**[2023] JMSC Civ. 122**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2021CV03253**

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| **BETWEEN** | **SHELDON ROBERTS** | **CLAIMANT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **1ST DEFENDANT** |
| **AND** | **THE PERMANENT SECRETARY, MINISTRY OF EDUCATION YOUTH & INFORMATION** | **2ND DEFENDANT** |
| **AND** | **HUGH SALMON (DECEASED)**<br>**EILEEN BIAMBY**<br>**FRANKLIN JACKSON**<br>**(A Committee of Enquiry appointed by the Permanent Secretary, Ministry of Education)** | **3RD DEFENDANT** |

**IN OPEN COURT**

Miss Kareem Reid instructed by Janet A. Patmore for the Claimant

Miss Karessiann Gray instructed by the Director of State Proceedings for the Defendants

Heard: June 29, and October 27, 2023

**Whether claim is an abuse of process - Constitutional law - Section 16(2) of the Constitution - Right to Due Process - Public Service Regulations - Jamaica Library Board Administrative Rules Governing Disciplinary Procedure Affecting**

**Permanent Officers and Employees – Withholding of salary on interdiction – Stay of Disciplinary Proceedings – Remedy for breach of constitutional rights.**

**PETTIGREW-COLLINS, J**

**BACKGROUND**

**[1]** The claimant, Mr. Sheldon Roberts, is a librarian employed by the Government of Jamaica at the St. Elizabeth Parish Library. He is currently on interdiction and has been since July 2016, because disciplinary action was taken against him on account of allegations of irregularities in his handling of public funds. Portions of his salary and emoluments are being withheld each month. A disciplinary hearing was convened, but after years have passed, the claimant has not been advised of the outcome of the hearing. He caused an Amended Fixed Date Claim Form to be filed on October 25, 2021, against the defendants, in which he sought various orders.

**THE CLAIM**

**[2]** In the Amended Fixed Date Claim Form, the claimant claims the following:

(a) A declaration that his constitutional right to a fair hearing within a reasonable time before an independent and impartial authority in respect of disciplinary charges against him has been and is being breached.

(b) A declaration that his right to a fair hearing within a reasonable time by an independent and impartial authority in relation to a decision to reduce his salary whilst on interdiction has been and is being breached.

(c) An order that so much of his salary and benefits as have been withheld between 2016 and the date of the Court's decision be paid to him forthwith with interest thereon at such rate as to the Court seems just.

(d) A declaration that he was wrongfully subjected to a disciplinary hearing prior to a ruling by the Director of Public Prosecutions.

(e) Damages for breach of his constitutional right to a fair hearing within a reasonable time by an independent and impartial authority.

(f) That he be reinstated.

(g) That the disciplinary proceedings against him be stayed and no further disciplinary proceedings taken against him in respect of the allegations in those proceedings.

**THE ISSUES**

**[3]** The court will seek to resolve this claim by addressing each declaration sought in the claimant's Amended Fixed Date Claim Form. But firstly, the court must consider whether the claim or any aspect of it is an abuse of process. In addressing the question whether the disciplinary proceedings should be stayed and there be no further disciplinary proceedings against the claimant in respect of the allegations, the court will also address whether the claimant's employment is governed by the Public Service Regulations or the Jamaica Library Board Administrative Rules Governing Disciplinary Procedure Affecting Permanent Officers and Employees, (Library Rules). Brief consideration will be given to whether the members of the committee of enquiry and the Attorney General are proper parties to the claim.

**THE CLAIMANT'S EVIDENCE**

**[4]** The affidavit of Mr Roberts, sworn to on October 9, 2021, was filed in support of the Amended Fixed Date Claim Form. He stated that he has been permanently employed by the Government of Jamaica at the Jamaica Library Service, an agency of the Ministry of Education, and has been a Public Officer pursuant to the Civil Service Establishment Act and orders made thereunder.

**[5]** The claimant said that he was initially employed as a reference librarian stationed at the Manchester Parish Library and was promoted to rural development librarian in 2007 and has occupied that post since 2007 but was placed on interdiction since July 2016. He said that all his appraisals since his appointment and up to the time of his interdiction have been favourable.

**[6]** He said that on July 20, 2016, he was notified of his interdiction from his duties with effect from July 22, 2016 on three-fourths of his salary based on allegations that he had violated standard procedures governing the collection of public funds, and that he has remained on interdiction continuously since then.

**[7]** He also said that although he is an approved travelling officer with a car, he has not been receiving the full allowance of upkeep for his motor car. Neither has he been paid duty allowance since he was put on interdiction. He also averred that on April 28, 2017, he was advised by the Director General of the Jamaica Library Service that the proportion of his salary that would be withheld would be increased from one quarter to one half.

**[8]** It was the claimant's affidavit evidence that he was advised by the Director General via letter dated February 2, 2017 of the completion of investigations into the suspected irregularities and the disciplinary charges against him were set out. It was the claimant's affidavit evidence that he was informed by the Ministry of Education Youth and Information via letter dated February 22, 2017 that the dates scheduled for his disciplinary hearing by a Committee of Enquiry were the 27th and 28th of March 2017. The letter was accompanied by a copy of the formal charges laid against him.

**[9]** It was the claimant's affidavit evidence that he attended at the hearing and was represented by his then attorney-at-law, Mr Debayo A. Adedipe, and that the Committee of Enquiry established to try him consisted of three persons: Mr. Hugh Salmon (Chairman), Ms. Eileen Biambi and Reverend Franklyn Jackson. He said Mr. Adedipe submitted to the panel that the hearing should not proceed because

no ruling had yet been made by the Director of Public Prosecutions, pursuant to the provisions of the Public Service Regulations.

**[10]** The hearing commenced on 27th April 2017 and continued 28th April and 1st May 2017. The claimant said that Mr. Adedipe addressed the Committee on the evidence on the 1st of May 2017 and the panel reserved its decision. The Committee promised that it would hand down its decisions within two (2) weeks. It was the claimant's evidence that the panel has not delivered a decision up to the date he swore to his affidavit.

**[11]** The claimant said that he made several enquiries of the Ministry of Education through Mr. Adedipe, to ascertain when the promised decision would be delivered but there was no response initially. Then, by letter dated 1st September 2017, the Ministry of Education Youth and Information advised that it had been directed by the Ministry of Finance to write to the Director of Public Prosecutions to seek its guidance and had done so.

**[12]** He stated that he was not advised of the panel's failure to deliver a decision in obedience to a directive from the Ministry of Finance that it awaits guidance/a ruling from the Director of Public Prosecutions, nor were his views sought by the Committee of Enquiry before it decided not to deliver a decision. The claimant said he has been denied a fair hearing by an impartial and independent tribunal to the extent that the panel clearly acted on the direction of the Ministry of Finance.

**[13]** He stated further that the advice of the Director of Public Prosecutions regarding whether criminal proceedings could be initiated against him was not sought before a recommendation or decision was made that disciplinary proceedings should be instituted. He contends that the disciplinary proceedings against him are in breach of the Public Services Regulations.

**[14]** The claimant also contends that the delay in making a decision after the hearing violates his constitutional right to have a fair hearing within a reasonable time. He claims that his salary was unconstitutionally reduced since he was entitled to a

hearing before any decision was taken to withhold any part of the salary. Mr. Roberts said that having regard to the decision in **Faith Webster v Public Service Commission** [2017] JMSC Civ 69, (hereinafter referred to as **Faith Webster**) repeated requests were made on his behalf, by his then attorney-at-law, that he be paid the portion of his salary that was wrongfully withheld, but the Ministry of Education/Jamaica Library Service has failed and refused to so.

**[15]** A third affidavit was filed by Mr. Roberts on February 28, 2022, in response to the defendant's affidavit filed November 26, 2021. Mr. Roberts stated in that affidavit that he has been continuously living at the address given in his affidavit since July 3, 2011, and that this address is the matrimonial home occupied by himself, his wife and young son. He said he has not removed from this address since being placed on interdiction. He said it is also not true that he cannot be found as he has attended at the Black River Parish Library every month since August 2018 to have his transport allowance claim form certified by the Parish Librarian, Mrs. Louise Foster, and to collect his electricity bill which is still sent to him at the Black River Library. He exhibited a copy of his electricity bills postmarked July 8, 2019, and March 12, 2021, which he said he personally collected at the Black River Library. He also said that all correspondence about extensions of his interdiction up to April 2017 were delivered to him personally at his home address, by staff members at the Black River library, the driver, Mr. Scott, and the Parish Librarian, Mrs. Louise Foster.

**[16]** The claimant also said that after that date, he received a letter dated July 24, 2019, saying that payment of transport allowance to him should be made only at the rate for officers without a motor vehicle, other correspondence was delivered to him by the said Mr. Scott. He said that in a letter from the Jamaica Library Service to him dated September 13, 2017, Mrs. Louise Foster first gave the impression that the claimant had removed from his home address in Black River. He exhibited a copy of this letter. He further said that when he received that letter, he called Mrs Foster immediately. He says that he was told that she assumed that he had removed from his home address because the yard was overgrown with weeds and bushes.

**[17]** Mr. Roberts denied that one year of the delay in granting a hearing/making a decision as to the portion of his salary to be withheld, is attributable to him. He adverted to his attorney having lost contact with him. He said that he re-established contact with Mr. Adedipe in July 2019 and met with him and furnished him with information to be submitted to the panel or committee that would determine the portion of his salary that should be withheld because of him being on interdiction. He said that more than three and a half years later, there still has not been a determination as to the portion of his salary that should be withheld.

**[18]** He said that he only learnt from the Affidavit of Mrs Anastasia Jones sworn on the 25th November 2021, that the panel had purportedly made a decision on April 24, 2017 but that he was never informed of this.

**[19]** Mr. Roberts said that this whole disciplinary process, the unlawful reduction of his salary and the delay and uncertainty has taken a dreadful toll on his health. He stated that he is only forty years old and he has been diagnosed as hypertensive and diabetic and has been out of medication. He further says that these health conditions have been brought about by the stress, uncertainty, delay, and prejudice that he has suffered because of his inconclusive trial.

**THE DEFENDANTS' EVIDENCE**

**[20]** Mrs. Anastasia Gordon-Jones gave an affidavit on November 26, 2021, in response to the claimant's affidavit. She is the Legal Officer assigned to the Ministry of Education, Youth and Information.

**[21]** Her evidence was that the claimant was advised by letters dated April 28, 2017, and August 18, 2017 of the basis for the non-payment of duty allowance and the reduction of salary. She also deponed that at the culmination of the disciplinary hearing, the Panel of Enquiry arrived at a decision, and she quoted that decision as being that "the evidence against Mr Sheldon Roberts is overwhelming and that

the charges against him have been proven. It is therefore recommended that his employment be terminated immediately".

**[22]** She stated that because the Attorney General's opinion was not obtained pursuant to regulation 30 of the **Public Service Regulations** (1961) the decision was not provided to the claimant. She also deponed that the Attorney General's opinion as well as that of the Director of Public Prosecutions were sought. She exhibited the responses from those departments.

**[23]** Mrs. Gordon Jones further stated that the Ministry of Finance and Public Service recommended to the Ministry of Education that disciplinary proceedings against the claimant be suspended pending clear advice from the Attorney General's chambers. This she said was despite the fact that the Ministry of Finance was advised that the "criminal aspect of the matter was not pursued" by the Compliance and Audit Unit at the Ministry of Education.

**[24]** She further claimed that the Panel of Enquiry considered that the issue of criminal proceedings was pending against the claimant and arrived at the decision based on a decision of the JCF that no action had been taken and so the panel concluded that the prerequisite for the disciplinary hearing under the **Public Service Regulations** was met. She further deponed at paragraph 37 that there is no requirement under **Public Service Regulations** (1961) for the advice of the Director of Public Prosecutions to be obtained regarding instituting criminal proceedings against the claimant.

**[25]** In relation to the claimant's complaint that his attorney repeatedly requested that he be paid the portion of his salary that was wrongfully withheld but that the Ministry of Education/Jamaica Library Service failed to do so, Mrs. Gordon Jones pointed to a letter dated October 7, 2017, directed to the claimant's attorney-at-law on behalf of the Permanent Secretary of the Ministry of Education. In that letter it was indicated that the Ministry was attempting to settle the issue of reduction of salary and that a letter had been written to the Attorney General's Department with a view

to convening a meeting, to discuss the question of the amount to be paid to the claimant during his interdiction.

**[26]** It is also the affidavit evidence of Mrs Gordon Jones that one year of the delay in relation to the hearing regarding the reduction in salary was due to the claimant's own actions. She stated that the delay was also due in part to the difficulty in obtaining personnel to be a part of the panel for that hearing. She adverted to various letters bearing dates between the period of December 4, 2018, to November 18, 2020, as demonstrative of the difficulty.

**[27]** Mrs. Gordon Jones also deponed that the defendant received correspondence dated March 16, 2020, from the JCF advising that the criminal matter was being investigated against the claimant and that attempts to locate him have been futile.

**[28]** Finally, she deponed that orders 3,4, and 6 ought not to be granted because the claimant is seeking orders which are remedies to be granted in a claim for judicial review.

## CLAIMANT'S SUBMISSIONS

**[29]** Miss Reid, on behalf of the claimant, submitted that he is a public officer, as he is a permanent employee of the Government of Jamaica and has been an employee of the Jamaica Library Service since October 1, 2004.

**[30]** Counsel referred to sections 125 and 127 of the Constitution and stated that the power to make appointments to the public service and to exercise disciplinary control over public officers is vested in the Governor General and that the Governor General is empowered to delegate said powers over a public officer. Further, that by virtue of the **Delegation of Functions (Public Service) (Specified Ministries and Departments) Order**, 2000, the Governor General's powers in respect of appointment, removal and discipline for all offices in the Ministry of Education and

Culture, except the office of the Permanent Secretary, have been delegated to the Permanent Secretary.

**[31]** It was also submitted that the practice of a Permanent Secretary is to appoint a committee of enquiry to conduct a hearing and make a recommendation for his action and that the final decision rests with the Permanent Secretary, which is reflected in Chapter 10 of the Staff Orders.

**[32]** Counsel further submitted that where, by virtue of the exercise of the delegated power, a decision is made to remove or exercise disciplinary control over a public officer, the public officer has a right of appeal to the Privy Council. Further, on the exercise of that right to appeal, the action of the person or authority to whom the power has been delegated shall cease and the case is referred to the Privy Council and the Governor General shall take such action as the Privy Council may advise. Furthermore, the Privy Council is obliged to consult the Public Service Commission before advising the Governor General.

**[33]** It was the submission that the Permanent Secretary, to whom the Governor General's power is delegated, cannot act on the directions of the Ministry of Finance any more than the Governor General could be directed in the exercise of his powers by the Ministry of Finance.

