IN THE SUPREME COURT OF BELIZE, A.D. 2014
(CIVIL)

CLAIM NO. 305 of 2014
and
CLAIM NO. 199 of 2015

BETWEEN:

MELISSA BELZAIRE TUCKER **Claimant**

AND

CHIEF EXECUTIVE OFFICER
THE MINISTER OF EDUCATION
ATTORNEY-GENERAL **Defendants**

Before:	**Hon. Madam Justice Shona Griffith**
Date of Hearing:	**January 28th, 2016; 16 September, 2016 (on written submissions)**
Appearances:	**Mrs. Magali Marin-Young SC for the Claimant and Deputy Solicitor General Mr. Nigel Hawke for the Defendants.**

DECISION

Regulation of Public Service – Government Workers (Open Vote) Regulations, 1992 – Constitutional Validity of Regulations – Whether Ultra Vires Section 106(1) of the Constitution – Whether Infringing Sections (3)(a) or 6(1) of the Constitution.

Employment in the Public Service - Appointment to Public Office – Meaning Of Public Officer – Employment in Established Post as Open Vote Worker – Whether Continued Employment as Open Vote Worker in Breach of Constitutional Rights to Protection of the Law and Equal Protection of the Law.

Introduction

1. This is a consolidation of two claims filed by the Claimant Melissa Belzaire Tucker against the Government of Belize by its respective officers, the Chief Executive Officer, the Minister of Education and Attorney General. The claims arise from the dismissal of the Claimant from her employment with the Government of Belize in June 2013, in her last held capacity of School Feeding Coordinator.

At issue in the claims was firstly the legality of the Claimant's dismissal from the public service, but more particularly, whether the Claimant was governed by the Public Service Regulations or the Government Workers (Open Vote) Regulations, 1992 ('the Open Vote Regulations'). Also in issue is the question of the constitutional validity of the Open Vote Regulations in terms of their enactment by the Governor-General as opposed to the Legislature. The Defendants' answer to the claims, is to stand by their dismissal of the Claimant as having been properly effected as an open vote worker, and they also assert that the Open Vote Regulations were within the scope of powers granted to the Governor-General under section 106(3) of the Constitution.

Issues

2. The issues for determination which arise from both claims are stated as follows:-

(i) (a) Were the Government Workers (Open Vote) Regulations, 1992 made in excess of the authority conferred by the Governor General under section 106(3) of the Constitution and thereby invalid?

(b) If validly enacted however, are the Open Vote Regulations nonetheless in breach of the Constitutional rights of non-discrimination and protection under the law?

(ii) (a) If the Open Vote Regulations were validly enacted and are not unconstitutional, was the continued classification and treatment of the Claimant as an open vote worker in breach of her constitutional right to protection of the law?

(b) If the Claimant was an open vote worker, was she properly dismissed in accordance with the Open Vote Regulations?

(ii) If not properly terminated, whether in breach of the Constitution or the Open Vote Regulations, what if anything is the appropriate relief and/or measure of damages to be awarded to the Claimant?

Background

3. A brief description of the background and factual circumstances of this matter is useful before engaging in discussion on the issues. There is little if any divide between the parties as pertains to the facts and circumstances which gave rise to the claim. According to the Claimant, she entered into employment with the Government of Belize ('the Government') in October, 1995 as a Hospitality Instructor, and in January, 1999 was confirmed to the post of Itinerant Teacher in the School Feeding Program. In August, 1999 the Claimant was re-assigned to work as the School Feeding Coordinator in the School Health and Physical Education Services (SHAPES) Program. The Claimant's position from the time she entered into Government employment was that of an open vote worker, but after she assumed duties as School Feeding Coordinator, the Claimant made many requests through her superior officers in the Ministry of Education, to have her position made permanent. By made permanent it is meant, that the Claimant sought appointment to the permanent and pensionable establishment to the post of School Feeding Coordinator, which since the year 2000, had been established by its continued inclusion in the annual Budgetary Estimates for Government expenditure.
4. As evidenced by the numerous written communications produced by and accepted on both sides, the issue of the appointment of the Claimant to the established post of School Feeding Coordinator was raised and addressed at various levels within the Ministry's line of command throughout her years of employment. Most of the communications – primarily internal memoranda and letters - tended towards advocacy by or on behalf of the Claimant for what was and for convenience will be similarly here termed, the 'regularization' of her position. Within those communications there was mention of submission of the matter to the Public Service Commission; of salary increases and even of upgrading the post in which the Claimant was de facto functioning but not appointed. In June, 2013 the Claimant was dismissed by means of a letter written by the Ministry's Chief Executive Officer, for reasons identified as gross insubordination and conduct unbecoming of a public officer.

The dismissal was the culmination of disciplinary proceedings instituted against the Claimant over her alleged role in the handling of a component of a school meals program for which she was responsible.

5. In particular, the program in question (which was for packaging and delivery of school meals to schools in Belize City) had been awarded to a provider, but upon the Claimant's initiative, the program was split into two components - one of which was sub-contracted by the provider to a person who was a relative of the Claimant. Consequent upon a report prepared by the Claimant regarding the implementation of the feeding program, questions arose from the Director of Education Support Services about the performance of the sub-contracted component, given that the person subcontracted was related to the Claimant. An administrative inquiry was conducted where the Claimant was called upon to account for the execution and her supervision of the program. The Claimant was accused of misconduct by virtue of a conflict of interest created by the subcontracting of part of the program to her relative. In April, 2013 disciplinary proceedings were requested and through a series of meetings and reports, the Claimant was directed on May 13th, 2013 to provide a written response to the allegations of misconduct, as the Ministry was considering disciplinary action with a view to dismissal with respect to those allegations.
6. In view of the threat of dismissal, the Claimant retained an Attorney-at-Law and submitted a written response on the 23rd May, 2013 (one week after the deadline provided), but was nonetheless dismissed for conduct unbecoming a public officer and gross insubordination - by reason of submitting her report one week after the deadline given. Following upon her dismissal, the Claimant by her Attorney-at-Law challenged the action taken on the basis inter alia, that the Claimant was not an open vote worker and could only have been dismissed by the Public Service Commission (or 'the Commission'). As a result of this dismissal the current proceedings were instituted initially as proceedings for judicial review and constitutional relief on the basis that as a public officer, the Claimant was governed by the Public Service Regulations and accordingly her dismissal was procedurally irregular, in breach of natural justice and unreasonable.

7. By subsequent action thereafter consolidated with the first, the Claimant challenged the constitutional validity of the Open Vote Regulations on the basis that they were made in excess of the jurisdiction conferred on the Governor-General to make regulations under section 106(3) of the Constitution; and that the failure to recommend the Claimant for appointment to the permanent establishment amounted to a violation of her constitutional rights to protection under the law and equal protection of the law. At the end of it all, the Claimant seeks reinstatement of her position within the public service, damages for loss of income and employment benefits, and damages for breach of her constitutional rights. In the event of failure of constitutional arguments, the Claimant seeks damages for unlawful termination.

Analysis of Issues

Issue (i)(a) – The legality of the Open Vote Workers Regulations and the powers of the Governor General.

Submissions of Counsel

8. With respect to this first question of whether the Open Vote Regulations were lawfully made by the Governor-General, learned Senior Counsel for the Claimant frames her argument within the context of the Public Service Commission having been vested with the authority under section 106(1) of the Constitution, to appoint persons to hold or act in offices of the public service. It was submitted that of even more significance, is the mode of establishment of the Public Service Commission itself and the tenure of fixed appointment granted to its members, both as provided under section 105 of the Constitution. The establishment and tenure of the members of the Commission, says learned senior counsel, underscore the intention of the Legislature, to ensure that the functions of the Commission are exercised without executive interference, which in turn is intended to likewise insulate public officers from any such interference.

