[2012] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL NOS 73, 74 & 75/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**LAFETTE EDGEHILL** **DWIGHT REID** **DONNETTE SPENCE**	**APPELLANTS**
AND	**GREG CHRISTIE** **(Contractor-General of Jamaica)**	**RESPONDENT**

Dr Derrick McKoy for the appellant Reid and Carlton Williams instructed by Williams, McKoy & Palmer for the appellants Edgehill and Spence

Mrs Jacqueline Samuels-Brown QC and Miss Tamara Malcolm for the respondent

17, 18 March, 29 July 2011 and 30 March 2012

PANTON P

[1] On 29 July 2011, we dismissed the appeals herein, ordered costs to the respondent to be agreed or taxed and promised to put our reasons in writing. This we now do.

The nature of the appeals

[2] These appeals were consolidated on 26 October 2010. The appellants were challenging the judgment of Rattray J who ruled on 30 April 2010 that there was no jurisdiction to allow him to proceed to hear their claim for judicial review of the action of the Contractor-General in terminating their contracts of employment. Leave had been granted for the appellants to apply for judicial review, but Rattray J held that they had not complied with the conditions of the grant of leave and so that leave had lapsed. There is a counter notice of appeal, details of which will be referred to later.

The appellants' terms of employment

[3] The appellants were employed on identical contractual terms, save for the amount of their emoluments, to the Contractor-General who under section 13 of the Contractor-General's Act has the power to appoint and employ officers and agents for the purposes of the Act. These persons are employed on terms and conditions approved by the Commission constituted under subsection (2) of the Act. Clause 9 of the contract provides that the Contractor-General "may at any time terminate the engagement of the Employee by giving three (3) months notice in writing or by giving three (3) months' salary in lieu of notice". The clause also provides that the employee may at any time terminate the engagement by giving three months notice in writing.

The termination of the employment

[4] On 30 April 2009, the Contractor-General terminated the services of the appellants. He held separate meetings with each appellant and handed each a letter stating the reasons for the termination. The circumstances in brief are that a contractor

had approached an employee of the office of the Contractor-General and offered to pay a sum of money to ensure being listed as one of the approved contractors for the award of government contracts. This approach was communicated by the employee to the three appellants who failed to report this unlawful act to the Contractor-General for criminal prosecution to be undertaken. The appellants were the principal officers of the office of the Contractor-General's Technical Services Department who were responsible for ensuring the integrity of, and probity in, the National Contracts Commission's contractor application, evaluation, verification, grading, and/or registration processes. In the light of the situation, the Contractor-General advised the appellants that he had lost confidence and/or trust in them.

[5] The appellants were further advised that in keeping with their terms of employment, they would be paid three months salary in lieu of notice together with all other sums properly due to them. The appellants were permitted to remove their personal items and thereafter were escorted from the premises. The suddenness of the separation fuelled rumours which were not helped by the fact that a report was made to the police and a press release issued. Of course, the Contractor-General cannot be blamed for bringing the police into the picture. However, the appellants found the situation embarrassingly unjustified and so headed to the courts, seeking judicial review of the action of the Contractor-General.

The judge's ruling

[6] In ruling that he had no jurisdiction to entertain the application for judicial review, Rattray J examined the provisions of rule 56 of the Civil Procedure Rules, and concluded that the appellants had failed to fulfil the conditions of the grant of leave. He relied on a judgment of this court to bolster his position: ***Golding v Simpson-Miller*** (SCCA No 3/2008 delivered 11 April 2008). He also referred to ***R v The Commissioner of the Taxpayers Audit and Assessment Department,*** Claim No. HCV-5719/2006 a decision of the Supreme Court, and ***Costellow v Somerset County Council*** [1993] 1 WLR 256.

[7] Rule 56.3(1) of the Civil Procedure Rules requires a person wishing to apply for judicial review to first obtain leave to do so. An application for leave may be made without notice, and these applications were so made. Each was verified by evidence on affidavit including a statement of the facts relied on. The applications were heard and granted by Donald McIntosh J on 3 July 2009. Rule 56.4 (11) provides that on granting leave the judge must direct when the first hearing should take place. That was, apparently, not done in this case. Rule 56.4 (12) specifies that leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave. It was on the basis of non-compliance with this rule that Rattray J denied that he had jurisdiction to hear the application.

[8] The factual situation placed before Rattray J reveals that when the application was made for leave to apply for judicial review, the applicants had also filed fixed date

claims in form 2. Having succeeded in getting leave to apply for judicial review, they were then required to make their claims within 14 days of the receipt of the order granting leave. The attorneys-at-law assumed that the forms filed on 3 June 2009, would have been sufficient to fulfil the terms of the order made one month later on 3 July 2009. The appellants' attorneys-at-law attended at the registry of the Supreme Court and obtained a date for the hearing of the fixed date claim. Subsequently, that date was changed to an earlier one. The fixed date claim forms were then served on the respondent who filed an acknowledgment of service and a notice of intention to rely on the affidavit of Mr Craig Beresford, senior director in the office of the Contractor-General, filed on 21 August 2009.

Grounds of appeal

[9] The appellants relied on the following grounds of appeal:

> "a. That the judgment unreasonable having regard to the evidence/circumstances.
>
> b. Where at the time of the grant of an application for leave to appeal for Judicial review, there was already filed a Fixed Date Claim Form without the date and time for hearing stated therein, the issue of the Claim form, within 14 days of the date of the Order granting leave, satisfies Rule 56(4)(12) of the Civil Procedure Rules, a provision requiring the applicant making a claim for Judicial review.
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> c. That the learned judge fell into error when he found that 'In the circumstances where no claim for judicial review has been filed within the time prescribed by the rules the leave of

the court lapsed ...' for the following reasons:

(i) Rule 56(4)(12) speaks to making a claim for judicial review as distinct from filing a claim

(ii) Rule 56.4(11) accommodates or pre-supposes the filing of the claim form before the granting of the leave

(iii) The definition of a Fixed Date Claim Form in Rule 2.4 implies two distinct stages in the filing of the document and issuing of the document. It is only after it is issued that it satisfies the definition of a Fixed Date Claim Form.

(iv) Rule 56.9(6) speaks to the issuing of the Claim Form Rule 11.5(3) speaks to an Application made before a claim has been issued.

d. And/or in the alternative, the learned trial judge ought to have invoked the provisions contained in part 1 (The Overriding Objective) and/or Rule 26.9 of the Civil Procedure Rules 2002, thereby permitting the case to proceed having regard to all the circumstances."

The counter notice of appeal

[10] In the light of the view I have taken of the appeals, it is appropriate at this time to set out the counter-notice of appeal which sets out additional grounds on which the judgment may be upheld, according to the respondent. These are as follows:

"1. The claims brought have been correctly struck out by the Learned Judge as there are alternative forms of redress available to the Appellants;

2. The claims brought by the Appellants are essentially claims for wrongful dismissal and ought to be properly dealt with in the realm of private law;

3. The claims brought do not concern and/or raise any issues of public law as it primarily concerns the contractual rights of the Appellants;

4. The procedures applicable in relation to private law proceedings do not apply to Judicial Review Proceedings."

[11] The arguments advanced in support of each appeal were similar in every respect. It was submitted that the filing of the claim form in the registry of the Supreme Court at the same time as the application for the order seeking leave for judicial review, was not detrimental to the appellants' cause as that act could not, without more, commence or constitute an application for judicial review. Having obtained leave, and having then entered the date for the first hearing, that became the time when it should be regarded that the application for judicial review was made.