**[34]** It was also the submission that but for the delegation of the functions of the Governor General, Mr. Roberts would have been entitled to a hearing by the Public Service Commission which would make a decision and advise the Governor General pursuant to the provisions of the **Public Service Regulations**. She referenced Regulation 13.

**[35]** She urged that Mr Roberts' position must be distinguished from that of an ordinary employee and that he is a public officer entitled to the protection of the provisions of the Constitution relating to the employment, discipline, and dismissal of public officers. Further, that he is entitled to a hearing pursuant to the provisions of the

**Public Service Regulations** and he is being tried by a statutory tribunal, that is, the Panel of Enquiry nominated by the Permanent Secretary.

**[36]** Counsel also stated that a panel which was chaired by Mr Hugh Salmon was duly appointed and contended that if that panel is to be considered independent, it cannot be subject to directions except by a competent court. Yet, it was submitted, instead of delivering a decision, the panel has refrained from doing so on the apparent direction of the Ministry of Finance and it is only in the first affidavit filed by the defendant on November 26, 2021 that it was disclosed that any decision and recommendation had been made by the panel. Counsel said there still has not been a formal disclosure or announcement of the panel's decision/recommendation and the Permanent Secretary has not acted on it.

**[37]** She contended that the failure of the panel to deliver its decision and/or the failure of the Permanent Secretary to act on it appears to contravene the provisions of the Constitution in the circumstances and that any informed observer, who was aware that the panel had rejected a submission that it could not proceed before the matter was considered by the Director of Public Prosecutions, would find it exceedingly strange that after hearing evidence and reserving judgment, the same panel would have failed to deliver a decision after the Ministry of Education, whose Permanent Secretary appointed it, was directed by the Ministry of Finance to refer the matter to the Director of Public Prosecutions.

**[38]** She further contended that in any event, the **Public Service Regulations** require that where disciplinary issues arise and there appears to be a breach of the criminal law, the matter is to be referred to the Director of Public Prosecutions for advice before proceeding with disciplinary proceedings. Counsel referred to Regulation 30 of the **Public Service Regulations** which is to be read with The **Constitution (Transfer of Function) (Attorney General to Director of Public Prosecutions) Order** 1962.

**[39]** It was submitted that this referral to the Director of Public Prosecutions was not done and because of that, this invalidates the proceedings because it violates an

important protection guaranteed to the public officer by the **Public Service Regulations**. Counsel referred **to Ex parte George Anthony Lawrence** [2010] JMCA Civ 13**,** paragraphs 10-23, where similar provisions in the **Police Service Regulations** were considered. She also referred to Regulation 31 of the **Public Service Regulations.**

**[40]** Miss Reid submitted that if the claimant is not to be treated as a public officer for the purposes of the Constitution and the **Civil Service Establishment Act**, disciplinary authority is indeed exercisable over him pursuant to the provisions of the **Jamaica Library Service Act**.

**[41]** Counsel said that the Act creates a body corporate, The Jamaica Library Board, which is charged, inter alia, with establishing, maintaining, controlling, and managing a library service and making all such appointments as may be necessary to enable the full and effectual performance of its duties. (See section 7(a) and (b) of the Act)

**[42]** Counsel also referred to section 15(1)(b) of the Act and said that it is the Parish Library Committee, established in accordance with the provisions of the Act, which is empowered to make recommendations to the Jamaica Library Board for the appointment and dismissal of professional staff. (See section 15(1)(a) and (b)).

**[43]** She submitted that Mr Roberts as a trained librarian, is a part of the library's professional staff and that neither the Parish Library Committee for Saint Elizabeth nor the Library Board has conducted a disciplinary hearing involving Mr Roberts. Further, that the only hearing that has happened is one by the Committee of Enquiry appointed by or at the instance of the Permanent Secretary on the footing that Mr. Roberts is a public officer.

**[44]** She further submitted that if Mr Roberts is not in fact a public officer entitled to the protection of the Public Service Regulations, then the hearing against him is void.

**[45]** Regarding the right to a fair hearing, Miss Reid referred to section 16 of the Constitution and stated that the section guarantees Mr. Roberts the right to a fair

hearing of the disciplinary charges against him by an impartial and independent authority.

**[46]** In relation to the right to a hearing within a reasonable time, counsel submitted that Mr Roberts has not been afforded a hearing within a reasonable time. She says that the claimant was placed on interdiction in July 2016, proceedings were commenced against him in February 2017, the hearing itself started on April 27, 2017 and the Permanent Secretary has still not yet notified Mr Roberts of his/her decision. She referred to **Cameron v Attorney General** [2018] JMSC Full 1.

**[47]** Counsel further said that the delay in bringing the proceedings to a conclusion (up to the time of Mr Salmon's death) was so great that it amounted to an abuse of process and a breach of the claimant's constitutional right to a fair hearing within a reasonable time.

**[48]** Miss Reid submitted that to this day, a final disciplinary decision has not been made by the Permanent Secretary more than seven years after the claimant was interdicted and that the claimant has suffered greatly as a result of the delay. Counsel said that Mr Roberts' interdiction effectively prevents him from working or leaving the island and has robbed him of seven years of his working life whilst unjustifiably compromising his ability to meet his financial responsibilities to his young family for seven years.

**[49]** Counsel submitted that this glaring example of the denial of a fair hearing within a reasonable time, whether by the Permanent Secretary in the Ministry or the Jamaica Library Board, entitles the claimant to substantial vindicatory damages. (see **Ernest Smith & Co v Attorney General of Jamaica** [2020] JMSC Full 7 (per Yvonne Brown J at paras 49 and 53-79)

**[50]** Miss Reid also said that the breach of the right to a fair hearing within a reasonable time and of the obligation to seek the advice of the DPP before proceeding with the disciplinary proceedings also amount to a breach of Mr. Roberts' right to the

protection of the law and that these breaches can only be remedied by a permanent stay of the proceedings, his reinstatement and an award of damages.

**[51]** Regarding the reduction of salary, it was submitted that, based on the case of **Faith Webster**, that reduction or withholding of salary upon interdiction cannot lawfully be done without the public officer being first afforded a hearing.

**[52]** Counsel submitted that the defendant(s) initially took the position that **Faith Webster** was inapplicable or did not bind them and that they changed their position and promised a hearing but wrongly maintained that any decision made would only apply to the position after a decision is made.

**[53]** Counsel for the claimant submitted that the defendant's submission that the court should refuse to grant the claimant constitutional relief on the ground that there was an alternate remedy that was not utilised, is incorrect.

**[54]** She stated further that this is because judicial review was not available to the claimant as he would have had to have first obtained leave and further that the application for leave must be made within thirty days of the act/decision complained of. She submitted that at the time this claim was filed, the time for applying for leave to apply for judicial review had long passed, and having regard to the egregious and unjustifiable delay in making a decision, it would be unjust to deny the claimant constitutional relief.

**[55]** In addition to the breaches alleged in the Fixed Date Claim Form, counsel raised for the first time, during submissions, that the treatment meted out to the claimant also breaches his right to equitable and humane treatment by a public authority. She stated further, that the claimant is entitled to the declarations sought, to be paid the sums wrongfully withheld from his salary with interest and account taken of any increments he has been deprived of, damages for breach of his constitutional rights and given the excessively long period of time that the still incomplete disciplinary hearing has taken and the fact that Mr Roberts has now been subjected to criminal proceedings, that the disciplinary proceedings against

him be declared a nullity or stayed indefinitely and also that he be reinstated. Counsel also asked that the claimant be awarded costs of this action.

**DEFENDANT'S SUBMISSIONS**

**[56]** As to whether the claimant is a public officer or a statutory employee, Miss Gray for the defendant submitted that the claimant is a statutory employee in accordance with the **Jamaica Library Service Act**, 1949. She further submitted that the defendant is not in agreement with the claimant's submissions that Mr. Roberts is a public officer, as the Jamaica Library Board is a body corporate and pursuant to section 28 of the **Interpretation Act**, a body corporate is empowered to employ staff for the performance of its function. Counsel referred to a letter dated August 28, 2007, which she says shows that the Director General, who is a member of the Jamaica Library Board, is authorised by the Board to employ the Claimant.

**[57]** She also submitted that the claimant was notified by letter dated July 20, 2016, of the Jamaica Library Board's decision to place him on interdiction pursuant to the **Jamaica Library Board Administrative Rules Governing Disciplinary Procedure Affecting Permanent Officers and Employees**, approved September 2016. Further, that the Jamaica Library Board, having found the results of the investigation to be serious, directed the matter to the Permanent Secretary who is the appropriate authority with delegated functions to establish a committee of inquiry.

**[58]** Further, that sections 3 and 4 of the **Delegation of Functions (Public Service) (Specified Ministries and Departments) Order**, 2000, empowers the Permanent Secretary to exercise his/her powers of disciplinary control in all the offices in the Ministry of Education and Culture. Also, the powers exercised are to be done in accordance with the provisions outlined in the **Public Services Regulations**, 1961.

**[59]** Counsel submitted that the Jamaica Library Service is a Department of Government that falls under the Ministry of Education and Culture. Thus, the Permanent Secretary in exercising her disciplinary control powers under regulation 43 of the **Public Service Regulations**, 1961, appointed a Committee of Enquiry.

**[60]** It was also Ms. Gray's submission that upon the conclusion of the hearing, the Committee of Enquiry would submit its report of findings to the Permanent Secretary and that the findings with the recommendations would then be sent to the Jamaica Library Services Board for the Board to make a decision. She also submitted that the delegated authority conferred on the Permanent Secretary does not include termination of employment; if that was intended by Parliament, it would have been expressly stated therein. Further, that it stands to reason that though the Permanent Secretary is conferred with the delegated authority to exercise disciplinary control, it is the employer who has the power to terminate an employee's employment (see section 7 of the **Jamaica Library Service Act** and section 35 of the **Interpretation Act**). It was Miss Gray's further submission that there is no evidence before the Court to indicate that the Permanent Secretary acted upon a direction of the Ministry of Finance.

**[61]** Counsel for the defendant then addressed the question of whether the claimant's right to a fair hearing was breached by the failure to render a decision after the conclusion of the Disciplinary proceedings.

**[62]** Regarding the reasonable time factor, Ms. Gray submitted that the claimant was given a hearing within a reasonable time and that the delay between the date when the claimant was formally charged, and the date of the hearing was not inordinate.

**[63]** She, however, submitted that the Committee of Enquiry had no duty to render a decision to the parties at the culmination of the hearing and further that the Committee of Enquiry was required by law to prepare a report of findings and recommendations and to forward same to the Permanent Secretary (see regulation 43 (2)(h)). Counsel stated that the delay in the decision maker (Jamaica Library Board) communicating the decision to the claimant would give rise to a

breach of the claimant's right to a hearing within a reasonable time, as a hearing would include the decision from the proceedings which ensued.

**[64]** Ms. Gray also submitted that the Committee of Enquiry was an independent and impartial tribunal established by law and further that there is no evidence to support the claimant's contention that the Committee of Enquiry's report of findings and recommendations was interfered with by the communication from the Ministry of Finance. It is the submission of counsel that the communication from the Ministry of Finance came after the report of findings and recommendations were provided to the Permanent Secretary, and further that the Permanent Secretary is not the decision maker in these circumstances, as the decision to dismiss the claimant rests with the Jamaica Library Board, the claimant's employer. (See section 7 of the **Jamaica Library Service Act** and section 35 of the **Interpretation Act**).

**[65]** It was also the submission in response to the claimant's contention that the disciplinary hearing was not in keeping with Regulations 30 and 31 of the **Public Service Regulations**, that on the evidence before the Court, the advice of the Director would be required only if no action by the police has been taken or is about to be taken. She contended that the evidence supports that the police were involved, and their decision was to not pursue the matter criminally and as such, the disciplinary proceedings process was correctly engaged.

**[66]** Counsel then addressed the question of whether the decision to reduce the claimant's salary while on interdiction without affording him a hearing breached his right to a fair hearing. Ms Gray submitted that neither Regulation 32(1) of the Public Regulations nor Rule 9.1 of the **Jamaica Library Board Administrative Rules Governing Disciplinary Procedure Affecting Permanent Employees** requires that the state entity afford any public officer a hearing prior to recommending to the Governor General or the delegated authority (being the Permanent Secretary in this circumstance) upon interdiction. Further, that there is no requirement under either provision for the delegated authority to afford the public officer a hearing

prior to recommending the amount of salary that the officer shall be permitted to receive while under interdiction.

**[67]** She also submitted that the regulatory scheme of the regulation is sufficiently clear and detailed such that there is no need to supplement its terms in order to import any duty on the Commission or the delegated authority to hear the officer prior to making a recommendation to interdict.

**[68]** Counsel further stated that the claimant's main argument for this declarative relief being sought is solely on the premise of the decision of **Faith Webster**, wherein Anderson J found that the regulatory scheme of the **Public Service Regulations** expressly incorporate principles of natural justice and in doing so, the tenets would dictate that prior to a decision being made which affects a person, a hearing should be held. However, she submitted that the decision of **Faith Webster** is not binding in the Supreme Court of Jamaica, but persuasive, and another judge in the Supreme Court is not bound to accept the learned judge's position and is free to conclude otherwise.

**[69]** It was the submission of Ms Gray that an argument can be made that the principles of natural justice are expressly incorporated into the regulations, wherein regulation 43 is invoked as a result of regulation 42 which are provisions to protect the claimant's right. Further, that had Parliament intended that a public officer is to be heard prior to a recommendation being made on the portion of the officer's salary to be withheld on interdiction, it would have made express provision for that intention in the regulations and similarly, such provisions would be included in the rules applicable to the state agency.

**[70]** Counsel also said this position can be bolstered by the authority of **Beatrice McKenzie et al v The Attorney General of Jamaica** SCCA 86/2003, delivered March 22, 2006, where Harris JA, at page 16 of the judgment states:

> *"In construing an enactment, the dominant purpose is to discover the intention of the legislature. If words used in a statutory instrument are plain and unambiguous, they must be given their natural meaning.*

> *They must be applied as they stand and must be taken to have been the intention as expressed and summed up by Lord Simon of Glaisdale in the case of Lord Advocate v de Rosa & Anor (4) [1974] 2 All ER. 863 when he said: -*
>
> > *"justice is more likely to be served, as well as constitutional propriety to be observed, if parliament is given credit for meaning of what she said".*
>
> *As it is the duty of the Court to give effect to the intention of Parliament, words cannot be imported into an enactment to modify or alter the language contained therein….*

**[71]** Further, it was submitted that the Board's decision to interdict the claimant was made within the statutory framework so it was guaranteed that the claimant would be fully heard during the disciplinary proceedings and would be afforded an opportunity to defend himself and to challenge the allegations made against him and that fairness did not require the Permanent Secretary (with delegated authority) to hear the claimant before the Board made its decision to interdict the claimant and withhold quarters and then one half of his salary while on interdiction.