9. Learned senior counsel cited **Thomas v The Attorney-General of Trinidad & Tobago**[1] which remains the classic authority of the Commonwealth Caribbean's move away from the doctrine of the public servant holding office at the Crown's pleasure and the susceptibility of the public officer to victimization at the hands of the Executive. It is against the backdrop of this deliberate scheme of insulation of public officers that learned senior counsel says that the Governor-General's powers to make regulations pursuant to section 106(3) of the Constitution must be interpreted. In this regard, it is submitted that the regulations authorized by all the sub-sections of section 106(3) extend in their totality to the management and control of the public service and public officers, and do not give authority to the Governor General to enact regulations that create a separate category of public officer, in addition to those appointed under section 106(1). Additionally, it was submitted on behalf of the Claimant, that as illustrated by **Cooper et anor v Director of Personnel Administration et anor**[2], in accordance with principles of legislative interpretation, powers should not be implied into a statute if inconsistent with the scheme of the statute itself.
10. The Deputy Solicitor-General on behalf of the Defendants submitted that the terms of sections 106(3a) and 106(3g) particularly, insofar as they authorize the Governor-General to make regulations for the formulation of schemes for recruitment to the public service and generally to manage and control the public service, are provisions which are broad enough to encompass the enactment of regulations for the employment of open vote workers. The learned Deputy Solicitor-General submits that this interpretation is supported by the meaning of '*public officer*' as illustrated by the Guyana Court of Appeal decision of **Yaw v Correia**[3]**.** On that interpretation, the regulations for employment of open vote workers do not affect the appointment of public officers by the Commission thus there is no question of the Regulations being ultra vires the Constitution.

[1] [1982] AC 113
[2] [2007] 2 LRC 100
[3] (1975) 65 WIR 144

The Court's Consideration

11. The Court does not take issue with either the effect or rationale of the Constitutional Service Commissions as articulated by learned senior counsel for the Claimant. That the public officer is meant to be insulated from interference by the Executive by means of the scheme of operation of the respective service commissions has been a standard feature of post-independence Caribbean Constitutions and a continuous feature of our jurisprudence most notably attributed to ***Thomas v The Attorney-General***. It is usefully noted, that at the time of Belize's independence in 1981 the service commissions were already established in the Constitution, but the power of appointment of public officers rested with Governor-General acting on recommendation of the Commission. It was not until 2001 that the Public Service Commission became vested with the absolute authority to appoint public officers as distinct from the power to recommend to the Governor-General for appointment. It is thus not strictly accurate to state as learned senior counsel for the Claimant has stated, that the status of the Commission coincided with Belize's independence in 1981 and in so doing provide weight to the argument in support of the powers of the Commission existing to the exclusion of any other authority. Regardless of when that shift occurred however, the clear effect or intended effect of insulation of the public officer has been correctly narrated by learned senior counsel for the Claimant.
12. More particularly stated, the argument with respect to the validity of the Open Vote Regulations is made on the basis that the Commission is the only authority by which persons can be employed into the public service. In such case, employment to the public service by any other means must be unlawful. Put another way, because of the exclusive authority of the Commission to appoint persons to offices in the public service, the Regulations of the Governor-General enabled by section 106(3), could not have been intended to grant a power which was inconsistent with the Commission's authority under section 106(1).

    The argument as to the excess in jurisdiction occasioned by the exercise of authority by the Governor-General in making regulations which provide for the employment of open

vote workers, is therefore hinged on construction and interpretation of section 106 and its related sections. The relevant statutory provisions now fall to be examined.

13. Section 106(1) provides as follows:-

> "106.-(1) The power to appoint persons to hold or act in offices in the public service, other than the offices in the judicial and legal services and the security services, including the power to transfer or confirm appointments, and, subject to the provisions of section 111 of this Constitution, the power to exercise disciplinary control over such persons and the power to remove such persons from office, shall vest in the Public Services Commission established in accordance with section 105(1) of this Constitution."

The power granted by section 106(1) is 'to appoint persons to hold or act in *offices* in the *public service'*. The corresponding power to remove and exercise disciplinary control is also provided and these powers are vested in the Public Service Commission.

14. Section 106(3) provides as follows:-

> "Subject to the provisions of this Constitution, the Governor-General, acting in accordance with the advice of the Minister or Ministers responsible for the public service given after consultation with the recognised representatives of the employees or other persons or groups within the public service as may be considered appropriate, may make regulations on any matter relating to-
>
> (a) The formulation of schemes for recruitment **to the public service**;
> (b) the determination of a code of conduct ***for public officers***;
> (c) the fixing of salaries and privileges;
> (d) the principles governing the promotion and transfer ***of public officers***;
> (e) measures to ensure discipline, and to govern the dismissal and retirement ***of public officers***, including the procedures to be followed;
> (f) the procedure for delegation of authority by and to ***public officers***
> (g) generally for the management and control of the **public service**.

15. In section 131 of the Constitution – the interpretation section, the words 'public office', 'public officer' and 'public service' are all defined:-

> 'public office' – means any office of emolument in the public service;

'public officer' – means a person holding or acting in any public office;

'the public service' – means, subject to the provisions of this section, the service of the Crown in a civil capacity in respect of the Government.

The definitions are all interrelated, but the one word that is not defined is 'office'. Given that the exclusive power granted to the Commission is to appoint persons to hold 'office' in the public service and there is a clear distinction between the use of 'public service' and 'public office' in section 106(3), the term 'office' must be construed.

16. As submitted by the Deputy Solicitor-General on behalf of the Defendants, there has been judicial pronouncement on the meaning of 'office', particularly with reference to the public service. In **Yaw v Correia**[4] the Court of Appeal of Guyana (then the final appellate Court) directly considered the definition of 'office' as it pertained to public office, and correspondingly public officer within the public service. The Court had under consideration, the dismissal of a watchman employed in the public service of Guyana under the service's 'block vote' (the same as 'open vote here in Belize'). The watchman was summarily dismissed by the permanent secretary and sought an order of certiorari quashing his dismissal as being ultra vires the permanent secretary's powers. The following provisions of the Constitution of Guyana fell to be examined and are extracted from the decision of Luckhoo JA as follows[5]:-

> *The Constitution of Guyana, art 96(1) provides as follows:*
>
> *'… the power to make appointments to public offices and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Public Service Commission.'*
>
> *The following definitions are included in art 125(1) of the Constitution:*
>
> *' "public office" means an office of emolument in the public service;*
>
> *' "public officer" means the holder of any public office and includes any person appointed to act in any such office; and*
>
> *' "the public service" means, subject to certain exceptions, service with the Government of Guyana in a civil capacity.'*

[4] Supra, n 3

[5] Ibid, pg 146 et seq.

Short of very minor differences, the provisions above are substantially the same as sections 106(1) and the definitions of public officer, public office and public service in section 131 of the Belize Constitution as shown above.

