REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-01809

IN THE MATTER OF JUDICIAL REVIEW ACT, 2000

AND

IN THE MATTER OF AN APPLICATION BY JOANN BAILEY-CLARKE FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A RECOMMENDATION MADE BY THE OMBUDSMAN TO THE DIRECTOR OF PERSONNEL ADMINISTRATION, BY LETTER DATED THE 28 JANUARY, 2016 PURSUANT TO REGULATION 42(4)(D) OF THE PUBLIC SERVICE COMMISSION REGULATIONS CHAPTER 1:01 THAT THE APPLICANT BE REVERTED FROM THE OFFICE OF EXECUTIVE OFFICER, OFFICE OF THE OMBUDSMAN, TO HER FORMER OFFICE

AND

IN THE MATTER OF A DECISION BY THE PUBLIC SERVICE COMMISSION, COMMUNICATED TO HER BY LETTER DATED 26 FEBRUARY, 2016 THAT THE APPLICANT REVERT FROM THE OFFICE OF EXECUTIVE OFFICER, OFFICE OF THE OMBUDSMAN, TO HER FORMER OFFICE OF HUMAN RESOURCE OFFICER III, MINISTRY OF THE ATTORNEY GENERAL

AND

IN THE MATTER OF A DECISION BY THE PUBLIC SERVICE COMMISSION, COMMUNICATION TO THE APPLICANT BY LETTER DATED THE 15 MARCH, 2016, THAT SHE REVERT FORTHWITH TO HER FORMER OFFICE HUMAN RESOURCE OFFICER III

BETWEEN

JOANN BAILEY-CLARKE

Applicant

AND

THE OMBUDSMAN OF TRINIDAD AND TOBAGO

First Respondent

THE PUBLIC SERVICE COMMISSION

Second Respondent

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Thursday January 26th 2017

Appearances:

Mr. Anthony Bullock instructed by Mr. Imran Ali for the Applicant

Mr. Elton Prescott S.C. leads Mr. Rikki Harnanan for the First Respondent

Ms. Amirah Rahaman instructed by Ms. Elena Araujo for the Second Respondent

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Introduction

> "The Courts do not sit as a Court of Appeal from the decisions of the Public Service Commission and are in no way concerned with the merits of candidates for promotion or the micromanagement of personnel decisions .... The Courts are concerned to ensure that public bodies carry out the functions that the relevant legislation assigns to them." per Lord Sumption **Harinath Ramoutar v Commissioner of Prisons and Public Service Commission** [2012] UKPC 29.

1. This application for judicial review is another occasion[1] to underscore the importance of the fair processes that exist to deal with staff in the public service under the Public Service Regulations (Regulations). The Court in exercising the supervisory jurisdiction over administrative action resists micromanaging matters which fall squarely within the Public Service Commission's expertise. In such instances, the Public Service Commission is entitled to make such operational and managerial decisions in the exercise of its discretion. The Courts however insist that it and the officers whom they consult comply with their relevant statutory functions and observe the principles of fairness that may be imbedded in the discharge of those functions.

2. The Applicant, Ms Bailey-Clarke, was an Executive Officer serving a period of probation in the Office of the Ombudsman, the First Respondent. She has sought in these proceedings to challenge both a recommendation made by her superior the Ombudsman made on 26th January 2016 and the subsequent decisions of the Second Respondent, the Public Service Commission, made on 26th February 2016 and 12th March 2016, to terminate her probationary period and that she revert to her former office.

3. Probationary appointments in the public service under the Public Service Regulations such as Ms Bailey-Clarke's serve as a testing ground. It is where the probationer is supervised, given

[1] See recent Privy Council decisions dealing with process followed by the Public Service Commission, **Balramsingh v the Public Service Commission** [2014] UKPC 26, **Ramoutar v Commissioner of Prisons and Public Service Commission** [2012] UKPC 29, **Harridath Maharaj v Public Service Commission** CV 2007-01093, **Manning v Public Service Commission** [2011] UKPC 20.

the opportunity to learn, demonstrate fitness for confirmation in the office and is generally under critical assessment as to her suitability for the job.[2] A probationer no doubt has aspirations to be confirmed in her job. However the probationer can lay no claim to the higher office. She must demonstrate through performance her fitness for that office. The critical trigger for the confirmation in an appointment, after serving a period of probation, is the probationer demonstrating to the Public Service Commission satisfactory service in the probationary period after it considers the final report of the Head of Department, in this case, the Ombudsman.[3] In the submission of that final report by the Ombudsman there must also be a firm recommendation made to the Public Service Commission as to the fate of the probationer. Whether to confirm, extend the probationary period, terminate the services or revert to a former office.[4] These are managerial and operational recommendations based upon the Ombudsman's qualitative assessment of the probationer's performance. However they are recommendations to be made against the backdrop of a fair process imbedded in the Regulations.

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[2] Regulation 41.The following principles shall be observed for the treatment of an officer during his period of probation:

(a) the officer on probation shall be given an opportunity to learn his work and be tested as to his suitability for it;
(b) he shall be accorded all possible facilities for acquiring experience in his duties;
(c) he shall be subject to continual and sympathetic supervision;
(d) so far as the exigencies of the service permit, he shall be assigned to duty only where such observation is possible; and
(e) if at any time during his period of probation he shall exhibit tendencies which render it in any way doubtful that he is likely to become fit for confirmation in his appointment, these shall at once be drawn to his attention in writing by the Permanent Secretary or Head of Department and he shall be given such assistance as may be possible to enable him to correct his faults.

[3] Regulation 44. (1) If, after consideration of the final report of the Permanent Secretary or Head of Department, the Commission is satisfied that the service of an officer on probation has been satisfactory, the Commission shall confirm his appointment with effect from the date of appointment.
(2) If the Commission is not satisfied that the service of an officer on probation has been satisfactory, the Commission may extend the period of probation for a further period.

[4] Regulation 42(4). In submitting the final report, the Permanent Secretary or Head of Department shall make a firm recommendation—

(a) that the officer be confirmed in the appointment; or
(b) that the period of probation be extended; or
(c) that the services of the officer be terminated; or
(d) that the officer revert to his former office.

4. Ms Bailey-Clarke contends that both the recommendation and decision was: made in breach of the principles of fairness and/or natural justice; an improper exercise of discretion and/or is irrational and made in bad faith and void for non-compliance with Regulations 43(5) and 43 (1). This challenge brings under anxious scrutiny the process by which her appointment on probation was terminated and the statutory functions to be performed by the Ombudsman and the Public Service Commission. Specifically, it raises the main issue whether it is necessary for the probationer to be informed of a recommendation by the Ombudsman that she revert to her former office and to make representations before any such firm recommendation is made to the Public Service Commission pursuant to Regulation 43(1).

5. These issues arise against the backdrop of unhappy differences which arose between the Ombudsman and Ms Bailey-Clarke while she was serving her probationary period as Executive Officer over the period 2015 to 2016. The Ombudsman rated Ms Bailey-Clarke's performance for the period as unsatisfactory. The Ombudsman assessed her as unfit to assume the higher office of Executive Officer. It is a view that is strongly resisted by Ms Bailey-Clarke. It is apparent that there existed a strained relationship between them arising from differences in the execution of the work in the office of the Ombudsman. Eventually, at the end of the probationary period, the Ombudsman recommended to the Public Service Commission that Ms Bailey-Clarke revert to her former office. This recommendation which was submitted with the Final Report was never shared with Ms Bailey-Clarke to solicit her response. It was a recommendation which was considered by the Public Service Commission in making its decision. Ms Bailey-Clarke was given an opportunity to address the Public Service Commission on its decision after which the Public Service Commission decided that the decision should stand. Yet that reconsideration by the Public Service Commission did not take into account the fact that the Ombudsman's recommendation was never seen by her or shared with her before it was made or during the course of the Public Service Commission's deliberations.

6. It is not in dispute that a probationer must be treated fairly during her probationary period. It cannot be disputed that the Regulations governing the probationary period are imbedded with notions of fundamental fairness. What these judicial review proceedings essentially focuses

on is the content of the duty of fairness to the probationer when the Ombudsman is making the final assessment of her service on probation pursuant to Regulation 42(4) against the backcloth of the Regulations and statutory obligations of the Ombudsman and Public Service Commission. It examines the extent to which a procedurally irregular recommendation of the Ombudsman's qualitative assessment of the probationer and her future can have the domino effect of vitiating the Public Service Commission's managerial decision which took that recommendation into account together with the final report. It also brings into question the larger issue of the process to be adopted by the Public Service Commission under Regulation 44 to sufficiently comply with that statutory function.

7. The Respondents resist this claim, in the main, by relying (a) on a series of events to demonstrate that substantially Ms Bailey-Clarke was given a full opportunity to make her representations in relation to a final decision that she revert to her substantive post (b) that the proceedings are moot having regard to the negative comments made by the Ombudsman of her patent unsuitability and the review process adopted by the Public Service Commission and (c) in any event that such a requirement for a hearing in Regulation 43(1) does not apply to a firm recommendation for the probationer to revert to her former office. They also complain of delay in commencing proceedings against the Ombudsman and acting prematurely against the Public Service Commission.

8. In my view, Regulation 43(1) of the Regulations clearly places an obligation on the Ombudsman as Head of Department to inform the officer on probation of any recommendation for the termination or extension of the period of probation before the firm recommendation is made to the Public Service Commission. Out of the four (4) available recommendations these two have been viewed by the drafters as serious enough deserving a hearing. Although Regulation 43(1) clearly does not specifically refer to a recommendation of "reversion to a former office" it is clear that the termination of the period of probation is a natural consequence of the recommendation to revert to a former office. Such a termination of appointment is inextricably linked and an inevitable feature of either a recommendation to revert to a former office or alternatively a termination of services altogether. They go hand in hand.

9. However regardless of the recommendation, the Public Service Commission is the body that makes the final decision on the satisfactory performance of the probationer. It is not a function delegated to the Ombudsman. The Public Service Commission reviews her service generally. This the Public Service Commission does upon considering the Ombudsman's final report. Impliedly, it is required to consider the Ombudsman's firm recommendation which accompanies the final report. There can be no legitimate challenge to the Ombudsman's final staff report which rated the performance as unsatisfactory. It is not for the Public Service Commission or this Court to resolve the "third party dispute"[5] as it were between Ombudsman and probationer. Although the Court has not been invited, rightly so, to resolve any "third party dispute" as to the performance of the probationer, the difficult employment relationship clearly manifested itself in the final staff report.

10. However, this only underscores the value of the "firm recommendation" made by the Ombudsman to the Public Service Commission. The statutory requirement of fairness as imposed by Regulation 43(1) in my view is fundamental. It guarantees to the Public Service Commission that the recommendation it receives from the Ombudsman as to the future of the probationer is untainted by bias and is a mature reflection of the officer's performance achieved through a transparent process. It is speculative at this stage to say whether the Ombudsman's recommendation would have been altered had Ms Bailey-Clarke been given the opportunity to be heard. It probably would not. But this is hardly the point of fundamental fairness in the administrative process of especially the highly sensitive constitutional offices of the Ombudsman and Public Service Commission.

11. It is true that removing the "tainted" recommendation simply means that the Public Service Commission had before it two unfavourable staff reports with the ultimate decision to make as to whether to extend the probationary period or end it. Such a decision made when the Ombudsman's recommendation was not rendered to the Public Service Commission through the transparent mechanism of Regulation 43(1) simply begs the question as to the fair process that should have been adopted. To adopt a "no harm no foul" approach (that it would not have made a difference) or further that the final recommendation was made fairly, (even though the

[5] **Marilin Sammy-Wallace v Judicial Legal Service Commission** C.A.CIV.159/2004.

officer was never given an opportunity to be heard) would dilute the significance of this statutory function to act fairly created by Regulation 43(1). Important recommendations such as these ought not to be rendered behind the back of the probationer. To sanction this, would only serve to inculcate a culture of insensitivity, uncaring and unsympathetic supervision and management, dent the dignity of officers and promote an ethos of superficial consultation in the public sector of not giving sufficient time to hear those affected by decisions or in this case not bothering at all. The Court cannot cover its eyes to a tainted final recommendation which was considered by the Public Service Commission and which to this day Ms Bailey-Clarke has not been given the opportunity to answer.

12. I am satisfied for the reasons set out in this judgment, that the circumstances in this case justify a declaration that the recommendation was made illegally, procedurally improperly, in breach of natural justice and contrary to Regulation 43(1) of the Public Service Commission Regulations. The recommendation shall be quashed and remitted for the Ombudsman's consideration in compliance with Regulation 43(1). The real question in this case is what should the Court do with the decision of the Public Service Commission in the face of such a flawed recommendation? After all the recommendation was not a final decision. In my view it is unnecessary to quash the Public Service Commission's decision but to direct that they re-open the matter and reconsider the question of Ms Bailey-Clarke's probationary period of service after receiving a 43(1) compliant recommendation from the Ombudsman as directed by this judgment. Indeed having received two (2) staff reports which rated her performance as unsatisfactory at the end of her probation period the Public Service Commission would be hard pressed to extend her period of probation. A decision to revert her to her substantive office while the matter was under review is not an unreasonable administrative decision. It does not defy logic that she remains in her substantive office pending a reconsideration of the decision on her probationary appointment upon receipt of a proper recommendation from the Ombudsman. The question of her fitness in office is therefore remitted to the Public Service Commission for their consideration upon receipt of that final recommendation.

"Rolled up" hearing

13. The Court had directed that the Respondents be heard on the application for leave. After a brief adjournment for the parties to explore a resolution of the matter, it was ordered, by agreement, that the Court will conduct a "rolled up hearing" of both the issue of leave and the substantive claim. Affidavits and written submissions were filed both on the issue of leave and substantive relief. A brief oral hearing was convened to clarify certain aspects of the parties' submissions. In the timetable of events the parties had also agreed to convene an all party's conference to further their discussions. The adoption of the procedure of a "rolled up hearing" was also a response to the Respondents' indicating that they wished to file affidavits in opposition to the grant of leave and that it would not be materially different if they were to file affidavits in opposition to the substantive claim.