**[72]** Thus, Miss Gray submitted, the statutory framework does not guarantee the claimant the right to a hearing, as such the right to a fair hearing before an independent and impartial authority established by law was not breached by the defendant as the right is not engaged in the circumstances.

**[73]** On the question of whether the disciplinary proceedings should be stayed by the court, Miss Gray urged that under the **Jamaica Library Board, Administrative Rules Governing Disciplinary Procedure Affecting Permanent Officers and Employees**, approved September 2016, Rule 9.1., the Board is empowered where there have been or is about to be instituted criminal proceedings or disciplinary proceedings, to interdict the claimant. Therefore, making an order to stay would not give effect to the statutory body complying with its functions outlined in the **Jamaica Library Board, Administrative Rules Governing Disciplinary Procedure Affecting Permanent Officers and Employees**.

**[74]** Further, that rule 9.1 would not envisage a retrial of the charges before a tribunal, as natural justice would not permit for the same to be done on the same facts and charges and as such, any order for a stay of future proceedings would be made in futility.

**[75]** Counsel then addressed the question of whether the delay in seeking alternate redress should operate as a bar to the claimant's constitutional claim pursuant to section 19(1) of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011. On the authority of **Brandt v Commissioner of Police and Others** [2021] UKPC 12, it was submitted that the claimant had an alternate route to redress which was available at the time the alleged breach occurred.

**[76]** The defendants submitted that the Privy Council in **Brandt** made the same findings wherein the Court stated that the claimant had an alternate route for redress but the claimant instead sought to commence administrative proceedings against the Director of Public Prosecutions, Attorney General and the Commissioner of Police, seeking a declaration that his constitutional rights had been breached.

**[77]** Further, Miss Gray submitted, in the instant matter, the claimant being unable to get a decision within a reasonable time, was always under the purview of the Supreme Court exercising its supervisory jurisdiction over inferior tribunals/decision makers. Thus, had he applied to the Court for leave, he would have been on good footing to obtain leave to have the Court exercise its supervisory jurisdiction, to order the decision makers to give the claimant a decision, the disciplinary proceedings having been concluded.

**[78]** Therefore, counsel said, the claimant's failure to avail himself of the alternate redress that was available contemporaneous with the period of the hearing of the enquiry, the Court should refuse to exercise its discretion under section 19(1) of the Charter.

**[79]** Counsel however said that if the Court is minded to exercise its discretion under section 19(1) of the Charter, then the defendants urge upon the Court to grant only

a declaration to the effect that the claimant's right to a decision within a reasonable time was breached.

**[80]** Further, Miss Gray said that the Privy Council in **Brandt** went further to say that the claimant had an alternative remedy, but instead, sought administrative relief and that course of conduct is an abuse of process. Counsel urged that the claimant, by seeking to bring a constitutional claim seeking relief after six (6) years, which is indirectly judicial review relief, is an abuse of process.

**[81]** Counsel then referred to paragraph 35 of **Brandt** and submitted that at the time, judicial review/administrative relief would have been adequate, as an order for mandamus would have quelled the claimant's present contentions. There it was said that:

> *"35. First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature "which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate". The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the* ***Board in Attorney General of Trinidad and Tobago v Ramanoop*** *[2006] 1 AC 328 at para 25, as follows:*
>
> > *"…where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power."*
>
> *There are examples of the application of that approach in cases such as* ***Harrikissoon v Attorney General of Trinidad and Tobago*** *[1980] AC 265 at 68, Jaroo v Attorney General of Trinidad and Tobago [2002] 1 AC 871 at para 39 and most recently, in* ***Warren v The State (Pitcairn Islands)*** *[2018] UKPC 20 at para 11. This approach prevents unacceptable interruptions in the normal court process, avoids encouraging technical points which have the tendency to divert attention from the real or central issues, and prevents the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in*

> *a case when properly viewed at the end of the process. This approach also promotes the rule of law and the finality of litigation by preventing a claim for constitutional relief from being used to mount a collateral attack on, for example, a judge's exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see eg Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 WLR 106 at 111–112)."*

**[82]** She submitted that the claimant has not put any evidence before the Court to justify the inordinate delay in seeking any administrative relief and has only now sought to aver to the constitutional breaches without more. Ms Gray contended that the claimant's constitutional claim does not possess any special feature so as to warrant the discretion of the Court under section 19 of the Charter.

**[83]** In response to the claimant's submission that judicial review may only be sought within 30 days [sic] of the act/decision complained of, counsel also submitted that this sheds light on the fact that the claimant could have applied for leave within 30 days [sic] of not receiving the decision of the Board, which would be the act (failing to give a decision) that is being complained of. Counsel urged that it was the claimant's responsibility to have filed such a claim soon after the breach complained of had occurred.

**[84]** The defendants further urged the Court, in the event that it exercises its discretion under section 19(1) of the Charter, to only grant declarative relief to remedy any such unjustifiable delay on the part of the Jamaica Library Board in its failure to communicate a decision to the claimant.

**WHETHER THE CLAIM IS AN ABUSE OF PROCESS**

**[85]** Even though the court acknowledges the claimant's failure to seek redress at an earlier stage, it is not considered that it is an abuse of process or that the claimant should be denied relief. This is certainly not the case especially regarding his claim to breach of his right to a fair hearing and his right to a hearing within a reasonable time. The breach of his right to a hearing within a reasonable time did not and could not have occurred without the passage of an unreasonably long period of time This is not a matter affecting just remedy but firstly, the question of whether the claimant

should have been permitted to pursue this claim. This court fully appreciates the law as set out in the case of **Brandt** and particularly the aspect of the case which indicates that a claimant may be barred from constitutional remedy even where the alternative remedy is no longer available to him.

**[86]** I observe at this juncture, that this is one of those instances where it can be said that there is a feature which makes it appropriate that the claimant should pursue his constitutional remedy. That feature of course being the continued breach by the failure to conclude proceedings against the claimant. It is true that if he had sought judicial review, it is highly probable that a decision would have had to be taken. This is not an instance where there was a single occurrence or a series of occurrences that happened and thereafter ceased. The circumstance here is a continuing nonfulfillment of the responsibility on the part of the relevant authority to make a decision one way or the other. What came along with that failure to act is the continuing uncertainty of the claimant's status. It is the considered view of this court that since the matter remained unresolved, and morphed in a way that gave rise to an additional cause of action, that is the breach of the reasonable time guarantee, then it was open to him to seek to have all the outstanding matters resolved in a single claim. If the defendants' argument were to be taken to its logical conclusion, then it would mean that the claimant's employment status could remain in limbo indefinitely.

**[87]** The fact that the claimant has been placed on suspension and has been made to sit in limbo for several years whilst being deprived of his salary without having been convicted of an offence while the powers that be are dilatory and being indecisive, is egregious enough for this court to consider an award of vindicatory damages. Further, the court considers the claimant's evidence regarding the economic hardship resulting from the deprivation of salary over an extended period as well as the distress occasioned by his situation.

**[88]** The instant cases is clearly distinguishable from the circumstances of Brandt. In Brandt, The appellant, David Samuel Brandt, was charged with various sexual

offences. The prosecution sought to admit at his trial certain incriminating WhatsApp messages, images, and other data obtained by the police as a result of a search of the appellant's cell phones. The appellant did not dispute the legality of the search warrants in so far as they authorised the police to search for, and seize the cell phone. He however contended that the warrants did not authorise a search of the contents of his cell phones. On that basis he contended that the search of his cell phones was unlawful and in breach of his constitutional right of privacy. Instead of challenging the admissibility of the WhatsApp data in the criminal trial, the appellant commenced separate proceedings in the High Court against the Commissioner of Police, the Attorney General, and the Director of Public Prosecutions by way of an application for an administrative order, seeking, amongst other relief, a declaration that the WhatsApp data is inadmissible in the criminal proceedings.

**[89]** He brought that claim although he had been given the opportunity more than once to mount an opposition to the admissibility of the WhatsApp data in pretrial case management hearings within the criminal proceedings. The trial judge found that the search of the cell phones was not unlawful and that the application for an administrative order was an abuse of process although he declined to find that the application was either frivolous or vexatious. In part, the finding of the trial judge was that the constitutional applications were "clearly and cynically being used to derail imminent criminal proceedings". On appeal to the Court of Appeal, the only reliefs pursued were declarations that the search of the cell phone was unconstitutional and/or unlawful. The Court of Appeal among other things, upheld the trial judge's decision that the administrative proceedings were an abuse of process.

**[90]** On appeal to the Judicial Committee of the Privy Council the Board found that the claim for administrative relief was an abuse of process. It was in that context that the Board through Lord Stephens made the pronouncement iterated at paragraph [81] above.

## THE CONSTITUTIONAL RIGHT TO A FAIR HEARING WITHIN A REASONABLE TIME BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL

**[91]** The claimant has complained of a breach of his constitutional rights as well as a breach of his right to due process. He alleges a constitutional breach in relation to the hearing of the disciplinary charges against him and a breach of his right to due process in relation to the failure to convene a hearing regarding the decision to reduce his salary whilst on interdiction. It is important to note that the rights as enshrined in section 16(2) of the Charter encompass the right to due process.

**[92]** Section 16(2) of the **Charter of Fundamental Rights and Freedoms** provides that:

> *(2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.*

It is now accepted that the provisions of section 16(2) of the Constitution bestow upon a citizen three different rights. (See **Cameron v Attorney General** and **Ernest Smith & Co v Attorney General of Jamaica** although in **Bell v DPP** [1985] AC 937 the Judicial Committee of the Privy Council had said that the rights guaranteed by the then section 20(1) of the Jamaican Constitution form part of one embracing form of protection afforded to the individual. That interconnectedness is explained in the case which will be discussed at an appropriate juncture. Each of those rights will now be considered.

### The right to a fair trial

**[93]** In **Al-Tec Inc Ltd. v James Hogan and Renee Latibudaire** [2019] JMCA Civ 9, the nature and content of the right to a fair trial was discussed by Edwards JA. In

that case, Edwards JA observed that the right is not absolute and may be abrogated pursuant to the provisions of section 13(2) of the Charter. She alluded to the judgment of Batts J. in **Natasha Richards and Phillip Richards v Errol Brown and the Attorney General of Jamaica** [2016] JMFC Full 05, and his discussion regarding the rights enshrined in section 16(2). She examined the similar right conferred by Article 6(1) of the European Convention on Human Rights. At paragraph 154, she quoted an excerpt from the Guide to Article 6: She referenced paragraphs 78 and 79 which state as follows:

> *78. The right to a fair trial, as guaranteed by Article 6(1) must be construed in light of the rule of law, which requires that litigants should have an effective judicial remedy enabling them to assert their civil rights (Beles and Others v The Czech Republic…)*
>
> *79. Everyone has the right to have any claim relating to 'his civil rights and obligations' brought before a court or tribunal. In this way Article 6(1) embodies the 'right to a court' of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect (Golder v The United Kingdom).*

**[94]** At paragraph 155, Edwards JA referred to the case of **Beles and Others v The Czech Republic** Application No. 47273/99 ECHR 2002 (unreported) judgment delivered November 12, 2002, where the following was observed:

> *"The Court has already stated on a number of occasions that the right to a fair trial, as guaranteed by Article 6(1) of the Convention, must be construed in the light of the Rule of Law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights…. …the 'right to a court', of which the right of access is one aspect, is not absolute. It is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard… nonetheless, the limitations applied must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Furthermore, limitations will only be compatible with Article 6(1) if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued. See **Guerin v France** judgment of 29 July 1998, Reports 1998-V, p 1867 & 37." (Emphasis added)]*

**[95]** At paragraph 156 the learned Judge of Appeal observed that the scope and content of the right to a fair trial includes not only compliance with the principle of equality of arms but also the right to cross examine witnesses, right of access to facilities on equal terms and to be informed of and be able to challenge reasons for administrative decisions. See **Beles and Others v the Czech Republic and Law of the European Convention on Human Rights** Harris DJ, O'Boyle M & Warbrick C (1995) London Butterworths at 206 -214. [99].

**[96]** At paragraph 157, she cited an excerpt from the case of **Al Rawi and Others v The Security Service and Others** [2012] 1 AC 531 where Lord Kerr in his dissenting judgment at pages 592 to 593 addressed the value of knowing the case that one must meet and the need to be given the opportunity to challenge the opponent's case, noting that those principles occupy a central place in the precept of a fair trial.

**[97]** At para 158, Edwards JA relied on a passage from **George Blaize v Bernard La Mothe and The Attorney General of Grenada,** HCVAP 2012/004, where the judge explained the need for parties to court proceedings to have knowledge of, and be able to comment on evidence adduced as well as the value of cross-examination as a critical component of the adversarial process. Paragraph 159 dealt with the right to know and thus to be able to challenge the opposing party's case and the centrality of the right to fairness of the trial process and generally to be able to call evidence in mounting that challenge, as was discussed in **Tariq v Home Office** [2011] UKSC 34. At paragraph 161, she addressed the right to make legal submissions on points of dispute and to be aware of and be able to comment on evidence adduced and observations submitted for the purposes of being able to influence the court's decision.

**[98]** It goes without saying that whether we are concerned with court proceedings or with proceedings before an administrative tribunal, the same principles obtain.

**The right to trial before an independent and impartial tribunal**

**[99]** The right entails two distinct aspects: the right to a hearing before a neutral authority and that aspect of the right which underpins the concept of the rule of law. A neutral authority is one free of bias and prejudgment. In considering the concept of independence and impartiality, one has to bear in mind the basis on which an individual holds office and consider if that individual is truly independent and impartial, in the sense of being independent of the executive, or other superior body responsible for its existence, or whether there is an appearance of such independence. In the case of **Findlay v United Kingdom** (1997) 24 EHRR 221, a matter in which a serving soldier pleaded guilty before a court martial, the European Commission on Human Rights considered the court martial lacking in independence and impartiality because of its composition. In the course of the judgment, the concepts were explained in this way:

> *The court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. The concepts of independent and objective impartiality are closely linked…*

**[100]** In **Millar v Dickson** [2002] 1 WLR, temporary sheriffs holding office at the pleasure of the Lord Advocate were held not to be independent and impartial, as it was felt that the system of short renewable appointments created a scenario where the sheriff might entertain hopes and fears in respect of his treatment by the executive when his appointment came up for renewal.