17. It is noted, that the power of appointment and corresponding powers in relation to public officers was similarly vested in the Public Service Commission of Guyana. The same interpretation and consequence of the insulation of the public service which is imputed to section 106(1) of the Belize Constitution, has been recognized as applicable to section 96(1) of the Guyana Constitution. Insofar as the question of 'public officer' was considered, Luckhoo, JA commenced his deliberation thus:-

> *"This appeal affords an admirable opportunity for examining the question of who is a 'public officer' under the Constitution of Guyana, a question which was specifically raised and fully argued."*

Luckhoo, JA then observed that in spite of the definitions of public office, public officer and public service, the term 'office' was not legally defined, and he thereafter examined a number of nineteenth and early twentieth century authorities (which were followed by earlier decisions of the Guyana Court of Appeal,) which concluded that 'public officer', applied to any person discharging a public duty for an emolument or reward. With respect to these early definitions of 'public officer' however, Luckhoo, JA said thus[6] (emphasis mine):-

> *"With great respect to the opinions of Sir Clyde Archer P, Persaud JA and Crane JA, the test adopted does not, in our humble view, go far enough; even if in some way it captures the ideas of 'public service' and 'payment', for it omits to take into consideration two vital factors, namely the pre-requisite of the existence of an 'office', and an appointment by the competent authority to that 'office', who would become the 'holder' of that 'office'.*
>
> *These additional elements must then be considered, and in so doing the warning of Chief Justice Marshall in United States v Maurice, 2 Brock 96, should be heeded, that 'Although an office is an employment, it does not follow that every employment is an office'. As also that which appears in Bacon's Abridgement, under 'Officer and Offices' which reads as follows:*

[6] Supra, n 3 @ 148

'There is a difference between an office and an employment, every office being an employment; but there are employments which do not come within the denomination of offices.'"

18. In thereafter considering the question of 'office' with specific reference to sections 96(1) and 125 of the Guyana Constitution, the learned Justice of Appeal continued as follows:-

> *"The impression one gets from the term 'office' in this context is that if someone is to be 'appointed' to it, that office must exist; it must be capable of subsisting on its own; it must have some duration of tenure, and be quite apart from the holder."*

Luckhoo JA made additional reference to the following pronouncement on the meaning of 'office' in *Great Western Railway Co. v Bater (Surveyor of Taxes)*[7] per Lord Atkinson as being:-

> *'a subsisting, permanent, substantive position which has an existence independent of the person who filled it, which went on and was filled in succession by successive holders, and that if a man was engaged to do any duties which might be assigned to him, whatever the terms on which he was engaged, his employment to do those duties did not create an office to which those duties were attached …' [emphasis supplied]. Lord Sumner, in that case*[8]*, was of the opinion that a clerk was not the holder of a public office. His lordship observed:*
>
> > *'… At present he is in the divisional superintendent's office at Swindon, whatever that involves, and he is called a member of the "permanent" staff, and enjoys such permanency, I suppose, as a month's notice allows. My lords, to say that Mr Hall holds an "office" seems to me to be an abuse of language … he merely sits in one.'*

19. Albeit belabouring the point, further reference still is made to Luckhoo JA from ***Yaw v Correia*** as follows[9] (emphasis mine):-

> *We entertain but little doubt that under our Constitution 'office' should be construed as a post created and designated, and intended to be, of a subsisting, permanent and continuing nature. With this in mind, we would proceed to the next question: When does a person 'hold' office under the Constitution? It goes without saying that a person cannot be regarded as the 'holder' of an office if there was no office to which an appointment*

[7] [1922] 2 AC 1
[8] Lord Atkinson had concurred with the definition from and was here referring to Rowlatt J at first instance.
[9] Ibid @ 150

could be made, nor could he be the 'holder' if his appointment was not in accordance with the law of the Constitution.

Having determined how 'office' should be construed for purposes of the Constitution, the discussion thereafter included the question of the creation of public offices and it was found that they were created (with the required degree of permanence), by the Legislature and appointments thereto effected by the Public Service Commission. The question of whether a public office was created and someone appointed thereto was expressed to be a mixed question of law and fact.[10]

20. After examining the evidence in the case regarding the creation of public offices in the Public Service of Guyana, Luckhoo JA concluded that the following questions must all be answered in the affirmative, in order for a person to be considered a public officer[11]: –

> *"(1) Is there an 'office' established in the sense afore described with a sufficient degree of permanence and continuity, and which exists apart from the holder? If so, (2) has an appointment been made to that office in accordance with art 96(1)? If so, (3) is it an office of emolument? If so, (4) is it an office which involves service with the Government of Guyana in a civil capacity?"*

Returning to the consideration of the validity of the Open Vote Regulations as made by the Governor under section 106(3) of the Constitution, the judicial construction of 'office', according to ***Yaw v Correia*** above puts in exact context, the meaning that ought to be ascribed to the various definitions in which 'public office' is used, and that is in contradistinction to 'public service'.

21. In the instant case, with respect to the term 'public office'- within the general scheme of operation of Government business and provision of services, there is, according to the evidence of the Director of Human Resources Management Mr. Choco, scope for several categories of employment. The Government, as of necessity, employs persons to carry

[10] Luckhoo JA in Yaw @ 151
[11] Ibid @ 152

out tasks of a temporary or seasonal nature in addition to the required day to day employment required in the conduct of Government business. In respect of employment as a whole therefore, there is employment which makes up the permanent establishment to cater to Government's day to day operations, and there are those workers who carry out those temporary, seasonal or specified tasks under the moniker of open vote. The permanent establishment is referred to as such, because the posts or positions of employment are budgeted for in the annual recurrent expenditure of the Government, as listed in the annual budgetary estimates. In referring to 'public service', Mr. Choco states that this term encompasses both of those categories (permanent and open vote), of workers.

22. This position is stated as a matter of evidence according to the understanding of Director Mr. Choco. However, whether or not that position is one which accords with the requirements of the law is a matter for the Court. The evidence was referred to however, as there must be a basis or a context from or within which to consider the manner in which the law is intended to function, vis-à-vis the public service. When one considers the judicial interpretation of 'office' as being something which must exist with sufficient degree of permanence or continuity; independent of the holder of the office; and being one to which a person must be appointed – the fact that an office is considered as 'established' when provision is made therefor in the Government's recurrent expenditure and thereafter a person is then 'appointed' to such office – is taken as clear indication, that the terminology of 'office' in section 106 must be viewed as deliberate. In this regard, the significance of enumerating offices as part of the Government's recurrent expenditure in the annual Budgetary Estimates must also be appreciated.

23. The Budgetary Estimates are Government's yearly projected expenditure, which are required to be produced by the Minister of Finance and laid before the Legislative Assembly, pursuant to section 115(1) of the Constitution. Each year the estimates of expenditure are enacted into law by the Legislative Assembly in the Constitutionally mandated 'Appropriation Act'. All monies that the Government is to expend including salaries of public officers, are authorised under this Appropriation Act passed year after

year. It is within this context of the provision in the legislated estimates of Government's recurrent public expenditure, that a post is termed as 'established' and thereafter the terminology of being appointed to the 'permanent establishment' follows. In contrast, employment is dubbed as 'open vote' by reason of the fact that there are no specific posts created but instead monies are allocated en masse to cater for the temporary nature of employment as and when necessary, limited by the capacity of the vote.

24. Continuing with this reasoning, when one considers section 106(3), the prescribed subject matter of the Regulations which the Governor-General is empowered to make is separated by reference to 'public officers' and 'public service'. In section 106(3a), the formulation of schemes for recruitment is enabled in respect of the public service. In respect of section 106(3g), regulations are likewise authorised for the management and control of the *public service*. The subject matter of the remaining paragraphs which authorise regulations to be made concerns *public officers* and their parameters bear no relation to the Commission's powers under section 106(1). Much like the use of the term 'office' in section 106(1), the difference in terminology in the remaining sub-paragraphs of section 106(3) are not considered without significance. Further to the argument on construction, learned senior counsel for the Claimant referred to the predecessor to the Open Vote Regulations 1992 - the Government Workers Rules, 1964. The reference was made as an answer to any possible argument that should the existing Regulations be found invalid, the predecessor Rules would nonetheless remain valid and applicable.