[12] The appellants argued further, that there is a difference between making a claim for judicial review and filing a claim. Rule 56.4(11), they said, accommodates the filing of the claim form before the granting of leave. In any event, they said, the

learned judge ought to have put matters right by considering the overriding objective contained in rule 1 of the Civil Procedure Rules. Fairness, they said, required that the judge exercise his discretion in favour of not driving the appellants from the seat of justice.

[13] I sympathize somewhat with the appellants in that their attorneys may be seen as having been proactive by filing their claims in advance of the hearing of the application for leave to file the said claims. Nevertheless, they found themselves being penalized for their anticipatory move. Realistically though, what happened was that the appellants jumped the gun. Like eager athletes, they came out of the blocks before the starter had given them the signal to do so. Jumping the gun has disastrous consequences in that disqualification usually results. It seems to me therefore that Rattray J may well have been right in reasoning as he did.

[14] In concurring with the decision to dismiss the appeals, I did so on the basis of the counter notice of appeal. I formed the view that the attempt to seek judicial review was misguided. The arrangements between the Contractor-General and the appellants were one of a simple contract in private law. There is nothing earth-shattering in the circumstances to elevate the matter to one of public law. In my opinion, the counter-appeal was well-founded. There was no basis for the action in the form in which it was filed. Hence, the niceties in relation to whether the claim was properly filed before or after leave was obtained are really irrelevant and of no moment, in my opinion.

[15] The judgment of the English Court of Appeal in ***Regina v East Berkshire Health Authority, ex parte Walsh*** [1984] 3 All ER 425 supports my position. In that case the applicant, a senior nursing officer employed by the health authority under a contract which incorporated by the health authority under a contract which incorporated the Whitley Council agreement on conditions of service in the health service, was dismissed by a district nursing officer for misconduct. He applied for judicial review under RSC, Order 53 for an order of certiorari to quash the dismissal on the grounds that the district nursing officer had no power to dismiss him and that there had been a breach of the rules of natural justice in the procedure which led up to his dismissal. The health authority raised the preliminary point whether the subject matter of the application entitled the applicant to apply for judicial review. The judge held that the applicant's rights were of a sufficiently public nature to entitle him to seek public law remedies, so the remedy of an order of certiorari would be an appropriate remedy.

[16] The health authority appealed. The Court of Appeal held that whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employee's position, and not on the fact of employment by a public authority per se or the employee's seniority or the interest of the public in the functioning of the authority. Where the authority was required by statute to contract with its employees on specified terms with a view to the employees acquiring private

law rights, a breach of that contract was not a matter of public law and did not give rise to any administrative law remedies: it was only if the authority failed or refused to contract on the specified terms that the employee had public law rights to compel the authority to comply with its statutory obligations. Seeing that the applicant was not seeking to enforce a public right but his private contractual rights under his contract of employment, his application was a misuse of the procedure for juridical review.

[17] Donaldson MR in his judgment, said at page 429 a - b:

> "The remedy of judicial review is only available where an issue of 'public law' is involved, but, as Lord Wilberforce pointed out in ***Davy v Spelthorne Borough Council*** [1983] 3 All ER 278 at 285, [1984] A.C. 262 at 276, the expressions 'public law' and 'private law' are recent immigrants and, while convenient for descriptive purposes, must be used with caution, since English law traditionally fastens not so much on principles as on remedies. On the other hand, to concentrate on remedies would in the present context involve a degree of circularity or levitation by traction applied to shoe strings, since the remedy of 'certiorari' might well be available if the health authority is in breach of a 'public law' obligation, but would not be if it is only in breach of a 'private law' obligation."

[18] Donaldson MR continued thus at page 431 e – g:

> "The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee 'public law' rights and at least making him a potential candidate for administrative law remedies.

> Alternatively, it can require the authority to contract with its employees on specified terms with a view to the employee acquiring 'private law' rights under the terms of the contract of employment. If the authority fails or refuses thus to create 'private law' rights for the employee, the employee will have 'public law' rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of 'public law' and gives rise to no administrative law remedies."

[19] The distinguished Master of the Rolls concluded that there was no "public law" element in Mr Walsh's complaints which could give rise to any entitlement to administrative law remedies (page 431 of the judgment). He said he was not sorry that he had been led to that conclusion as a contrary conclusion would have enabled all national health service employees, to whom Whitley Council conditions of service apply, to seek judicial review.

[20] May LJ and Purchas LJ delivered very useful judgments in the case. However, there is no need, in my view, to lengthen my reasons for judgment by including quotations from them. It is sufficient to say that the learned judges gave sterling support to the principles articulated by the Master of the Rolls.

[21] In the instant matter, I found it irrelevant that the appellants were employees by the Contractor-General who reports to Parliament. The terms and conditions of their

employment are clear. If they have been breached, the appellants have their remedy in private law.

HARRIS JA

[22] Having agreed to the dismissal of the appeals, I find it necessary to briefly state my reasons for doing so. The main issue in the appeal is whether the learned judge was clothed with the jurisdiction to hear and determine the fixed date claim form before him. Rule 56.3 (1) of the Civil Procedure Rules (CPR) mandates that a claim for judicial review must be preceded by an application for leave so to do. By rule 56.4 (11) the judge is obliged to give a date for the first hearing at the time of the granting of the leave. Under rule 56.4 (12) leave is conditional upon the applicant making the claim within 14 days subsequent to the order granting leave. Failure to file the claim within the time prescribed renders the claim invalid.

[23] On 3 June 2009, the appellants filed applications for leave to apply for judicial review together with fixed date claim forms. The appellants prematurely obtained a date from the registry for the hearing of the claim. They obtained an order granting leave on 3 July 2009 and ought to have made their claims for judicial review within 14 days of 3 July 2009. This they failed to do. The time for filing the claim having expired, the learned judge would not have been empowered to entertain the claim.

[24] I now turn to the counter-notices of appeal. There is a divergence in the views of my brother and sister as to the appropriate avenue which the appellants should

pursue in seeking a remedy. My brother has proposed that private law is the proper course which the appellants ought to adopt. My sister is of the opinion that the matter is one which is subject to public law.

[25] The Contractor-General, in light of the powers vested in him under the Contractor General's Act, is empowered to enter into contractual relations with the appellants in the terms expressed in their contracts of service. They seek to contest their termination of service by the Contractor- General. This, to me, would be a right to which they would be entitled to pursue a claim under private law. Accordingly, their remedy sounds to be in private law. They would not have the capacity to successfully pursue a claim for judicial review.

PHILLIPS JA

[26] Before the court are three consolidated appeals, which raised the same substantive issues for our determination, from an order made by Rattray J on 30 April 2010, which essentially ruled that the fixed date claim forms filed by the three appellants respectively, on 3 June 2009 were invalid.

[27] The decision of Rattray J in all three claims stated:

> "1. That the 2nd Defendant the Attorney General of Jamaica be removed as a party to the proceedings herein.

2. The claim herein is therefore struck out with costs to the 1st Defendant to be taxed if not agreed."

[28] The appellants filed their respective notices of appeal on 9 June 2010 and relied on four grounds of appeal which are set out below:

"(a) That the judgment is unreasonable having regard to the evidence/circumstances.

(b) Where at the time of the grant of an application for leave to appeal for Judicial review, there was already filed a Fixed Date Claim Form without the date and time for hearing stated therein, the issue of the Claim Form, within 14 days of the date of the order granting leave, satisfies Rule 56 (4) (12) of the Civil Procedure Rules, a provision requiring the applicant making a claim for Judicial review.