14. A "rolled up hearing" is a hearing where the Court considers first the issue of leave and then the substantive hearing for final relief to follow. See paragraph 26.130 ***Judicial Review Principles and Procedure by Jonathan Auburn, Jonathan Moffett, Andrew Sharland*.** It does not dispense with the value of or the need to apply for leave to apply for judicial review provided for in section 6 of the Judicial Review Act Chap. 7:08 and Rule 56.3 CPR. Holman J observed in **R (on the application of Lunn and Ors) v Revenue and Customs Commissioners** [2011] EWHC 240 that such a hearing should not "blur the important step of the grant of permission or the distinction between consideration of permission and substantive consideration". Senior Counsel for the Ombudsman raised the important issue that the test to be applied on the grant of leave in such hearings ought to be of a higher standard above mere "arguability" and that the grounds for leave should be strong or likely to succeed. Reliance was placed on **Mass Energy Limited v Birmingham City Council** [1994] Env LR 298 where the Court at the leave application conducted a full inter-partes hearing of the substantive relief. **Mass Energy** certainly raises the issue as to what process is being engaged by the Court in a "rolled up hearing" in judicial review proceedings.

15. There is no rule in Part 56 of the CPR or under the Judicial Review Act which refers to a "rolled up hearing". Equally there is no rule that expressly prohibits it. Part 56 makes it plain that the application for leave must first be considered before a claim for judicial review can be filed. References to "rolled up hearings" are to be frequently found in the UK under a different

rule regime. See **R (Candlish) v Hastings Borough Council** [2005] EWHC 1539 and **R (on the application of Lunn and Ors) v Revenue and Customs Commissioners**. However the utility of adopting "rolled up" hearings in this jurisdiction with a public law jurisprudence which has "passed the stage of galloping and is now at racing pace"[6] is not to be overlooked.

16. The Court in determining applications for leave exercises powers under Rule 56.4 CPR. If the Court elects to conduct a hearing of the application pursuant to Rule 56.4(3) CPR it is open to it to exercise such case management powers for the just disposition of the application. See Rule 11.11(4) CPR. In exercising such case management powers the Court is conferred with a wide discretion to take such step or give any direction or make any order for the purpose of managing the case and furthering the overriding objective. See Rule 26.1(2) CPR and **Real Time Systems Limited v Renraw Investments Limited** Civ App. No.238 of 2011.

17. The direction given for the disposal of the leave application in a "rolled up hearing" is a tool of effective case management in the deserving case where both questions can be determined on one hearing upon considering all of the available evidence as a means to further the overriding objective.[7] The Court must exercise that discretion "with regard to the filtering purpose of the leave application"[8]. The "rolled up" hearing is however useful where a serious issue of delay needs to be preserved at the substantive hearing or where expedition is needed and the case needs to be managed to a rapid conclusion. Lord Justice Beatson in **Ben Hoare Bell v Lord Chancellor** [2015] EWHC 523 provided a useful commentary on the use of rolled up hearings:

> "A court may decide to do this where expedition is needed, or because there is a latent delay point in what is otherwise an arguable case and the court or the defendant, or exceptionally an interested party, wishes to preserve their position on delay, or where the whole case just needs to be managed to a rapid conclusion. A common example of the latter involves government departments and sensitive issues. It is also sometimes apparent that a permission hearing of the usual length of half an hour would not suffice, yet by the time a

[6] Per Kangaloo JA in **Steve Ferguson and Ishwar Galbaransingh v The Attorney General of Trinidad and Tobago** Civ App No. 207 of 2010.
[7] See Lam VP in **MST v Duty Lawyer Service** [2015] HKEC 1300.
[8] Ibid

half day or more has been set aside to resolve arguability in a document heavy case, some planning cases come to mind, the whole case would be nearing resolution. Yet to conclude that the case was arguable only for most of the argument to be repeated on another day before another judge for want of an hour or two would be a complete waste of time[9].

48. This point may have validity if a claimant has requested a "rolled-up" hearing. But, as seen from the examples we have given, that is not the position in many cases where such a hearing is ordered. The defendant or an interested party may request such a hearing in order to preserve their positions on a delay point. The court may order such a hearing for the other reasons given.

49. Guidance as to when to use "rolled-up" hearings has been given by the Judicial College in an Administrative Court Handbook, prepared for its Administrative Court induction courses. The most recent version, dated April 2013, states (at p.15) that "rolled-up" hearings "should only be ordered in very limited and rare circumstances, as … valuable court time and resources will be set aside because the case has to be prepared for a full hearing", and "in other words, an order for a rolled-up hearing leads to queue jumping". The Handbook also states that an order for a "rolled-up" hearing should "never be made as a means of avoiding a decision whether a claim is arguable". It should normally only be ordered where "(a) there is a genuine degree of urgency and the judge is in doubt whether the claim is arguable, or where there is a genuinely important point which arises which should be determined … and (b) there is believed to be an arguable case but a delay argument should be kept open to the defendant on the wider basis available under the [CPR] as opposed to section 31 of the [Senior Courts] Act 1981".[10]

18. A rolled up hearing may not be an option for complex cases which may be burdensome on the Respondents, or where the question of leave can be determined by a summary review of the papers in chambers without a hearing. It may be more suitable as in this case where the proposed Respondents have signalled their intention to resist the grant of leave and that the

[9] See the February 2014 document, Judicial Review – Proposals for further reform: the government response.

[10] **Ben Hoare Bell v Lord Chancellor** [2015] EWHC 523, paragraphs 47, 48 and 49. See also Beaston J in **R v WJ China v Secretary for State for the Home Department** [2010] EWHC 776.

affidavits to be filed on either the issue of leave or the substantive hearing are brief or the facts are largely not in contest or there is good reason to manage the case on a urgent footing. No rigid prescription can be placed on what is best suited for a rolled up hearing as it is purely the exercise of a case management decision of achieving the result of dealing with cases justly. In the deserving case a "rolled up" hearing is an effective use of the Court's and the parties' resources, it maintains the parties on equal footing by advancing the Applicant's case on the one hand while preserving the Respondent's right to object to the grant of leave. It also leads to an economical disposal of the matter finally where the parties are free to approach the Court of Appeal in one hearing and avoid protracted litigation with satellite appeals on the grant of leave in time sensitive matters which may impact the administration of public bodies and it is proportionate to the nature of the matter and which will allow for a final determination in relatively quick time.

19. In so conducting a "rolled up" hearing a claim form (or draft) should be formally filed without prejudice to the defendant's rights on the question of leave. In that case, at the hearing, the Court will have all the papers in relation to a proper determination of both the question of leave and the claim for judicial review.

20. A variation to this approach which has been taken in urgent cases is where the application for leave is considered as the substantive hearing. In that case, the substantive claim for judicial review is being considered without consideration as to whether leave ought to be granted and in that respect a full merits based approach is taken at the hearing where the only issue is whether the Court would exercise any of its discretionary relief of declarations or certiorari in considering a claim for judicial review. Justice Boodoosingh adopted such an approach in **Marvin Scott & Others v. Commissioner of Prisons and Attorney General for Trinidad and Tobago** CV2015-02088 where the affidavits that he considered, presumably by agreement by the parties and due to the urgency of the matter was for final relief and not on the question of leave. In such an approach where there is no "rolled up" hearing the question whether the claim passes the threshold of leave is not considered. Interestingly in such a case no claim form is filed and the judicial review claim is dealt with on affidavits. **Mass Energy** similarly was another variation not strictly a "rolled up hearing" but upon a renewed application for leave

the Court had the benefit of as much detailed inter partes argument they were in as good a position as a Court in the substantive hearing to construe the evidence. In those circumstances the test for leave was not "arguability" but "likely to succeed". A variant of a process to deal with leave applications expeditiously. See also para 21.1.8 ***Fordham Judicial Review*** and **R (Persimmon Homes (Thames Valley) Ltd) v North Hertfordshire District Council** [2001] EWHC Admin 565.

21. Our Courts have been adopting variations in its process in dealing with judicial review leave applications. It suggest that the Court's exercise of its case management powers is evolving to deal in a practical manner with the balance between the "filtering" and what I will term the "funnelling" function to be achieved by the mechanism of the grant of leave. It balances the "filtering" function of protecting public bodies from unmeritorious applications with the "funnelling" function of managing all such claims which legitimately seek to protect the interest of the litigant's access to justice in keeping State action in check and guarding against incursions on the rule of law.

22. The history of the development of judicial review itself demonstrates an evolving approach to the larger question of the legitimacy in public process.[11] Similarly as to matters of process, a discussion therefore on the need and importance of the grant of leave in the times of **O'Reilly v Mackman** [1982] 3 All ER is much different now in the 21st Century cast against the backdrop of the increasing demands for accountability, transparency and good governance in the public sector. A re-thinking in the approach to the grant of leave is necessary lest an unduly rigid approach in the use of this procedural device becomes a fetter on the

[11] "For much of the 20th century, jurists saw the tasks of administrative law as one of mediating conflicts between public and private interests. The growth of the administrative state, it was thought, required not just the development of new remedies but also the creation of a common law of public bodies, which would define the proper extent of public powers and provide guidance that would ultimately improve the practice of administrators whose work necessarily brought them up against private interests. In stark contrast with modern administrative law, it was taken virtually for granted that this would necessarily involve the development of *substantive* principles which spoke directly to the balance between private interests and the public interest. This shift responded to concerns about the judicialisation of administration raised by sections of the government, and shared by one senior judge, which were alarmed at the possible intrusion of the judiciary into questions of public policy. Behind the appearance of continuity with the older law, therefore, lay a form of review that was very different from what anyone in the 1960s might have envisaged, both in terms of the kinds of decisions that would be reviewed and the grounds on which that review would be based."***The Curious Origins of Judicial Review,*** L.Q.R. 2017, 133(Jan), 91-117.

litigant's access to justice against public bodies and a luxury for such bodies that may only serve to encourage illegality or abuse of power.

23. Kangaloo JA observed in **Steve Ferguson and Ishwar Galbaransingh v The Attorney General of Trinidad and Tobago** Civ App No. 207 of 2010 "Such protections are part of the wider concept of the rule of law which lies at the foundation of any democratic society."[12] Such considerations no doubt prompted Kangaloo JA in that case to recommend to the Rules Committee that our jurisdiction should consider the adoption of a procedure to streamline the rules governing applications for judicial review that forces interactions between the parties at the leave stage and "injecting a much needed dose of efficiency into the judicial review procedure."[13] Kangaloo JA was then referring to the UK reforms to judicial review process in 2000 Part 54 and its PD 54A. Under such rules rolled up hearings are conducted. However nothing prevents the judge in our jurisdiction exercising his wide power of case management rule 26.1(w) CPR of taking such step which furthers the overriding objective.

24. In this case all the affidavits are before the Court and the claim form was directed to be filed. The facts are largely not in contest and the parties have agreed that the Court shall determine the two questions whether leave ought to be granted and if so whether the Claimant is entitled to any substantive relief.

The test for leave at a rolled up hearing: "Mass Energy" vs "Sharma"

25. Quite correctly Senior Counsel for the Ombudsman raises the issue as to the appropriate test to be applied in "rolled up" hearings. Whether it is the "**Mass Energy**" test or the "**Sharma**" test of "arguability". Where, as in this case, Ms. Bailey-Clarke will succeed on the substantive relief, the question as to the appropriate test is probably moot. However as a matter of process, where leave may be refused, it is an important question. In this case the issue of arguability

[12] **Steve Ferguson and Ishwar Galbaransingh v The Attorney General of Trinidad and Tobago** Civ App No. 207 of 2010, paragraph 4, page 3, Kangaloo JA also referenced Lord Phillips of Worth Matravers who stated:

> "The rule of law is the bedrock of a democratic society. It is the only basis upon which individuals, private corporations, public bodies and the executive can order their lives and activities…..The rule of law will not fully prevail unless the domestic law of a country permits judges to review the legitimacy of executive action. This is increasingly becoming the single most important function of the judge in the field of civil law, at least in my jurisdiction."

[13] Ibid, paragraph 10, page 6-7.

and delay were two matters which was not altogether clear to the Court at the leave stage. In my view the task of the Court at the rolled up hearing is now to assess the facts from the totality of the evidence with two broad considerations in mind. The first to determine whether on the facts leave ought to be granted applying the test of **Satnarine-Sharma v Browne-Antoine & Ors** [2006] UKPC 57 and second if leave ought to be granted then whether the Court ought to exercise its discretion to grant final relief. This raises the theoretical possibility that if after considering all the evidence a decision is made granting leave the Court may also decline to grant the reliefs sought.

26. To that extent the Ombudsman submits that the test should be the test applied in **Mass Energy**, a more stringent one than that applied in **Sharma v Brown-Antoine** requiring a strong probability of success after considering all the evidence. In my view **Mass Energy** which predates **Sharma** is but an example of the scales of "arguability" given the context of the dispute. The **Sharma** test of "arguability" must still be applied: that is whether there is an arguable ground of judicial review having a realistic prospect of success and not subject to the discretionary bar such as delay or an alternative remedy. At a "rolled up" hearing the Court is entitled to take a more demanding view of "arguability" and realistic prospect of success requiring a more intense examination of the evidence rather than an "arguability-light" approach. Kangaloo JA in **Steve Ferguson and Ishwar Galbaransingh** usefully explained that the approach to "arguability" using the **Sharma v Brown-Antoine** test is a flexible and not rigid one. An "arguability-light" approach is explained "it must be in wholly unmeritorious cases which are patently unarguable (barring issues of delay and alternative remedies) that the courts should exercise its discretion in refusing the grant of leave"[14]. However, that was not a case of a "rolled up hearing" and equally it was observed that "The test of arguability must be applied contextually and cannot be divorced from the nature of the challenge which is raised by the litigant"[15]. The fuller the argument and consideration of the evidence, the easier it is for the Court to form a judgment on the prospects of success. In such a case the Court engages in as Fordham describes as "enhanced arguability"[16] and a "realistic prospect of success" may

[14] See also **R v Legal Aid Board ex p Hughes** [1992] 24 HLR 698 and ***Caribbean Civil Court Practice 2011*** *Note 34.29.*
[15] See paragraph 3 of the judgment of Kangaloo JA.
[16] Handbook on Judicial Review, Michael Fordham, 6th edition, paragraph 21.1.9

well be for practical purposes as stringent as requiring a substantial prospect of success or likely to succeed. See **R (on the application of Federation of Technological Industries) and others v Commissioner of Customs and Excise** [2004] EWHC 254 (Admin) at [8].

27. In such a "rolled up" hearing the two questions of arguability and substantive relief are to be answered based on the same evidence. If leave ought not to be granted the Court can and should still express its opinion on the merits. In this way procedurally, it obviates the need to have two separate hearings and whether parties appeal they can put before the Court of Appeal the entire question of leave and substantive relief.