25. As learned senior counsel for the Claimant pointed out however, those prior rules would have had to be and would similarly run afoul of the exclusive power of appointment granted to the Commission under section 106(1) of the Constitution. There is no argument contrary to that point, but the purpose of alluding to the 1964 Rules is that the scheme of employment of persons outside of the established public offices was one which was well entrenched at the time the Constitutional amendments were enacted vesting exclusive power for appointment to public office in the Public Service Commission. An

additional argument of construction is that learned senior counsel for the Claimant submits that statutes must be construed in a manner consistent with the clear scheme of an Act and refers to several authorities in support of this point[12]. The authorities referred to however, (**British Waterways Board v Severn Trent Water Limited[13]** and **Cooper et anor v Director of personnel Administration et anor[14]**), do not assist in the questions of construction in the instant case.

26. In ***Severn Trent***[15]* the issue under consideration arose out of express and implied statutory powers of utility bodies vis-à-vis predecessor bodies established under prior legislation. The construction and interpretation applied were specific to the scheme of legislation and subject matter of the particular circumstances of the case, thus it is not found that the case offers any aid to the construction of section 106 as it relates to the powers of the Governor General to have made the Open Vote Regulations. The case of ***Cooper*** is also considered of limited assistance in construing the extent of the Governor-General's powers under section 106(3) as this case dealt with public officers properly appointed by and therefore already subject to the regulation of the relevant service commission. The subject of the dispute was the existence of a board constituted by the Executive, which was stated to have control over the conduct of examinations of the public officers for purposes of their promotion and appointment.

    It was not the existence of the Board appointed by the Executive which was found objectionable, it was the imposition of the Board as having governance over the examination process to the exclusion of the service commission. It was found that the Regulations giving life to the Board did not expressly state by whom the examination process should be governed, thus in the face of that silence it was within the purview of

[12]Paras 39 et seq, submissions on behalf of Claimant
[13] [2000] Ch. D. 347
[14] [2007] 2 LRC 100
[15] [2001] All ER (D) 23; *(this is the Court of Appeal's Decision which was not cited by learned senior counsel for the Claimant).

the Cabinet having general power to manage and control the Government, to have constituted the Board.

27. It was however held that given the power granted to the service commission in respect of appointment to offices, including transfers and promotions, the decision as to whether and how to utilise the Board in carrying out those exclusive powers was for the service commission to dictate. This power had been impinged upon when the conduct of the examination process was expressed as resting entirely within the control and regulation of the Cabinet appointed Board. In the instant case, once a distinction between appointment to office and employment in the public service is acknowledged, the potential for conflict in the exercise of powers between the Governor-General under section 106(3) and the Commission under section 106(1), is removed. A further argument on behalf of the Claimant was that the Regulations made provision for the employment of persons '*outside the public service*'. More particularly[16], that since the employment of persons '*outside the public service*' would attract financial allocations for persons so employed, the only authority to employ persons where no budgetary allocation is made, is by the Legislature.
28. In support of this point, learned senior counsel cited instances across the Caribbean[17] where it is indeed the case that provision for alternate schemes of employment were exclusively made or found exclusively to exist within the purview of the Legislature. In the first place however, budgetary allocation is made for persons employed under the open vote as there is an allocation under Heads of Expenditure in the annual Budget categorised as 'open vote'. Insofar as these cases do illustrate that the respective schemes of employment therein were enacted by the Legislature, the relevant question in the instant case is whether the power afforded the Governor-General under section 106(3) of the Constitution contemplates the formulation of a scheme for the employment of workers to the public service, outside of persons appointed to permanent and

[16] Para 44, submissions on behalf of the Claimant.

[17] **Webster et al v AG for Trinidad & Tobago [2015] UKPC 10; Perch et al v AG for Trinidad & Tobago [2003] UKPC 17; Grenada Technical and Allied Workers' Union et anor v Public Service Commission et al Civil Appeal No. 11 of 2003.**

pensionable posts by the Commission. If that power is in fact afforded the Governor-General, any process differently effected in another jurisdiction does not affect what the Governor-General is empowered to do under the Constitution of Belize.

29. Additionally, with respect to the cases referred to - with the exception of ***Webster***, they all concerned instances of the creation of schemes altering the status of persons already appointed within the respective public services, or transferring persons to employment outside the public service, which entailed having to treat with and make provision for rights and entitlements already earned by those public officers. This is not the situation under consideration thus it is not found that these illustrations shed any light on the construction and operation of the Governor-General's powers under section 106(3). Finally with respect to the cases cited on this point, in ***Webster,*** the subject of complaint of unconstitutionality arose from implementation of a Cabinet decision altering terms and conditions of a force of reserve officers or special constables. The fact that the special constables were established pursuant to statute as opposed to Executive action had no bearing on the constitutional challenge therein. Therefore it is likewise found that this case offers no assistance on the construction of powers afforded the Governor-General under section 106(3) of the Constitution.

30. After all of this discussion, the Court returns to the key word that serves as the basis for construction of section 106 as a whole – i.e., 'office'. Taking guidance from the authority of ***Yaw v Correia***, it is found that the definition of office – meaning that which requires a position of permanence and continuity, to which a person must be appointed, and which exists independently of whether a person is appointed to it – is that definition which is to be afforded the term under section 106 of the Belize Constitution. The terms 'public office' and 'public officer' are thereafter to be construed accordingly. With this definition in mind, the exclusive authority bestowed upon the Public Service Commission to appoint persons to public office under section 106(1) of the Constitution applies to those offices in the public service established by means of publication in the annual Budgetary Estimates of the yearly Appropriation Acts. The question still remains however, whether

the Governor-General's powers under section 106(3) are broad enough to encompass making regulations for the employment of persons outside of established posts.

31. On their plain construction, the words 'formulation of schemes for recruitment to the public service' under section 106(3) are wide enough to encompass making provision for employment to cater to Government's needs over and above the posts established by publication in the Budgetary Estimates. This is considered so, as when construed within the context of the clear synchrony between the requisites of 'office' and the creation of an 'established post', the subject matter of the regulations authorised under section 106(3) are capable of construing employment in a public service that comprises employees outside of established offices. Additionally, when construed within the context that the practice of employing persons for work that did not fall under 'established posts', widely existed at the time Public Service Commission was put in exclusive control of appointments to established posts, the case for regulations enabling open vote employment being within the intent of section 106(3)(a) is even stronger.
32. In all circumstances and after considering all arguments, it is found that rather than being inconsistent with the scheme of appointment to public officers falling exclusively within the purview of the Public Service Commission, the exercise of power by the Governor-General to make regulations for open vote workers under section 106(3), is entirely within the authority conferred by sections 106(3a) and 106(3g) of the Constitution. The enactment by the Governor-General, of regulations to provide for employment and governance of open vote workers, did not therefore impinge upon the authority conferred to the Commission in respect of the appointment of public officers. The Government Workers (Open Vote) Regulations are found to be valid and not ultra vires sections 106(1) or 106(3) of the Constitution.

<u>Issues (i)(b) –</u> <u>The Open Vote Regulations and the Right to Protection of the Law and Equal Protection under the Law.</u>

33. The Claimant alleges breaches of her Constitutional rights to protection of the law and of her right to equal protection of the law having been subjected to the Open Vote

Regulations in her employment with the Government. In relation to the breach of protection of the law, the circumstances establishing the breach as it arises from Claim 305 of 2014 are alleged as follows:-

(i) The termination of her employment by the CEO of the Ministry of Education being disproportionate and *Wednesbury* unreasonable;

(ii) The termination of her employment by the CEO being illegal for reason that the Claimant was not afforded a right to be heard on the allegation of gross insubordination;

(iii) The decision terminating her employment infringed sections 3(a) and 6(7) of the Constitution.

The allegation of breach of protection of the law in Claim 199 of 2015 is on the basis of:-

(iv) The continued employment of the Claimant as an open vote worker and failure to recommend her confirmation to the post of School Feeding Coordinator.