**The right to a hearing within a reasonable time**

**[101]** The seminal case on the question of breach of the right to a fair hearing within a reasonable time is **Bell v DPP** [1985] AC 937. The appellant claimed that his right

to a fair trial within a reasonable time was breached and he sought relief under the constitution. The incident in respect of which he was charged occurred on the 17th of April 1977. He was convicted on October 20, 1977, in the Gun Court for offences to include robbery with aggravation, wounding with intent, shooting with intent and burglary. On the 7th March 1979, his convictions were quashed by the Court of Appeal Jamaica and a retrial ordered. The Registry of the Supreme Court was notified of the retrial on March 12, 1979, but the Gun Court was not made aware until December 19, 1979. The original statements of the witnesses were not served on the appellant. The matter came up for mention in the Gun Court on several occasions between January and February 1980. Bail was granted to the appellant on the 21st of March 1980. There were several other adjournments. Then, on November 10, 1981, the Crown offered no evidence against the appellant, and he was discharged. On the 12th of February 1982 he was rearrested and was ordered to be tried on the 11th of May 1982.

**[102]** Upon trial of his civil claim in the Supreme Court alleging breach of his rights, the claim was dismissed and his appeal was dismissed by the Court of Appeal.He appealed to the Judicial Committee of the Privy Council. In giving judgment in the matter, the Judicial Committee of the Privy Council observed that "the three elements of section 20 namely, a fair hearing, within a reasonable time, by an independent and impartial court established by law, form part of one embracing form of protection afforded to the individual. The longer the delay in any particular case, the less likely it is that the accused can still be afforded a fair trial, but the court may nevertheless be satisfied that the rights of the accused provided by section 20(1) have been infringed although he is unable to point to any specific prejudice. The question then is whether in the circumstances of the present case the appellant's right to "a fair hearing within a reasonable time" has been infringed.

**[103]** The Board supported its opinion by utilizing the approach taken by the Supreme Court of the United States. It is useful to set out that aspect of the judgment. The following was said:

*Some guidance is provided by the judgments of the Supreme Court of the United States in Baker v Wingo [1972] 407 U.S. 514. The 6th amendment to the constitution of the United States provides that:*

> *"in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury…"*

*Justice Powell pointed out that:*

> *"…the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitively say how long is too long in a system where justice is supposed to be swift but deliberate…the amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried."*

*Powell J then identified four factors which in his view the court should assess in determining whether a particular defendant has been deprived of his right. They are:*

> 1. *Length of delay*

> *"Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an enquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious complex conspiracy charge."*

**[104]** The Board went on to say that:

> *In the present case it cannot be denied that the length of time which has elapsed since the appellant was arrested is at any rate presumptively prejudicial.*

> 1. *The reasons given by the prosecution to justify the delay*

> *"A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."*

*In the present case, part of the delay after arrest was due to overcrowded courts, part to negligence by the authorities, and part to the unavailability of witnesses.*

*2. The responsibility of the accused for asserting his rights.*

*"Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain."*

*Their Lordships do not consider this factor can have any weight in the present case. The appellant and his counsel no doubt took the view that strenuous opposition to an application sought by the prosecution from time to time for an adjournment or an appeal from an order granting an adjournment would be a waste of time. The appellant's complaint is that he was discharged and told to go free and was subsequently in 1982 re-arrested for the offences for which he had first been arrested in 1977. The appellant raised that complaint as soon as he was rearrested.*

*3. Prejudice to the accused.*

*"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration;(ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last… If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not always reflected in the record, because what has been forgotten can rarely be shown."*

**[105]** The Board made the observation that the fact that the appellant did not lead evidence of specific prejudice did not mean that the possibility of prejudice should be totally discounted. The Court also went on to observe that in giving effect to the constitutional rights, there must be a balance between those fundamental rights and the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions in Jamaica.

**[106]** It was made plain in the case of **Cameron v The Attorney General** as well as **Ernest Smith** that with some modifications, the reasoning in **Bell** may be applied to alleged breaches of section 16(2) rights.

**[107]** As Wolfe Reece J remarked in **Ernest Smith**, in **Porter and another v Magill** [2002] 1 All ER 465, Lord Hope of Craighead expressed the view that the reasonable time requirement is a separate guarantee and that it is no answer to a complaint that one of the rights was breached, that the other rights were not. He referenced the decision in **Herbert Bell** and observed that in construing Article 6(1) of the Convention on Human Rights, it was not necessary to show that prejudice has been or is likely to be caused as a result of the delay. He went on to say that the only question is whether, having regard to all the circumstances of the case, the time taken to determine the person's rights and obligations was unreasonable.

**[108]** Jackson-Haisley J in the case of **Kevin Simmonds v Ministry of Labour and Social Security and the Attorney General** stated that after a review of several cases, the relevant questions when addressing whether there has been an infringement of the right to a hearing within a reasonable time, are as follows:

1. How long has the delay been?
2. What are the reasons provided for the delay?
3. Is the delay reasonable in light of the particular circumstances of the case such as its complexity and the conduct of the parties?
4. Has the claimant contributed to the delay or has he done anything to assert his rights?
5. What is at stake for the claimant, or what does he stand to lose
6. Has there been any prejudice occasioned to the claimant resulting from the delay.

**THE RIGHT TO DUE PROCESS**

**[109]** Procedural fairness is indispensable to any system of justice. There are two fundamental rules of fair procedure: one is that a man may not be a judge in his own cause and the second is that a man's defence must always be heard. These rules are encapsulated in two Latin maxims: '*Nemo judex in re sua'* and '*audi alteram partem'.*

**[110]** The rule that a man may not be a judge in his own cause expresses the rule against bias. Bias may be actual, or it may be apparent. Actual bias is concerned with where a person or body is automatically disqualified from being involved in decision making because he or she has a proprietary or financial interest in the outcome or the individual or body promotes the cause of the body concerned. The test for apparent bias is an objective one and is whether right thinking members of the public apprised of all the facts and circumstances, would conclude that the particular tribunal, body or person was biased.

**[111]** It is critical to fair procedure that the rule against bias and the *audi alteram partem* rules are observed. The *audi alteram* principle has been said to be the more far reaching of the principles of natural justice. In essence, this principle encompasses every aspect of fair procedure and due process.

**[112]** The rules of natural justice apply to disciplinary bodies. Bodies which are entrusted with legal and administrative powers are required to adhere to the rules of natural justice. What procedural fairness entails was discussed earlier in addressing the constitutional right to a fair trial and will not be further discussed here, suffice it to note that a decision made in breach of the rules of fairness will be held to be void. See **Rees v Crane** (994) 43 WIR 444.

**ANALYSIS – BREACH OF CONSTITUTIONAL RIGHT TO A FAIR HEARING WITHIN A REASONABLE TIME BEFORE AN INDEPENDENT AND IMPARTIAL TRIBUNAL – RE DISCIPLINARY CHARGES**

**[113]** In order to conduct an assessment utilising the criteria enumerated by Jackson Haisley J in **Kevin Simmonds** to determine whether there was a hearing within a reasonable time in relation to the hearing before the Committee of Enquiry as well as in relation to the decision to reduce the claimant's salary, it is necessary to construct a chronology of events. This chronology is also relevant to the question of whether there was a fair trial.

**Chronology of events**

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| July 20, 2016 | Claimant notified that he would be placed on interdiction. |
| July 22, 2016 | Interdiction commenced. Claimant ceased receiving full salary and full motor vehicle upkeep as well as payment of duty allowance. |
| September 20, 2016 | Claimant advised via letter from Director General that his interdiction was being extended to October 31, 2016. |
| October 27, 2016 | Claimant advised via letter from Director General that his interdiction was being extended to November 30, 2016. |
| November 28, 2016 | Claimant advised that period of interdiction extended until December 31, 2016 and that A committee for the Panel of Enquiry had been appointed. |

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| January 27, 2017 | Claimant advised via letter from Director General that his interdiction was being extended to February 28, 2017. |
| February 2, 2017 | Claimant advised of the charges against him and that an enquiry would be conducted. |
| February 22, 2017 | Claimant advised via letter from Director General that his interdiction was being extended to March 31, 2017. |
| March 27, 28 and April 3, 2017 | Hearing by the Committee of Enquiry took place. |
| April 24, 2017 | Letter from Inspector General seeking clarification on the reason why criminal investigations were not pursued and indicating that half and not quarter of the claimant's salary was to be withheld based on the Public Service Regulations and the Staff Orders. |
| April 28, 2017 | Claimant advised via letter from Director General that his interdiction was being extended until further notice. |
| April 28, 2017 | Claimant advised by Director General that he would begin to receive half salary instead of three quarters and the basis for the reduction in salary upon interdiction. |
| June 28, 2017 | Attorney General department through Crown Counsel Nigel Gayle responded to letter of June 21, 2017 from Ministry of Education. Indicated that it was mandatory for Permanent Secretary to receive advice from the AG |

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| | as to whether criminal charges ought to be instituted against the claimant but only in circumstances where the police had not taken action nor was about to do so. He further advised that the claimant is to be afforded a hearing on what proportion of his salary is to be withheld. |
| August 18, 2017 | Claimant advised that he had been wrongfully paid duty allowance and that same would be deducted from his salary and further that sums would also be deducted to reflect the overpayment consequent on a further increase in the portion of his salary being withheld which should have taken effect since September 27, 2017. |
| August 31, 2017 | Claimant's attorney at law Mr Debayo Adedipe wrote to the Ministry of Education enquiring about the result of the enquiry. |
| September 1, 2017 | Mr Roger Desnoes, Legal Officer in the Ministry of Education, wrote to claimant's attorney at law acknowledging receipt of letter of August 31. He advised that as directed by the Ministry of Finance, the Ministry of Education had written to the DPP for direction. |
| September 11, 2017 | Claimant's attorney at law Mr Debayo Adedipe again wrote to the Ministry of Education enquiring about the result of the enquiry. |
| September 11, 2017 | Claimant's attorney at law Mr Debayo Adedipe again wrote to the Ministry of Education advising that the claimant was interdicted and was placed on three |

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| | quarters salary without being afforded a hearing in order to make representations prior to the decision to reduce salary. Ministry also advised of the decision of Faith Webster v The Public Service Commission. |
| September 11, 2017 | Mr. Adedipe wrote to Permanent Secretary expressing concern at the fact that the claimant had been advised of a further increase in the amount of salary being withheld. |
| September 13, 2017 | Letter to the claimant from the Jamaica Library Service advising him that there was an attempt to deliver a letter to him at his address but that it was observed that “the place appeared unoccupied”. |
| October 2, 2017 | Claimant’s attorney at law Mr Debayo Adedipe again wrote to the Ministry of Education expressing alarm at no outcome to the enquiry. |
| October 2, 2017 | Claimant’s Mr Adedipe again wrote to the Ministry of Education putting them on notice that the claimant intended to seek an order of certiorari to quash the reduction in salary and an order of mandamus to compel full payment. |
| October 5, 2017 | Letter to Mr Desnoes from the Office of the DPP advising that the matter should be referred to CTOC Unit for an investigation. Further that the DPP could not advise on whether the claimant should be discharged based on the outcome of the enquiry. |
| October 27, 2017 | Letter from Mr. Desnoes to claimant’s attorney Mr Adedipe advising that the Ministry of Education was desirous of settling the matter of the reduction in the |

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| | claimant's salary and of the fact that the DPP advised that the matter should be referred to CTOC. |
| July 10, 2018 | Mr. Adedipe wrote to Ministry of Education complaining of the continued interdiction, continued withholding of salary and the failure of the Committee of Enquiry to give a decision after the hearing. |
| March 26, 2018 | Mr Adedipe acknowledged receipt of letter from Ministry of Education and sought clarification as to whether the claimant would be paid his outstanding salary. |
| December 4, 2018 | Ministry of Education wrote to claimant's attorney at law advising that panellists had been identified in order to decide on the portion of the claimant's salary to be withheld. |
| December 12, 2018 | Letter from the Ministry of Education setting out details of the approach to dealing with the question of the portion of the claimant's salary to be withheld and inviting the claimant's attorney at law to make written submissions supported by documentary evidence on the matter. |
| April 30, 2019 | Letter from Ministry of Education to Mr Adedipe advising that the Ministry had not received the written submissions. |
| July 18, 2019 | Letter from Ministry of Education to Mr Adedipe enquiring whether the claimant was still interested in pursuing the matter of the portion of his salary to be withheld. |

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| July 29, 2019 | Mr. Adedipe wrote to Ministry of Education advising that he had re-established contact with the claimant. He also made submissions re withholding of salary and provided documentary support. |
| October 24, 2019 | Letter from the Ministry of Education to Mr. Adedipe advising that the Ministry was about to convene the committee for the hearing. |
| March 16, 2020 | Letter from the JCF to the Ministry of Education advising that there were difficulties in pursuing criminal prosecution against the claimant because of reasons to include inadequate record keeping on the part of the library and that further investigations needed to be done into some of the complaints made against the claimant before a final decision is made. |
| July 24, 2020 | Letter from the claimant's new attorney at law Janet A Patmore demanding that the portions of the claimant's salary withheld over the past four years be paid to him forthwith and indicating that if a satisfactory response was not received within 7 days, the claimant would bring legal proceedings. |
| November 12, 2020 | Letter from Ministry of Education to claimant's new attorney at law Miss Patmore advising that matter had stalled because Mr. Adedipe advised that he was unable to locate the claimant. |
| November 18, 2020 | Letter from Miss Patmore to Ministry of Education advising that since July 29, 2019, Mr. Adedipe had forwarded information requested and that the Ministry was being put on notice that a claim would be filed. |

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| October 25, 2021 | Amended Fixed Date Claim Form filed. |
| February 28, 2022 | Claimant's second affidavit filed. |

**Fair hearing/Due process**

**[115]** Denial of the right to a fair hearing and/or the right to due process suggests that for example, there was absence of disclosure of the charges the claimant was to meet, and/or absence of disclosure of adequate material to enable him to properly prepare his defence, and/or absence of the opportunity to be properly represented by an attorney at law of his choosing, and/or of the opportunity to cross examine witnesses, and/or that there was no access to, or inadequate access to facilities on equal terms, and/or that there was lack of compliance with the principle of equality of arms or the inability to challenge the reasons or basis put forward for the decision to proceed with the disciplinary hearing.

**[116]** There is no contention that any of the mentioned features obtained in this instance. Denial of the right could also suggest that there was an absence of the opportunity to make legal submissions on points of dispute and to be aware of and be able to comment on evidence adduced and submissions from the opposing party made with a view to influencing the panel's decision. Again, there is no such complaint. It cannot therefore be said that as far as those processes go, there was not a fair hearing.

**[117]** There is of course the likelihood that a fair hearing could be compromised because of the length of time that it has taken for a decision consequent on the hearing to be rendered. The claimant has not put forward any evidence to suggest that the fairness of the hearing has been compromised because of the length of time that it has taken to render an outcome to the hearing but the absence of a hearing within a reasonable time has the potential to infringe the right to a fair hearing. The maxim that justice delayed is justice denied is apt.

