the PSC Regulations sets out the procedure to be used in the investigation and charging of public servants for disciplinary offences. Sub-regulations (1) through (5) set out a timetable for the investigation of an allegation against a public officer. An investigating officer is forthwith appointed by the PSC upon receipt of a report of misconduct. He is given one month to take written statements from the accused public officer and all material witnesses and to deliver his report to the PSC. Regulation 90 does not prescribe a timetable for the PSC to consider the report and charge the public officer. This is what is provided in sub-regulation (6):

> The Commission after considering the report and any explanation given by the officer in writing shall decide whether the officer shall be charged with an offence and if the Commission so decides shall as soon as possible cause the

> officer to be informed in writing of the charge together with such particulars as shall leave the officer under no misapprehension as to the precise nature of the allegations on which the charge is based.

Herbert Charles v. The Attorney General (unreported, Privy Council Appeal No. 26 of 2001, 2002 UKPC 34) is authority for the following two propositions: (1) a departure from the prescribed time limits at the investigation stage will not necessarily nullify further proceedings; (2) the effect of section 23 of the Interpretation Act is that a respondent must decide whether to prefer charges against an officer "without unreasonable delay having regard to the circumstances". In these proceedings, I have examined the events at the investigation stage and I find that the five-day delay of the officer in submitting his report is brief and understandable. It is not the type of delay that can operate to nullify the proceedings. With respect to the delay that occurred after the submission of the report, I will have to examine whether, having regard to the circumstances, the delay was unreasonable.

22. In *Carmel Smith v Statutory Authorities Service Commission (unreported, decision of 7 December 2007 in HCA S-95 of 2004*) I reviewed all the authorities on this increasingly common complaint of prosecutorial delay, among them, *Bell v Director of Public Prosecutions [1985] A.C. 937; Barker v Wingo 407 US 514 (1972); London & Clydeside Estates Ltd. v. Aberdeen District Council[1980] 1 WLR 182; Sieuraj Sookermany v. Director of Public Prosecutions(1996) 48 WIR 346;* and *Attorney General's Reference (No. 2 of 2001) [2004] 2 AC 72.* This is what I said:

> "In my opinion, taking into account the cases I have mentioned, a public law court must consider four factors in determining whether an applicant's right to a trial within a reasonable time has been infringed: (1) the length of the delay, which must, by its measurement, be presumptively prejudicial or unfair, and not merely trifling or inconvenient, or rebuttable; (2) the reasons given to explain the delay, taking account of the *bona fides* (if any) of the explanation; (3) the nature or quality of the applicant's assertions or complaints, which absent might negative a finding of deprivation, and present might prove it; and (4) the potential of personal prejudice caused by the delay, firstly, to a fair trial, which is measured by its actual (and not presumed) adverse effect on the preparation of a defence, and secondly, by the distress or anxiety caused by the prolongation of any pre-trial interference with the person, reputation, or property of the accused. The first two factors are related to questions of good public administration,

> because while it is in the public interest that accusations should not lie indefinitely against any citizen, neither should wrongdoing go unpunished. The other two factors are related to the rights of the citizen, to be spared from deprivation or distress and to be able to fully defend his person or his reputation."

The weight to be attached to each of the factors will vary from case to case: *Bell*, per Lord Templeman at page 327. In *Anthony Leach v. Public Service Commission (unreported decision of 14 February 2005 in HCA 1002 of 2004)* Judith Jones J held that a four-year delay in preferring charges was an abuse of process. In *Felix Durity v the Attorney General (unreported decision of 5 November 2004 in HCA 569 of 1997))* Gobin J held that a delay of 34 months was likewise abusive. The fact that the former involved an application filed before the preferrment of charges, and the latter was a constitutional motion does not sufficiently distinguish them as persuasive authorities for the proposition that every case of delay will turn on its own facts. I was told that both are on appeal.

23. The length of the delay in preferring the charges against the applicant is four years and eight months, and there can be no question that it is long enough for prejudice to be presumed. I must therefore go on to consider the three remaining factors.