Also in relation to Claim 199 of 2015, the circumstances of the breach of equal protection of the law are alleged in terms that:-

(v) The creation of the Open Vote Regulations creates a second caste of public officer to which there attaches different and less advantageous terms and conditions of service.

The Claimant, by virtue of remaining an open vote worker, was therefore deprived of the benefit of the advantages of the permanent public officer such as remuneration, pension and several other conditions of service and benefits.

34. It is convenient to firstly treat with paragraph (v) above, i.e., the issue of equal protection of the law as it pertains to the existence of open vote workers as a second category of employees attracting different treatment amongst persons within the public service. In her written submissions, learned senior counsel for the Claimant initially framed the

issue[18] in terms that the existence of the two differently treated classes of public servant – one constitutionally protected and the other not - amounts to a breach of the Claimant's entitlement to equal protection of the law. The argument fully advanced on the breach of the right to equal protection of the law however[19], did not amount to an outright contention that the existence of the two schemes of employment within the public service amounted to a breach of the Claimant's right to equal protection of the law. The argument advanced, was that the failure to recommend the Claimant for appointment to the permanent establishment, deprived her of the advantages associated with the status of a public officer. The loss of those advantages is what is submitted as the basis of the breach of equal protection of the law.

35. This argument framed in this manner is not viewed as sustainable within the context of the right to equal protection of the law as provided under the Belize Constitution. As will be illustrated, the right to equal protection of the law provided under the Belize Constitution is most appropriately considered in the circumstances of this case from the standpoint of the constitutionality of the existence of the two separate schemes of employment within the one public service. Although not developed in argument, the issue of the constitutionality of the existence of the Open Vote Regulations, insofar as they provide for a separate category of workers within the public service, is one of public importance, which having been raised, ought to be determined. Learned senior counsel examined a number of authorities on the issue of breach of equal protection of the law. In considering the matter, it is firstly acknowledged (as illustrated by the schedule compiled by learned senior counsel)[20], that a number of differences do exist in relation to the two different schemes of employment.

    These differences include - the manner of appointment, constitutional protection of appointment, removal from office and discipline, different benefits, such as rates of pay, vacation, and pension entitlements.

[18] Para 4(a) and again at para 59(ii), written submissions on behalf of the Claimant.
[19] Para 107 et seq, written submissions on behalf of the Claimant
[20] Annex 1 to Written Submissions on behalf of Claimant.

36. The case of **Annissa Webster et al v The Attorney General of Trinidad & Tobago**[21] is considered a sound basis upon which to center the discussion on the right to equal protection of the law as against the existence of the two schemes of workers in the public service. The case is extensively considered with reference to the facts and examination of the decision as follows:-

    (i) In Trinidad and Tobago there existed a Regular Police Force created by a Police Force Act, 1965, governed by regulations which were both subsequently replaced in 2006 and 2007. There was also a Special Reserve Police Force established by statute in 1946 which was intended to provide 'a body of persons, otherwise employed…' who could be called out to duty in any of three statutorily prescribed instances. The third such instance, which originally was for '*any special occasion when additional police may be required for preservation of good order*', was widened in scope in 1967. It was also the case that the regular and special reserve officers were subject to different terms and conditions, undoubtedly more advantageous in favour of the former. From about 1969 it was said that in response to increased demand to fulfill police manpower, the numbers of special reserve police officers were increased as opposed to the number of regular police officers.

    (ii) The situation which resulted was that persons employed over a number of years as special reserve police officers (estimated at one sixth of the full strength police force), functioned and carried out the same if not similar duties as regular police officers for the same basic pay but absent significant benefits including medical treatment, overtime, housing and pension.

    This situation was recognized to be unjust, and in response to the recognized injustice, the Cabinet in 2000, decided to discontinue the practice of using the special constables on a full time basis in the regular

[21] [2015] UKPC 10

police force. This decision was put into effect by administrative policies and measures which absorbed special constables already employed for a certain time period into the regular force, and offered a separation package for special constables who were not integrated into the regular police force.

(iii) The administrative policy gave rise to different consequences to the special constables, depending on whether they were absorbed in to the regular Force, made redundant or remained special constables. The proceedings in this case were brought by the special constables, differentiated by the various consequences to their terms and conditions which ensued from the implementation of the administrative policy. The principal complaints were found to fall into two categories - namely those who functioned as but had not been treated the same as regular police officers before the Cabinet decision and received no compensation for their service prior to the decision; the other category comprised those who remained serving in either force (whether converted to regular police officers or remaining as special constables) and who were still not being treated equally as regular police officers. The officers affected brought their action against the state for breach of their fundamental right to equal protection under the law, pursuant to sections 4(b) and 4(d) of the Trinidad and Tobago Constitution.

(iv) Baroness Hale, delivering the judgment on behalf of the Judicial Committee, observed that whilst section 4(b) (the right of the individual to equality before the law and the protection of the law) was firmly rooted in international human rights conventions, section 4(d)
(the right of the individual to equality of treatment by a public authority in the exercise of its functions), had no equivalent.

(v) In explaining the difference between the two rights (which is of significance in the case at bar), Baroness Hale[22] stated that 'equal

[22] @ para.15 of judgment

protection of the laws' requires that the laws themselves be equal but she observed that *"the problem is that the law necessarily has to treat different groups of people differently".* Thereafter citing Lord Hoffmann in *R (Carson) v Secretary of State for Work and Pensions*[23], Baroness Hale endorsed his statements regarding the question of equality of laws being referable to grounds of discrimination which offend against "*our notions of respect due to the individual*", as opposed to different treatment which carries '*some rational justification'*.

(vi) Differences in treatment arising in respect of the latter category (rational justification), were viewed by Lord Hoffman as dependent upon considerations of the general public interest and "*were a matter for the democratically elected branches of Government*". Lord Hoffman's comments were then contextualized in terms of having been made in respect of distinctions in rules relating to retirement pensions and welfare benefits, and it was thereafter recognized that the right under section 4(d) of equal treatment by public authorities in the exercise of their public functions was an entirely different consideration for which there was no known parallel.

(vii) The determination of the appeal of the special constables was dismissed, but on the basis of a failure of evidence to support the claim of different treatment applied to persons carrying out the same functions not dependent upon any special qualification or training.

However, in the course of coming to that determination[24] Baroness Hale examined a number of authorities from which she extracted the general principle that:-

> *"…a test of 'sameness' is inadequate to secure real equality of treatment. It is almost always possible to find some difference between people who have been treated*

[23] [2006] AC 173
[24] Paras 16-20 of judgment

differently…'discrimination' entails an unjustified difference in treatment. Justification is divided into two questions: does the difference in treatment have a legitimate aim and are the means chosen both suitable to achieve that aim and a proportionate way of doing so?"

(viii) With respect to the legitimate aim and the means employed to achieve that aim, the Board was of the view that the duties carried out by the special constables qua police officers did not justify different treatment in terms and conditions because the actual duties carried out by the special constables were the same as regular officers and did not require special qualifications. The evidence to support this claim however fell short of establishing that claim, hence the dismissal of the appeal.

37. With reference to the instant case, it is found that the formulation of the argument on behalf of the Claimant of a breach of the right to equal protection of the law, is more a question of equal treatment by a public body in the exercise of its public function as provided under section 4(d) of the Trinidad and Tobago Constitution as illustrated in ***Webster***. This section does not have an equivalent under the Belize Constitution, which is why the Claimant's argument is being restricted to consideration with reference to the right to protection under the law. Returning to the question of equal protection of the law and the constitutionality of the existence of the two classes of public officer, according to ***Webster*** – in determining this issue, the questions are (i) whether there is a legitimate purpose of having the two classes of public servant and (ii) whether the means employed to support these two classes, are suitable and proportionate to achieving that aim.