**[118]** Notwithstanding the above observations, it could plausibly be argued that the fact that the explanation offered for not communicating the decision of the Committee of Enquiry to the claimant is that the Ministry of Finance recommended to the Permanent Secretary of the Ministry of Education that the matter be referred to the DPP meant that there was some interference with the decision-making process. This is so firstly because the hearing effectively was not completed until a decision was rendered consequent on the hearing. In this instance, a decision does not necessarily mean a final decision as to the claimant's fate but a decision as to the outcome of the hearing. This viewpoint is plausible because the directive/ recommendation was accepted and acted on. That directive/ recommendation effectively operated to prevent the Ministry of Education from Acting on the decision of the Committee of enquiry and from communicating that decision to the claimant so that he could have taken whatever steps he deemed appropriate based on the relevant rules. The approach adopted impacted a fair hearing.

**Hearing within a reasonable time**

**(a) The length of the delay**

**[119]** The actual hearing was conducted between April 26, 2017 and May 3, 2017.To date, no decision has been formally communicated to the claimant as having been made as a result of that hearing. The claimant's evidence is that he learnt from the affidavit of Mrs Jones filed in response to his affidavit that the Committee had arrived at a decision and had made its recommendation. The defendants contend that there was a hearing within a reasonable time. The basis of this contention is that the hearing was conducted by early May of 2017, and it was not the duty of the committee to render a decision, but it was required to make a recommendation to the Permanent Secretary, pursuant to Regulation 43 (2) (h) of the **Public Service Regulations**. The concession was made however, that the failure by the decision maker to render a decision would give rise to such breach. According to counsel for the defendants, the Jamaica Library Board (which is not a party to this claim) is that decision maker.

**[120]** Without undertaking any detailed analysis, the defendants would be hard pressed to refute the claimant's contention that he did not receive a hearing within a reasonable time. As was demonstrated in the **Ernest Smith & Co v Attorney General of Jamaica,** the right to a hearing within a reasonable time includes the right to receive a decision as to the outcome of the hearing within a reasonable time. As at the date of the hearing of this claim, no decision has been given in relating to the disciplinary hearing.

**(b) The reason for the delay**

**[121]** The defendants' account is that a decision was made by the panel, but that decision was not conveyed to the claimant. From the various pieces of communication, it is safe to say that the reason for not communicating the outcome of the hearing to the claimant was the view taken that there should have been consultation with the Director of Public Prosecutions prior to the commencement of the hearing. The absence of a hearing within a reasonable time infringes the right to a fair hearing. The maxim that justice delayed is justice denied is apt.

**(c) Is the delay reasonable in light of the particular circumstances of the case such as its complexity and the conduct of the parties.**

**[122]** The defendants have made no attempt to justify the delay on any such ground, and it is inconceivable that there could be any justification on this ground, given that there was in fact a hearing and a report containing findings and a recommendation was prepared consequent on the hearing of the charges. The outcome was not conveyed to the claimant so that he could have had an opportunity to challenge it, and was not acted upon by his employer. The excuse offered is unconvincing.

**(d) Has the claimant contributed to the delay or has he done anything to assert his rights**

**[123]** The claimant through various letters written to the Ministry of Education by his attorney as shown in the chronology, sought to get an explanation for the delay

and to urge that the matter be addressed. There is no evidence whatsoever to show that he contributed in any way to the delay. He did what was open to him in the circumstances.

**(e) What is at stake for the claimant, or what does he stand to lose**

**(f) Has there been any prejudice occasioned to the claimant resulting from the delay.**

**[124]** The claimant has been severely prejudiced as a result of the delay. His evidence which is in part also supported by the defendants' evidence is that he has been on interdiction for an extended period of time, initially on 3/4s of his salary, and for a significant period, being paid half of his salary. He has not been paid his duty allowance. Neither is he being paid his full motor vehicle allowance. He is not able to experience growth and development in his career as a librarian. He is restricted from travelling outside of the jurisdiction. He gave evidence of experiencing extreme stress and that grave economic hardship has been visited upon himself and his family. As things stand it may properly be said that a major aspect of his life has been put in abeyance. It should be made clear that the type of prejudice alluded to by the claimant is not such as to affect the fairness of the hearing.

**Hearing before an independent and impartial tribunal**

**[125]** Lack of independence and want of impartiality based on lack of security of tenure may not necessarily arise in this instance, since the Committee of Enquiry was assigned to do a one-time job. It could only arise if one considers the possibility of the desire of the panellists to be engaged in the future. There is nothing on the evidence to suggest that this is an area of concern in this instance. The complaint is that there was external influence.

**[126]** Independence guarantees not only that the panellists are disinterested in relation to the claimant and the cause but also disinterested so that in fulfilling their judicial functions, they can be seen to be free of links with bodies and persons such as the

Ministry of Finance and its functionaries which might affect or might appear to affect their assessment of the matter entrusted to them.

**[127]** The claimant's observation is that if the members of the disciplinary panel are to be considered independent, they cannot be subjected to directions except by a competent court. The contention is that instead of delivering a decision, the panel has refrained from doing so on the apparent direction of the Ministry of Finance. There is no evidence whatsoever to suggest that the panellists or any of them has in any way been influenced by any functionary of the Ministry of Finance.

**[128]** There is also no evidence to suggest any element of personal prejudice or bias on the part of any of the panellists, or that there was any element of prejudgment on the part of any of them. There is also absolutely no evidence to suggest that that there was any outside influence that was brought to bear on the decision-making process or on any decision and /or recommendation that was arrived at by the panel.

**[129]** It is also the contention that an informed observer who was aware that the panel had rejected a submission that it could not proceed before the matter was considered by the Director of Public Prosecutions, would find it particularly strange that after hearing evidence and reserving judgment, that panel failed to deliver a decision after the Ministry of Education, whose Permanent Secretary appointed the panel, was directed by the Ministry of Finance to refer the matter to the Director of Public Prosecutions.

**[130]** There is no evidence to support the claimant's contention that the Committee of Enquiry's report of findings and recommendations was interfered with by the communication from the Ministry of Finance to the Ministry of Education. The defendants' attorney at law contends that the Permanent Secretary is not the decision maker in this instance. The inference is that even though directives may have been given to the Permanent Secretary in relation to referring the matter to the Office of the Direction of Public Prosecutions, that fact could not possibly have impacted the findings and recommendation made in relation to the claimant.

**[131]** It is important to note that the role of the Committee was not to make a decision in the matter, but rather, to make findings of guilt or otherwise in relation to the allegations and then make a recommendation. By the time of the communication from the Ministry of Finance to the Permanent Secretary in the Ministry of Education, the Committee of Enquiry had long carried out its mandate. There could therefore be no question of the members of the Committee being influenced by the communication from the Ministry of Finance. The evidence shows that the Committee rendered its findings and made its recommendation by the latest, the 31st of May 2017. The signatures of the panellists were made to a document entitled "Decision of the panel enquiring into the charges preferred against Mr Sheldon Roberts, Rural Development Librarian, Ministry of Education Youth and Information/Jamaica Library Service" on April 27, 2017, April 27, 2017 and May 4, 2017 respectively.

**[132]** It cannot be said that a decision was made in relation to the claimant by a tribunal that was not independent and impartial.

## THE RIGHT TO A FAIR HEARING IN RELATION TO THE DECISION TO REDUCE THE CLAIMANT'S SALARY

**[133]** Rules 9:1 and 9:2 of the Library Rules provide that:

> *9:1 Where there have been or are about to be instituted against an officer or employee –*
>
> *a. Disciplinary proceedings, or*
>
> *b. Criminal proceedings*
>
> *And the relevant sub-committee is of the opinion that the interest of the Jamaica Library Services requires that the officer or employee should forthwith cease to perform the functions of his office, the relevant subcommittee may interdict the officer or employee from such performance.*
>
> *9:2 An officer or employee so interdicted shall subject to sub paragraph (4) of this paragraph, be permitted to receive half, quarter, or no*

*salary, pending the outcome of the proceedings, as the relevant sub -committee may recommend. Paragraph 9: goes on to explain that if the employee is cleared of the charge, then he is entitled to the full amount of the salary withheld.*

**[134]** Regulations 32 (1) – (4) of the Public Service Regulations state –

*'(1) Where –*

*(a) disciplinary proceedings; or*

*(b) criminal proceedings,*

*have been or are about to be instituted against an officer, and where the Commission is of the opinion that the public interest requires that that officer should cease to perform the functions of his office, the Commission may recommend his interdiction from the performance of these functions.*

*(2) An officer so interdicted shall, subject to the provisions of regulation 36 and paragraph (3) hereof, be permitted to receive such proportion of the salary of his office as the Commission shall recommend to the Governor-General.*

*(3) The proportion of salary referred to in paragraph (2) shall be related to the nature and circumstances of the charge against the officer, so, however, that –*

*(a) subject to sub-paragraphs (b) and (c), the proportion shall not be less than one-half;*

*(b) subject to sub-paragraph (c), where the charge involves an allegation of defalcation, fraud or misappropriation of public funds or public property, the proportion shall not be less than one-quarter; and*

*(c) where special circumstances exist which in the opinion of the Public Service Commission justify such action, the Commission may recommend to the Governor-General that salary be paid at a proportion less than one-quarter or entirely withheld.*

*(4) Where disciplinary proceedings against an officer under interdiction from duty result in his exculpation, he shall be entitled to the full amount of the salary which he would have received had he not been interdicted, but where the proceedings result in any punishment other than dismissal the officer shall be allowed such salary as the Commission may in the circumstances recommend.'*

**[135]** Regulation 43 of the Public Service Regulations outlines the procedure by which an officer may be dismissed. This procedure applies to an investigation with a view to the dismissal of an officer whose basic annual salary (whether fixed or on a scale) exceeds the prescribed salary rate.

**[136]** By virtue of the **Delegation of Functions (Public Service) (Specified Ministries and Departments) Order**, 2000, the powers of the Governor General have been delegated to the Permanent Secretary. Therefore, where there is reference to the powers of the Governor General it may be understood to be referring to functions actually carried out by the Permanent Secretary.

**[137]** The procedure under Regulation 43 is as follows:

a) The officer is to be notified of the charge in writing by the Public Service Commission and must be called upon to state, in writing, any grounds that he intends to rely on in order to exculpate himself.

b) If the officer fails to submit the statement within the required time or fails to exculpate himself, the Governor General shall appoint a Committee to enquire into the matter, on recommendation of the Commission. The officer who has been charged is to be informed that the Committee will enquire into the charges on a specified day and on that day, the officer must be present to defend himself.

c) If witnesses are examined by the Committee, the officer is to be present and to be given the opportunity to put questions to witnesses. Further, no documentary evidence is to be used against him unless it has been disclosed to him before.

d) The officer is entitled to representation at this Committee enquiry.

e) If further grounds of dismissal are disclosed and pursued during the enquiry, then the officer is to be furnished with the written additional charges and be allowed to defend himself against same.

f) If the Committee finds that the evidence in support of the charges is insufficient, it may report this to the Public Services Commission without requiring a defence from the officer.

g) The Committee is to furnish a report of its findings, along with evidence and all material documents to the Commission. Although subsection(h) makes reference to the Commission as the appropriate authority, in the pursuit of practicality, the report may be furnished to the Permanent Secretary by virtue of the **Delegation of Function (Public Service) (Specified Ministries and Departments) Order**, 2000.

h) The Commission should recommend to the Governor General that the officer be dismissed, if it is of such an opinion.

i) If the Commission believes that the officer deserves punishment other than dismissal, then it shall recommend to the Governor General what other penalty should be imposed.

**[138]** In **Faith Webster**, the claimant was the Executive Director of the Bureau of Women's Affairs. That body is an executive Agency falling under the office of the Prime Minister. About 6 years into the job, the claimant was interdicted consequent on a report submitted by the Permanent Secretary to the Offices of the Service Commission, arising from an audit of the Bureau. The first interdiction was rescinded. She was interdicted a second time after charges were laid against her pursuant to regulation 43 of the Public Service Regulations. She was placed on half salary pursuant to Regulation 32. The claimant sought and was granted leave to apply for judicial review. One of the declarations sought on judicial review was that the decision to interdict her and to withhold half of her salary was made in breach of her constitutional rights as a public officer and in breach of the rules of natural justice.

**[139]** One constitutional provision relied on was section 15 of the Charter which guarantees property rights. She also contended that the second interdiction was

imposed in breach of her constitutional rights as she was not afforded a hearing to determine if interdicting her and paying her half salary was appropriate. She among other things, contended that the charges against her did not warrant interdiction for reasons inter alia, that most of the charges were related to the inefficient performance of her duties and there were no charges involving dishonesty, fraud, defalcation or misappropriation of public funds or public property. She contended in the alternative that if the court concluded that her interdiction was warranted, then the court should find that based on the nature and circumstances of the charges laid against her, it did not justify half of her salary being withheld. It was also the claimant's contention that the reduction in salary following on interdiction was a penalty and the rules of natural justice should apply. Reliance was placed on the cases of **Card v Attorney General** and **Re Rafael Mitchell.**

**[140]** The defendant's attorney at law in **Faith Webster** during submissions directed the court's attention to the case of **Lloyd v Mc Mahon** [987] AC 625, where it was postulated that when a domestic or administrative body makes a decision affecting the rights of individuals, what fairness requires depends on the character of the decision making body, the type of decision it has to make and the statutory or other framework. The court will require the procedure set by the statute to be followed and will readily imply additional procedural safeguards to be introduced only to the extent that fairness requires that to be done. The defendant also placed reliance on the **Mafabi** case, where the claimant's salary was also withheld, yet the court found that the claimant was not entitled to be heard.

**[141]** In giving judgment, the learned judge observed that whether a particular disciplinary procedure constitutes a penalty or not, must depend on the circumstances of the case. This was said in light of the fact that in the **Card** case, a first instance decision from Belize, the court had found that no hearing was required prior to interdiction, although the court had found that interdiction with half salary was a penalty but that interdiction itself was not a penalty. However, in the **Mitchell** case, also a first instance decision from Trinidad and Tobago, the court

found that a hearing was required prior to interdiction, considering that interdiction constituted punishment.

**[142]** The learned judge in **Faith Webster** concluded that withholding a portion of a public officer's salary is a penalty and that a hearing should have been conducted before a determination was made as to what portion of salary was to be withheld. Part of the basis for concluding that withholding a portion of the claimant's, was a penalty, is the provision in the very Regulation (38) that withholding increment is a penalty. The learned judge also reasoned that if the presumption of innocence is to prevail, then an individual on interdiction is not to be presumed either by a court of law or anyone for that matter, to be guilty of wrongdoing. Further, that even though one may consider that an interdicted person is not actively engaged in carrying out his duties and that that fact may be a relevant consideration, it must be borne in mind that the fact of not carrying out the duties is not a matter of choice on the part of the interdicted individual.