(c) That the learned judge fell into error when he found that "In the circumstances where no claim for judicial review has been filed within the time prescribed by the rules the leave of the court lapsed..." for the following reasons:

(i) Rule 56 (4) (12) speaks to making a claim for judicial review as distinct from filing a claim.

(ii) Rule 56.4 (11) accommodates or pre-supposes the filing of the claim form before the granting of the leave.

(iii) The definition of a Fixed Date Claim Form in Rule 2.4 implies two distinct stages in the filing of the document and issuing of the document. It is only after it is issued that it satisfies the definition of a Fixed Date Claim Form.

(iv) Rule 56.9 (6) speaks to the issuing of the Claim Form

(v) Rule 11.5 (3) speaks to an Application made before a claim has been issued.

(d) And/or in the alternative, the learned trial judge ought to have invoked the provisions contained in part 1 (The Overriding Objective) and/or Rule 26.9 of the Civil Procedure Rules 2002, thereby permitting the case to proceed having regard to all the circumstances."

[29] On 23 June 2010, the respondent filed a counter notice of appeal in all respective appeals. The respondent asked this court to affirm the judgment of Rattray J based on the reasons given by the court and also the following additional grounds:

"1. The claims brought have been correctly struck out by the Learned Judge as there are alternative forms of redress available to the Appellants;

2. The claims brought by the Appellants are essentially claims for wrongful dismissal and ought to be properly dealt with in the realm of the private law;

3. The claims brought do not concern and/or raise any issues of public law as it primarily concerns the contractual rights of the Appellants;

4. The procedures applicable in relation to private law proceedings do not apply to Judicial Review Proceedings."

[30] It was not disputed that the issues raised in the counter notice of appeal were not argued before Rattray J as the successful challenge to the proceedings then, was that the judge had no jurisdiction to hear the application as the Fixed Date Claim Form

was not valid. The reasons from Rattray J do not therefore address the question of whether these matters were properly the subject of judicial review.

The proceedings below

[31] On 3 June 2009, each appellant filed three documents in the registry, the fixed date claim form in form 2, the affidavit in support of the fixed date claim form and the application for leave to apply for judicial review. The fixed date claim form requested the following reliefs:

> "a. An order of certiorari to quash the dismissal of the Claimant by letter dated the 30th of April, 2009 whereby the 1st Defendant purported to terminate the Claimant's engagement with the Office of the Contractor-General with immediate effect;
>
> b. A declaration that the reasons given by the 1st Defendant in support of the dismissal of the Claimant from the office of the Contractor-General amount to arbitrary and capricious conduct by a public official, an abuse of the powers of his public office, and a denial of the reasonable expectation of the Claimant to fair treatment;
>
> c. A declaration that the dismissal of the Claimant from the Office of the Contractor-General is wrongful and violates the principles of natural justice, the Claimant's reasonable expectation, and the protection of law under the Constitution;
>
> d. Damages; and
>
> e. Exemplary or Vindicatory Damages."

[32] The appellants relied on 11 grounds in support of the reliefs sought which I shall attempt to summarize. They claimed that the Contractor-General (CG) as the holder of

a public office had a duty to act fairly and responsibly and in keeping with the provisions of the Contractor-General Act (the Act), the Constitution of Jamaica and in accordance with the principles of natural justice. In dismissing the appellants, the CG ought to have acted fairly and given them an opportunity to respond to the allegations which had been made against them, and failing to do so would confirm that he was not acting fairly and impartially, and was therefore not making a decision on the merits of the case, which was an abuse of the powers conferred on him. The allegations made against the appellants were complete with uncorroborated and hearsay assertions and ought not to have been acted on, and in any event the allegations did not give rise to any breach of law, or contract or any established code of conduct. The appellants were denied a right to, and reasonable expectation of, fair treatment in the course of their employment, and the Contractor-General relying on the said hearsay information in the allegations, and dismissing the appellants on that basis without hearing from them, was an indication that he was also acting outside of the powers conferred on him. The dismissal of the appellants on the grounds stated, and without a fair hearing, also constituted unfair treatment by a public authority contrary to section 5 of the Fundamental Rights (Additional Provisions) (Interim) (Act). The said dismissal of the appellants demonstrated that the Contractor-General was engaged in arbitrary and capricious conduct which was an abuse of the powers of his public office.

[33] The affidavits filed in support of the application, were detailed and comprehensive but due to the fact that the matter has not yet been dealt with on its

merits, I will attempt to capture only some of the salient points, and refrain from commenting on the contested allegations disclosed.

[34] The appellants each had contracts of employment which provided for termination as follows:

> "9. **TERMINATION:**
>
> The Contractor-General may at any time, terminate the engagement of the employee by giving three (3) months notice in writing or by giving three (3) months' salary in lieu of notice.
>
> The employee may at any time terminate this engagement by giving to the Contractor-General three (3) months notice in writing."

[35] On the afternoon of 30 April 2009, the appellants employment was terminated by the Office of the Contractor-General, (OCG) in successive separate interviews, at the end of which, each of them was handed a three page termination letter, also dated 30 April 2009. The common basis for the termination of all appellants was that they had intentionally withheld critical information, in breach of the OCG's Code of Discipline, an offence, the sanction of which, it was claimed, was immediate dismissal. They claimed that they had not been given any opportunity to respond to any of the allegations made against them.

[36] The factual basis of the termination of the appellants was, in summary, that a named employee of the OCG had said in their presence that she had received information of an allegation by an outside contractor that he had had a corrupt

relationship with a former employee of the OCG, who had three years before been asked to resign following allegations of her involvement in corrupt activities related to her employment at the OCG. In those circumstances the OCG contended, the appellants ought to have brought the discussion to the attention of the Director of the Technical Services Division, (TSD) or the CG himself, particularly given "the high principles of integrity and ethical conduct which the OCG demands of its employees". The appellants also contended that prior to the meetings they were unaware that the OCG had conducted any investigations, or had made any assertions or allegations with regard to their work at the OCG, or in respect of the National Contracts Commission allegedly disclosing any irregularities. They were certainly not aware of any OCG audit allegedly identifying any such irregularities which could have been uncovered but for the failure to make a report which they viewed as unnecessary.

[37] At the end of the said meetings with the appellants, each of them was escorted by an official of the OCG and a police officer to their desks to collect their belongings, before being escorted from the premises. A subsequent press release from the OCG spoke to the issue of corruption at the OCG, the behavior of unscrupulous persons at the OCG and referred to the dismissals of three senior people.

[38] In their affidavits, the appellant Spence stated that she had not had any discussion with the employee as stated above, either singly, or in the presence of any other person and indicated that the allegation was entirely untrue. The appellant Edgehill equally denied the discussion in the terms as alleged, and stated that the

employee had told him on one occasion that a contractor applying for registration had intimated that he was willing to give her money to expedite registration. With regard to the appellant Reid, he had also been told, in addition, that the external contractor had stated that he knew of another contractor who had paid money to a previous employee. Both appellants, Edgehill and Reid indicated that, as they had been assured and had believed that there was no possibility of the acceptance of any such offer by the employee, there was therefore nothing to pursue and or report. The appellants themselves all denied ever having accepted any bribes or having been involved in corrupt activity of any kind.

[39] All the appellants spoke to the embarrassment, humiliation and distress which the fact and the manner of their termination had caused them, as well as the subsequent negative effect that their dismissals have had on their personal lives and future job prospects. It was also their contention that since their dismissals the OCG has continued to make damning and false statements about them which has resulted in increasing reputational losses.