38. The relevant issues in this case concern the performance of duties in employment and the terms and conditions for such performance. These questions are considered with regard to the evidence of Mr. Marcelino Choco, Director of Human Resources Management in the Ministry of the Public Service and Secretary to the Public Service Commission Mr. Choco described the two classes of public officer as those persons appointed to the permanent establishment to posts provided for in the Estimates and the

'open vote workers'. Both categories are governed by their own separate regulations, terms and conditions of service and are hired differently – viz- one by the Commission and the other by Ministry Heads (CEO's) after financial approval is given by the Minister of Finance. According to Mr. Choco the 'open vote' workers are temporary and are utilized for work of a seasonal nature (such as construction or specific projects for limited periods) or even in respect of established posts for a temporary time. In response to the question posed by learned senior counsel for the Claimant, the length of time a person could be considered as temporary could vary from months to years.

39. From the authority of ***Webster,*** it is seen that the existence of the two separate schemes of employment may be justified but the implementation or operation of the schemes may be carried out in such a way that is or becomes unfair or unequal. In ***Webster*** the situation was that whilst intended to be part time, detailed to respond to extraordinary situations and assigned less onerous tasks than regular police officers - the special constables had systematically over a number of years, been utilized to an extent that they carried out the same jobs as regular constables on a full time basis, but were not afforded the same terms and conditions for so doing. Had this situation been proven, the Board would have found the breach claimed of a lack of equal treatment by a public authority in carrying out its public function. It can easily be appreciated that legitimate differences in this regard include qualifications of workers, degrees of skill required, the period of employment required and the relation these differences bear to the actual duties carried out.

40. The authority of ***Webster*** must also be appreciated insofar as it illustrates the specific distinction between Trinidad and Tobago's section 4(b), for which there are the Belize sections 3(a) and 6(7) of equal protection of the law and equal protection under the law, on the one hand; and Trinidad's section 4(d) which provides for equal treatment by a public authority in the discharge of its public functions, of which there is no Belize equivalent. In the instant case, it is found that the second category of workers outside the permanent establishment are required for the legitimate purposes of affording Government access to workers required for work that is temporary in nature or period of

time, seasonal or of a nature for which no or lesser qualification or skill is required. It is also found that the means of achieving those needs are fair and proportionate, insofar as the Open Vote Regulations provide for important terms of employment such as dismissal, discipline, employment benefits commensurate with the work to be performed and employment safeguards provided generally to privately employed persons under the Labour and Workmen's Compensation Acts. It is therefore found that there is no violation of the right the equal protection of the law by the existence of the separate classification of open vote workers. The Government Workers (Open Vote) Regulations, 1992 are also affirmed as valid on this ground.

Issues (iia&b) – The failure to recommend the Claimant for appointment to the Permanent Establishment and Breach of Protection of the Law.

The submissions of counsel

41. This aspect of the Claimant's argument alleges that the Government failed by omission, to treat the Claimant fairly in her employment in the public service. As the Court understands it, the submission is that the Claimant held title in name and performed the functions in respect of the post of School Feeding Coordinator which became established in the year 2000. Instead of being properly appointed in the manner intended by virtue of the establishment of that post, the Claimant was employed under the scheme of the Government's 'open vote' workers. Albeit not for the want of trying, as evidenced by the numerous exchanges urging the 'regularisation' of the Claimant's position, the Claimant remained employed as an open vote worker for a period of fourteen years whilst her managers and supervisors failed to recommend her for appointment to the permanent establishment in that post. As a result of that failure to recommend her for appointment, it is submitted that the Claimant was disadvantaged for the entire period of her employment, in terms of the clear differences between the open vote worker and the appointed public servant. The Claimant was in effect put into the position of performing a permanent established post, without the security of tenure that ought to have attached to it.

42. The disadvantages or less favourable terms between the two categories of employees – public officer and open vote worker, were illustrated in a schedule compiled for that purpose by learned senior counsel for the Claimant. In that schedule she highlights the differences which include more favourable terms to the appointed public officer in the form of security of tenure (by means of provisions relating to appointment, dismissal and transfer); advantages in benefits such as the rate of allowances, vacation allotments, and rates of pension and gratuity. Upon dismissal of the Claimant, the disadvantages of the two schemes became evident with respect to the procedure adopted for dismissal to the detriment of the Claimant. In light of these disadvantages and the circumstances surrounding her dismissal, the failure to recommend the Claimant for appointment is what is submitted to have amounted to a breach of her right to protection of the law under article 3(a) of the Constitution.

43. With respect to the law to be applied when considering the question of a breach of the Claimant's right to protection of the law, learned senior counsel referred to several authorities in which section 3(a) of the Constitution has unequivocally been interpreted (by Belize's highest appellate court, the CCJ) as '*independently enforceable*' in its own right, as distinct from merely perambulatory as an introduction to the actionable fundamental rights and freedoms which thereafter follow. In particular, learned senior counsel referred to '**the Maya Leaders' Alliance case'**[25] as the most recent example from the Caribbean Court of Justice, in which the nature of section 3(a)'s right to protection of the law was explained and affirmed.

    Of particular relevance to the case at bar, was the CCJ's pronouncement[26] that the right to protection of the law, extends well beyond its most recognizable aspect of access to independent and impartial courts and was so '*broad and pervasive*' that it was potentially applicable to any number of situations and infringements.

44. The submission continues that the judgment (***Maya Leaders' Alliance***), built upon and affirmed earlier judgments in which the Court made similar pronouncements (for

[25] The Maya Leaders Alliance v Attorney-General of Belize, [2015] CCJ 15
[26] Maya Leaders Alliance, supra @ paras 44-45

example, *Attorney-General v Joseph & Boyce*[27] *and Lucas v Carillo v the Chief Education Officer et al,*[28]*)* and of great relevance to the case at bar, is the following passage from the ***Maya Land Rights Case*** on the nature and extent of the right to protection of the law.[29]Learned senior counsel for the Claimant, extracted this passage in her submissions and it reads as follows:-

> *"…However the concept goes beyond such questions of access and includes the right of the citizen to be afforded, "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power." The right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, that action or failure of the State may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."*

45. It is against this backdrop of the broad nature of the right to protection of the law as stated and restated by the Caribbean Court of Justice, that the Claimant rests her submission that the fourteen years employed as School Feeding Coordinator without having been given the opportunity to have her status converted to that of public officer, is what amounts to the breach of protection of the law.

    It is further submitted, that the breach of the right to protection of the law in this regard was exacerbated by the manner of the Claimant's dismissal, which was in breach of natural justice and *Wednesbury* unreasonable. The breach of natural justice is alleged to have been occasioned by the unreasonably short period given to the Claimant to respond to written allegations of misconduct. Thereafter, the submission of the report by the Claimant one week after the unreasonably short deadline was labelled as gross insubordination and formed one of the grounds of the Claimant's dismissal. This

[27] [2006] CCJ 1
[28] [2015] CCJ 6
[29] Maya Leaders Alliance, supra @ para 47 (as extracted from written submissions on behalf of Claimant).

categorization of the late submission of the response as 'gross insubordination' resulting in termination also forms the basis of the claim that the Claimant's dismissal was *Wednesbury* unreasonable and therefore in breach of her right to protection of the law.

46. With respect to this contention of a breach of the claimant's right to protection of the law, the Government maintains that the Claimant was properly employed as an open vote worker. It was submitted that in this regard, given that the Claimant was certainly not appointed by the Public Service Commission to the permanent establishment, the only other basis upon which the Claimant could have been employed was as an open vote worker and thereby subject to the Open Vote Regulations. With respect to the employment as an open vote worker, it was submitted that albeit primarily intended for temporary employment, the regulations are silent on how long a person can be employed as an open vote worker, thus the period for which the Claimant was employed was not precluded under the Regulations. Given that the Claimant was not subject to the Public Service Regulations, she was properly dismissed according to the provisions of the open vote Regulations which provided for termination with four weeks' notice, whilst the Claimant in fact received eight weeks' notice.