**[143]** It is important to note that **Faith Webster** is not authority for the proposition that any public officer is entitled to a hearing before being placed on interdiction. The case however seems to be authority for the proposition that every public officer is entitled to a hearing before a decision is taken to withhold a portion of the individual's salary, if fairness so dictates. It must be borne in mind that in **Faith Webster**, the court made a decision based on the provisions in Regulation 32. The decision as to whether an individual is entitled to be heard before a decision is taken as to what proportion of salary is to be withheld must depend on the particular facts of the case and the particular regulation governing the scenario.

**[144]** The wording of Regulation 32 seems to make it mandatory that a proportion of the salary of an interdicted person, whatever that proportion might be, must be withheld. The same arguments made in relation to salary is applicable to the motor vehicle upkeep, as the upkeep is part of the emoluments received by the claimant pursuant to his contract of employment.

**[145]** It was explained in **Faith Webster** at paragraph 141 of the judgment that regulation 32 (2) makes it plain that "*upon the interdiction of a public officer, the Commission shall recommend to the Governor General that the said officer receive a proportion of his or her salary"*. The court went on further to say that the *"wording of Regulation 32 (2) appears to preclude the Commission from lawfully recommending to the Governor General that the public officer who has been interdicted, shall receive his or her full salary whilst that interdiction remains extant"*.

**[146]** The first question, then, must be whether Regulation 32 is the applicable regulation in this instance. If that is so, then it is the procedure set out in Regulation 43 that should have been employed in respect of the claimant.

**[147]** I believe the claimant's interdiction is governed by the **Jamaica Library Board Administrative Rules Governing Disciplinary Procedure Affecting Permanent Officers and Employees**, (Library Rules) and not by Regulation 32 of the Public Service Regulations. My reasons for so concluding will be explained later in this judgment. The outcome in terms of withholding of salaries could therefore differ where the Library Rules are applicable.

**[148]** A careful look at the Library Rules will reveal that the wording is different. The Rules state that the interdicted officer is permitted to receive half, quarter or no salary, unlike the Public Service Regulations which speak to the portion that must be withheld. Under the Public Service Regulations, that portion is up to three-quarters of the pay withheld based on subparagraph (b) of Regulation 32(3) or possibly even all of the salary, based on sub-paragraph (c*).* In other words, the proportion the person interdicted on account of an allegation of defalcation, fraud, or misappropriation of public funds or public property could conceivably be permitted to receive, would be not less than one-quarter of his salary or even no salary at all. The evidence reveals that initially, a quarter of his salary was withheld. Later, the portion withheld was increase to half.

**[149]** One can't help but wonder whether this wording was adopted from the Staff Orders which are not in sync with the Public Service Regulations. If the Staff Orders was intended to reflect what the Regulations state in this regard, it did not. What is clear, is that where the Regulations are applicable, its provision would prevail over the staff orders.

**[150]** Even if the relevant aspect of the Library Rules was formulated as it is on the wrong assumption that the Public Service Regulations provided that an interdicted person could receive no more than half of his /her salary, ultimately, what this means for the claimant, is that by being paid a half of his salary, he was being paid the maximum that he could have received pursuant to Library Rule 9.2, and it would have been pointless to convene any hearing to determine what portion of his salary he should receive, when even after the reduction in the proportion he was receiving during the earlier phase of his interdiction, he is still in receipt of the maximum portion that the Library Rule allows him to receive.

**[151]** Although it might not be of much relevance, since the claimant is in receipt of the maximum portion allowed, in this instance, unlike in the **Faith Webste**r case, the claimant was interdicted in relation to charges involving misappropriation of public funds. It necessarily means that there would have been justification for a higher proportion of his salary to be withheld than occurred in **Faith Webster.**

**[152]** The claimant's and his attorney at law have wholly failed to address the basis on which the order was sought for a benefit such as his duty allowance. It is not readily apparent to me that an employee should be in receipt of a duty allowance while on interdiction. The considerations in relation to that item are not necessarily the same as it relates to salary. It is partly on that basis that the declaration in relation to that item is refused.

**[153]** In formulating the declarations sought, the claimant did not assert the failure to afford him a hearing as to the portion of salary to be withheld as a breach of constitutional right, although in his evidence he alluded to same as a breach of his constitutional right. This court observes the difference between the wording of the

first declaration sought and the declaration in relation to the failure to convene a hearing regarding his salary. The claimant specifically averred a breach of his constitutional right in relation to the first declaration but did not so state in relation to the failure to convene a hearing in regard to his salary. The necessary inference must be that he was not asserting a constitutional right in the second instance but his right to due process.

**[154]** As was earlier explained in this judgment, I am of the view that the claimant was not entitled to a hearing in relation to the reduction in salary. As the right to due process encompasses the right to a hearing within a reasonable time, I will undertake the examination in the same way it was done in relation to whether there was a breach of the constitutional rights. This assessment is being undertaken in the event I am wrong in concluding that it is the Library Rules and not the Public Service Regulations which are applicable.

**(a) The length of the delay**

**[155]** The claimant was interdicted in July of 2016. His evidence which is undisputed is that up to the time of the filing of his second affidavit in February of 2022, no hearing had been convened to resolve the question of the portion of his salary that was to be withheld. There was therefore a lapse of 5 years, 7 months and 2 weeks. A delay of over 5 years must in the circumstances be regarded as *presumptively* prejudicial, and so there is clearly need to enquire into the other factors that go into the balance.

**(b) The reasons for the delay**

**[156]** The withholding of the claimant's salary commenced in July 2016. From all indications, the Ministry of Education would not have been aware of any requirement that a hearing was to be held in order for a decision to be made on the portion of salary to be withheld until the decision of **Faith Webster v Public Service Commission**. That decision was made on the 12th of May 2017 and was

communicated to the Ministry via letter from Mr. Adedipe dated September 11, 2017.

**[157]** The only explanation offered on behalf of the defendants for the delay in not convening the hearing is the inability to identify panellists for the hearing. The reason that panellists could not be identified to conduct the hearing while it is a valid reason, cannot completely justify the delay on the part of the Ministry/first defendant. That hurdle was overcome as far back as December 4, 2018. By letter of that date, the claimant's attorney at law was advised that panellists had been identified.

**[158]** There is really no explanation from the Ministry covering the period July 2019 to the date of the filing of the claim and beyond. The Ministry sought in November 2020 to say that the delay was due to the claimant's attorney at law not being able to locate the claimant. At that point, the inability to locate the claimant was no longer a factor and could not have been a factor after July 2019. The Ministry had indicated its readiness to convene the committee for the hearing.as at October 24, 2019 and had in fact stated via letter of said date to Mr. Adedipe, that it was about to convene the hearing. No explanation has been offered by either as to why the hearing did not occur shortly thereafter or up to July 2020 when the claimant's new attorney at law Miss Patmore contacted the Ministry.

**[159]** It is accepted that the delay between the time when Miss Patmore's letter of July 24, 2020 letter came to the attention of the Ministry and the response by letter dated November 12 must be attributed to the Ministry and by extension, the Permanent Secretary. The claimant filed his Fixed Date Claim Form on July 12, 2021. It may fairly be said that after Miss Patmore's letter of November 18, 2020, the ball was in the Ministry's court to convene the hearing. No explanation was offered by the Ministry for the delay between that period and the date of the filing of the claim.

**(c) Is the delay reasonable in light of the particular circumstances of the case such as its complexity and the conduct of the parties.**

**[160]** There is nothing on the evidence to suggest that there were any other circumstances outside of those already addressed. There is no question of this matter being complex and there are no questions of institutional delay that would further contribute to the delay.

**Has the claimant contributed to the delay or has he done anything to assert his rights?**

**[161]** The claimant in paragraph 10 of his affidavit filed February 28, 2022, refused to acknowledge that part of the delay in dealing with the question of the portion of his salary to be withheld was due to his non-action. Although he denied that there was any fault attributable to him, he stated that his attorney in a letter dated July 29, 2019, responded to information requested by the Ministry in a letter dated December 12, 2018. According to him, the delay arose because he had lost contact with his attorney at law, and he only re-established contact with him in July 2019. There is no need for any clearer evidence that the delay during that period must necessarily be attributed to the claimant.

**[162]** It is also important to note that after the October 24, 2019 letter to Mr. Adedipe, there is no indication that there was a response from him. What is plain enough, is that at some point, a new attorney at law assumed conduct of the matter on behalf of the claimant. This is evidenced by letter of July 24, 2020. By then it seems that the claimant's posture had somewhat been adjusted. His main focus was the reimbursement of the sums deducted from his salary. Although the claimant's new attorney at law in a letter to the Ministry dated November 18, 2020 indicated that it would appear that the claimant had no prospect of receiving the hearing the Ministry had accepted that he was entitled to, it is not entirely clear on what basis she made that statement, since there is no evidence that she had been actively pursuing that path to a hearing. It was not explained in evidence to this court at what point Mr. Adedipe exited the matter and when his new attorney assumed

responsibility. There is nothing on the evidence to explain why there was not a hearing between July 2019 when Mr. Adedipe forwarded documents that were requested by the Ministry and July 2020.

**(e) What is at stake for the claimant, or what does he stand to lose**

**(f) Has there been any prejudice occasioned to the claimant resulting from the delay.**

**[163]** There can be no question that serious prejudice has been caused to the claimant. It is not necessary to again explain in detail. The evidence in this regard has already been addressed. Since the Ministry accepted that the present legal position is that he was entitled to a hearing, it ought to have made arrangements to convene the hearing at the least between November 2020 and the time the claim was filed.

**[164]** There was therefore failure to ensure that the panel was convened. There is also an absence of reasonable explanation for not doing so. If the claimant was indeed entitled to a hearing, it could be said that there was a breach of his right to a hearing within a reasonable time.

**Due process**

**[165]** The breach of the right to a hearing within a reasonable time exists at common law but differs from the section 16(2) right enshrined in the constitution only to the extent that the claimant is required to show prejudice to himself where he asserts the right to a hearing within a reasonable time as part of due process. Delay in the common law context usually arises with criminal cases where there is the question of whether the accused is still able to receive a fair trial. There are of course implications for an appropriate remedy where it is determined that an accused may be deprived of a fair trial.

**[166]** Lord Steyn in **HM Advocate and Another v R** [2002] UKPC made the following observations in the context of criminal a case, but it is also relevant to a civil case:

> *The position under the reasonable time guarantee must now be considered. The background is that in England the common law principle is that the court is not empowered to stay a prosecution unless the defendant can show that unless a stay is granted, he would suffer serious prejudice in the sense that no fair trial could be held: Attorney General's Reference (No 1 of 1990) [1992] QB 630. My understanding is that before the Scotland Act 1998 came into force the position in Scotland was similar. Thus in McFadyen v Annan 1992 JC 53 it was held that on a plea in bar on the grounds of delay the question is whether there was significant prejudice to the prospects of a fair trial: if there was, the plea succeeded; if not, it failed. Under both systems a stay of a prosecution where a fair trial is still possible, is regarded as a draconian remedy.*

**[167]** If the analysis is whether there can still be a fair hearing in relation to what portion of the claimant's salary is to be withheld, then the resounding answer must be yes, since the claimant has not for example, suggested that because of the lapse of time, evidence has been lost, or some information is no longer available to him. Neither could he fairly say that the facilities and procedures necessary to ensure a fair hearing would no longer be available to him.

**[168]** No question of bias arises in this aspect of the claim. The fact that the claimant is able to prove some prejudice to himself because of the delay may not be enough in this instance. The kind of prejudice he has established is not encapsulated in the common law concept of a hearing within a reasonable time in so far as he has not established that the resulting prejudice compromises his right to a fair hearing. The claimant correctly in my view, formulated his claim in this regard as a breach under the common law. He has not established a breach of his common law right.

**WHETHER THE CLAIMANT WAS WRONGFULLY SUBJECTED TO A DISCIPLINARY HEARING PRIOR TO A RULING BY THE DIRECTOR OF PUBLIC PROSECUTIONS.**

**[169]** Among the orders sought by the claimant is a declaration that he was wrongfully subjected to a disciplinary hearing prior to a ruling by the Director of Public Prosecutions.

**[170]** It is the claimant's submission that where disciplinary matters arise, the Public Service Regulations require that where there appears to be a breach of the criminal law, the matter is to be referred to the Director of Public Prosecutions. Both sides agree that the relevant Regulations (30) though it refers to the Attorney General, that reference must be understood to be a reference to the Director of Public Prosecutions based on the provisions of the **Constitution (Transfer of Function) (Attorney General to the Director of Public Prosecutions) Order** 1962, which transferred certain functions of the Attorney General to the Director of Public Prosecutions. The claimant relies on the case of **Exp George Anthony Lawrence** [2010] JMCA Civ 13 to say that the failure to so refer the matter invalidated the proceedings that were instituted against the claimant.

**[171]** It is to be noted that Rule 8.1 of the Library Rules provide that:

> *"where an offence against any law appears to have been committed by an officer or employee, the Board, (unless action has been taken or is about to be taken by the police,) shall obtain the advice of the Board's Legal Advisor as to whether criminal proceedings ought to be instituted.".*

I am of the view that this is the applicable provision. The relevant Library Rule bears some resemblance to Regulation 31(5) of the Police Service Regulations with which the court was concerned in **Exp George Anthony Lawrence,** although clearly not at all identical. That regulation reads as follows:

> *Where an offence against any enactment appears to have been committed by a member, the Commission, or as the case may be, the authorized officer, before proceedings under this regulation shall obtain the advice of the Attorney General or, as the case may be, of the clerk of the Courts for the parish ,as to whether criminal proceedings ought to be instituted against the member concerned; and if the Attorney general or Clerk of the Courts advises that criminal proceedings ought to be instituted, disciplinary*

*proceedings shall not be initiated before the determination of the criminal proceedings so instituted.*

**[172]** The court in **Exp George Anthony Lawrence** accepted Mr. Frankson's submission that noncompliance with the Regulation rendered the proceedings taken against the appellant void. The Court of Appeal agreed. At paragraph 13 of the judgment, the learned judge of appeal said that:

> *The language of 31(5) is mandatory. Its objective is to ensure that a member is not made the subject of simultaneous criminal and disciplinary proceedings arising out of the same offence. In effect, the regulation operates as a safeguard against any prejudice to the member.*

**[173]** Rule 8.1 does not state anything that means that any disciplinary proceedings must abide the outcome of any criminal process. Rule 8.1 stops short of saying that disciplinary proceedings shall not be instituted before the determination of the criminal proceedings. Rule 8.2 provides as follows:

> *Where criminal proceedings have been instituted in any court against an officer or employee, proceedings for his dismissal upon any grounds arising out of the criminal charge shall not be taken until the court has given judgment and the time allowed for an appeal from judgment has expired.*

When Rule 8.1 is read in combination with Rule 8.2, it seems logical that the intent is that the advice should be taken and if criminal charges are laid and pursued, then disciplinary proceedings should abide the outcome of the criminal charges. Although there is not as strong a basis for reaching the conclusion which was reached by the court in **Exp George Anthony Lawrence,** it may reasonably be argued that unless it can be shown that action has been taken or is about to be taken by the police, then disciplinary proceedings should not be taken before legal advice was sought as to whether criminal proceedings should be instituted.