[40] Mr Craig Beresford on behalf of the OCG referred to the onerous responsibilities borne by the OCG and indicated that the appellants as members of staff were expected to assist the OCG with its functions as set out in section 4 of the Act. He pointed out that the appellants were a part of the TSD which had been created to provide the technical and administrative support in the monitoring and award of the contracts to the National Contracts Commission (NCC) registered contractors. He confirmed that the

appellants had been employed by "standard contracts" of employment, were subject to the OCG disciplinary code of conduct, but were not members of staff recruited from the public service.

[41] He maintained that the meetings of 30 April 2009 were conducted in keeping with the policy of the OCG. The decision to terminate the appellants, he stated was taken at the meeting, after consultation between the representatives present, and as a result of the responses given by the appellants in their respective interviews. This was however denied by the appellants who claimed that the representatives of the OCG never left the meeting, and yet the letters of termination were handed to them at the end of the same. Mr Beresford indicated that it was company policy, in respect of persons whose employment had been terminated and who had access to sensitive information, to be escorted off the premises, in order to avoid tampering with any such information, and in his view all effort had been made to cause the least amount of embarrassment.

[42] Prior to the filing of the affidavit of Craig Beresford on 3 July 2009, leave was granted to the appellants by D O McIntosh J to apply for judicial review. On 6 July 2009, the orders granting leave were duly filed, and at 2:00 pm that same day, the date given by the registry for the hearing of the fixed date claim form, which had been filed on 3 June 2009, was inserted in the document as 17 December 2009. No further originating document was filed. The following day, 7 July 2009, the appellants filed affidavits of urgency, and on 8 July 2009, wrote to the registrar in an effort to obtain an

earlier date for the hearing of the matter, which was successful, as the date was advanced to 20 October 2009. On 10 July 2009, the fixed date claim form and accompanying affidavits and the orders of the court granting leave to apply for judicial review were all served on the OCG. The second defendant (the Attorney-General of Jamaica) (although not relevant for these purposes) was served on 14 July 2009, and entered an acknowledgement of service on 17 August 2009. The OCG entered an acknowledgment of service on 21 August 2009 and simultaneously filed the affidavit of Craig Beresford mentioned previously. Further affidavits were duly filed on behalf of the appellants in reply.

[43] The matter then went before Rattray J for determination of the fixed date claim form, and the respondent first raised the preliminary objection that the court had no jurisdiction to proceed to hear the application. An affidavit of Carlton Williams attorney-at-law was filed to provide information with regard to the filing of the fixed date claim form which, as indicated, was filed on the same day as the application for leave to file the same, and information was also provided with regard to the facts set out in paragraph [42] above. With that explanatory affidavit filed and served by the attorney-at-law on behalf of all the appellants, the matter which had been adjourned on 20 October 2009, was heard by Rattray J, on 22 October 2009. On 30 April 2010, judgment was delivered, and as indicated, he struck out the claims of the appellants on the basis that judicial review proceedings were in a different category from ordinary civil proceedings, and are governed by part 56 of the Civil Procedure Rules, and must be strictly complied with, which had not occurred in this case. He painstakingly went

through the relevant rules and having referred to the undisputed fact that the appellants had not filed their fixed date claim forms subsequent to obtaining leave to do so, referred to the dictum of Smith JA in ***Orrett Bruce Golding and The Attorney General of Jamaica v Portia Simpson Miller,*** SCCA No 3 2008, delivered on 11 April 2008, when he stated at page 20:

> "It seems to me that under rule 56.4 (12) the consequence of failure to make a claim for review within the prescribed time is that the leave will lapse – it will become invalid."

Rattray, J therefore ultimately found that:

> "In the circumstances where no claim for Judicial Review has been filed within the time prescribed by the rules, the leave of the Court lapsed, thereby removing any vestige of jurisdiction to which the Applicants had hoped to cling in their desire to continue their legal excursion. I find that this Court has no jurisdiction to proceed further with these matters."

The decision of Rattray J was therefore solely on the basis of the preliminary point taken before him, [and as previously indicated, the matters that are now the subject of the counter-notice filed in this court, were not argued in the court below].

The appeal

The appellants' submissions

Ground of appeal one - Judgment unreasonable having regard to the evidence

[44] Counsel for the appellants recounted the chronology of events with regard to the filing of the documents, and accepted that rule 56.3 of the CPR indicates that a

person wishing to apply for judicial review must first apply for leave, and that rule 56.4 (12) states that the leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave. However, counsel submitted, that in the circumstances of this case, although it was clear that the appellants were aware of the requirement to obtain leave, the court should in keeping with the principles of fairness, and also the established rules of statutory construction, read and construe all the provisions relating to judicial review and the procedures governing claim forms, and not interpret any single rule in isolation for "fear that rampant injustice will result". Counsel submitted that as there was a valid fixed date claim form before the court, it was unreasonable to strike out the matter for want of jurisdiction.

Ground of appeal two – Was the fixed date claim form filed at the grant of leave issued when the date was inserted therein and the claim made when the claim form, issued was served?

[45] Counsel canvassed several of the relevant rules in the CPR relating to the application for judicial review. Counsel argued that: an application for judicial review is made by way of fixed date claim form (FDCF) (rule 56.9(1)), which must be used whenever a rule or practice direction required it (8.1 (4) (e)). A FDCF is by definition a claim form in form 2 upon which there is stated a date, time and place for the first hearing of the claim, (rule 2.4); and when a fixed date claim is issued the registry must fix a date time and place for the first hearing of the claim (rule 27.2). Counsel submitted that a FDCF on which no date, time or place is stated is not a FDCF but only

a claim form, which cannot be used pursuant to the rules to commence a claim for judicial review; there must be a date stated on the form for the first hearing. So, if as is not disputed, the date for the first hearing was inserted after the grant of leave, then that was when the claim form by definition became a FDCF and pursuant to rule 56.4 (12), when the claim for judicial review was made. Counsel submitted that when the FDCF was brought to the registry that is when it was filed, but when the registry issued the claim that is when it was made. In respect of the Limitations of Actions, time would stop running when the claim was brought, even though the action on the FDCF did not commence until the claim was issued. Counsel therefore submitted that the trilogy of cases viz, **Golding v Simpson-Miller**, ***R v The Commissioner of Taxpayers Audit and Assessment Department/ Commissioner of Inland Revenue ex parte Andrew Willis*** Claim No HCV -5719/2006 delivered 29 January 2009; and ***Christopher Olubode Ogunsalu v Dental Council of Jamaica*** SCCA No 53/2008 delivered 3 April 2009 are all distinguishable and not applicable to the instant case as they did not address the issues which arose for consideration.

Ground of appeal three – Did the leave granted by the court lapse in the circumstances of this case; had a claim for judicial review been filed within the time prescribed for in the rules?