28. In my view, the Applicant in this case is entitled to the grant of leave even if one adopts the "enhanced arguability" test. It has been demonstrated for the reasons set out in this judgment, that her grounds of challenge are arguable with a realistic prospect of success. The question of delay or alternative remedy are not sufficient enough to deprive her from legitimately putting before this Court the substantive question of how her final recommendation ought to have been made by the Ombudsman in relation to her probationary appointment and what impact it will have on the final decision of the Public Service Commission.

29. To determine the legitimacy of that final recommendation and decision of the Public Service Commission and the remedies that ought to be granted it is necessary to examine the factual backdrop and the statutory context of that recommendation and decision.

Factual Matrix

30. Ms Bailey-Clarke joined the Public Service in 1984. She held various positions beginning with Clerk 1, Human Resource Officer and Supervisor of Examinations. She was appointed Human Resource Officer III with effect 1st March 2014. By letter of 11th February 2015 she was advised of her promotion to the senior positon of Executive Officer (Group 3B) in the office of the Ombudsman with effect from that date. She was required to serve a probationary period. As she had not previously acted in this position, the period of her probation was to be one (1) year.

31. As Executive Officer she would report directly to and liaise with the Ombudsman as there was no administrative superior to the position. Her duties largely required the coordination of the

administrative function of the office of the Ombudsman. The Regulations require that during this period of probation the Ombudsman would monitor her performance, provide feedback and guidance and submit to the Commission two (2) confidential reports, at the end of six (6) months and the second at the end of her probationary period concerning her performance in the position. See Regulations 41 and 42.

Trouble brewing

32. The relationship between the Ombudsman and Ms Bailey-Clarke deteriorated over the period of probation. Ms Bailey-Clarke admits that their relationship became strained within the first three (3) months mainly because of their differing views on the role of the Executive Officer. Ms Bailey-Clarke identified three occasions from the period February 2015 to October 2015 when the Ombudsman made complaints to her about her performance. Those instances arose in May, August and October 2015. Ms Bailey-Clarke has sought to answer those claims in these proceedings but it is safe to characterise these as run-ins with her superior/supervisor which were left as unresolved issues in their working relationship.

33. The breakdown in their relationship stem essentially from the level of autonomy displayed by Ms Bailey-Clarke in the management of the office without reference to the Ombudsman. I have observed the tenor and the exchange of correspondence and I am satisfied that there was a breakdown in the relationship between the parties. Evidence of Ms Bailey-Clarke's responses indicated that she copied letters to several persons unconnected with the dispute. The Ombudsman throughout their communication was insistent in maintaining her authority over operational matters. It culminated in predictably very poor performance appraisals which Ms Bailey-Clarke has challenged by reporting it as a grievance to her union's representative. That too remains an unresolved dispute. Ms Bailey-Clarke understands in her letters that there is an unclear area of authority.

34. As early as May 2015 by letter of 15th May 2015 the Ombudsman had expressed her loss of confidence in Ms Bailey-Clarke's ability to perform and requested a re-assignment from Executive Officer. The Public Service Commission pointed the Ombudsman to the Regulations as to the treatment of probationers and requested the submission of periodical reports. The first of such report should cover the initial (six) 6 months period. Subsequently by letter 18th August

2015 the Ombudsman submitted the first appraisal report for the period of February to August the first six (6) months of Ms Bailey-Clarke's probation.

The First Performance Report (PAR1)

35. The first six (6) months report identified the following major weakness of Ms Bailey-Clarke: not one to accepting advice, not a team player, lacks confidentiality, does not have a sound knowledge of civil service Regulations, HR practise. The report is dated 14th August 2015 and signed by Ms Bailey-Clarke on 22nd February 2016 six months later and at the end of her one year probationary period stating her total disagreement with the report.

36. There are conflicting versions of how this report was prepared. The report reflected the Ombudsman's overall view of the performance of Ms Bailey-Clarke which was unsatisfactory. There was no cross examination on how this report was prepared and I am satisfied from the Ombudsman's evidence that the report was prepared and presented to Ms Bailey-Clarke for her comments. Both parties discussed it in February 2016 and Ms Bailey-Clarke did not sign it. The Ombudsman's evidence is consistent with Ms Bailey-Clarke's evidence of her reaction to seeing the report as being surprised at seeing its contents and "vehemently denying" that her performance was such a low standard. I am satisfied that Ms Bailey-Clarke did see this report before it was submitted to the Director.

37. There is no challenge in these proceedings to the findings and conclusions drawn by the Ombudsman of Ms Bailey-Clarke's performance. There is no pending appeal or review of that performance appraisal as Ms Bailey-Clarke admits that her attempt to seek redress on that review bore no result. It is disingenuous of Ms Bailey-Clarke to therefore say that her grievance in relation to the August 2015 report is still pending but at the same time maintaining that there is no body which has been engaged to review that report.

38. The Public Service Commission responded to the Ombudsman's appraisal report by drawing to her attention Regulation 41(e) requiring her to draw to Ms Bailey-Clarke's attention in writing tendencies which render it doubtful that the probationer may not be fit for confirmation in office and the probationer will be given such assistance as may be possible. The Public Service Commission enquired whether any assistance was given to Ms Bailey-Clarke to enable her to address her shortcomings. The Ombudsman replied comprehensively by letter of 23rd

October 2015 inter alia pointing out that Ms Bailey-Clarke received two (2) comprehensive handovers, weekly meetings, and referred to instances of poor performance by Ms Bailey-Clarke and the two letters issued to Ms Bailey-Clarke in May 2015. She ended her letter: "In spite of all my efforts to assist the officer to perform her duties efficiently and effectively there has been no improvement in her performance. Additionally, the officer is loath to take advice and it is doubtful whether I can be of any further assistance to her".

The Second Performance Report (PAR2)

39. The Public Service Commission reminded the Ombudsman by letter of 25th January about the final performance report of Ms Bailey-Clarke. The probationary appointment would have come to an end by 10th February 2016. According to the Regulation 42(2) the final report ought to have been submitted one month before the period of probation expired. The final report was prepared by the Ombudsman and issued to Ms Bailey-Clarke on 2nd February 2016. They both met on it on 2nd February 2016.

40. The report prepared by the Ombudsman again recorded Ms Bailey-Clarke's shortcomings and the conclusion that her performance was unsatisfactory. The Ombudsman had indicated in the report that: "Major weakness identified: Officer does not understand her role as Executive Officer and therefore she does not perform at the level expected of a very senior officer. Is not receptive to constructive criticism and advice. Lacks foresight. Needs to improve writing skills." There was no recommendation on this appraisal report itself that Ms Bailey-Clarke revert to her former office.

41. Ms Bailey-Clarke complained that the Ombudsman did not fairly assess her performance and ignored the several matters which she did for the department. A list of these matters are set out in her affidavit which deal with administrative initiatives taken by Ms Bailey-Clarke.

42. Ms Bailey-Clarke referred to a "convention" concerning performance appraisals at paragraph 35 of her principal affidavit:

    "The convention which was observed in my previous Performance Appraisal Reports is that the Reporting Officer/Supervisor who prepared the report would have prior discussions to agree on the duties and relevant standards of performance. The Supervisor/Reporting Officer would present the original report along with a copy to the officer under review. A

discussion would follow concerning the report, and the officer under review would then be invited to submit any comments he or she may have, and then sign the original report. The signed original is sent to the Director of Personnel Administration, the copy is placed in the officer's confidential file and the officer can retain a copy for his or her records. This was not done when Ms. Stephenson met with me on February 02, 2016."

43. However there is no evidence to support such a convention. What is clear however is that the Ombudsman and Ms Bailey-Clarke did discuss the contents of the report before it was submitted to the Public Service Commission. The report was submitted by the Ombudsman on 2nd February 2016. It was unsigned by Ms Bailey-Clarke as was the first report. The Ombudsman indicated in her affidavit that she did not expect the officer to sign the report and that she expected the same reaction as with the first report and sent it on to the Public Service Commission. The report was only signed by Ms Bailey-Clarke on 22nd February 2016 with her comments and concerns about the contents of the report. Ms Bailey-Clarke's comments were also forwarded to the Public Service Commission by the Ombudsman.

44. The Ombudsman also submitted a letter dated 28th January 2016 making the final recommendation that Ms Bailey-Clarke revert to her former office. This was the final recommendation being made pursuant to Regulation 42(4). By that letter the Ombudsman made several significant comments in relation to the poor working relationship between the two officers which were not recorded on **PAR2**:

"Over the period under the review, I informed the EO both verbally and in writing of my concerns with respect to the manner in which she performed her duties. The problem stems from the fact the officer clearly does not understand her role as EO.

She believes that the function of the Ombudsman is merely to outline policy for the organisation and that as Administrative Head, she has full control of the operations of the Office. In other words, the Ombudsman is a "Figure Head". She is of the view that the role of the EO equates with that of a Permanent Secretary."

"Lack of support and quality performance from the EO have placed an added burden on me. In addition to fulfilling my core duties as Ombudsman, I am also required to deal with human resource and administrative matters on a regular basis; duties which it was expected

that the EO would perform. This is affecting the fulfilment of my constitutional mandate and my overall well-being. It must also be noted that in addition to my duties as Ombudsman of Trinidad and Tobago, I also have international commitments in my capacity as Regional Ombudsman Institute with headquarters in Vienna, Austria."

45. This recommendation was never shown to Ms Bailey-Clarke before any of the decisions were made by the Public Service Commission that she revert to her former office. In fact the Public Service Commission it must be said was neither aware that the Ombudsman did not discuss this recommendation with Ms Bailey-Clarke before she made a final recommendation. The Public Service Commission would have in my view proceeded on the basis of compliance with Regulation 43(1).

46. The Public Service Commission at its meeting on 16th February 2016 had before it then both the performance report and the letter of the Ombudsman containing the Regulation 42(4) "firm recommendation". The probationary period had by then ended on 11th February 2016. Ms Bailey-Clarke had at that time knowing that her probationary period would have come to an end on 11th February 2016 had still not signed the final reports. At that meeting, the Public Service Commission considered the adverse comments and the recommendation of the Ombudsman and decided to revert the officer to her former office. It also decided to inform Ms Bailey-Clarke of this decision and to invite her representations on same in purported reference to the obligation set out in Regulation 43(1). However that was an obligation to entertain Ms Bailey-Clarke's representation by the Ombudsman and not the Public Service Commission. Further it is an obligation to be discharged before the submission of her recommendation to the Public Service Commission and not after a decision was made by the Public Service Commission.

47. By letter dated 26th February 2016, Ms Bailey-Clarke was informed of the Public Service Commission's decision. "After careful consideration, the Commission has decided to revert you to your former office of Human Resource Officer III, Ministry of the Attorney General in accordance with provisions of Regulation 42 (4) (d) of the Public Service Commission Regulations. The Commission is therefore inviting you to submit any representations you may

wish to make within seven (7) days of the receipt of notification in accordance with the provisions of Regulation 43 (1) of the Public Service Commission Regulations."

48. At that time her note would have come to the Public Service Commission. That decision was later confirmed by a directive of 15th March 2016 to comply with the Public Service Commission's decision at the penalty of being found guilty of misconduct if she failed to comply. The Public Service Commission as appears by the letter of 26th February 2016 also gave Ms Bailey-Clarke a second chance of making representations directly to it in relation to the decision to revert her to her former office

A Second Chance

49. In the Public Service Commission's letter of 26th February 2016, it invited Ms Bailey-Clarke's comments on the decision to revert her. Ms Bailey-Clarke's response was dated 7th March 2016. In her letter she commented:

> "In my thirty one (31) years of employment in the Public service my Staff Reports/Performance Appraisal Reports have been sterling. Preceding this appointment having performed the duties of Senior Human Resource Officer in the Office of the Prime Minister, the Head of the Public Service at the time Mr. Reynold Cooper awarded me a grade two on my Performance Appraisal Report and indicated that no weakness identified for the period. The records will also reveal that as Supervisor of the Examinations Section, in the Ministry of Education will attest to my sterling performance in my Performance Appraisal Reports and also at the different levels in the position of Human Resource Officer in the Ministry of Education. It is instructive to note that after such a consistent history my performance can so drastically fall in such a short space of time."
>
> "The chronology of events seems to resemble an orchestrated and premediated plan bordering on improper basic procedural propriety. There appears to be a lack of legal industrial proceduralism which goes against all age old precepts of common law justice and the modern day practice of good industrial relations. I humbly ask that Public Service Commission revisit its decision based on my representations and afford me the opportunity to have the Chief Personnel Officer review the Performance Appraisal Reports in accordance with their set guidelines."

50. The Public Service Commission however by letter of 15th March 2016 directed her to revert to her former office indicating that any disobedience to that order will be construed as an act of misconduct. This appeared to have either ignored Ms Bailey-Clarke response or that a final decision was being made. It triggered Ms Bailey-Clarke's pre action letters.

Pre-action letters

51. Ms Bailey-Clarke's pre action letter was issued on 15th March 2016. In response the Public Service Commission indicated that it had not yet considered Ms Bailey-Clarke's representations. They subsequently met on 22nd March 2016 to consider Ms Bailey-Clarke's representations and decided to let Ms Bailey-Clarke know that her claims are being investigated and to invite the Ombudsman's response to Ms Bailey-Clarke allegations. By letter 31st March 2016 this decision was conveyed to Ms Bailey-Clarke. By letter of 22nd March 2016 her attorney issued another pre-action letter and the Public Service Commission responded by letter of 28th April 2016 indicating that the matter was still under consideration.

52. The Ombudsman had submitted her response by 20th April 2016.

The review of its decision

53. The application for leave to file for judicial review was filed on 25th May 2016 and first came up for hearing on 22nd June 2016. By that time the Public Service Commission had convened another meeting on 14th June 2016 to consider Ms Bailey-Clarke's claims and the Ombudsman's response and the decision to revert her to her former office. It considered all the matters submitted to it and the final decision was made that she revert to her former office and that its decision to revert should stand. This decision was communicated formally to the Ombudsman and Ms Bailey-Clarke by letter dated 8th July 2016. That final decision is not formally the subject of challenge in these proceedings. It is their decisions by letter of 28th February and 15th March 2016 which are under review. At the time the leave application came on for hearing the Public Service Commission contended that the application was premature as the matter was still under consideration. The final decision dated 8th July 2016 of the Public Service Commission was eventually filed together with the Public Service Commission's affidavit in response.