**[174]** The defendants' attorney at law does not dispute that the advice of the Director of Public Prosecutions (or for that matter, that of the Library Board's legal advisor) was not taken before disciplinary proceedings were instituted. The evidence shows that the advice of the DPP was sought long after the hearing had been concluded. See letter of September 1, 2017 from Mr Desnoes to Mr Adedipe.

**[175]** The defendants' witness claimed that the Panel of Enquiry considered the fact that criminal proceedings were pending against the claimant and arrived at the decision to proceed with the enquiry, based on a decision of the JCF that no action had been taken, and so the panel concluded that the prerequisite for the disciplinary hearing under the Public Service Regulation 31 was met.

**[176]** It was also the witness' evidence that there is no requirement under the Public Service Regulation (1961) for the advice of the Director of Public Prosecutions to be obtained regarding instituting criminal proceedings against the claimant. While it is not the advice of the Director of Public Prosecutions that was required to be taken, the advice of the Library Board's legal advisor is to be taken where the circumstances so require.

**[177]** The defendant's attorney at law submitted that action was taken by the police and a decision was made not to pursue charges at the time and therefore, the advice of Legal Counsel was therefore not required prior to instituting disciplinary proceedings.

**[178]** It is noteworthy that via letter dated April 24, 2017 from the Permanent Secretary in the Ministry of Education to the Inspector General, the following was said "Additionally, on the matter of the disciplinary proceedings in progress, the PAI [Public Accounts and Inspectorate Division] is in possession of a letter dated February 16, 2017, addressed to Mr Hugh Salmon, Chairman of the Committee of Enquiry, from Mr Roger Desnoes, Legal Officer in the office of the Permanent Secretary". That letter referred to another letter from Mr Salmon dated January 30, 2017. It also advised that according to one ASP Minto, who is attached to the Compliance and Audit Unit at the Ministry of Education, the criminal aspect of the matter was not pursued.

**[179]** Reference to a letter dated March 16, 2020, to the Acting Permanent Secretary from a senior member of the JCF cannot be omitted. This letter indicated that criminal matters involving the claimant, apparently related to the activities at the library, had been referred to the Fraud Squad on the 21st November 2019 for

investigation. This referral it must be noted, came long after the disciplinary hearing had been embarked on.

**[180]** What is apparent from the letter of April 24, is that the police had been involved in the investigation of the matter against the claimant, and for whatever reason, did not pursue criminal charges. This court is unable to say whether it was that consideration was given to pursuing criminal charges and a decision was taken not to pursue such charges, or whether it was simply a case that the police neglected to act. In the light of the letter of February 16, 2017, to Mr Salmon, it would not have been entirely incorrect for the Committee of Enquiry to form the view that the police had decided not to act and so the enquiry could proceed. Consequently, it cannot be said that the claimant was wrongfully subjected to a disciplinary hearing in the circumstances, since action had been taken by the police in the sense that the police had been involved in the case, albeit, that action never led to charges being instituted against the claimant.

**[181]** It cannot be said that the claimant was wrongfully subjected to a disciplinary hearing.

**WHETHER THE DISCIPLINARY PROCEEDINGS SHOULD BE STAYED AND THERE BE NO FURTHER DISCIPLINARY PROCEEDINGS AGAINST THE CLAIMANT IN RESPECT OF THE ALLEGATIONS IN THE PROCEEDINGS.**

**[182]** The initial bases on which a stay of proceedings was sought is twofold. Firstly, it was argued that the failure to refer the matter to the Director of Public Prosecutions before pursuing the disciplinary proceedings was a breach of the claimant's right to protection of the law. In essence it was argued that the proceedings were void. That issue was addressed above. A second basis was said to be a breach of his right to a fair hearing within a reasonable time before an independent and impartial tribunal.

**[183]** A third argument was later made. The claimant's attorney at law observed that the claimant as well as the defendants accept that the claimant is a public officer. It was urged upon the court that in the event the court finds that the claimant's employment is regulated by the Library Rules and not the Public Service Regulations, then the hearing was void, as the Committee of enquiry was not convened by neither the Parish Library Committee for St Elizabeth nor the Library Board. That point will now be addressed. This court will now explain the basis for concluding that the claimant in his employment, is regulated primarily by the Jamaica Library Board Administrative Rules Governing Disciplinary Procedure Affecting Permanent Officers and Employees, (Library Rules). The court will then examine the extent to which the procedure set out in those Rules was followed and thereafter a determination made whether the disciplinary proceedings should be stayed for breach on account of any breach.

**Is the claimant's employment regulated by the Public Service Regulations or the Jamaica Library Board Administrative Rules Governing Disciplinary Procedure Affecting Permanent Officers and Employees, (Library Rules)**

**[184]** By virtue of section 3 of the Jamaica Library Service Act, a body Corporate known as the Jamaica Library Board was established. Based on the provisions of section 7(b), the duties of the Board include making appointments as may be necessary to enable the duties of the Board to be effectively carried out. Section 14 provides for the establishment of a Parish Library Committee. Based on section 16, the duties of that Committee include:

> *(a) to maintain, manage and operate the library services in the particular parish subject to regulations made by the Board;*
>
> *(b) to make recommendations to the Board for the appointment and dismissal of professional staff, Parish Library shall be*
>
> *(c) to appoint and dismiss staff other than professional staff;*

**[185]** Section 6 of the Act empowers the Board, with the approval of the Minister, to make regulations among other things,

> *(a) for securing the full and effectual performance of any duty imposed and exercise of any power conferred upon the Board by or under this Act;*
>
> *(b) for securing the proper, efficient and economic maintenance, management, organization, administration and operation of the library service operated by the Board;*
>
> *(c) for securing the proper, efficient and economic maintenance, management, administration, organization and use of any facilities or services of any description provided by or at the expense of the Board;*

**[186]** Section 15(2) states that professional staff means staff designated by the Board as professional staff.

**[187]** A cursory look at the Library Rules reveal that they address the procedure to be employed when an officer or employee is alleged to have committed some misconduct. The wording (inappropriate in my view) speaks to when an officer is guilty of misconduct. The Library Rules set out the disciplinary functions and the procedure to be adopted in exercising those functions, for example, the procedure involved in preferring the charges. The Rules also set out the details of how the enquiry is to be conducted and the penalties that may be imposed where the charges are proven, as well as the appeal process. They address the withholding of emoluments and the process of interdiction.

**[188]** What seems clear is that the Library Rules are confined to dealing with disciplinary procedures where some infraction is alleged on the part of an officer or employee. The claimant did not exhibit his letter of employment, but the defendants do not dispute that he was employed by the Library Board. It is indicated at the commencement of the Library Rules that the Rules are terms of the Library Board's

contract of service with each officer and employee and are to be deemed incorporated therein. The court did not have access to the original Rules but only to the Rules as amended in September 2016. Neither side has however suggested that any relevant aspects of the Rules were amended or changed.

**[189]** The Public Service Regulations, in addition to dealing with disciplinary matters, speak to appointments, promotions and transfers. The fact that the claimant was employed by the Library Board does not preclude his inclusion as a public officer. However, the court has to consider that where there is a special provision specifically dealing with a subject, a general provision, howsoever widely worded must yield to the former.

**[190]** This principle is expressed by the maxim *generalia specialibus non-derogant,* that is, special provisions override general ones. The converse, *generalia specialibus non derogant*, that is, general provisions do not override special ones is also true.

**[191]** This maxim has been widely used in cases where there is a conflict between general and special provisions of an act or different acts. It has helped our judiciary in the interpretation of statutes. The definition of the terminology *generalia specialibus non derogant****,*** in ***"Bennion, Bailey and Norbury on Statutory Interpretation, Chapter 21, Section 21.4: General and specific provisions"*** is as follows:

> *"Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision.*

The principle was articulated by Sir John Romily MR in ***Pretty v Solly***:

> *"The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."*

**[192]** It means therefore that the rules specifically relating to employees to the Library Board are applicable to the claimant. He is nevertheless subject to, and entitled to all the provisions, protections and guarantees in the Constitution that are there to regulate the employment of public servants and to protect them. The aspects of the Public Service Regulations that are not covered by the Library Rules are applicable to him.

**[193]** The relevant provisions of the Library Rules dealing with disciplinary action against an officer or employee are set out below. Rule 3 sets out how the process is to be initiated and is as follows:

> *3.2 If the relevant subcommittee considers that the alleged misconduct, if proved, would warrant the imposition of a penalty more severe than a reprimand it shall direct the Head of Department to carry out a preliminary investigation into the allegation and forward a full report of such investigation to such sub-committee.*
>
> *Such sub-committee shall then cause to be delivered to the officer or employee written charges specifying the nature of the offence, at the same time informing the officer or employee in writing.*
>
> *Then he should forward within 14 days of the delivery of the charging, a written reply to the charges, and any observation he made desire to make thereon;*
>
> *a. That he may attach to the written reply statement from his witnesses;*
>
> *b. That he may elect in his written reply to have the charges dealt with by the sub-committee on the basis of the written reply and statements, if any, of witnesses, or to have an oral enquiry before the sub-committee, (if this is not stated in the letter, it will be presumed that the officer or employee has elected to have the charges dealt with on the basis of the written reply) and*
>
> *c. That the sub-committee may, after considering the written reply and the statements, if any, of the witnesses, hold an oral enquiry notwithstanding the election of the officer.*

**[194]** Rule 4 sets out the procedure for an enquiry and provides as follows:

> *ORAL ENQUIRY*
>
> *4.1 If it is decided to hold an oral enquiry, the time, and place of this enquiry shall be conveyed to the officer or employee in writing and it shall be the responsibility of the officer or employee to see that his witness attend the*

*enquiry. The enquiry should be held, except in unusual circumstances, within fourteen (14) days after receipt of the officer's or employee's written reply. However, failure to do so shall not invalidate any proceedings commenced after a period of fourteen (14) days has passed.*

*4.2 If the officer or employee does not attend at the time and place specified and fails to satisfy the relevant sub-committee that his absence is due to illness or other justifiable cause, the oral enquiry will proceed in his absence which of itself shall be misconduct rendering him liable to dismissal.*

*4.5 At the oral enquiry the relevant sub-committee shall*

*a. First hear the evidence in support of the charges;*

*b. permit the officer or employee charged, or his representative, to cross-examine the witnesses called in support of the charges;*

*c. Hear the officer or employee and his witnesses who may be crossed-examined*

*4.6 At the close of the oral enquiry the relevant sub-committee will consider the charges, the written reply and the statements, if any, and the evidence given at the oral enquiry and shall find as a fact whether or not any of the charges have been established. The relevant sub-committee will then proceed as follows:-*

*a. if it has found that none of the charges have been established the Director General, or where necessary, another member of the sub-committee for that purpose, will so inform the officer or employee in writing.*

*b. If it has been found that the charges have been established, the relevant sub-committee will forthwith forward a report to the employer stating its findings and recommendations as to the penalty to be imposed. If the penalty recommended is dismissal, the relevant sub-committee may forthwith suspend the officer or employee from duty, pending the decision of the employer and in any such case shall refer to such suspension in its report to the employer, and the Director General, or where necessary, another member of the sub-committee designated by the sub-committee for that purpose, shall notify the employer accordingly and submit the report of the sub-committee on the case for ratification by the employer, informing the officer or employee of the sub-committees recommendation.*

*c. If the employer accepts the recommendation of the sub- committee and ratifies the findings and the suspension of the officer or employee, the Director General, or where necessary, another member of the sub-committee designated by the sub-committee for that purpose, shall inform the officer or employee of the findings and penalty. Where the penalty is dismissal it shall take effect from the date of suspension. If the employer does not rectify the findings or suspension or the penalty recommended, then the employer may*

*give you such directions as it may think fit in relation to the reinstatement of the officer or employee, the penalty, if any, to be imposed, and the payment of the whole or such amount not less than one-half the officer's or employee's salary from the date of the suspension; and the director General, or where necessary, another member of the sub-committee designated by the sub-committee for that purpose, shall inform the officer or employee of the employer's direction.*

*4.7 Where an infraction is felt to be serious, it may be necessary for the Jamaica Library Board or any appropriate authority with delegated functions to establish a committee of inquiry, with clear terms of reference specific to the case.*

*a. Any such committee should be constituted as to guarantee objectivity, impartiality and timeliness;*

*b. The committee should be comprised of no fewer than three members;*

*c. The chair of the committee should be a member of the legal profession with the appropriate expertise*

**[195]** Thus, to summarize, where misconduct warrants the imposition of a penalty greater than a reprimand, the head of department should carry out preliminary investigations and give a report to the subcommittee of the Library Board. The subcommittee should then deliver to the officer the written charges specifying the nature of the offences in writing. The officer should give a written reply within 14 days and submit witness statement if he wishes. The subcommittee should hold an oral enquiry. At the end of the Oral enquiry, the subcommittee should consider the evidence. If the charges are made out, the sub-committee may suspend the officer and make recommendations and refer the matter to the employer and the Director General. For a serious infraction, the Library Board "or any appropriate authority with delegated functions" may establish a committee of enquiry.

**The procedure that was adopted in dealing with the claimant.**

**[196]** In this instance, no one has clearly set out in a concise way the procedure that was adopted. What is known from various letters and documents, is that the Senior Librarian of the St Elizabeth Parish Library made a report of suspected irregularities involving the claimant, in the collection of income generating funds on April 14, 2016. Thereafter an audit was conducted over a period between April 15,

and May 2016. By letter of July 20, 2016, the claimant was advised that he would be interdicted effective July 22, 2016, as based on the findings of the audit, he was alleged to have violated standard procedures in relation to the collection of public funds. The claimant was advised by letter of February 2, 2017, from the Director General of the completion of investigations into irregularities. He was also advised of the charges that were laid against him and of the fact that an oral enquiry would be conducted. He was advised of his right to representation.