24. The second factor involves an examination of the reasons given for the delay. After receipt of the file it took one year and eight months for the Legal Unit to write the investigator requesting further information. The chief reason for the delay was the self-described "file audit" that was undertaken by the Legal Unit. This curiously involved the physical return of all pending files to their department of origin, an initiative that, in my view, prolonged the delays that it was apparently intended to reduce. It took a further one year and seven months for the legal officer to discover that her two requests for further information would not be forthcoming because the investigator had gone on two years' unpaid leave some eleven months before the first request was written, and had resigned immediately thereafter. I find it unacceptable, in this era of instant communication, that it would take so long to find out that the investigator was not at his place of work. A simple phone call to the Commissioner, Board of Inland Revenue, ought to have revealed his absence. Having belatedly made the discovery, the understaffed Legal Unit resolved to draft

the charges without the requested information. It took one year to draft the charges. The delay here was attributable to staff shortages and a back-log of pending files. It was submitted that I should take local conditions into account, which would include the large quantity of pending files and chronic staff shortages at the Legal Unit. In *Carmel Smith* I carefully examined the cases on this point, including *Pratt v. Morgan (1993) 43 WIR 340, Mungroo v. The Queen [1991]1 WLR 1351*, *Bell*, and *Sookermany*. I posited that Trinidad and Tobago could not rightfully be described as so economically strapped as to be unable to expand the size of its overworked civil service. I also said that all adverse local conditions were not necessarily financial. In that case I held that a delay of four and a half months by the Service Commissions' Legal Unit, which is the same department in this case, was not inordinate, bearing in mind that the public service was in a state of flux, trying to manage its work in an age of rapid national development. However, the length and circumstances of the delay of the Legal Unit in the instant case defies rational explanation. It took one year to draft three simple charges. Obviously, there was no prioritising between charges that were recent and those that were antique. Moreover, the time that the file was at the Legal Unit, which includes the period vainly spent waiting for a response from the absent investigator, was two years and seven months. I cannot apply any, even generous, interpretation of local conditions as a bromide for such an institutional failure. While there was no *mala fides* in the delay, the reasons advanced fall far short of even minimum standards, and I believe, as every one else must surely believe, that this department was certainly capable of much better performance.

25. The third and fourth factors likewise lean in favour of the applicant. As to the third factor, I regard the applicant's letter of 7 October 2004 as an assertion of her rights and a complaint of prejudice and unfairness. Admittedly, it was written over four years after notice of the appointment of the investigator, but it came shortly after the charges had been belatedly preferred. The applicant, throughout this period, was not suspended, but she complained of being by-passed in promotions, and suggested that it might have been a consequence of the investigation. However, I believe that her continued employment preserved a *status quo* that may not necessarily have

demanded an assertion of her rights. She might even have reasonably believed that the file was lost or moth balled, because neither the investigator nor the respondent remained in contact with her. The preferrment of the charges changed the *status quo*, bringing life to what was ostensibly moribund, and she then forcibly asserted her right of complaint.

26. With respect to the fourth factor, I am of the view that the delay would substantially prejudice a fair hearing of the three charges. In *Mc Calla v. Disciplinary Committee of the General Legal Council (53 WIR 272)* the Privy Council considered the effect of delay on a fair trial and held that events within the personal knowledge of the appellant would not substantially compromise his defence, notwithstanding a delay of some five years. In that case, the appellant, an attorney at law, had *inter alios* falsely misrepresented his qualifications and credentials in a *curriculum vitae* presented to the Canadian government and the case was largely documentary. However, another charge of plagiarism of scholarly legal articles was stayed on the ground that the delay interfered with the appellant's ability to call witnesses as to the authorship of the articles. Therefore, the quality and availability of the required evidence is a key consideration in fair trial prejudice cases. Further, Lord Hutton, writing on behalf of the majority, approved the dictum of Lord Lane CJ in *Attorney-General's Reference (No. 1 of 1990) [1992] QB 630 at page 641*, where, referring to the common-law powers of the court to intervene to stop abuse of its process, he said: "However, the most usual ground is that based on delay, that is to say, the lapse of time between the commission of the offence and the start of the trial". In assessing the delay, I must therefore take a wide-angle view of the period. It seems reasonable to me to discount time lost as a result of the applicant's actions (here, about six weeks, due to her untimely response to correspondence).

27. Almost six years elapsed between the incident and the date fixed for the disciplinary hearing. During this period, the applicant lost contact with the three importers who would allegedly confirm that the Bills of Sight were provisionally signed. She fears that the security guards may not accurately remember the instructions she gave them not to release the packages without her inspection. The respondent's counsel

submitted that liability would turn on a simple "yes" or "no" answer to the question whether she signed the Bill of Sight without examining the packages. However, a one-word answer does not encapsulate the entire defence. The circumstances surrounding her actions will obviously have some bearing. While the respondent has a documentary case, hers is based on the oral evidence of persons who she cannot locate, or whose memories might have faded. The applicant testified that signing a Bill of Sight pending an inspection was a standard practice at the Aeromarine Bond. The respondent never contradicted this allegation, although reference was made to the investigator's acquisition of a written statement from the Comptroller of Customs and Excise. This presumably would have set out the correct customs procedure. The Comptroller's statement was never tendered into evidence, and I am therefore unable to determine the officially or unofficially recognized procedures of customs officers. Oral evidence will be needed to prove whether such a practice had developed at the Aeromarine Bond in 1999. It is part of her stated defence.