54. Against this backdrop Ms Bailey-Clarke contends that she was not afforded an opportunity to be heard in relation to the final report and the recommendation and the decision to revert her was made unfairly and improperly and in contravention to the Regulations specifically Regulation 43. The Public Service Commission contends that they had no other alternative at the end of the probationary period but to revert her to her former office while they reconsidered the question of her service based upon the representations made to it by the parties. As far as the Ombudsman was concerned there was no obligation on her by the Regulations to inform Ms Bailey-Clarke of her final recommendation contained in her 28th January 2016 letter before issuing it to the Public Service Commission.

Issues

55. As discussed above, it is only if Ms Bailey-Clarke is successful on her leave application would the Court consider the question of what substantive relief can be granted. I prefer however to focus on the critical issues articulated by the parties and then reflect on the questions of leave and substantive relief. These issues then can be neatly summarised as follows:

A. THE STATUTORY DUTY QUESTION

Whether the Ombudsman as Head of Department who makes a final recommendation to the Public Service Commission that an officer on probation revert to her former office pursuant to Regulation 42(4) (d) is required to apply the procedural provisions of Regulation 43(1).

If there is none the application is misconceived. If there is such an obligation the following issues arise.

B. THE ILLEGALITY QUESTION

- **Whether such a recommendation made in breach of Regulation 43(1) is null and void or unlawful.**

- **If such a recommendation is void or unlawful whether the Commission's decision made on the basis of such a recommendation is itself void.**

C. THE UNFAIRNESS QUESTION

Whether such a recommendation made in breach of Regulation 43(1) and/or such decisions made by the Commission on such a recommendation is a breach of the principles of natural justice and/or a breach of the Claimant's legitimate expectation.

D. DISCRETIONARY FACTORS:

a) Whether the Claimant is guilty of delay or failing to act with promptitude in making her application;

b) Whether the proceedings are academic, the Public Service Commission having already reviewed its decision;

c) Whether the proceedings are premature and filed at a time when the Commission was in the process of reviewing its decision which is the subject of the proceedings.

E. In light of these matters whether:

a) Leave ought to be granted to the Claimant having raised arguable grounds of review with a realistic prospect of success and not subject to any discretionary bars;

b) If so whether the Claimant is entitled to any relief which remains at the Court's discretion.

The Statutory Duty Question

56. Ms Bailey-Clarke submitted that:

- The duty imposed by Regulation 43(1) is mandatory and non-compliance of it renders the recommendation null and void. **Gunwick Processing Laboratories Ltd v ACAS** [1978] AC 277.
- Where there has been non-compliance with a statutory requirement and the statute does not specify what is to be the consequence of such non-compliance, the intention of the legislature must be ascertained to determine whether the non-compliance renders the act null and void. See **R v Soneji and Anor** [2005] UKHL 49 where Lord Steyn at paragraph 23 noted that "the emphasis ought to be on the consequences of non-

compliance and posing the question whether Parliament can fairly be taken to have intended total invalidity." **Herbert Charles v The Judicial and Legal Service Commission, The Disciplinary Tribunal** HCA No.26 of 2001.

- The requirement to inform and to invite the representations of the Applicant is a procedural safeguard that protects the interest of the officer and also protects the Commission's interest in ensuring that the appointment of persons to hold office in the public service is fairly and transparently exercised.
- It follows that a recommendation made in breach of Regulation 43(1) is null until the procedural safeguards are followed.

57. The Respondents made the following submission:

- The Ombudsman does not dispute that it did not inform Ms Bailey-Clarke of the recommendation to the DPA that she be reverted to her former position and did not invite her to make representations on the same.
- The Ombudsman's recommendation was not for the termination of the Applicant's appointment but that she should return to her substantive appointment since she was not found to be suitable for appointment by the Ombudsman. It is contended therefore that Regulation 43(1) does not require that she be heard before a recommendation to revert was made.
- It was open in any event for the Public Service Commission to decline to accede to the recommendation of the Ombudsman.
- Both Respondents contend in any event if there was a procedural irregularity it is trumped by (a) substantial compliance with Regulation 42(5) since she was provided with copies of both of the Performance Appraisal Reports (b) a record which shows her patent unsuitability for higher office (c) her delay in accessing the Court and (d) that the entire matter has been totally reconsidered by the Public Service Commission.

58. As in the several authorities that deal with the statutory function of the Public Service Commission or officers under the Regulations [17], this question of the existence of a duty on the

[17] See **Balramsingh v the Public Service Commission** [2014] UKPC 26, **Ramoutar v Commissioner of Prisons and Public Service Commission** [2012] UKPC 29 , **Favianna Gajadhar v Public Service Commission** C.A.Civ.P.170/2012.

Ombudsman to provide a hearing to the probationer before a final recommendation is made, is one of statutory construction. The Public Service Commission regulations sets out a detailed code[18] dealing with among other things the operations of the Public Service Commission and provisions for dealing with officers in the public service such as in this case - officers on probation. See Chapter V of the Public Service Commission Regulations which deal specifically with "Probationary Appointments".

59. These Regulations are to be interpreted in the context of the status of the bodies and officials involved. The Public Service Commission is a body exercising constitutional functions following procedures set out in the schedule of the Constitution. As an independent body established by section 120 of the Constitution it has the power pursuant to section 121 of the Constitution to appoint persons to hold or act in offices in the public service including inter alia the power to make appointments on promotion and to confirm appointments. The Office of the Ombudsman is equally an important constitutionally created office.[19] The Ombudsman is an officer of Parliament appointed by the President after consultation with the Prime Minister and the Leader of Opposition. Section 121(8) requires the Public Service Commission to consult with the Ombudsman before making any appointments or transfers in the staff of the office of the Ombudsman. Constitutionally, the Public Service Commission is required to act in consultation with the Ombudsman. When dealing with such high constitutional offices, transparency and fairness must be the touchstone of the exercise of discretion and power.

60. Ordinarily, an officer on first appointment to the public service is required to serve on probation for a period of two (2) years. See Regulation 37. However, if the officer has satisfactorily performed the duties of the office to which he has been appointed either in an acting capacity on secondment or temporary capacity there will be no requirement for probationary service if such performance is longer than two years or set off for such shorter periods **See Regulation 38.** The language of the regulation refers to "appointment on probation". Later in Regulation 43(1) the use of the language termination of "appointment" comports with the notion that the officer is "**appointed on probation**" the language of Regulation 38.

[18] See **Rajkumar v Lalla and others** [2001] UKPC 53 and **Colin Furlonge v Hamid O'Brien** H.C.2098/2003.
[19] Section 91 of the Constitution of Trinidad and Tobago.

61. In Ms Bailey-Clarke's case she was promoted on probation from 11th February 2015. Regulation 39 provides that such an officer "appointed on promotion" is required to serve a probationary period of one (1) year.

62. Regulation 41 usefully sets out the principles to be observed for the treatment of an officer during her period of probation. She must be:

    a) given an opportunity to learn her work and be tested as to her suitability for it;
    b) accorded all possible facilities for acquiring experience in her duties;
    c) be subject to continual and sympathetic supervision;
    d) so far as the exigencies of the service be assigned to duty only where such observation is possible; and
    e) if at any time during her period of probation she shall exhibit tendencies which render it in any way doubtful that she is likely to become fit for confirmation in her appointment, these shall at once be drawn to her attention in writing by the Head of Department and be given such assistance as may be possible to enable her to correct her faults.

63. Generally speaking these principles of testing, supervision and remedial action outline a process of levelling the playing field for the probationer to allow for a fair assessment of her work by her Head of Department and assess her potential to perform in her new assignment.

64. A tool of assessment of the probationer during the probationary period is the confidential staff reports prepared by the Ombudsman. By Regulation 42 (2) in the case of an officer serving a period of probation of one year, two confidential reports shall be submitted as follows:

    (a) A first report six months before the period of probation expires;

    (b) A final report one month before the period of probation expires.

    These staff reports prepared by the Ombudsman are ultimately to be used by the Public Service Commission under Regulation 44 to determine whether the service of the officer on probation has been satisfactory. In this way the submission of these staff reports are the mechanism by which the Public Service Commission operationalises its constitutional duty of consulting with the Ombudsman before it confirms its appointment of staff in the Ombudsman's office.

65. Incidentally, Chapter IV of the Regulations sets out the general requirement for the preparation of staff reports. Importantly, Regulation 34 (3) established that the person preparing these reports is guided by her "own deliberate judgment". The assessment is one that must be an unbiased assessment of the officer's performance and conduct and give an indication of the future prospects of the officer.[20] To be fair to the officer the assessor is required by Regulation 35 to inform the officer of any shortcomings in writing when noticed and to inform the officer in writing of any adverse markings in the staff report before submitting it to the Director. Indeed these reports being the means by which the Public Service Commission is able to make decisions regarding the officer's future in the service it is understandable that such in built mechanism of a fair process becomes important.

66. In submitting the final report at the end of the probationer's twelve (12) months period, the Ombudsman is required to make "a firm recommendation" as to the officer's future prospects. **See Regulation 42(4).** There are four (4) recommendations open to the Head of Department under Regulation 42(4) (a) to (d) to make when submitting the final report of the probationer:
    a) That the officer be confirmed in the appointment; or
    b) That the period of probation be extended; or
    c) That the services of the officer be terminated; or
    d) That the officer revert to his former office.

67. Normally such a report shall not be seen by the officer on probation, but like the fair process created under Part IV "Staff reports", Regulation 42 (5) provides that any adverse comments on her work shall be made as early as possible so that she should have sufficient time in which to make an effort to correct her shortcomings before her period of probation expires. The officer shall retain the original notification and shall sign the duplicate and return it to the Permanent Secretary or Head of Department for the record.

[20] Regulation 34(3) of the Public Service Commission Regulations states:
"In the preparation of a staff report, the Permanent Secretary or Head of Department shall be guided by his own deliberate judgment and shall in such report— (a) make an unbiased assessment of the officer's performance and conduct over the past twelve months; and (b) give an indication of the future prospects of the officer."

68. In this case it is important to note that the final report prescribed by Regulation 42 is **PAR2** and the firm recommendation contemplated by Regulation 42(4) was submitted under a separate letter by the Ombudsman dated 26th January 2016. There is no prescription by the Regulations for this recommendation to be contained within or separate from the final report. So long as the Ombudsman makes a firm recommendation as to the Regulation 42(4) options that will suffice for compliance with Regulation 42.

69. There is no dispute in this case that the Ombudsman did prepare and submit two such staff reports **PAR1** and **PAR2**. I have already reconciled the facts in favour of the Ombudsman that Ms Bailey-Clarke did see the adverse comments on those reports before it was sent to the Director. I am satisfied that the letters on record demonstrate at least three instances when her shortcomings were brought to her attention. It is equally not in dispute that the final report **PAR2** was not submitted one month before the period of probation expired as required by Regulation 42(2) (b). However these reports are not under challenge by Ms Bailey-Clarke in these proceedings.

70. Regulation 43 (1) and (2) and Regulation 44 provide the linchpin of this dispute. They are set out verbatim as follows:

> "43(1) **Before any recommendation is made** to the Commission for the extension of the period of probation of an officer or **for the termination of his appointment**, the Head of Department **shall inform** the officer of this recommendation and of the **specific reasons** therefor and he **shall invite** the officer to submit any representations he may wish to make.
>
> (2) Subject to the provisions of these Regulations, the first appointment on probation of an officer may, at any time during the period of probation, be terminated by the Commission.
>
> 44. (1) If, after consideration of the final report of the Permanent Secretary or Head of Department, **the Commission is satisfied** that the service of an officer on probation has been satisfactory, the Commission shall confirm his appointment with effect from the date of appointment.
>
> (2) If the Commission is not satisfied that the service of an officer on probation has been satisfactory, the Commission **may** extend the period of probation for a further period."

71. From a proper reading of Regulation 43(1) and Regulation 44 the following relevant obligations are pellucid:

    (a) The Ombudsman is required prior to the end of the probationary period to inform the officer of any recommendation for the extension or termination of her appointment and the reasons for it.

    (b) The Ombudsman is required to invite the probationer to submit her representations in response to that recommendation.

    (c) That this, which I may conveniently refer to as **the Regulation 43(1) duty** must be complied with before the recommendation is made to the Public Service Commission.

    (d) The Public Service Commission will consider the final report to determine whether it is satisfied with the probationer's service.

    (e) The Public Service Commission upon considering that final report shall exercise a discretion if satisfied of the performance by confirming the appointment or if not satisfied it may extend the period of appointment.

    (f) It is also clear that in the exercise of its discretion the Public Service Commission is not bound by the recommendation of the Ombudsman and retains a full discretion as to the placement or treatment of the officer that suits the case subject to any overarching duty of fairness.

Application of the 43(1) duty to the Ombudsman's recommendation

72. The Ombudsman's recommendation was that the officer revert to her former office. It is argued by the Ombudsman that the Regulation 43(1) duty did apply where that recommendation is for either the extension of the period of probation of an officer or for the termination of his appointment. It is submitted by the Ombudsman that a final recommendation to revert to her former office is not a recommendation for the "termination of his appointment". The Regulation 43(1) duty has therefore not been triggered.

73. The Ombudsman is correct that the Regulation 43(1) duty is in reference to a final recommendation to either extend the period of probation or "termination of appointment". The

Ombudsman did not use the words "termination of appointment" in her recommendation. She recommended that Ms Bailey-Clarke revert to her former office which is the language used in Regulation 43 (4) (d). However it cannot be overstated that the recommendation had the same effect and result of terminating her appointment. To construe the Regulations in accordance with its literal meaning as the Ombudsman has argued, which delinks a Regulation 42(4) (d) recommendation from the Regulation 43(1) duty, would lead to a manifest absurdity and inconsistent with the intention of Parliament.

74. Justice of Appeal Jamadar in **Omar Maraj v Public Service Appeal Board** C.A.CIV.100/2006 observed that while Courts seek to discover the intention of Parliament first by applying the most natural and ordinary meaning of the words as is contended by the Ombudsman, to take these words on its face value, "where there is reasonable uncertainty as to whether Parliament intended a provision to have a particular effect, especially where that effect is controversial, of doubtful application to a specific situation, or in apparently unintended conflict with the fundamental rights and freedoms of the individual, then reference to context is proper and in furtherance of the purposive approach to statutory interpretation."[21]

75. The informed interpretation rule stipulates that the person who construes an enactment must infer that the legislator when settling its wording intended it to be given a fully informed rather than a purely literal interpretation. See **Statutory Authorities Service Commission v Jacqueline Solomon-Sankar** Civ. App. No.122 of 2008 and **Bennion on Statutory Interpretation pg 537**. Justice of Appeal Mendonca in **Harinath Ramoutar v Commissioner of Prisons and Public Service Commission** Civ App. No. 112 of 2009 pointed out that the regulations as a whole are to be construed to ascertain the meaning that was most likely intended by the draftsman.