**[197]** Via letter dated February 22, 2017, from Mr Desnoes, Legal Officer, the claimant was advised that disciplinary proceedings pursuant to Regulation 43 of the Public Service Regulations would be pursued against him by the Ministry of Education. From a number of different documents, it was garnered that the Committee of Enquiry was appointed by the Ministry of Education. The enquiry was held.

**[198]** There was no significant departure from the procedure set out by the relevant Library Rules in the first phase of the process. In fact, it would appear that the only departure from the Rules was the appointment of the Committee of Enquiry by the Permanent Secretary of the Ministry of Education instead of by the Library Board. It is important to note that the Library Rules are silent as to what should transpire after the committee of enquiry is appointed, but there is no reason to suppose that the same procedure that would have been followed where an oral enquiry is held, should not be followed in this instance, since evidently the charges were such that a penalty greater than a reprimand was likely in the event of findings adverse to the claimant, and dismissal is one of the permissible penalties based on the Library Rules.

**[199]** The Library Services chose to invoke the procedure established by Regulation 43 of the Public Service Regulations. Those regulations are stated to be applicable where there is an investigation with a view to dismissal. I am of the view that although there was a procedure set by the Library Rules, the departure from the Rules was insignificant in that a Committee of Enquiry was established, and a hearing was held.

**Whether the order should be granted**

**[200]** Even if the court were to assume that the disciplinary proceedings were flawed, because of the appointment by the Permanent Secretary of the Committee of Enquiry, that is not a basis on which this court would make an order that the proceedings be stayed. This court observes that the claimant at no time sought any declaration or order to the effect that the proceedings were flawed and very noteworthy, did not set out as a ground, any allegation that the disciplinary proceedings were flawed. Even more noteworthy for that matter, was the total absence of any grounds on which any of the orders and declarations were sought.

**[201]** The claimant and his attorney at law are being alerted to the provisions of Rule 56.9 of the Civil Procedure Rules dealing with how to make an application for an administrative order, which includes a constitutional claim. 56.9(2) requires a claimant to file with the claim form evidence on affidavit. Rule 56.9(3) directs that the affidavit must state - (c) in the case of a claim under the Constitution, set out the provision of the Constitution which the claimant alleges has been, is being, or is likely to be breached as well as (d) the grounds on which such relief is sought.

**[202]** The turn of events has nevertheless caused this court to take the view that the disciplinary proceedings should be stayed. That's one possible remedy that can be granted to the claimant for the breach of his constitutional right to a hearing within a reasonable time, although I would not without more have considered a stay an appropriate remedy. More importantly, is the fact that it emerged in viva voce evidence by way of cross-examination of the claimant that he has since been criminally charged in relation to the irregularities giving rise to his interdiction and the holding of the enquiry. As was explained in **Exp George Anthony Lawrence**, it is highly undesirable that one should be made the subject of criminal prosecution as well as disciplinary proceedings simultaneously in relation to the same allegations; in fact, that is not permissible. The claimant is therefore entitled to have the order sought.

**[203]** Finally, on this matter, the court is cognizant that there is the probability that disciplinary proceedings could conceivably arise from the criminal proceedings which have been initiated against the claimant. Since the criminal charges emanated from the allegations which formed the subject of the inquiry, the court thinks it unwise to grant an order that there be no further disciplinary proceedings against the claimant in respect of the allegations in the proceedings.

## WHETHER THE COURT SHOULD MAKE AN ORDER THAT THE CLAIMANT BE REINSTATED

**[204]** An order that the claimant be reinstated would be inappropriate for several reasons. The most obvious is that there are pending criminal proceedings against him. Secondly, it was open to the claimant to seek leave to apply for judicial review. Mr Adedipe had intimated that he would do so on the claimant's behalf when no information had been communicated as to the outcome of the enquiry. He did not however follow through. In circumstances where the claimant failed to avail himself of a remedy which was then available, and after years have passed, to seek an order for reinstatement and to be granted reinstatement without any resolution to the allegations against him would be sending the wrong message to individuals faced with a similar predicament. Such a decision could have the effect of signalling to individuals that they can purposely not avail themselves of an available remedy then seek to circumvent the defined process because of tardiness on the part of state institutions.

## ARE THE DECEASED MEMBER OF THE COMMITTEE OF ENQUIRY AND THE ATTORNEY GENERAL PROPER PARTIES TO THE CLAIM?

**[205]** On the occasion of the hearing, the court raised with the attorneys at law representing the parties the issue of whether the deceased member of the Committee of Enquiry and the Attorney General are proper parties to the claim. It was apparent on the face of it that the claimant could not properly have named an

individual who was known to be deceased at the time of the bringing of the claim, as a party to the claim. Neither attorney was prepared to address the issue. The opportunity given to file further submissions was not utilized to address the issue.

**[206]** The defendants' attorney at law has sought to deflect blame for the failure to render a decision based on the recommendation of the Committee of Enquiry from the Permanent Secretary and onto the Library Board. It is not clear to this court by what process or how precisely it came to be that it was the Permanent Secretary who made the appointment of the Committee of Enquiry. What is clear, is that based on the procedure which was pursued, the Committee was required to provide its findings to the Permanent Secretary.

**[207]** The evidence, based on letter dated September 1, 2017, from Mr Desnoes, legal officer in the Ministry of Education to Mr. Adedipe, is that the Ministry had written to the Director of Public Prosecutions for direction in the matter and that Mr. Adedipe would be provided with an update when a response was received. That letter was a response to Mr. Adedipe's various enquiries as to why there was no outcome to the hearing by the Committee. This court can only infer that it was at the Ministry of Education that the matter had stalled. Even if the decision was ultimately to be taken by the Library Board, it was to the Permanent Secretary that the Committee was required to communicate its findings since the Permanent Secretary had assumed the responsibility by appointing the Committee. There is no evidence that the Permanent Secretary did anything with the findings and recommendation of the Committee. In fact, the evidence is that he refrained from acting on the findings. Thus, blame for the failure to render a decision would have to be laid at the feet of the Permanent Secretary. That finding would mean that there is no liability on the part of the members of the Committee of Enquiry. In any event, the claim against the deceased member of the Committee of Enquiry Mr Hugh Salmon is struck out.

**[208]** I am of the view that in an administrative claim, such as a claim for judicial review or in certain constitutional claims, the Attorney General may not be a proper party

where the Attorney General was not the decision maker or the Agency in breach of the individual's rights. This is not to suggest that there may never be instances where the Attorney General could be a property party. The Attorney General is made a party to civil claims by virtue of certain provisions in the Crown Proceedings Act. Section 13(2) of the Crown Proceedings Act provides that civil proceedings being pursued against the Crown should be instituted against the Attorney General. But the Attorney General is not a party to constitutional claims by virtue of this provision in the Crown Proceedings Act.

**[209]** The matter was comprehensively addressed in the case of **George Neil v The Attorney General for Jamaica and Others** [2022] JMFC Full 06. The court considered whether a constitutional claim was civil proceedings. In paragraphs 18 and 19 of that judgment, the following was stated:

> *[18] The decision in Scott Davidson v Scottish Ministers alluded to by Ms White demonstrates the point that more likely than not, constitutional claims are not civil proceedings within the meaning of the CPA. The facts of that case are not relevant to the present claim, but the reasoning is insightful with regard to the meaning of civil procedure in the United Kingdom (UK) and by extension in our jurisdiction. The UK CPA which bears similarity to our legislation was passed with a view to remedying three main defects in bringing claims against the Crown namely:*
>
> *a) the subject was at a disadvantage because of the particular procedure involved in cases where the Crown was a litigant;*
>
> *b) the Crown could not be sued in the county courts; and*
>
> *c) the Crown was not liable to be sued in tort.*
>
> *The intendment was the same in our jurisdiction. The changes brought about by the passage of the Act meant that the subject was given a remedy as of right against the Crown both in tort and in contract, and the procedure governing litigation between subjects was now applied to litigation in civil proceedings by, as well as against the Crown. In other words, those changes affected what would be matters of private law.*
>
> *[19] Section 10 of our CPA abolished certain mentioned civil proceedings by, or against the Crown and directed that all civil proceedings by or against the Crown be instituted and proceeded*

*with in accordance with rules of court. Section 18(2) sets out proceedings that are to be considered civil proceedings against the Crown. Constitutional claims are not mentioned.*

**[210]** Since the Attorney General has apparently accepted its role as a defendant in this matter, and there were no arguments made by either side so that there could be a fulsome consideration of the matter, this court declines to make a specific ruling on a matter that has not been addressed. Based on the findings of this court, the liability would be that of the Permanent Secretary and not the Attorney General.

**Remedy for breach of the claimant's constitutional right to a hearing within a reasonable time**

**[211]** The defendant's attorney at law has asked that in the event the court finds that there has been a breach of the claimant's constitutional right to a fair hearing within a reasonable time, the court should grant a declaration to acknowledge that breach and make no order as to damages in favour of the claimant. The claimant's attorney advanced that in the light of a glaring denial of a fair hearing within a reasonable time, the claimant is entitled to substantial vindicatory damages.

**[212]** At paragraph 170 of the judgment of **Ernest Smith and Co (A Firm) et al v Attorney General of Jamaica** [2020] JMFC Full 7, Wolfe Reece J reproduced a passage from the case of **Spiers (Procurator Fiscal) v Ruddy** [2008] 1 AC 873, where the court examined cases decided under the Strasbourg jurisprudence, dealing with the question of an appropriate remedy for breach of the right to a hearing within a reasonable time for civil cases. Reference was made therein to the case of **Cocchiarella v Italy** (Application No 64886/01) (unreported) 29 March 2006. In that case, the observation was made that:

> *"the best solution for problems of delay is indisputably prevention and that a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy has the advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely*

*repair the breach a posteriori, as does a compensatory remedy of the type provided for under Italian law for example."*

It was also emphasized that where there is a breach of the reasonable time guarantee, automatic termination of proceedings cannot sensibly be an appropriate remedy.

**[213]** A declaration is an acknowledgement of the breach of the claimant's right. This court will make such declaration. The court earlier indicated that a stay of the disciplinary proceedings would be granted. Although in essence that stay is also a remedy, the court must determine whether those remedies combined would be sufficient in the circumstances. The court would have been constrained to grant a stay of the disciplinary proceedings whether or not there was a finding that the claimant's constitutional right had been breached. That position detracts from the impact that such a remedy would ordinarily have.

**[214]** As Wolfe Reece J observed in **Ernest Smith and Co (A Firm) et al v Attorney General of Jamaica** [2020] JMFC Full 7, the award "should be sufficient to illustrate disdain for the breach". In **Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15, it was said that:

*"An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award not necessarily of substantial size, be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award."*

**[215]** In **Ernest Smith**, each claimant was awarded the sum of $1,500,000 as vindicatory damages where there was never any question of wrongdoing on the part of any of them. This was a case where the police had raided the claimants' offices and seized and removed clients' files pursuant to search warrants. The Court of Appeal ultimately determined that the claimants' constitutional rights were breached on account of the searches and seizure of documents. The claimants sought damages for breach of inter alia their constitutional rights. The matter was set for

assessment of damages and the hearing took place. The learned judge reserved judgment, but never delivered same. The claimants filed a claim for breach of their section 16(2) right.

**[216]** The present claimant merely stated that it was appropriate for the court to award a substantial sum for damages. The court is not of the view that an award of a substantial sum is merited in this instance. An award of $1,000,0000.00 is hereby made.

**CONCLUSION**

**[217]** The claim is not an abuse of process. The Court finds that the claimant has made out a claim that his constitutional right to a hearing within a reasonable time has been breached. Although the evidence established that a decision was arrived at, as at the time of the trial of this claim, the decision had not been communicated to the claimant. The claimant's right to a hearing before an independent and impartial tribunal was not breached, as there is no evidence that the Committee lacked impartiality and independence. It could be said that the constitutional right to a fair hearing was impacted although none of the factors that would ordinarily vitiate a fair hearing was present. However, the input /directive/ recommendation from the Ministry of finance effectively operated to cause the Ministry of Education not to act on the decision of the Committee of Enquiry and to refrain from communicating that decision to the claimant, thereby interfering with the final stage of the process of the hearing.

**[218]** It cannot be said that the claimant was wrongfully subjected to a disciplinary hearing in the circumstances as based on the Library Rules, there was no need to obtain the advice of the Library Board's Legal Advisor since the police had been involved in the matter and had not laid charges.

**[219]** The claimant is not entitled to a hearing regarding the decision to reduce his salary because based on the Library Rules, he was receiving the maximum amount of

salary that could have been paid to him while he was on interdiction. A hearing to determine the portion of his salary that was to be withheld, would have been redundant. Even if he had been so entitled, it could not be said that his right to due process has been infringed by the failure to convene a hearing in a timely way.

**[220]** The disciplinary proceedings should be stayed because the claimant has since been criminally charged. It is highly undesirable for the claimant to be made the subject of simultaneous criminal and disciplinary proceedings arising out of the same offence. It is inappropriate for the claimant to be reinstated in his post, as criminal proceedings have been instituted against him.

**[221]** It was improper to have instituted a claim against a person known to be deceased. Mr Hugh Salmon is therefore not a proper party to this claim. There is no liability on the part of the other two members of the Committee, as they carried out their mandate of making their findings and recommendation. The blame for the delay in delivering the decision is to be ascribed to the Permanent Secretary. The Committee was only responsible for giving a decision within a timely manner.

**[222]** I am of the view that the Attorney General was not a proper party to this claim, but since that point was not taken by the Attorney General, the court declines to make an order in that regard. The court however thinks that there is no liability on the part of the Attorney General.

**[223]** An award of $1,000,000.00 for damages for breach of the claimant's constitutional right to a fair hearing within a reasonable time is appropriate in the circumstances.

**[224]** In the result, the court makes the following declarations and orders:

1. A declaration that the claimant's constitutional right to a fair hearing within a reasonable time in respect of disciplinary charges against him has been breached is granted.

2. A declaration that the claimant's right to a fair hearing within a reasonable time before an independent and impartial authority in

relation to a decision to reduce his salary whilst on interdiction is refused.

3. An order that so much of the claimant's salary and benefits as have been withheld between 2016 and the date of the court's decision be paid to him forthwith with interest thereon at such rate as to the court sees fit is refused.

4. A Declaration that the claimant was wrongfully subjected to a disciplinary hearing prior to a ruling by the Director of Public Prosecutions is refused.

5. The order for reinstatement is refused.

6. An order that disciplinary proceedings which commenced against the claimant be stayed is granted.

7. An order that there be no further disciplinary proceedings against the claimant in respect of the allegations in the proceedings is refused.

8. The claimant is awarded the sum of $1,000,000 for the breach of his constitutional rights.

9. The parties are to make written submissions on costs within 21 days of today's date.

**……..**
**A. Pettigrew-Collins**
**Puisne Judge**