[46] Counsel made further reference to provisions in the rules relating to the application for judicial review. He stated that the rules recognize the making of a claim subsequent to the grant of leave, (rule 56.4 (12)) and presuppose that before the hearing for the grant of leave takes place, a claim has already been filed (rule

56.4(11)). The rules also recognize two stages in the filing and issuing of the FDCF (rule 2.4) and that it is on issuing the claim form that the registry must fix a date for a first hearing which must be endorsed on the claim form, (rule 56.9 (6)); proceedings are started when a claim form is filed, which must either be in form 1 or in specific circumstances as prescribed in form 2, (rule 8.1 (2), (3), (4)). Counsel argued therefore that when proceedings, (such as judicial review) can only be started by FDCF, which by definition only exists when issued with the date endorsed thereon, one ought to get assistance from the rules in the United Kingdom which state that a claim is started when the claim is issued, and apply accordingly. Counsel submitted that the court should therefore on construing rules 56.3(1) and 56.4 (12) give due consideration to all the provisions in the rules, especially part 56, and particularly as under the CPR, a distinction must be made between the filing and issuing of the claim. Counsel then concluded that the leave granted by the court to apply for judicial review would not have lapsed as the claim had been filed issued and made within the time prescribed for in the rules. Counsel relied on several cases, viz: ***Eaton Baker and Another v R*** (1975) 13 JLR 174; ***Canada Refining Co. v R*** (4) (1898) AC 471; ***Felix v Burkett and Thomas*** (1964) 7 WIR 339 and ***Ali v Ashraph*** (1964) 7 WIR 354, in requesting the court to read words into the rules in order to make certain provisions intelligible and workable, reasonable and reconcilable with the rest of the rules, and to resolve any inconsistencies, which would show that the learned judge erred in finding that the FDCF was a nullity in the circumstances.

Ground of appeal four - Should the application of the overriding objective, 1.1 and rule 26.9 of the CPR permit the case to proceed.

[47] Counsel argued that if the correct interpretation of the rules require the re-filing of the FDCF after the grant of leave by the court, then in dealing with the case justly, and utilizing the court's general powers to rectify matters where there has been a procedural error, the learned judge had the power to put matters right. The court could at case management (that is at the first hearing) have ordered, that the FDCF filed simultaneously with the application for leave, if of no value then, could stand. Additionally, counsel submitted, as there is some ambiguity in the rules, the appellants should not suffer by being denied access to justice.

The respondent's submissions in response

Grounds of appeal one-four

[48] Counsel submitted that part 56 of the rules govern applications for judicial review and is restrictive in scope unlike the other parts of the CPR. Contrary to the position taken by counsel for the appellants, counsel argued that the rules were not ambiguous, and the rules required that leave be obtained before the applicant made a claim for judicial review, and that the FDCF be filed within 14 days thereafter, and there was, counsel submitted, "no room for the Judge to exercise any discretion where there is non compliance".

[49] Counsel submitted further that proceedings are commenced by claim form whether in form 1 or form 2 (rule 8.1). With respect to the claim form on form 1, the

date is fixed for the hearing of the matter at the case management conference, whereas in respect of the fixed date claim form, the date is fixed before issue of the same for service. Counsel argued that it is the appellants' responsibility to insert a date in the FDCF which is the date of filing of the document (rule 3.6(3)(2), on filing the document which occurs on the delivery of the FDCF to the registry (rule 3.7 (1) (2)(3)). If the litigant consults with the registrar in circumstances where the registrar has no authority, and then acts on that advice, the litigant would do so at his/her own peril, for the registrar in inserting a date in a document which was not properly filed, could not avail the appellants "as she could not give life to a document which never existed and was a nullity. It was her duty to insert a date in a document which was properly filed."

[50] Additionally, Counsel submitted, that the rules indicated what should occur after the claim form was filed, viz it should be issued and served as (rule 8.2(1)), and state that before the claim form is issued, the court should process the same and seal it for authenticity (rule 3.9(1)). Counsel drew the distinction between issuance of the proceedings, after filing, under the CPR, as against commencement of the claim on issuance by the court in the UK, and submitted that the rules and the processes in the UK and in Jamaica were not similar. Counsel argued further that the litigant in Jamaica "makes a claim" by filing the claim form as stipulated in the rules, and since the rules require the appellants to obtain leave before making the claim, then the claim, having been filed without the appellants first obtaining the leave to do so is a nullity, and not filing the claim within the period prescribed, the leave lapsed.

[51] Counsel submitted that in these circumstances the overriding objective could not avail the appellants, as it "cannot be used to give life to that which as a matter of procedural law never was". Counsel relied in extenso on the judgments of this court in ***Golding v Simpson-Miller,*** and ultimately submitted that the arguments on behalf of the appellants were untenable and Rattray J was correct in finding that he had no jurisdiction to hear the FDCF.

The counter-notice of appeal

The respondent's submissions

Ground of appeal one - The claims were correctly struck out as there were alternate forms of redress.

[52] Counsel submitted that where there are alternate remedies available judicial review will not be allowed, (***R v Sandwell Metropolitan Borough Council, ex parte Wilkinson*** (1998) 31 HLR 22) and in this case the appropriate remedy was an action in damages, which existed independently from any finding which could have been made in judicial review proceedings. (***R v Ministry of Agriculture, Fisheries and Food ex parte Live Sheep Traders and Others*** (1995) COD 297). The evidence disclosed that the appellants were engaged by standard employment contracts which were renewable in three years, and therefore gave rise to private law remedies and were not susceptible to judicial review. Counsel explained that this objection to the actions was not taken below as the application for leave was made ex parte, and at the hearing before Rattray J the preliminary point with regard to jurisdiction succeeded.

Ground of appeal two - The claims relate to wrongful dismissal and should be dealt with in the realm of private law.

[53] Counsel re-iterated that the law provided an avenue for the appellants to obtain damages for wrongful termination of one's contract of employment which could include reasonably foreseeable losses in respect of one's reputation and ability to obtain employment. Additionally, the appellants also had recourse, as individual litigants to the Industrial Disputes Tribunal pursuant to the Labour Relations and Industrial Disputes Act if they viewed the termination of their employment, or wrongful dismissal to be "unfair" or "unjustifiable" (***Lindon Brown v Jamaica Flour Mills Ltd.*** Claim No. B199/2000, judgment delivered on 15 December 2006). Counsel also argued that the OCG is not a part of the civil service and does not fall under Chapter IX of the constitution thus the appellants were not subject to any protection of, nor were they entitled to any benefits in relation to the staff orders, which are applicable to civil servants. The OCG is in fact a separate commission of Parliament.

Ground of appeal three - The claims do not raise any issues of public law

[54] Counsel relied on the well known and oft cited authorities of ***Associated Provisional Pictures Houses Ltd. v Wednesbury Corp*** [1948] 1 KB 223 and ***Council of Civil Service Unions v Minister for the Civil Service*** **2** [1985] AC 374, for the principles to ground a claim for judicial review. In the latter case she referred to the dicta of Lord Diplock who stated:

> "Judicial Review ... can conveniently [be classified] under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would

> call illegality, the second irrationality and the third procedural impropriety."

So the appellants must show, argued counsel, that their employment had some features over and above the ordinary contract of employment, and the court in endeavouring to assess whether public law applies ought to look at the nature of the complaint of the employee as opposed to the nature of the employer.

[55] Counsel drew the court's attention to several authorities to illustrate the principles and instances when judicial review is not applicable, for example, it was found not to be so merely because the employer is a public entity (***R v British Broadcasting Corporation, ex parte Lavelle*** [1983] 1 All ER 241) nor where the employee may have rights both in private and public law as the terms of employment are controlled by statute, as distinction must be drawn, argued counsel, between "an infringement of statutory provisions giving rise to public law rights and those that arose solely from the breach of the contract of employment." (***R v East Berkshire Health Authority, ex parte Walsh*** [1985] QB 152).

[56] Counsel submitted that the OCG is a creature of statute and pursuant thereto is empowered to engage and to dismiss staff at his sole discretion and the termination of the contracts of employment of the appellants could not, based on the principles disclosed in the authorities cited, fall under any public law review. Counsel referred to section 13 (3) of the Act wherein certain protection is afforded for the secondment of "officers in the service of the government", to be distinguished from the contractual position of the appellants. Indeed in this matter the Attorney-General was originally a

party to the action, but had been released by consent when the matter went before Rattray J. Counsel submitted that that step indicated that the appellants had conceded that they were not members of the public service, but it seemed they were still attempting to say that the staff orders of the public service applied to them, which counsel submitted was a completely untenable argument, without merit and could not succeed. In any event counsel contended relying on ***R v Derbyshire County Council, ex parte Noble*** [1990] IRLR 332 that not all decisions of a public authority are subject to judicial review. If the rights under review for which the decision has been given, are solely private rights, public law will not be applicable.