47. As far as the contentions that the Claimant was not afforded an opportunity to be heard, the Government's position is that the Claimant was entitled to be terminated under the Regulations by notice in any event and having been given more than the appropriate period of notice for her years of service, her termination was lawful. It was also contended that the Claimant had in fact been given an opportunity to be heard via a written response, it being the case that an opportunity to be heard does not require an oral response or response in person.[30]Additionally, it was submitted that the Claimant was not entitled to any relief in administrative law given that she was not subject to the Public Service Regulations but even if so, in any event the Claimant had failed to exercise alternative remedies in the form of an appeal to the Labour Commissioner, thus any administrative relief should be refused.

[30] This point was supported by reference to **Balliram Roopnarine v The Attorney General of Trinidad and Tobago**. Civil Appeal No. 04461/2007.

The Court's Analysis on Issues (iia&b)

48. There is no doubt as to the extensive nature of the right to protection of the law provided by section 3(a) of the Constitution, or the fact that it is independently enforceable. As per the authorities cited by learned senior counsel for the Claimant – (**Maya Leaders Alliance case**; **Juanita Lucas & Celia Carillo v the Attorney-General et al**; and **R v Joseph & Boyce)**[31] the right has conclusively been interpreted as being broad and pervasive so much so that it would be impossible to attempt to define the many ways in which it could be infringed. In considering the breach of the right to protection of the law as alleged in the instant case, the court will examine the nature of the right with greater scrutiny, as it must nonetheless be determined whether this is an appropriate case for its application. In the first instance, the Court returns to the ***Maya Leaders Alliance*** case which has been widely referenced in the submissions of learned senior counsel for the Claimant[32].

49. The Court finds paragraphs 42-43 of the judgment of additional utility to the case at bar, and these paragraphs cite in the first instance, Lord Diplock in **Ong Ah Chuan v Public Prosecutor**[33]. A measure of forbearance is in order as the Court with permitted liberty, extracts in some detail, as follows (emphasis mine):-

> *"In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law," "equality before the law," "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties…"*

[31] Respectively ns 26, 28 & 29.
[32] Paras 45-47 of the Judgment as extracted at pgs 28-29 of the submissions on behalf of the Claimant.
[33] [1981] AC 648 @ 670-671.

What is extracted from this passage is that the extent of the right of protection of the law is not limited only to written law. The protection of the law, as with other references generally to 'law' in jurisprudence, applies to the 'fundamental rules of natural justice' that formed part of the common law of England as was in existence prior to establishment of written constitutions. In the circumstances, the 'law' to which protection is afforded, encompasses not only written law, but also due process. This observation will hold merit in the determination of this case.

50. In further consideration - in ***Ong Ah Chuan*** the Privy Council had under consideration, an alleged breach of the fundamental rights to protection from deprivation of liberty and equal protection of the law, in relation to a presumption of trafficking under the Drugs Act of Singapore. The answer of the prosecutor to the alleged constitutional breach was that the provisions of the Drugs Act satisfied the constitutional saving in relation to infringements of fundamental rights carried out pursuant to any written law.

    It is within the context of rejecting this answer of the prosecutor, that Lord Diplock made the statement extracted above, which itself followed a recognition taken from Lord Wilberforce in *Minister of Home Affairs v. Fisher*[34] – that even though the Constitution was included in the definition of 'written law', the way to interpret a constitution on the Westminster model is-

    > *"…to treat it not as if it were an Act of Parliament but "as sui generis, calling for principles of interpretation of its own, suitable to its character … without necessary acceptance of all the presumptions that are relevant to legislation of private law."*

    The effect of regarding the Constitution in this way is to recognise that the Court is at liberty where appropriate, to interpret the Constitution as broadly as may be necessary, in order to give effect to the fundamental rights which are guaranteed. The question which arises, and which must be considered in this case, is whether it is an appropriate case for application in this regard.

51. In **Juanita Lucas and Celia Carillo v Attorney-General et al**, Saunders J gave a dissenting judgment which examined the nature and application of the right to protection of the

[34] [1980] A.C. 319 @ 329

law. His dissent was hinged upon a different view taken of the facts of the case which resulted in a finding that the Claimants' constitutional rights to (inter alia), protection of the law had been infringed. Given their contrary view of the facts, the majority judgment merely acknowledged the nature of the right of protection of the law as broad and pervasive, but offered no further discourse on its interpretation or application. In the circumstances, the dissenting judgment offers significant guidance in the absence of pronouncements to the contrary by the majority. Saunders J commences[35] his discussion on the infringement of the right to protection of the law by similarly acknowledging the broad and pervasive nature of the right, particularly stating that the right '*is anchored in and complements the State's commitment to the rule of law*.' Once again, with apologies in advance, it is found useful to extract aspects of the judgment at length.

52. Saunders J states (with reference to earlier CCJ decisions *Joseph & Boyce v Attorney-General* and *Minister for Home Affairs v Fisher)* (my emphasis) as follows[36]:-

> *"…The citizen must be afforded '*adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power*'. The right to protection of the law may successfully be invoked whenever the State seriously prejudices the entitlement of a citizen to be treated lawfully, fairly or reasonably and no cause of action is available effectively to assuage consequences to the citizen that are deleterious and substantial. There is therefore likely to be a breach of the right whenever a litigant is absolutely compelled to seek vindication under the Constitution for infringement by the State of a fundamental right. But even where no other fundamental right is impacted, the right to protection of the law may also be implicated when there is a violation of due process and a denial of the citizen's expectations of fairness, procedural impropriety and natural justice. **One must quickly caution, however, that since the law usually provides avenues to pursue these latter violations, not every instance of them may be escalated up to a constitutional breach. Courts will regard as an abuse of jurisdiction, resort to the supreme law in those cases where the aggrieved person has some convenient alternative process, outside the Constitution, that gives sufficient and effective recourse, or where the breach is insubstantial**…"*

[35] Lucas & Carillo v Attorney-General et al, supra n 34. Para 138 et seq therein.
[36] Ibid.

53. It is not thought that these words require any explanation or expansion, as they speak for themselves. The greater question is how are they to be applied? There is further assistance to be obtained by continuing close examination of this judgment. For this purpose, a brief reference to the facts of ***Lucas & Carillo*** is helpful. This was a claim for breach of constitutional rights, including that of protection of the law, made by the principal and vice principal of a secondary school. The teachers had been suspended following a convoluted and contentious process which involved widespread dissent and dissatisfaction at the teachers' management of the school. The Ministry of Education got involved, and for all intents and purposes took over the handling of what became a crisis. There was an investigation conducted in an indiscrete manner which resulted in widespread criticism and condemnation of the claimants not only by fellow teachers and parents, but also members of the public.

54. The investigative process concluded with a report which gave rise to what was expressed to be a suspension pending formal investigation into damning allegations against the teachers, by then reduced into writing. The claimants challenged their suspension by way of judicial review and alleged a breach of several constitutional rights. The questions which remained on final appeal before the CCJ included that of whether there had been breaches of the constitutional rights as alleged. This is a reductionist account of the facts, which were far more extensive and involved, but for the present purposes, will suffice.

    As stated before, the majority of the Court took a view of the facts which resulted in a finding that there were no constitutional breaches as alleged. Although the facts are not germane to the case at bar, the process of reasoning by Saunders J with respect to his fact finding is what is relevant. The judgment is extracted in part primarily for the purpose of illustrating the method and degree of analysis which should be applied in determining whether or not the right to protection of the law, as alleged, has been infringed.