76. In my view, reading the regulations in their proper context and applying the various interpretative criteria leads to the conclusion that a Regulation 42(4) (d) recommendation must be compliant with the Regulation 43(1) duty. I say so for the following reasons:

[21] **Omar Maraj v Public Service Appeal Board** C.A.CIV.100/2006, paragraph 62, page 18.

(a) A manifest absurdity arises in applying a literal construction where it would mean that out of the 4 possible recommendations that can be made by the Ombudsman, the Regulation 43 (1) duty refers only to the extension of the period of probation. The reference in Regulation 43(1) to a recommendation "termination of probation" is not the language used in any of the available options under 42(4) (d). By such parity of reasoning "termination of probation" is yet an additional final recommendation which can be made by the Ombudsman. If that is so, schematically it is out of place in the regulations appearing as it were created in Regulation 43(1) when the draftsman should have included it under Regulation 42 (4) as a fifth possible final recommendation. Notably the side note to 43(1) refers: "officer may make representation on recommendation of Permanent Secretary". Regulation 43(1) is therefore a Regulation "creating" the opportunity for representation and not directed to creating a new recommendation.

(b) A recommendation "termination of appointment" cannot be restricted to reference to the "services of the officer be terminated", the language of Regulation 42 (4) (c). Such termination of services would of course necessarily arise in the case of an officer on first appointment when that officer's appointment on probation is terminated. In that case his **services** as an officer in the public service is also terminated and comes to an end. In the case like Ms Bailey-Clarke however where her period of appointment on probation is terminated it does not necessarily mean that her **services** are terminated, unless that is also specifically stated as the recommendation for some ground of misconduct. The natural consequence of such a termination of her appointment is a reversion to her former office.

(c) In my view therefore the use of the words "termination of his appointment" in Regulation 43(1) is a convenient expression of the draftsman to refer to the natural consequence arising out of the recommendations made under Regulations 42(4) (c) or (d). The natural consequence of a recommendation that

under Regulation 42(c) the "services are terminated" would mean that the probationary appointment is terminated. The same prevails for a recommendation under Regulation 42(2) (d) that the officer revert. Such recommendations are inextricably bound with a termination of the probationer's appointment.

(d) One cannot pick and choose the words used by the draftsman and place undue significance on the word "termination" in Regulation 43(1) to mean this restricts the reference to Regulation 42(c). To do so raises the equally important question why then did the draftsman not use the word "services" which is the word used in Regulation 42(c) but the word "appointment" the language in Regulation 39. It is true that a recommendation to terminate the services of a probationer is a very serious matter and may often arise on the grounds of misconduct for an officer who is not on first appointment. This compels the view then that in such a case the duty to notify becomes significant. But equally the Regulations specifically provide that a person on probation who is not being confirmed in his appointment after his first period of probation is deserving of notification.

(e) Taken in this context and construing the entire scheme of the process afforded to the probationers under Part V of the Regulations to be notified of adverse comments, it would be absurd to think that any recommendation that is adverse to the officer would be made behind her back. **See Regulations 34, 42 and 43.** The Commission relies on **Munusamy v Public Service Commission** [1967] AC 348 to support the proposition that a probationer like Mr Munusamy whose probation period is terminated and he reverts to his former office does not suffer any penal consequences or punishment. That authority however did not consider the general question whether a recommendation that the probationer is unfit and should revert, is an adverse comment. It is accepted that the probationer as in **Munusamy v Public Service Commission** is not entitled to the higher office. However for Mr Munusamy in that case to have succeed he

had to prove that such a termination of appointment was a "reduction in rank". Only if there was a dismissal or "reduction in rank" was Mr Munusamy entitled under section 311 of the Constitution of India to a hearing. Clearly a decision that a probationer revert does not qualify as a "reduction in rank". He still maintains his substantive office. This hardly is an authority to suggest that a recommendation that a probationer is to revert is not an adverse recommendation or one that affects the prospects of the probationer. The recommendations of 42(4) (b) (c) (d) are all adverse recommendations. As Lord Mustill explained in **ex p Doody** fairness will very often require a person who may be adversely affected by the decision will have an opportunity to make representations.

(f) Construing the Regulation 43(1) duty to apply to both Regulation 42(c) or (d) recommendations, conforms to the principle clearly distilled from the Regulations that fair opportunities are being made to the probationer to be notified and to be heard in relation to any adverse recommendations be it that she has to continue her probationary period to prove herself fit for office or that her services are being terminated or that she is being reverted to her former office.

(g) Such a construction also conform with the importance of transparency and accountability in the operation of the discharge of constitutional powers of appointments in office. Critically, such an interpretation removes the spectre of biased reports coming to the Commission for it to act.

77. Jamadar J, as he then was, in **Colin Furlonge v Hamid O'Brien** H.C.2098/2003 explained this latter principle of construing these Regulations consistently with the principles of fairness and transparency.[22] The Court was reviewing a recommendation by the Permanent Secretary of the Ministry of Health which failed to recommend the Applicant for an acting appointment and to recommend someone else. The Respondent in that case was of the view that the

[22] Senior Counsel and Junior Counsel are commended for bringing this authority to the Court's attention.

recommendation was valid having followed a convention or policy to appoint the most able and competent officer within the unit. On the surface it appears to be a reasonable managerial decision. However it was not compliant with the Regulations governing acting appointments made other than as a prelude to a substantive appointment. Jamadar J in that case reviewed the regulatory scheme of acting appointment and concluded that the duty of fairness was imbedded into the regulation such that the recommendation could not have been made without notice or representation from the Applicant. He commented that "because all of the above regulations must be followed, fairness demands that even if officers are entitled to make representations prior to the submission of recommendations, generally, if an officer is passed over the reasons should be given to that officer sufficiently well in advance to afford him/her an opportunity to be heard and/or to make representations on same prior to a decision by the PSC."[23]

78. Jamadar J adopted a purposive approach to construing the Regulations and elevated the principle of fairness as a presumption applicable to the construction of these regulations:

> "The PSC Regulations are thus intended to be in service of the aim of ensuring, with respect to acting appointments, that all such appointments are free from any political interference. In my opinion, this context creates a presumption that where these regulations state that certain things 'shall' be done, the intention is for compliance. Moreover, an examination of the regulations under consideration reveals that there is a carefully detailed scheme that has been prescribed by the legislature for the process of selection of officers for acting appointments. Such a scheme must be presumed to be purposeful. And, such a scheme was no doubt prescribed in order to (i) avoid both the mischief of political interference and arbitrariness; and (ii) ensure fairness and transparency/accountability in the selection process."[24]

79. The Ombudsman therefore was under a statutory duty to notify the probationer of her recommendation, give her reasons for it and allow her to make representations, before it was submitted to the Public Service Commission. She plainly failed to do so. In so far as the Ombudsman and the Public Service Commission are to consult on the question of Ms Bailey-

[23] **Colin Furlonge v Hamid O'Brien** H.C.2098/2003, page 10.
[24] Ibid page 11.

Clarke's future one can only expect openness and transparency. One would not expect that long after the Public Service Commission has made its decision to revert Ms Bailey-Clarke to her former office that it is now being discovered by the Public Service Commission that such opportunities to inform the final recommendation was never given to the probationer.

80. The construction of the Regulations in the manner above provides the clue as to the gravity and effect of the breach of the Regulation 43(1) duty. Regulation 43(1) simply must be complied with. The consequence for failure invalidates the act. The failure to comply with Regulation 43(1) in my view taints the recommendation as fundamentally unfair to the probationer and undermines the Public Service Commission's process who would have acted on the premise and the guarantee that its final decision is being made in a fair manner. Rather than examine whether the Regulation 43(1) duty is a mandatory requirement, the real question is what are the consequences of the breach of this requirement?

Compliance with the Regulation 43(1) duty

81. The question whether one would be pardoned for failure to comply with statutory obligations historically was once viewed with the "mandatory" or "directory" labels attached to statutory obligations compelling different views on the breach of them[25]. The modern view is that an examination of statutory obligations as those set out in Regulation 43(1) through the lens or looking glass of "mandatory" or directory" has outlived its prescription[26]. Such an approach

[25] *It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. A brief review of the earlier case law is to be found in Wang v IRC [1995] 1 All ER 367 at 375-376, [1994] 1 WLR 1286 at 1294-1295…*

[26] In **R v Secretary of State for the Home Department, ex p Jeyeanthan (1999)** [2000] 1 WLR 354 it was held that "an inquiry whether the requirement was "mandatory" or "directory" was of limited assistance; that a more just and intended result could usually be achieved by asking whether the requirement was fulfilled by substantial compliance with it and, if so, whether there had been substantial compliance, whether the non-compliance was capable of being waived and, if so, whether it could or should be waived, and if it was not capable of being, or had not been, waived, what the consequence was of the non-compliance." In **Sumukan Ltd v Commonwealth Secretariat - [2007] All ER (D) 253,** it was stated that the distinction between mandatory and directory requirements was now "opaque." Lord Justice Waller had this to say at paragraph 42:
"The significance of a departure from a prescribed process has been bedevilled in modern public law by an opaque distinction between mandatory and directory requirements. A departure from the former vitiates a decision; a

only served to introduce over rigid classification and a "Procrustean bed" unsuitable for the legal analysis which is much more fluid and dynamic to accommodate a wide variety of fact patterns. The proper prescription is whether, having regard to the scope and purpose of the legislation in which the provision appears, the failure to satisfy the provision is sufficiently serious so as to invalidate the whole decision-making process.[27] By adopting this perspective one gets a clearer picture of the nature of the obligation created by the statute and the consequences if it is not followed against the particular fact pattern of the case.

82. In **R v Soneji** [2005] 4 All ER 321**,** Lord Steyn classically surmised:

> *"*Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court **that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their useful-ness**. Instead, as held in A-G's Ref (No 3 of 1999), **the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity**."[28]

83. **Matthews (Charles) v The State** 60 WIR 390 the Court of Appeal also observed :

> "It is no longer accepted that it is possible, merely by looking at the language of a legislative provision, to distinguish between mandatory provisions, the penalty for breach of which is nullification, and directory provisions, for breach of which the legislation is deemed to have intended a less drastic consequence… it is necessary to look beyond the language and consider such matters as the consequences of the breach and the implications of nullification in the circumstances of the particular case."[29]

84. Regulation 43(1) is cast in the imperative. Before the recommendation is made to the Public Service Commission by the Ombudsman she "shall" inform the officer of the recommendation. The recurrent theme as Lord Steyn observed in the drafting of such regulations is that

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departure from the latter does not; but deciding which class any particular requirement falls into has been frequently as much a matter of impression as of law."

[27] Halsbury's Laws of England/Judicial Review (Volume 61 (2010), paragraph 626.

[28] **R v Soneji** [2005] 4 All ER 321 paragraph 23.

[29] **Matthews (Charles) v The State** 60 WIR 390 at 391.

Parliament casting its command in imperative form did not expressly spell out the consequences of a failure to comply. In determining the effects of non-compliance with a statutory provision, the Court is engaged in an examination of the legislation's purpose and its relationship with the scheme, subject matter and object of the statute in which it appears and must attempt to assess the importance attached to it by Parliament. Beginning with Lord Hailsham's analysis in **London & Clydeside Estates Ltd v Aberdeen DC** [1979] 3 All ER 876 at 883, [1980] 1 WLR 182 at 189-190 and ending with **R v Soneji** [2005] 4 All ER 321 the following legal principles can be culled in the more flexible approach to determining the consequences of breach of a statutory provision focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity: [30]

- The decision on the legal consequence of non-compliance on the rights of the subject is viewed in the light of a concrete state of facts and a continuing chain of events.

- There may be a spectrum of possibilities in which one compartment or description fades gradually into another[31].

- Consideration must be had for the intention to be imputed to Parliament judged objectively, the place of the statute and the degree and seriousness of the non-compliance, the scope and purpose of the statute.

[30] **R v Soneji [2005] 4 All ER 321**, paragraphs 14 and 15.

[31] At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like "mandatory", "directory", "void", "voidable", "nullity" and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition.

- The more serious the public inconvenience and injustice likely to be caused by invalidating the administrative action including the fruition of the purpose of the legislation, public expense and hardship to the parties, the less likely a Court will conclude that legislative intent is best implemented by a declaration of invalidity.[32]

85. Specifically dealing with the Service Commission Regulations, Nelson JA in **The Police Service Commission v Rodwell Murray** C.A. CIV. 143/1994 laid down the following propositions:

    - Failure to follow the regulation does not mean that the relevant Service Commission had acted illegally and also outside its jurisdiction.

    - The real question to be asked is, what was the particular regulation designed to achieve.

    - Was there substantial compliance given the objective of the regulations, whether all or any of the breaches were minor, whether any prejudice to the officer outweighed by the public interest.

    - Even when there are breaches of the regulation the discretion vested by the Constitution in the Commission is not exorcised. A Commission's departure from or breach of the regulations does not by itself mean that the Commission acted without jurisdiction or in excess of jurisdiction. The Commission's powers are entirely discretionary and it may take into considerations the breaches when exercising its discretion.

    - The Court will have regard to the importance and materiality of the regulation breached. Breach of a mandatory regulation did not automatically mean that the

[32] As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind.

decision of the Commission was invalidated. That would be so only if there had been a breach of natural justice.[33]

86. There is statutory silence as to what the Ombudsman is to do if the probationer submits any representations to his proposed final recommendation. There is no statutory requirement to forward such representations to the Public Service Commission. But the purpose of Regulation 43(1) is plainly obvious. It imbeds the administrative process with the principles of a fair hearing: notice, reasons, representation. The purpose of Regulation 43(1) in my view is to establish a statutory duty to act fairly towards the probationer. This is consistent with the entire scheme set out under Chapter V of the Regulations treating probationers along the principles of fairness and transparency. The final recommendation must also bear the hallmarks of good administration and supervision of giving the officer the opportunity to respond to adverse comments on performance. See Jamadar J in **Colin Furlonge v Hamid O'Brien** H.C.2098/2003 at page 14:

> "The consequences of regulation 28 not being complied with (the consequence question) include: the likelihood of arbitrariness; an undermining of the appearance of independence and impartiality in appointments; the likelihood of irrational, discriminatory and extraneous considerations being determinative of the recommendations (including but not limited to political interference); a lack of transparency and accountability by the Respondent; and detriment and prejudice to officers passed over. ... Parliament could not have intended the above consequences. Rather, the legislature, by prescribing the regime that it has, clearly intended the consequence of non-compliance to be the nullity and illegality of a defective recommendation."