[57] Counsel made the point however that "the authorities establish that what is relevant is not so much the category of office/agency/authority/decision maker from whence a decision emanates but more so the nature of the decision under question". Counsel made it clear that in the instant case, "the nature of the decision herein was to terminate contracts of employment". The CG was not therefore, she submitted, exercising a public law function.

Ground of appeal four - The procedures applicable to private law proceedings are not applicable to public law proceedings

[58] Counsel submitted that in judicial review proceedings the applicant is not asserting a right of action but is seeking to have review by the courts of administrative action, and it is only after the court has indicated that there have been public breaches and that there are remedies available that the applicant will be entitled to damages. The court must first rule on the prerogative public law remedies in the citizen's favour.

Counsel referred to her arguments opposing the appeal indicating that the rules are specific, narrower in scope than those applicable to other claims, and are to be strictly interpreted, applied, and complied with.

The appellants' submissions in response to counter notice

Ground of appeal one

[59] Counsel submitted that an action for wrongful dismissal would not adequately address the adverse consequences and injury suffered by the appellants, particularly to their respective reputations, and any damages obtained must be meaningful. Further the appellants complain not only about their wrongful dismissal but the poor governance of a public office, which affects them "more severely than members of the public". The appellants were claiming redress on the basis of their expectation that the CG holding a public office would have treated them fairly. Counsel argued that "the Supreme Court is the proper authority to review and declare that a public body has exceeded its authority and has otherwise behaved improperly". He relied on ***R (Molinaro) v Kensington and Chelsea RLBC*** [2001] EWHC Admin 896; [2002] LGR 336. Counsel submitted that the powers of a public body must be exercised in the public interest and the public has an interest in ensuring that the powers are not abused, and he set out in detail the opinion of Elias J, in ***Molinaro***, on which he placed much reliance. Counsel referred to and relied on several cases in which he said the judicial review principles had been held to be applicable in the termination of contracts of employment, but particularly the Court of Appeal case of ***R v Hertfordshire County Council ex parte Nupe*** [1985] IRLR 258, and in the context of a lease the

decision of the House of Lords in ***Wandsworth London Borough Council v Winder*** [1985] AC 461.

Ground of appeal two

[60] Counsel relied further on ***Molinaro*** in support of this ground and referred to several cases to support the submission that the CG holds a public office. He referred to the definition in the Act of "public body" which includes (a) a ministry, department or agency of government; (b) a statutory body or authority, and submitted that a fortiori the CG was the holder of a statutory office, that is a public office and therefore subject to review of the courts. He also referred to sections 3 and 4 of the Act which set out the duties of the CG and the responsibilities and functions of the OCG. He referred to section 13 of the Act with regard to the fact that although the CG was empowered to employ persons to assist him with his duties and functions under the Act, noted that the terms and conditions of the appellants' contracts were determined by a special commission of Parliament, which commission consists of the following persons: the Speaker of the House as chairman, the President of the Senate, the Leader of Government business in the House of Representatives, the Leader of Opposition business in the House of Representatives, and the Minister responsible for the public service. Such a commission, counsel argued, would be expected to act in accordance with the principles applicable to any public authority, which would specifically include fairness, the principles of natural justice, procedural regularity, and ought to act consistent with public law and regulation. As a consequence, he submitted, judicial

review would be available to the appellants when the CG was exercising contractual powers.

Grounds of appeal three and four

[61] Counsel relied yet again on the principles enunciated in ***Molinaro***, and also on the Privy Council case of ***Fraser v Judicial and Legal Services Commission*** [2008] UKPC 25, and submitted that "the appellants had been denied certain procedural safeguards, including the principles of natural justice, to which they were entitled as officers in the OCG". He referred to the text, Albert Fiadjoe, Public Law (Cavendish, London 1996) in which the principles of natural justice had been stated to "represent nothing more than the imposition of certain procedural safeguards on a body or person whose decisions may affect the rights, interests and legitimate expectations of others". Counsel submitted that fairness required that the CG give adequate notice of the charges against the appellants. In this case no notice was given. The appellants were merely summoned to a meeting, the letter containing the charges read to them, and then the said letter of termination handed to them purporting to dismiss them.

[62] Counsel argued that an analogy could be drawn between the special commission of Parliament, the OCG and the GOJ scheme relative to employment of public servants by the Public Service Commission, and suggested that the OCG should, and it was reasonable to expect it to discharge its functions in a manner consistent with that of the Public Service Commission. He submitted that in the circumstances, the appellants were entitled to be heard in their defence. They were entitled to the legitimate expectations

created by the statutory body, which had developed its own disciplinary code, and on that basis the appellants would have been led to expect that they would not be summarily dismissed, but only after due process and a hearing. The meetings, he stated held in April 2009, could only be described as a sham. Additionally, as persons employed at the OCG had repeatedly had their contracts renewed, the appellants could reasonably have expected that their contracts would not be determined without cause.

[63] Counsel submitted further that, having been given no opportunity to put their position forward was grossly unfair and made the decision taken to dismiss them a nullity. The representatives of the OCG were aware of the gravity and potential consequences of the meeting and yet the appellants were not given an opportunity to have legal representation present, or to obtain independent advice. Counsel recognized that there is no absolute right to the same but given the facts, the question, he said, must arise as to whether the appellants would have been able to represent themselves adequately. Counsel stressed that fairness required that there should have been an oral hearing; the appellants had not known that an investigation had been conducted, nor whether the same persons who conducted the investigation were at the meeting taking the decision to terminate their services which would have been a real risk or danger of bias. Counsel also indicated that in these circumstances an action in damages and/or a hearing at the industrial disputes tribunal would not have provided an adequate remedy. Counsel referred to and relied on several more authorities in support of these submissions.

Analysis

Issue on appeal

[64] In my opinion the sole issue on the appeal is whether Rattray J, had jurisdiction to hear the FDCF which was before him. Was it valid?

[65] There is no question that under the CPR, proceedings are started when the claim form is filed, either in form 1 or form 2. Form 2 is referred to as the FDCF and is thus intituled on page 462 of the CPR, which sets out the form and what must be stated therein. It is also clear that a document is filed by delivering or faxing it to the registry, (rule 3.7(1)) and that the claim form must be sealed by the court on its issue (rule 3.9(1)). Generally, when the FDCF is issued, the registry must fix a date, time and place for the first hearing of the claim (rule 27.2(1)), but this is not so in an application for judicial review. The rules do state though that the application for judicial review must be made by a FDCF (rule 56.9(1)). However, a person wishing to apply for judicial review must first obtain leave from the court (rule 56.3(1)). The application for judicial review is not however commenced when the application for leave to do so is filed, as the application for leave is preliminary to the claim commencing, as leave is required for the claim to have efficacy.