28. In the applicant's written statement to her superiors she indicated that the waiting area was crowded with people seeking to clear packages. It is possible that she naïvely wanted to fast track the non-commercial entries, and clear the waiting area. Evidence of this will go towards mitigation, and mitigation of sentence is an integral part of a defence. The evidence of the importers and the security guards will likewise add something to mitigation. When the applicant first appeared before the tribunal she said that she was ready to proceed, but she was unrepresented at that adjourned hearing, and, having no experience of disciplinary matters, her willingness to proceed cannot amount to a waiver of her rights. It may be that the applicant is still able to advance a reasonably persuasive defence on the basis of her own testimony and that of the security guards, but the courts are more concerned with the right to fully, not partially defend an accusation. I think that her ability to fully defend herself is prejudiced, and while it may be a matter of degree as to whether or not the prejudice is substantial, I believe that it has crossed the threshold, if only barely.

29. In the circumstances, taking the four factors into account, the delay amounts to an abuse of process and the further prosecution of the applicant is unfair.

ALTERNATIVE REMEDY

30. The respondent submitted that the applicant has an alternative remedy before the disciplinary tribunal. It was submitted that she could raise a preliminary objection to the prosecution on the following grounds: (a) that the delay of almost six years was unreasonable and "amounted to punishment in itself"; (b) that it was unreasonable for the respondent to prefer charges after such a long delay; (c) that the delay interfered with her ability to defend herself. The respondent submitted that this preliminary objection could provide an effective alternative remedy.

31. An alternative remedy or avenue of redress must be "more convenient, expeditious and effective" than that provided in judicial review proceedings: *R v Devon County Council, ex parte Baker [1995] 1 All E.R. 73*, *Saga Trading Limited v The Comptroller of Customs and Excise (unreported, HCA. No. 1347 of 1993).* In most cases where alternative relief is available, the decision or action under review is impeachable before a body that has legal authority to provide the same or similar relief afforded by the High Court. The disciplinary tribunal is empowered to try the guilt or innocence of the applicant. It was appointed by the respondent to do that. The charges were framed by the respondent and are now before the tribunal in accordance with the respondent's mandate. The relief sought in these proceedings is meant to nullify the charges and destroy that mandate. The proceedings question the right of the respondent to exercise the mandate. In order to take a preliminary objection the applicant must first submit to the jurisdiction of the tribunal to determine the charges. This flies in the face of her legal right to de-legitimise its jurisdiction. It is not a right that the tribunal can protect, save on the basis of a preliminary objection. I find it difficult to treat the preliminary objection as a substantive alternative remedy, especially when it is based on an appreciation of technical law in a state of evolution, and will be advanced before a quasi-judicial body that may not readily grasp its technicalities. In my view, the relief sought in

these proceedings is undoubtedly more convenient, expeditious, and effective. It goes to the heart of the complaint in a direct and efficacious manner, and with all the legal issues fully ventilated. However, the courts are extremely reluctant to interfere in prosecutorial decisions. In *R v. DPP Ex parte Kebilene* [2000] 2 AC 326, 371, Lord Steyn said this:

> "My Lords, I would rule that absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the Director to consent to the prosecution is not amenable to judicial review."

This statement was approved by the Privy Council in *Satnarine Sharma v. Carla Brown-Antoine and Ors.[2007] 1 WLR 780.*

32. A delay of six years, between the commission of the offence and the trial, is an exceptional circumstance. It compromises the applicant's ability to defend herself. It raises questions of whether a fair trial is possible. In cases where exceptional circumstances arise, especially before a trial begins, it is often preferable that a body other than the one conducting the trial reviews those circumstances. Oversight involves remoteness from a process, and the ability, from a great distance, to view a matter panoramically.

DISPOSITION

33. In light of the above, I declare that the applicant has been treated unfairly and I remove into this court and quash the respondent's decision to prosecute or try the three disciplinary charges. I also order that the disciplinary proceedings arising out of the events of 21 July 1999 be permanently stayed. The respondent is accordingly ordered to pay the applicant's costs.

James Christopher Aboud
Judge (Ag.)