87. There has been no compliance to date with this duty. It is conceivable that the final report would contain the final recommendation of the Ombudsman. In this case, the report and the final recommendation were two separate documents which carried two separate appraisals. The final report containing an appraisal of work performance in the last six (6) months which was unsatisfactory. The final recommendation intending to be the recommendation of the Ombudsman as to her opinion on the future of the probationer. Based on such a bad

[33] See also **Herbert Charles**.

performance in her view logically such a recommendation could have been any of Regulation 44 (b) (c) or (d). However, importantly in making that final recommendation would be to engage with the worker herself following the fair process as set out above comporting with Regulation 43(1) duty on her own views of her future in the office.

88. In **Marilin Sammy-Wallace v Judicial Legal Service Commission** C.A.CIV.159/2004 the Court had to consider the similar situation of the head of department, in that case the President of the Industrial Court, making a final recommendation on the performance of the Registrar who was on appointment on probation. His final recommendation was for her appointment to be terminated and that she revert back to her office. Indeed this also demonstrates that the distinction made here by the Ombudsman that she reverts as being distinct from a "termination" of her appointment is indeed a distinction without a difference.

89. However, in **Sammy-Wallace** the President did communicate his final recommendation to the officer, invited her views on it and submitted it with his report to the Director. In that case the Registrar's challenge of the decision to revert her failed. There was good reason for that outcome:

    a) Even though there was no strict compliance with Regulation 43(1) the President did conduct "a hearing" on the issue of his recommendation to the Director.

    b) The President was alive to the Regulation 43(1) duty and made efforts to comply with it.

    c) The Applicant was invited by the Judicial Legal Service Commission to submit her response to the final report and recommendation which was then considered by the Public Service Commission.

    d) The Judicial Legal Service Commission was not obliged to resolve any "third party dispute" between the officers but to act fairly.

    e) The Judicial Legal Service Commission was obliged to consider the final report and decide whether to act on the recommendation or not.

90. The gaping omission in this case is that the Ombudsman's recommendation was non-compliant with the Regulation 43 (1) duty. A fatality which was not in play in **Marilin Sammy-Wallace**.

91. No argument can be mounted here by the Ombudsman nor the Public Service Commission that there was substantial compliance of the Regulation 43(1) duty. What Ms Bailey-Clarke received was an opportunity to respond to the adverse comments on her **PAR2**. Unlike **Sammy-Wallace** she never received an opportunity to respond to the final recommendation of her supervisor, which contained substantive allegations against her. Indeed the Public Service Commission in their letter of 26th February 2016 inviting her to make representations drew her attention to the Ombudsman's letter of recommendation but did not provide her with a copy of it nor provided a gist of its contents. Presumably the Public Service Commission quite rightly would have acted on the basis that the recommendation was indeed compliant with Regulation 43(1) and accordingly there was no need to give her another copy. From their perspective it is understandable that they would make the case of substantial compliance when Ms Bailey-Clarke had responded to their invitation to respond. The fundamental fallacy there however is that Ms Bailey-Clarke had not been shown the Ombudsman's letter of final recommendation to which she had not been given the opportunity to respond.

92. It is to be expected that such response should be considered by the Ombudsman. Indeed the response may have changed their mind or not. That is immaterial. Such a regulation sets out the fundamental ingredients of a fair hearing, the hallmark of proper and effective assessment process and a breach of it is equally fundamental. Indeed the duty of administrative bodies to act fairly is a fundamental axis governing public action.

The duty to act fairly

93. In a recent speech of the Hon. Louis LeBel the importance of procedural fairness and the duty to act fairly was summarised[34] in this way:

> "Although impartiality, independence and access to a fair hearing do not guarantee a fair outcome, they certainly increase the chances of a fair outcome occurring.

[34] **Canadian Journal of Administrative Law & Practice** February, 2013 Speech Notes for an Address: Reflections on Natural Justice and Procedural Fairness in Canadian Administrative Law, The Hon. Louis LeBel.

> Moreover, as Peter Cane points out: Fair hearings are valuable not only instrumentally for the contribution they make to fair outcomes but also intrinsically. Giving a person a fair hearing shows them respect as an individual; and empirical research has demonstrated that people value fair procedure for its own sake and are more prepared to accept adverse decisions if they have been treated fairly.
>
> In this way, the values encompassed by natural justice-- impartiality, independence and access to a fair hearing--are fundamental both to the integrity of our legal system and to public support for that system. Natural justice and also protect human dignity. Therefore, it is particularly critical that we do not interpret these key values in a *narrow* fashion. Rather, they should be interpreted in a generous and flexible manner. As the majority expressed in *New Brunswick (Board of Management) v. Dunsmuir*: "Procedural fairness is a cornerstone of Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated, the principle is easy to grasp. It is not, however, always easy to apply. As noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case"."

94. Similarly in our jurisdiction in the several authorities cited to this Court by the parties, our Courts have repeatedly emphasised the value of the principle of procedural fairness and the duty to act fairly encompassing values of human dignity, the rule of law and the pillars of democracy of fair outcomes by fair processes. See **Colin Furlonge v Hamid O'Brien** H.C.2098/2003**, Favianna Gajadhar v Public Service Commission** C.A.Civ.P.170/2012, **R v Secretary of State for Home Department ex parte Doody** [1994] 1 AC 531, **Gopichand Ganga**.

95. These cases establish that the duty of fairness is not a "one size fit all" doctrine. In **Manning v Ramjohn** [2011] UKPC 20 Lord Browne observed that it is trite law the requirement of fairness in any given case depend crucially upon the particular circumstances[35]. Almost always

[35] See also Lord Mustill's judgment in **ex p Doody** [1997] 1 AC 531 at 568D.

if a decision is to be taken against someone on the basis of an allegation, fairness will demand that they be given an opportunity to be heard on it. **R v Chief Constable of the Thames Valley Police, ex p Cotton** [1990] IRLR 344 was an interesting case referred to in the judgment of Lord Brown in **Manning** in which a constable's probationary term was terminated on the ground of obvious obesity without having a hearing. His challenge failed based in the main part on the manifest unsuitability of the constable. But even so Bingham LJ explained that denying a subject an adequate opportunity to put his case may not be in all circumstances unfair. He was physically unfit. However those cases are rare for the following reasons:

"(a) Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what cause he could or would have put if he had had the chance.

(b) Experience shows that that which is expected is by no means always that which happens. As memorably pointed out by Megarry J in **John v Rees and others** [1970] Ch 345.

(c) It is generally desirable that decision makers should be reasonably receptive to argument and it would therefore be unfortunate if the complainant's position became weak as the decision makers mind become more closed.

(d) In considering whether the Complainant's representations would have made any difference to the outcome the Court may unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of a decision.

(e) This is a field in which appearances are generally thought to matter.

(f) Where a decision maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard and rights are not to be lightly denied."

96. The latter proposition applies with full force in this case. Indeed a rich discussion on the correlation of a breach of natural justice and the constitutional protection of the law under section 4(b) of the Constitution was engaged in the recent judgment of **Sam Maharaj v Prime Minister of Trinidad and Tobago** [2016] UKPC 37. In that case **Rees v Crane** [1994] 2 AC

173 has held sway in this jurisdiction of the fundamental nature of the principles of natural justice. So much so the Law Lords were content to say that no case was referred to in which the government of Trinidad and Tobago or any of its emanations or agencies had argued that the right to the protection of the law enshrined in section 4(b) did not comprehend a right to be treated fairly or that it did not give rise to an obligation on the part of public bodies to observe the rule of natural justice. This simply underscores the point as observed in the speech above of the significance attributed by the Court to the observance of the rule of natural justice indeed such duties of fairness imposed by statute. See also the CCJ judgment of **Luca and another v Chief Education Officer** [2015] CCJ 6.

97. Indeed once the duty of procedural fairness is found to exist, the legislative and administrative context is crucial to determining its content. In this case the content of the duty to act fairly is impressed indeed in Regulation 43(1). To that extent I prefer to view Regulation 43(1) as creating a statutory duty to act fairly towards the probationer to inform her of the recommendation and to give her an opportunity to be heard. Regardless of the outcome it is a procedural requirement which is significant in the scheme of the Regulations both as to the intention and purpose of the object of arriving at a proper appraisal of the officer untainted by bias.

98. The Privy Council in **Gopichand Ganga** discussed the role of recommendations to service commissions. Lord Dyson commented that even if the Commissioner of Police had no power to make recommendations the Commission was entitled to seek his views as an "obvious source from which to obtain information and an opinion about individual applicants". It is noted in that case that the recommendation made by the Commissioner was a product of a fair process. Jamadar JA in **Favianna Gajadhar v Public Service Commission** C.A.Civ.P.170/2012 takes the principles of natural justice imbedded in these regulations even further. In examining Regulation 49 which simply confers on the Public Service Commission a discretion that it "may" declare an officer to have resigned if he is absent from duty without leave, Jamadar JA read into that section an elaborate process of enquiry consistent with the principles of natural justice. See paragraph 22 of **Favianna Gajadhar v Public Service**

Commission. Such rounds of disclosure and invitation to response was described as being an "implicit procedure."

99. The Regulation 43 duty is clear as to the fair procedure to be adopted. However **Favianna Gajadhar v Public Service Commission** is of great significance to the Public Service Commission in the exercise of its discretion under Regulation 44 in considering the final report. Implicit in the procedure is indeed a process of notification and disclosure. Indeed the process by which the Public Service Commission engaged with Ms Bailey-Clarke is not as it was submitted, gratuitous, but indeed following **Favianna Gajadhar v Public Service Commission** a requirement prior to making its determination on the future of the probationer. Certainly therefore as in **Favianna Gajadhar v Public Service Commission**, Ms Bailey-Clarke should have been given the Ombudsman's recommendation to counter and for her representation to be considered.

100. Having determined that the recommendation was in breach of natural justice there is no need to determine if there was a breach of Ms Bailey-Clarke's legitimate expectation.

Patent Unsuitability

101. The Respondents submissions are seductive. They seek to demonstrate by the relationship between the two officers that because of the patent unsuitability of the probationer the Commission cannot be faulted in arriving at its decision. It harks back to **Marilin Sammy-Wallace** and **ex p Cotton**. It is tantamount to making a submission that the same result would have resulted if there was adherence to the Regulation or "no harm no foul".

102. It was contended by the Respondents that from the time of her appointment, her conduct was "challenging and problematic." Through several correspondences her shortcomings were pointed out to her. She did not make any attempt with the Ombudsman or Public Service Commission to discuss the first Performance Appraisal Report which was given to her on the 25th August 2015.

103. The Public Service Commission also argued that its duty extends to considering the final report of the Ombudsman and the Performance Appraisal report in deciding whether to confirm, extend or terminate a probationary appointment. The Public Service Commission considered

Ms Bailey-Clarke's representations and confirmed its original decision to revert Ms Bailey-Clarke and she was informed of same on 8th July 2016. Ms Bailey-Clarke therefore has not suffered any particular damage since she was given the right to make representations **Re Crawford's Application** [1994] NIJB 83. Indeed the Public Service Commission contended that they were not even expressly required to invite Ms Bailey-Clarke to make representations under the Public Service Commission Regulations. There was no commitment or representation that it would hear Ms Bailey-Clarke before the decision was taken. See **HMB Holdings Ltd v Antigua and Barbuda** [2007] UKPC 37.

104. However it is sliced, it is clear that the Ombudsman did not comply with the Regulation 43(1) obligation requiring her to bring the contents of a recommendation to the probationer's attention before it was made to the Public Service Commission. It is also clear that the Public Service Commission proceeded on the basis that there was compliance with Regulation 43(1) as the "gratuitous overtures' made to Ms Bailey-Clarke to her could hardly be in reference to a recommendation she had not seen.

105. I agree with the Respondents that the evidence in this case demonstrate that the likely recommendation by the Ombudsman would have been to revert even if the probationer was allowed the opportunity to respond before the recommendation was sent to the Public Service Commission. But to jump to such conclusions as a defence to this administrative omission shreds the basic notion of fundamental fairness and the rule of law.

106. Megarry J in **John v Rees and others [1968 J. No. 2692] Martin and Another v. Davis and Others [1968 m. no. 2390] Rees and Another v. John [1968 r. no. 2276]** remind us of the many cases which we thought were open and shut were not. Of unanswerable charges being fully answered or inexplicable conduct which was fully explained:

> "Of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has

been made without their being afforded any opportunity to influence the course of events."[36]

107. To readily assume that the Ombudsman would arrive at the same result regardless of compliance with Regulation 43(1) is a conclusion to draw with great caution "down that slippery slope lies the way to dictatorship" per Staughton LJ in **R v The Ealing Magistrates' Court, ex parte Fanneran** 160 JP 409. Courts have infrequently gone down that slippery slope and if it did it was in the face of very strong evidence. See **R v Chief Constable of the Thames Valley Police, ex p Cotton** [1990] IRLR 344. See also **Manning v Ramjohn** [2011] UKPC 20.

108. Bingham LJ in **ex p Cotton** usefully explained why Court would rarely venture down such a slippery slope. His explanation bears repeating and I adopt it:

> "Judges of high authority have held that the subject of a decision who has been denied a right to be heard cannot complain of a breach of natural justice (or unfairness) unless he can show that the decision might have been different if he had been heard. In Malloch v Aberdeen Corporation [1971] 1 WLR 1579 at p.1595 Lord Wilberforce said:
>
> > 'The particular principle of administrative law to which he appeals is that, before his dismissal became effective, he ought to have been given an opportunity of making written representations to or being heard by the education authority. He had asked for this opportunity, and it is admitted that it was refused by the respondents.
> >
> > The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a

[36] **John v Rees and others [1968 J. No. 2692] Martin and Another v. Davis and Others [1968 m. no. 2390] Rees and Another v. John [1968 r. no. 2276],** Ch. 345 Page 402.

remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain'."[37]

109. The obligation is on the Ombudsman to make his final recommendation after hearing the probationer. In **Dattatreya Panday v Judicial Legal Service Commission** PCA No.33 of 2007 it was noted that:

"The evidence now filed before the Board, which it is unnecessary for the Board to detail here, demonstrates beyond question that there was much that Mr Panday could and would no doubt have said in response, had he been given any opportunity. It is impossible to suggest that, had the matter been fairly conducted, whether under Regulation 9 or in accordance with general common law principles of fairness, the outcome before the Commission would have been inevitable and that Mr Panday's temporary appointment would have been bound to be terminated….."[38]

110. Similar sentiments were expressed by Brook J in **R v Secretary of State ex p Prior** 1994 ICR 877 that it is likely that a same decision would be arrived at albeit by a different route.