[66] The general rule is that applications must be made to the registry where the claim was issued, (rule 11.5(1)), but the rules do envisage an application being made before the claim is issued, which must be made to the registry where it is likely that the claim to which the application relates will be made (rule 11.5(3)). This is relevant to the

application for leave to apply for judicial review, as the notice of application is filed with an accompanying affidavit before the claim is filed. The rules give details of the specific information which must be stated in the application and which must be verified on affidavit, with a short statement of the facts relied on (rule 56.3). Once leave is obtained, the rules indicate that the court, on the grant of leave, must direct the date for the first hearing of the application for judicial review (rule 56.4 (11)), which could include directions for the efficient disposal of the matter, inclusive of orders relating to witness statements, discovery and service of skeleton submissions (rule 56.3(3)), or in an emergency, when the full hearing of the claim for judicial review will take place. The claim must then be filed, with the date for the hearing (already directed by the court) inserted thereon, duly impressed with the stamp and seal of the court by the registry, and is then issued by the court (rule 56.9). This must be done within 14 days of the order granting leave in order to be effectual, and as the leave is conditional on the making of the claim, if the claim is not filed within the 14 days the leave lapses (rule 56.4 (12)).

[67] Additionally, if the leave is granted under rule 56.4 (12), the application for leave cannot be renewed (rule 56.5(1) (a),(b)). Indeed, the cases adverted to by both counsel have some relevance to the instant case. In ***Ogunsalu v Dental Council***, the FDCF was filed within the 14 days of obtaining leave but the incorrect number was inserted thereon which this court found was a mechanical exercise, which fell within the purview of the registry, and could not be considered the fault of the litigant. The FDCF was held to be valid. In ***Golding v Simpson-Miller*** *[and* ***R v Taxpayers & Audit***

ex parte Andrew Willis], this court and a single judge of appeal respectively, held that time could not be extended to file the FDCF outside of the 14 day period allotted by the rules, and the leave granted conditional on the filing of the same, lapsed. In those cases, the applications for judicial review were filed woefully outside the time prescribed in the rules, and were found not to be valid.

[68] I must say that I do have some sympathy with the appellants in this case, in that, they too had filed their FDCFs. But I agree with counsel for the respondent, that it was not for the registry to attempt to authenticate the FDCF's filed without leave, when they had no efficacy. In ***Evans Court Estate Company Limited v National Commercial Bank et al*** SCCA No 109/2007, Appln No 166/2007, judgment delivered 26 September 2008, although dealing with a notice of appeal filed without leave as required, being an appeal from an interlocutory order, Smith JA stated: "But of course the filing of a Notice of Appeal without leave, where leave is first required is completely ineffective...", see ***Strachan v The Gleaner Company Limited*** SCCA No 54/1997 judgment delivered 18 December 1998 at p 11. The filing of the FDCF without leave therefore, was completely ineffective. In any event, as already indicated, it is the judge who **MUST** direct the date for the first hearing not the registry so the appellants were at fault on this occasion.

[69] With regard to whether the overriding objective and rules 26.2 and 26.9 can avail the appellants, in my opinion, that is a question of construction of the CPR. Rule 56.4 (12) is very clear. It indicates that the leave granted is conditional on the applicant

making a claim for judicial review within 14 days of the grant of leave. The rules do say that the court must seek to give effect to the overriding objective when interpreting the rules or exercising any power under the rules, but I agree with the dictum of May LJ when he stated in ***Vinos v Marks and Spencer plc*** [2001] 3 All ER 784, "Interpretation to achieve the overriding objective did not enable the court to say that provisions which were quite plain meant what they did not mean, nor that the plain meaning should be ignored". So, if leave is conditional on making a claim, and no claim is made pursuant thereto then the leave must lapse. If leave must be obtained before making the claim, the claim is invalid or as stated above completely ineffective if made before the leave is obtained. In my view, the language of part 56 is plain.

[70] The discretionary power to extend time in rule 26.2 of the CPR equally cannot apply because of the introductory words of the section, "Except where a rule or other enactment provides otherwise", and the general words in rule 26.9 also cannot apply to permit the court to do something which the specific rule 56.4 (12) forbids.

[71] As a consequence, in my opinion, the learned trial judge had no jurisdiction to hear the FDCF as in October 2009 the FDCF was invalid.

[72] Having found that the FDCF was invalid, that would dispose of the appeal and there would be no need to make any decision on the matters which arose on the counter-notice, but as my learned brother and sister may not agree with my opinion with regard to the appeal, I will briefly address the grounds argued on the counter-notice.

[73] The issues which arise on the counter- notice can be stated thus:

(1) Are there alternate methods of redress; and

(2) Do the matters in controversy raise issues of public law or are they merely private rights in the realm of private law.

Issue one on counter-notice

[74] I accept that the court retains a discretion to refuse relief even where a ground for judicial relief has been made out, if the applicant had failed to use an alternate remedy which would be more convenient for the disposal of the matter (***R v Sandwell Metropolitan Borough Council ex parte Wilkinson***). Indeed it seems clear that the jurisdiction will not be exercised when there is an alternate remedy (***R v Secretary of State for the Home Department, ex p Swati***, [1986] 1 WLR 477). It is true that the law in relation to the recovery of damages on the termination of one's employment is in a developmental mode, and happily is moving away from the early 20th century position as enunciated in ***Addis v Gramophone Company Limited***, [1909] AC 488. In ***Addis*** the House of Lords held that damages for breach of the contract of employment cannot include compensation for frustration, mental distress, injured feelings and annoyance occasioned by the breach in respect of the manner of dismissal, which meant that the only damages which could be sought was direct financial loss arising from the wrongful dismissal, which equated in most cases to the sums one could have earned, had the contract been performed, i.e. pay in lieu of notice and nothing more. ***Addis*** has been followed in this jurisdiction over the years, for example, in ***Kaiser Bauxite Company v Cadien*** (1983) 20 JLR 168, ***Chang v NHT*** (1991) 28

JLR 495 (SC) and ***Cocoa Industry Board and Cocoa Farmers Development Company Limited and F.D. Shaw v Burchell Melbourne*** (1993) 30 JLR 242 CA. It had been held in these cases in which there was a claim for wrongful dismissal that where there was an express term in the contract that covers the notice period or payment in lieu of notice, then the measure of damages for breach is the amount of such wages calculable with reference thereto.

[75] Since the decision in those cases, there has been the recognition of an implied duty of trust and confidence in law in the contract of employment, unless expressly excluded. This express duty recognizes the mutual obligation between employer and employee where the latter owes the employer duties of fidelity and good faith, whilst the employer owes a duty not without reasonable and proper cause, to conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee (***Malik & Mahmud v Bank of Credit and Commerce International*** [1999] AC 20, HL). In ***Malik,*** the damages for breach of the mutual obligation under the implied duty of trust and faith in the contract of employment were assessed on the basis of reasonable forseability in relation to the loss of future employment prospects, and continuing financial losses sustained, including reputational losses. However the implied duty appeared to exist on the basis of the continuance of the contract, and it is arguable whether it extends to the actions of the employer in the manner of the employees' dismissal, due to the protection given in respect of termination of employment in labour legislation (see **Johnson v Unisys** [2001] UKHL 13; 2 All ER 801, ***Eastwood & Another v Magnox Electric*** plc [2004] 3

All ER 991, ***United General Insurance Company Limited*** **v Hamilton** SCCA No 88/2008) delivered 15 May 2009, although in some other jurisdictions (e.g Canada and New Zealand) the implied duty is expressed as one of good faith throughout the pendency of the contract, and has specifically embraced acts leading up to and relative to the manner of dismissal, so as to ground a claim for damages in contract, if the duty is breached.

[76] On the basis of the above principles, the appellants would have been able to lay a claim that the CG breached the implied duty of trust and confidence by pursuing the investigations into the alleged irregularities without any consultation or communication with them, and although with some difficulty, may have been able to establish a breach of the duty of good faith in the actions immediately leading up to the alleged wrongful dismissal, all of which allegedly took place on 30 April 2009, the date of the dismissal. That claim may encounter more difficulties now as there are provisions under the Labour Relations and industrial Disputes Act, (see Act No. 8, 22 March 2010) which permit the individual employee, who is not a member of any trade union, and without the threat of any industrial action at the workplace, direct access to the Industrial Disputes Tribunal to obtain relief including damages for wrongful or unfair dismissal, which direct access did not exist previously. But the referral of the Minister is still restricted to a period of 12 months from the disciplinary action taken against the employee. The appellants therefore may be able to show that in June 2009, it was certainly arguable whether there was adequate alternate redress, as opposed to the relief obtainable on the applications for judicial review, wherein the conduct as alleged,

could be found to have breached all legitimate expectations, the rules of natural justice, and established procedural guidelines. In the circumstances, the appellants could therefore seek to recover damages relevant to the alleged handicaps in respect of job prospects, reputational losses, embarrassment, hurt, anger and shame.

Issue two on counter-notice

[77] It is true that the subject for review in this case is the alleged unlawful dismissal of the appellants from the OCG. The issue is whether the alleged "standard contracts" between the appellants and the OCG only cover "private law rights" and are not subject to judicial review in public law. In this matter, I have considered several of the authorities submitted and must be forgiven for referring in detail only to the dicta of the Court of Appeal in **Regina v East Berkshire Health Authority, Ex parte Walsh** [1984] 3 All ER 425; 3 WLR 818, and that of Elias J, in the Queen's Bench Division of ***Regina v (Molinaro) v Kensington and Chelsea Royal London Borough Council*** ([2001] EWHC Admin 896).

[78] ***East Berkshire*** dealt with the dismissal of a senior nurse from the health authority by a district nursing officer for misconduct. The nurse applied for judicial review to quash the dismissal pleading that the district nursing officer had no authority to dismiss him, and that there had been a breach of the principles of natural justice. A preliminary point was taken by the health authority whether the subject matter was such as entitled the senior nurse to apply for judicial review. Much was canvassed in this case, but one of the main issues was whether the procedure adopted to apply for

And per May LJ said that:

> "... [I]n at least the great majority of cases involving disputes about the dismissal of an employee by his employer, the most appropriate forum for their resolution is an industrial tribunal.
>
> ... [T]he courts should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure provided for by R.S.C,. Ord 53".
>
> Per Purchas L.J "In order that there should be a remedy sought by the applicant which makes available to him the relief granted by R.S.C., Ord 53, it is clear that there must be something more than a mere private contractual right upon which the court's supervisory functions can be focused. Section 31 of the Supreme Court Act 1981, although recognizing the wider remedies available under R.S.C., Ord 53, is no statutory justification for extending the area of jurisdiction beyond that of a supervisory function which is to be directed in relation to remedies sought against public or similar authorities whose actions under their statutory or other powers call for the courts intervention."

[79] In this case it is pellucid that once the authority contracts on specific terms with its employees, they engage "private law" rights, and only if the employer fails to provide these terms, will the employer have public law rights to compel compliance. Additionally, it is only in circumstances where a public right hitherto enjoyed has been breached that judicial review will be applicable. The "standard contracts" referred to herein between the appellants and the OCG, containing as they did a termination clause, could force one to conclude that the application for judicial review in those circumstances may have been a misuse of the process. But there is still the issue of the operation of the office and the expectations of fairness.

judicial review was a misuse of proceedings in the courts. Sir John Donaldson MR in giving the lead judgment had this to say:

> "The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for re-instatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedies. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring 'private law' rights under the terms of the contract of employment. If the authority fails or refuses to thus create "private law" rights for the employee, the employee will have "public law" rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of "public law" and gives rise to no administrative law remedies."

The Master of the Rolls made it clear that:

> "the remedy of judicial review is only available when an issue of "public law" is involved, but cautioned then that "public law" and "private law" were 'recent immigrants'. It was ultimately held in the case, that an applicant for judicial review had to show that a public law right which he enjoyed had been infringed; that where the terms of employment were controlled by statute, its employees might have rights both in public and private law to enforce those terms but a distinction had to be made between an infringement of statutory provisions giving rise to public law rights and those that arose solely from a breach of the contract of employment..."

[80] Many years later in ***Molinaro***, which was a case related to the refusal of the council to consent to change the permitted user of leased premises to that of a restaurant, Elias J found that the council was not acting as a private body when it sought to give effect to its planning policy through the contract, but was endeavouring to satisfy its planning objectives. He decided that the case had a sufficient public element to be subject to public law principles and made the following statements:

> "But public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest, and the public has an interest in ensuring that the powers are not abused. I see no reason in logic or principle why the power to contract should be treated differently to any other power. It is one that increasingly enables a public body very significantly to affect the lives of individuals, commercial organizations and their employees.
>
> Moreover, there are a host of important cases where decisions relating to contracts have been subject to the principles of judicial review to prevent the power being unlawfully exercised..."

And the learned judge maintained that in his opinion:

> "[T]he important question..... is the nature of the alleged complaint. If the allegation is of abuse of power the court should, in general, hear the complaint. Public law bodies should not be free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal redress. But sometimes the application of public law principles will cut across the private law relationship and, in these circumstances, the court may hold that the public law complaint cannot be advanced because it would undermine the applicable private law principles...
>
> However in other cases...public law principles have been superimposed upon the private law relationships. The two are not necessarily incompatible. The facts of each case will

need to be carefully considered to determine whether they can properly co-exist..."

[81] The facts of this case make the decision a difficult one. There is no doubt that the issues relate to private rights, the OCG had engaged the appellants pursuant to contracts with express terms and conditions, and the appellants were not public servants. But the matter also relates to a public office where the OCG is a special commission of Parliament established by statute, and even though the latter facts alone will not attract the realm of public law, in the instant case, I found myself arriving at that conclusion although I must state with some difficulty. I came to that view not only because the CG held a public office but the functions as set out in section 4 of the Act, include wide duties, viz, inter alia, monitoring the award and the implementation of government contracts and also the grant, issue, suspension or revocation of any licences. The OCG is therefore constantly dealing with members of the public in whose interest the office operated, and which focused on transparency, impartiality and propriety in the conduct of those duties, and which office, appeared to see itself having the obligation of reporting even the irregularities of its own staff, employees, the subject of standard type contracts, to the cabinet and to members of the public at large. The members and staff of the OCG were equally engaged in the protection of the interest of members of the public and in what counsel for the appellants described as "good governance". The powers of the OCG ought not to be abused to the detriment and/or prejudice of the appellants, or others who assist in the performance of those

onerous duties indicated herein, and if that has occurred the OCG should be subject to judicial review to ensure that the powers are not unlawfully exercised.

[82] In the circumstances of this case, therefore in my opinion the claims by the appellants for wrongful dismissal, breach of the principles of natural justice and gross procedural irregularities could have been subject to review by the courts. However the application having been found by me to be out of time, and the FDCF having been found to be invalid, the appellants may be forced to pursue their claims at common law.

Conclusion

[83] In the light of the above, I agreed that the appeals would be dismissed, which we did on 29 July 2011 and ordered costs to the respondent to be agreed or taxed. In my opinion the counter-notice should also be dismissed.

PANTON P

ORDER

Appeals dismissed on the ground that the appellants did not comply strictly with Part 56 of the Civil Procedure Rules. The appellants, in any event, cannot proceed with the application for judicial review as their remedy (by a majority decision) is in private law.

Costs to the respondent to be agreed or taxed.