"…but nothing is certain and in my judgment the applicant is entitled to a decision on his complaint which is not seriously flawed as a matter of law."[39]

111. I agree with the Public Service Commission with its submission that in certain cases a hearing can legitimately take place after a decision was made. Such was the case in **Crawford's Application [1994] NIJB 83, McDonnell's Application for Judicial Review** [2001] NIJB 106 and **De Verteuil v Knaggs** [1918] AC 557. None of these cases detract from the fundamental principle of natural justice and are simply applications of the flexible approach of determining what was fair in the circumstances to Ms Bailey-Clarke. In those cases absent statutory provision requiring a hearing or public interest factors it was not fundamentally unfair to hold hearings after decisions were made. However such cases are in contrast and not apposite to the facts of this case where the complaint is that Ms Bailey-Clarke was never heard in the

[37] **R v Chief Constable of the Thames Valley Police, ex p Cotton** [1990] IRLR 344 at 352.
[38] **Dattatreya Panday v Judicial Legal Service Commission** PCA No.33 of 2007, paragraph 19.
[39] **R v Secretary of State ex p Prior** 1994 ICR 877 at 896.

face of the clear 43(1) statutory obligation to act fairly by hearing her on the Ombudsman's recommendation before it is sent to the Public Service Commission.

112. Indeed the subsequent "hearings" conducted by the Public Service Commission after the decision was made that Ms Bailey-Clarke revert to her former office could not paper over the gaping wound of the fundamental failure to hear her response to the final recommendation.

113. In my view having regard to the significance of the obligation, the Ombudsman's recommendation made in the absence of conferral with the probationer was fundamentally unfair. It is a nullity and it is not cured by the substantive evidence of the relationship between the office-holder in this case.

114. However although the recommendation is a nullity it does not deprive the Public Service Commission of the jurisdiction to act on it and does not necessarily render a nullity the decision that the officer reverts to her former office.

The Public Service Commission's decision and illegality

115. The Public Service Commission's interaction with the probationer went outside the strict remit of the regulations. There was no requirement in the regulations for the Public Service Commission to reconsider its own decision. However their approach in doing so was salutary and commendable. See **Ganga v Commissioner of Police and Public Service Commission** [2011] UKPC 28.

116. While the Public Service Commission was guided by the recommendation of the Ombudsman and the Performance Appraisal Reports, it was free to attach whatever weight it deemed fit to them. It exercised its own discretion in the instant case. There is no evidence that the Public Service Commission merely adopted the Ombudsman's recommendation and did not arrive at its own decision. However there is in fact no evidence before the Court as to what were the legitimate considerations taken into account by the Public Service Commission in arriving at the decision to revert save that the Public Service Commission considered the report and the recommendation. In contrast in **Marilin Sammy-Wallace** and in **Favianna Gajadhar v Public Service Commission** C.A.Civ.P.170/2012 in **Omar Maraj v Public Service Appeal**

Board C.A.CIV.100/2006 the Respondents had set out what considerations were taken into account.

117. It is plainly a decision for the Public Service Commission to determine whether the service of the probationer is satisfactory. The evidence available to the Public Service Commission at the time it made the decision to revert the officer to her former office demonstrated a clear unworkable relationship between the two parties. In the face of this the reversion to her former office was not an illogical or unreasonable decision to make in the circumstances. Moreover, it was not unreasonable to do so having regard to the fact that the period of probation had come to an end and there was (a) no recommendation to extend the probationary period; (b) two staff reports which rated the service of the probationer as unsatisfactory.

118. Two authorities very usefully illustrate what should be the legal consequences. Jamadar J (as he then was) in **Colin Furlonge** quashing a recommendation by a Head of Department to the Commission and Jamadar JA in **Favianna Gajadhar** issuing a declaration that there was a breach of natural justice in the Public Service Commission's process and a mandamus the Public Service Commission re open its inquiry. With that approach the process had to be re-opened and to continue. There was no need therefore to formally quash the Public Service Commission's order. According to Jamadar JA:

> "It may be that upon reconsideration the same decision will be arrived at, or it may be that it will not. That remains a matter for the Commission after reconsideration and due deliberation….. We will however further direct, that this matter be remitted to the Public Service Commission to be given urgent attention and reviewed as a priority, as both the appellant and the respondent are entitled to an early resolution of this long outstanding issue."[40]

119. See also **Rajkumar v Lalla and others** [2001] UKPC 53. In like manner there is no need to quash the decision of the Public Service Commission. It should simply re-open its inquiry into the question upon receipt of a Regulation 43(1) compliant recommendation. The fact that the probationer's term has come to an end for all practical purposes makes it administratively

[40] **Favianna Gajadhar v Public Service Commission** C.A.Civ.P.170/2012, paragraph 50-51, pages 17-18.

expedient that she remains in her former office until the decision is reconsidered with a proper recommendation placed before it by the Ombudsman. Only then will the object of a true consultation process between the Public Service Commission and the Ombudsman be achieved.

120. Further there was no duty to extend the probationary period. Faced with two unsatisfactory performance appraisals and the fact that the probationer's period of appointment had come to an end the Public Service Commission was duty bound to act rationally and fairly. The decision to revert her to her office while it reconsidered the decisions was a rational and reasonable decision. The Court ought not to substitute its views for the Public Service Commission on what should be the future fate of the probationer while it pondered on the issue of her probationary service. Such interference in matters which fall squarely within the administrator's purview must be strongly resisted. Lord Ackner in **R v. Secretary Of State For The Home Department, Ex parte BRIND and Others** [1991] 2 WLR 588 underscored the standard of reasonableness:

> "It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role will quash that decision. Such a decision is correctly, though unattractively, described as a "perverse" decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision — that is, to invite an abuse of power by the judiciary."[41]

121. The only remaining issue to be determined is whether there are discretionary bars to the grant of leave or final relief.

[41] **R v. Secretary Of State For The Home Department, Ex parte BRIND and Others** [1991] 2 WLR 588 at 601.

Delay and Promptness

122. Section 11 of the Judicial Review Act requires applications for judicial review to be made "promptly" and in any event within three months from the date when the grounds of the application first arose. The Court retains a discretion to extend such time provided there is a good reason to do so. In making such a decision 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 may consider relevant. See Section 11(3). Section 11(2) of the Judicial Review Act further provides that the Court can refuse to grant leave if there has been undue delay and that the grant of any relief "would be detrimental to good administration".

123. It is well settled that an application for judicial review even if brought within the three month period may fail the "promptness test". See **Fidelity Finance and Leasing Company Limited and Ors v Mc Nicholls and DPP,** (unreported) decision of Bereaux J (as he then was) CV2008-1228. Pill LJ observed in **R (on application of Young) v Oxford Citv Council** [2002] EWCA Civ 990 that:

> "Application of the promptness test does involve a judgment by the court which will depend upon the circumstances of the particular case……"[42]

124. In **R (on the application of Young) v Oxford City Council,** Pill LJ had this to say on the issue of promptness:

> "[39] Application of the promptness test does involve a judgment by the court which will depend upon the circumstances of the particular case. In Burkett Lord Hope (para 64) recognised the principle which led to the presence of the word "promptly" in the rule:
>
> > "On the other hand, it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the

[42] **R (on application of Young) v Oxford City Council** [2002] EWCA Civ 990, paragraph 39.

person affected by the decision; see also R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell [1990] 2 AC 738."[43]

125. That case highlights that in the planning permission cases under consideration how certain administrative decisions are time sensitive in that there is a "public interest in limiting the period of suspense when projects of value to the public".[44] In reference to another planning permission case **R (Burkett) v Hammersmith and Fulham London Borough Council [2002] 1 WLR 1593** Lord Hope explained the principle of promptness in these terms:

> "The important point to note for present purposes is that there is no Scottish authority which supports the proposition that mere delay (or, to follow the language of *CPR r 54.5(1)*, a mere failure to apply "promptly") will do. It has never been held that mere delay is sufficient to bar proceedings for judicial review in the absence of circumstances pointing to acquiescence or prejudice: … On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237, 280–281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision…."[45]

126. The question of delay is to be examined against the backdrop of the context of the proceedings, matters that are "time sensitive" and the gravity of the challenge. See Note 34.6 ***Caribbean Civil Court Practice 2011***. In this case in matters of employment generally there are administratively time sensitive matters of appointments and transfer and the like. In determining the question of whether there is a good reason for extending the period in the face of delay in bringing the application the Court may still refuse relief if it would be likely to cause hardship prejudice or would be detrimental to good administration. **R v Criminal Injuries Compensation Board ex parte A** [1992] 2 WLR 974 979.

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[43] **R (on the application of Young) v Oxford City Council** [2002] EWCA Civ 990, paragraph 39
[44] Ibid at paragraph 40.
[45] **R (Burkett) v Hammersmith and Fulham London Borough Council** [2002] 1 WLR 1593, paragraph 63 and 64.

127. Not surprisingly Jones J as she then was in **Digicel (Trinidad and Tobago) Limited v The Telecommunications Authority of Trinidad and Tobago et al** CV2006-03320, a case dealing with important decisions in the public telecommunications industry, placed much emphasis on the issue of delay and the detriment to good administration. Jones J stressed the need for discipline in approaching the public law court, for Applicants to act diligently as the nature of the proceedings from time to time impose a heavy burden on third parties. It was observed that such discipline is the price to be paid for vindicating the rule of law. The following statement of Jones J deserves repeating:

> "A judicial review Applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he take no step but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late…. A discretion to refuse leave, or relief, in such a case whether or not it falls within the terms of Order 53, r. 4(1) or section 31(6)….
>
> This is an inevitable function of the fact that the judicial review court, being primarily concerned with the maintenance of the rule of law by imposition of objection legal standards upon the conduct of public bodies, has to adapt a flexible but principled approach to its own jurisdiction. Its decisions will constrain the actions of elected government, sometimes bringing potential uncertainty and added cost to good administration. And from time to time its judgments may impose heavy burdens on third parties. This is a price which often has to be paid for the rule of law to be vindicated. But because of these consequences which touch the public interest, the Court in its discretion-whether so directed by rules of court or not-will impose a strict discipline in proceedings before it. It is marked by an insistence that applicants identify the real substance of their complaint and then act promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage. The rule of law is not threatened but strengthened by such a discipline. It invokes public confidence and engages the law in the practical world. And it is administered, of course, case: where there is bad faith, or real instance of Wednesbury

perversity, a respondent's argument based on delay is likely to get a little shrift. But there is nothing of that here."[46]

128. In the judgments of **Digicel (Trinidad and Tobago) Limited v The Telecommunications Authority of Trinidad and Tobago et al** CV2006-03320 and in **R v Chief Constable of the Devon and Cornwall Constabulary, ex parte Hay; R v Chief Constable of the Devon and Cornwall Constabulary, ex parte Police Complaints Authority** [1996] 2 All ER referred to by the parties there is the notion of scaling down the time within which an application for judicial review was to be made. So much so, irrespective of the formal time limit of three months the practice of the Court is to work on the basis of the three month time limit and "scale it down whenever the features of the particular case make that limit unfair to the respondent or third parties". Per Sealy J at p 732 and see Jones J in **Digicel**.

129. These are statements of general principle engaged when the Court is considering the application for leave against the backdrop of the particular facts.

130. These proceedings commenced on 25th May 2016. That is some four (4) months after the date of the recommendation of the Ombudsman, made on 28th January 2016. It is also some three (3) months after the Public Service Commission's first decision by letter dated 28th February 2016 and a little over two months (2) from the date of the second decision of the Public Service Commission dated 15th March 2016[47].

131. However Ms Bailey-Clarke was never told by the Ombudsman that she made any recommendation. The fact that a recommendation was made was disclosed by the Ombudsman's pre action response dated 20th April 2016. Even so there was no definitive statement that a recommendation had in fact been made or what that recommendation was.

132. The relevant timeline is conveniently set out as follows:

    a) **11th February 2015-** Ms Bailey-Clarke was promoted to the office of Executive Officer in the Office of the Ombudsman. She was on probation for a year.

[46] **Digicel (Trinidad and Tobago) Limited v The Telecommunications Authority of Trinidad and Tobago et al** CV2006-03320, page 42-43

[47] The Applicant having sought orders of certiorari the date when the ground for the application first arose is taken to be the date of these decisions. See section 11(4) the Judicial Review Act.

b) **28th January 2016:** The recommendation was made by the Ombudsman to the Director of Personnel Administration that Ms Bailey-Clarke be reverted to her former office.

c) **3rd February 2016:** The recommendation and the final report is sent to the DPA.

d) **10th February 2016:** Ms Bailey-Clarke's probationary period expired.

e) **26th February 2016:** By letter, the decision of the Public Service Commission was communicated to Ms Bailey-Clarke that she revert to her former office.

f) **7th March, 2016:** Ms Bailey-Clarke submitted representations requesting the Public Service Commission to review its decision and afford her the opportunity to file an appeal with the Chief Personal Officer regarding the assessment of her job performance in the Performance Appraisal Reports.

g) **15th March 2016:** By letter, the decision of the Public Service Commission was communicated to Ms Bailey-Clarke that she revert forthwith to her former office.

h) **March: Pre action letters:** 1st pre-action protocol letter – 15th March 2016; 2nd pre-action protocol letter – 22nd March 2016. Response to the 1st pre-action protocol letter – 18th March 2016. Response to the 2nd pre-action protocol letter – 20th April 2016 by the Ombudsman via her attorney and 28th April 2016 from the Public Service Commission.

i) **May 24th 2016:** Application for leave filed.

j) **14th June 2016:** Ms Bailey-Clarke's representations and the Ombudsman's response were considered by the Public Service Commission where a decision was taken to revert Ms Bailey-Clarke to her original position.

k) **8th July 2016:** Ms Bailey-Clarke was informed of this decision.

133. Ms Bailey-Clarke has been forthright in seeking an extension of time to bring this application. But she is caught between two views on promptitude made by the parties. On the part of the Ombudsman it was submitted that she did not act promptly and in any event acted outside the three (3) months limit prescribed by section 11(1) of the Judicial Review Act. On the part of the Public Service Commission it complained that the application was made prematurely, she acted too quickly. The issue of prematurity is dealt with later in this judgment.

134. In matters dealing with public employment having regard to the constitutional duties discharged by the Public Service Commission, where there is no demonstrable evidence of detriment to good administration or prejudice to the public officials, the Court while insisting on discipline in its process must be alive to vindicate the rule of law and accountability in public office. In **Favianna Gajadhar v Public Service Commission** C.A.Civ.P.170/2012 the Court extended the time limit within which to challenge the Public Service Commission ten (10) months after the decision was made. In making such a decision the Court was prepared to overlook the delay due to the incompetence of the Applicant's previous attorneys in deference to vindicating the rights of the Applicant in a meritorious application raising substantive issues that have an impact beyond the Applicant. See also **R v Secretary of State ex parte Ruddock** [1987] 1 WLR 1482. Jamadar JA observed in **Favianna Gajadhar v Public Service Commission**: that every case must be determined on its own particular circumstances to determine if there is a good reason for the extension of time. He observed that in any event quite apart from the conduct of the Applicant this case raised "issues of construction and interpretation in relation to regulation 49 of the Public Service Commission Regulations that will have an impact on the Commission's decision making process beyond the particular challenge of this appellant. This broader impact can constitute 'good reason' for the purposes of section 11(3) of the Judicial Review Act. In addition, the prima facie merits of the matter are a further consideration operating in favour of finding 'good reason' for extending time."[48]

135. In my view time would be extended for Ms Bailey-Clarke to make its claim for judicial review against the decision of the Ombudsman in this case for the following reasons:

    (a) The actual recommendation was never seen by Ms Bailey-Clarke until the 20th April 2016 when she received a copy of the 1st Respondent's letter where the 1st Respondent purported to make a recommendation that Ms Bailey-Clarke's appointment be reverted;

    (b) It is patently unfair to make such a recommendation knowing that it was not disclosed yet seek to rely on that date to raise a procedural bar of delay in these proceedings;

    (c) Ms Bailey-Clarke has raised more than arguable grounds of judicial review. She raises serious questions which are more than academic of the obligations of the Ombudsman as Head of Department generally in discharging its Regulation 43(1) obligations. It

[48] **Favianna Gajadhar v Public Service Commission** C.A.Civ.P.170/2012, paragraph 15 and 16.

requires, as seen above, a thorough examination of the obligations by the both the Ombudsman and Public Service Commission to probationers under Part V of the Regulations;

(d) Ms Bailey-Clarke has acted bona fide and has not sat idly by. She has complied fully with the pre action process pursuant to the Pre-Action Protocols (Practice Direction 2005). This of necessity would have taken time away from her bringing an action but was an invaluable step in the litigation process to obtain the required information to trigger these proceedings and seek a resolution by a reconsideration of the decisions.

(e) To that extent Ms Bailey-Clarke legitimately was engaged in the review of the decision to revert her to her former office with the Public Service Commission and only launched these proceedings when it was demonstrably clear that she was not being given a fair hearing.

Prematurity

136. The Public Service Commission also submitted that the application is premature since the decision of the 15th March 2016 was not final. They contend it was a provisional decision to which Ms Bailey-Clarke was invited to make representations within seven days which Ms Bailey-Clarke was aware of. See **R v Personal Investment Authority and PIA Ombudsman ex parte Burns- Anderson Independent Network plc [1998] Admin Law Reports 57,** where the Ombudsman gave a provisional decision after hearing complaints from the purchasers against the company. The Ombudsman thereafter invited submissions from the Company. The Company sought leave to apply for judicial review against the provisional decision but the Court of Appeal refused leave on the basis the application was premature since there was no final decision justifying intervention by way of certiorari.

137. The Public Service Commission's submission that the application is premature is without merit. The fact is that the Public Service Commission communicated a clear decision to Ms Bailey-Clarke on 15th March 2016 to revert to her former office. So serious was this decision that it was accompanied by a sanction that if she failed to comply it would be considered an act of misconduct. As a result of that decision, which clearly is reviewable on its face, she reverted to her lower substantive office with a reduced remuneration.

138. While it is true that the Public Service Commission asked Ms Bailey-Clarke to submit her views on the decision to revert it was not made altogether clear to Ms Bailey-Clarke in light of the subsequent letter of 15th March 2016 that either the Public Service Commission was seriously embarking upon a review of their decision or that it had already made up its mind without receiving the benefit of her views.

139. At the heart of her challenge is an unfair submission of the Ombudsman's recommendation compounded by the actions of the Public Service Commission which was ambivalent as to whether it had in fact made up its mind without considering her response.

140. While the pre action response indicated that the Public Service Commission was reconsidering the matter, it was no bar to commencing proceedings. Indeed if anything it would be a matter for the Court in assessing the pre action conduct of the parties to make such orders on costs as are just. See Rule 66.6(6) CPR.

Academic

141. The Ombudsman further submitted that the proceedings are academic in that there has been a full reconsideration by the Public Service Commission of its decision that Ms Bailey-Clarke revert to her former office and as such Ms Bailey-Clarke had already obtained the relief it would have obtained by this Court upon successful application by her.

142. As discussed above, there has not been a full reconsideration. A careful examination of the letters and the contents of Ms Bailey-Clarke's response, demonstrate that she could only be answering adverse comments in **PAR2** which she saw. She never addressed her mind to the recommendation by the Ombudsman in the separate letter which she had not seen. To this extent the proceedings are still very relevant and are not academic, if not only to determine whether a Regulation 43(1) obligation exists

143. Jamadar J in **Colin Furlonge**[49] also demonstrated that recommendations even though not final decisions are subject to reconsideration by the decision making body are in themselves reviewable. Proceedings to review such recommendations are not academic as it affects the

[49] H.C.2098/2003.

future of the officer in his or her employment and raises serious issues of law which go beyond the officers involved in this dispute.

Alternative Remedy

144. The Public Service Commission further submitted that the main complaint is a dissatisfaction with the performance appraisal report and the Ombudsman's recommendation which are matters to be reported to the Chief Personnel Officer (CPO) and not the Public Service Commission. This submission fails to appreciate the true nature of the challenge in this case which is to a recommendation which fails to comport to the principles of fundamental fairness imbedded in the Regulation 43(1) duty and a decision of the Public Service Commission premised upon such a recommendation.

145. Unless the CPO or the Public Service Commission had established some formal ADR mechanism to deal with such complaints no appeal to the CPO could address Ms Bailey-Clarke's real complaint[50].

Detriment to Good Administration

146. Lord Goff in **R v Dairy Produce Quota Tribunal ex p Carswell** [1990] 2 AC 739, HL, 748 sought to explain 'detriment to good administration' without attempting to formulate any precise definition or description of what constitutes detriment to good administration.

> "This is because applications for judicial review may occur in many different situations and the need for finality may be greater in one context than in another. But it is of importance to observe that section 31(6) recognises that there is an interest in good administration independently of hardship, or prejudice to the rights of third parties, and that the harm suffered by the applicant by reason of the decision which has been impugned is a matter which can be taken into account by the court when deciding whether or not to exercise its discretion under section 31(6) to refuse the relief sought by the applicant. In asking the question whether the grant of relief would be detrimental to good administration,

[50] Indeed by analogy in cases where the Industrial Court retains wide jurisdiction to hear and determine trade disputes it does not have the power to judicially review a decision of the Minister of Labour who unlawfully remitted a question to the Registration and Recognition Board. See **Union of Commercial and Industrial Workers v The Honourable Minister of Labour and Small and Micro Enterprise Development** CV2009-04383. See also **University of Trinidad and Tobago v Registration, Recognition and Certification Board** CV2016-00147.

the court is at that stage looking at the interest in good administration independently of matters such as these."[51]

147. The Ombudsman makes the point that Ms Bailey-Clarke jeopardised the proper functioning of the office of the Ombudsman and was not suitable to pass muster on the probation. Whereas nothing in this judgment is to be interpreted as removing from the Ombudsman as Head of Department from making that qualitative assessment of the performance of the probationer an exercise of managerial discretion and oversight, such assessment must be the product of manifest fairness. More so on fairness as prescribed by the relevant regulations. Indeed granting Ms Bailey-Clarke relief in these judicial review proceedings should redound to the benefit of good administration, removes any uncertainty with regard to the nature of the Regulation 43(1) duty and reinforce the demands of the Public Service Commission to receive such recommendations and report procured through fair and transparent means.

Relief

148. I return to the two major questions, should leave be granted in these circumstances and if so what relief is Ms Bailey-Clarke entitled to in the exercise of the Court's discretion. In my considered view, leave ought to be granted to apply for judicial review as Ms Bailey-Clarke has made out an arguable ground for judicial review with a realistic prospect of success. She has a legitimate complaint that the regulations were not complied with by the Ombudsman in making her final recommendation. The Public Service Commission therefore never had properly before it a recommendation with which it can validly consider or treat. The heads of judicial review of illegality, breach of natural justice are all in play. I see no basis however for alleging bad faith and that ground of review on the papers is patently unarguable and can be dismissed forthwith. Nor is it necessary to quash the decision of the Public Service Commission but to remit it back for its consideration.

149. There are no discretionary matters that debar her from making the application. Upon a full consideration of the matter, I am satisfied that the delay of Ms Bailey-Clarke is no impediment to her approaching the Court to seek judicial review of a decision which at face value is non-compliant with the Regulation 43(1) and raised the deeper and more grave question of the off-

[51] See also Note 34.10 in ***Caribbean Civil Court Practice 2011.***

hand approach in making a final recommendation without the input of the officer. Time would be extended formally for her to make her application.

150. Final relief is however discretionary. The principles upon which the Court's direction must be exercised take account of the needs of good public administration. See **Bahamas Hotel Maintenance and Allied Workers v Bahamas Hotel Catering and Allied workers** [2011] UKPC 4. In **Credit Suisse v Allerdale Borough Council** [1997] QB 306, 355D it was stated that: "The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. **The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act**." See also **R v Panel on Take-overs and Mergers, ex p Datafin Plc** [1987] QB 815, 840B.

151. In **Walkerwells Ltd v WASA** HCA No. 342 of 2000 cited with approval by Rajnauth-Lee J in **Omar Maraj v Public Service Appeal Board** C.A.CIV.100/2006 several considerations were identified in the exercise of the Court's discretion as to whether to grant certain relief: regard to the wider public interest, whether the relief would be of any practical value, the impact on third parties, the impact on administration.

152. In this case I have taken into account the need for good public administration which also require fairness. Also, I have considered what remedies are necessary to vindicate the complaints of Ms Bailey-Clarke and not to go so far as to make incursions in the managerial decisions of the Public Service Commission which is outside the strict purview of the Court's supervisory jurisdiction. In these circumstances it is necessary to grant declaratory relief and to quash the order of the Ombudsman not that of the Public Service Commission.

153. For the reasons set out in this judgment, the Court will declare that the recommendation is illegal and should be quashed. There is no need to quash the decision of the Public Service Commission for her to be reverted but in exercising the Court's wide discretion in granting such appropriate relief to take into account the needs of good public administration, I will direct that the Public Service Commission reconsider the decision after the Ombudsman is given an

opportunity to comply with Regulation 43(1). It will then be a matter of the Public Service Commission to make its decision as to the suitability of Ms Bailey-Clarke.

154. Damages are also at the Court's discretion. However it does not arise having regard to the manner of disposition of this case. The Public Service Commission's decision to have ordered that she revert to her former office is not unreasonable, until the requirements of fairness as directed in this judgment are observed it is not a final decision but a holding bay to determine her future in the office of Executive Officer. The final decision is yet to be made and the decision for her to revert as a holding mechanism is administratively entirely a legitimate option available to the Public Service Commission.

Order

155. The Court therefore makes the following order:

A. That the Applicant is hereby granted leave to make a claim for judicial review for the following relief:

i. An order of certiorari to remove into the High Court of Justice and quash the decision of the Ombudsman dated 28th January 2016;

ii. A declaration that the said decisions of the Public Service Commission and the Ombudsman are unlawful, null and void and in breach of the principles of fairness and/or natural justice and/or section 20 of the Judicial Review Act.

iii. A declaration that the recommendation submitted by the Ombudsman to the Director of Personnel Administration on or around 28th January 2016 that the Applicant ought to be reverted to her substantive post of Human Resource Officer III at the Ministry of the Attorney General and Legal Affairs is null and void for non-compliance with Regulations 42(5) and 43(1) of the Public Services Commission Regulations, Chap. 1:01;

iv. A declaration that the decisions of the Public Service Commission were in breach of the principles of natural justice and/or fairness;

v. Costs; and

vi. Any further relief the Court may consider just.

IT IS FURTHER ORDERED

a) An order of certiorari to remove into the High Court of Justice and quash the following decision/recommendation namely: The recommendation made by the Ombudsman to the Director of Personnel Administration, by letter dated 28th January 2016 pursuant to Regulation 42(4) (d) of the Public Service Commission Regulations, Chap. 1:01, that the Applicant be reverted from the office of Executive Officer, Office of the Ombudsman, to her former office.

b) An order of mandamus compelling the Public Service Commission to re-open its consideration of the suitability of the Applicant in the post of Executive Officer in the Office of the Ombudsman upon receipt of the a recommendation from the Ombudsman which complies with Regulation 43(1) of the Public Service Commission Regulations, Chap. 1:01.

IT IS HEREBY DECLARED AS FOLLOWS:

(a) That the final recommendation submitted by the Ombudsman to the Director of Personnel Administration by letter dated 28th January 2016 that the Applicant ought to be reverted to her substantive post of Human Resource Officer III at the Ministry of the Attorney General and Legal Affairs was made illegally, procedurally improperly, in breach of natural justice and contrary to Regulation 43(1) of the Public Service Commission Regulations, Chap. 1:01.

(b) That the Ombudsman in making a final recommendation that the Applicant revert to her former office must act in accordance with Regulation 43(1) of the Public Service Commission Regulations, Chap. 1:01.

(c) That the procedure adopted by the Public Service Commission prior to its decision of the 26th February 2016 and 15th March 2016 did not fulfil all of its natural justice obligations to the Applicant.

Conclusion

156. In the final analysis it matters not whether the Public Service Commission's decision would be the same. What is critical is that due regard be had to the principles of fundamental fairness imbedded in Regulation 43(1), statutorily engraved as a requirement to be observed in the discharge of constitutional functions. For the Public Service Commission and this probationer alike to be guaranteed fair results from fair processes, the requirement of fairness must be observed not as an afterthought or as some perfunctory intermeddling exercise. It is a sacred responsibility to ensure that the rule of law and the democratic principles of transparency are observed in the functioning of the very sensitive operations of employment in the public service.

Vasheist Kokaram

Judge