55. At paragraph 139 Saunders J continues:-

> *"The majority asserts that the appellants' right to the protection of the law was guaranteed by their ability to institute proceedings for libel or slander against anyone who defamed them. In my view this misses the point. <u>The complaint of the ladies, is not so much that their reputations were damaged by specific words</u>*

uttered by any particular individual but that rather, in relation to them, the respondents engaged in an indiscrete and unfair process, facilitated all and sundry in unfairly and publicly criticizing them, published a report that was extremely critical of them without affording them natural justice and unlawfully suspending them immediately following all the public criticism. ***For purposes associated with their claim for damages, these matters must collectively be regarded as a single package.*** *The quashing order properly addressed the illegality of the suspensions. That order did nothing to compensate the ladies for the injury produced by the arbitrariness and unfairness associated with the package* ***and, absent the constitutional claim, there was no recourse which they could access to obtain such compensation****."*

The approach of Saunders J can be described in terms that he stripped bare, the entire process to which the claimants were subjected, considered together with the result and effects of that process on the claimants. The fact that there might have been breaches of private law against the claimants by persons embroiled in the process was found immaterial as the state of affairs was caused and facilitated by the Government.

56. The process of analysis is further extracted from paragraph 142 (with my emphasis):-

"According to the Court of Appeal and the majority, the appellants were disentitled to the protection of the law because the suspensions hinged on an investigation that was exploratory in nature, one that was in the nature of 'fact finding' exercise as opposed to a 'disciplinary' inquiry.

The notion of finding facts adverse to a party without first informing that party of specific allegations made against her and giving a full opportunity to contest or explain them seems unfair to me. But even if one concedes that the investigation here was intended to be merely exploratory, that the actual terms of reference given to the investigators, and the accompanying statements they and/or the Ministry officials made at the time, were consistent with such an intention, ***in order to determine whether in fact there was fairness and procedural propriety we must go further****.* ***We must go beyond intentions and statements made and get to the substance of the matter****. We must critically assess what was actually done by the Ministry and its investigators. In particular we must consider: the content of the report generated; the procedures utilized for carrying out the investigation; the widespread publicity that accompanied the investigation; and the effect the entire process had on the appellants, their employment status and their reputations…"*

57. This critical and analytic approach to the facts, which goes beyond that which exists on the surface in considering whether or not there has been an infringement of the right to protection of the law, is considered the key element of Saunders J's judgment and of greatest utility to the Court in the case at bar. This approach accords with that of Lord Wilberforce in ***Minister for Home Affairs v Fisher*** with respect to how widely the Constitution should be interpreted, to give effect to the fundamental rights enshrined therein. With this approach in mind, the facts of the instant case can now be assessed in the context of a breach of the right of protection of the law, particularly in terms of the recognized and affirmed classification of the right as 'broad and pervasive' and the fact that the reference to 'law' goes beyond only written law and includes principles of natural justice and fairness. This approach is to be counteracted by equal consideration of whether resort to the Constitution is the appropriate means of redress in the circumstances.

The Circumstances of the alleged infringement of protection of the law & the Claimant's employment.

58. The first issue that must be resolved in relation to the Claimant, is under which scheme was she employed? Was she a public officer - having been employed in a position that was a permanently established post; or was she an open vote worker, having not been appointed by the Public Service Commission? The Open Vote Regulations as already mentioned, make provision for the terms and conditions applicable to workers not employed by the Government on the permanent establishment. The claimant was employed as an open vote worker in 1995, in the position of Hospitality Instructor. In 1999 the Claimant continued her employment as an open vote worker first as 'Itinerant Teacher' in January, 1999 and from August, 1999 as the School Feeding Coordinator. This position became an established post in 2000 and the Claimant (according to her), continued her employment in that post, under the open vote category until 2013 when she was dismissed. The qualification 'according to her' regarding the Claimant's employment as School Feeding Coordinator, is made in light of the evidence of Mr. Jesus Castillo, Administrative Officer in the Ministry of Education, Youth and Sport.

59. Mr. Castillo first states in his affidavit that the Claimant was employed as a School Feeding Coordinator in the capacity as an open vote worker since 1999. Later in the affidavit, Mr. Castillo states that according to the Chief Executive Officer of the Ministry of the Public Service there was no record of temporary employment (of the Claimant) against any vacant post in the Ministry of Education '*which suggested that no approval was sought for the Claimant to be held against that post*'. Additionally, the CEO, Ministry of the Public Service confirmed that no submission was ever made to the Commission for approval of the Claimant to be appointed in the post of School Feeding Coordinator. This evidence appears to be suggesting that on top of never having been submitted for appointment to the post of School Feeding Coordinator, there was never even any approval granted for the Claimant to be 'held against the post' of School Feeding Coordinator. As clarified by Mr. Choco, the terminology 'held against the post' refers to the situation where a person is not formally appointed by the Commission but for all intents and purposes performs the duties of that post and is paid by virtue of the monies allocated in the Estimates for that post. Further, once a person is 'held against a post', there can be no other person substantively appointed to that post at the same time.
60. As opposed to the evidence of Mr. Castillo that there was never any approval sought or granted for the Claimant to be held against the post of School Feeding Coordinator, (aside from the numerous correspondence in which the Claimant was referred to as such by the Education Ministry Officials), exhibit MBT1-11 contains information to the contrary. This is a letter dated 10th March, 2005 from the Chief Executive Officer to the Claimant in which it advises that '*approval is given for your retroactive employment as Feeding Program Coordinator, Education Support Services, Ministry of Education, Youth, Sports and Culture, with effect from August 1st, 1999*'. The letter then goes on to state that the Claimant would continue to receive her existing salary at Pay Scale 8 until her status was regularized by the Public Service Commission and that her conditions of service were in accordance with the Government Workers Regulations.
61. It appears that the appropriate authority to have issued that approval for the Claimant to be held against the post of School Feeding Coordinator was the Ministry of the Public

Service, hence Mr. Castillo's evidence that there was no such approval given. As far as the Court is concerned however, the concept of being 'held against a post' in the public service, is an entirely administrative construct, where for whatever reason, appointment by the public service has not been effected. Within the circumstances of the Claimant having de facto performed the job as School Feeding Coordinator for 14 years; of her having been paid as such; of having been recognized by the Ministry of Education as such; and there being no substantive holder of the post as confirmed by the Director of Human Resources Management - the attempt to now assert that she was never granted approval to be held against that post because this was not done by the appropriate Ministry is wholly rejected by the Court. It is positively found therefore, that the Claimant was held against the post of School Feeding Coordinator and was so held for thirteen years from the time of the post's establishment in 2000. We therefore continue the discussion of the Claimant's employment status.

62. An open vote worker is defined under the Open Vote Regulations as follows:-

> *"'open vote worker' means an employee of any Government Department whose post is not provided for under any Personal Emoluments item of any Head of Expenditure in the Estimates"*

Further, open vote workers are categorized by Regulation 3, into two categories – A(i) being workers engaged for permanent round the year service and (ii) workers of 5 years or more whose employment is not intended to be permanent round the year service, including workers intended for a particular project only. Category B applies to workers employed for less than 5 years as per Category A(ii). Two observations arise from the above provisions. The first - that the Regulations do not apply to persons in respect of whom there is an established post provided in the Estimates; and second – the Regulations by their classification of workers, contemplates that persons could be employed as open vote for more than five years. Thereafter, the Regulations prescribe (inter alia), for (i) the method of appointment which is effected by the relevant Head of Department; (ii) payment of wages (prescribed as 'normally' paid weekly, calculated at a daily rate); (iii) allowances and benefits (including vacation, sickness and injury, retirement and maternity); termination of services; and (iv) dismissal of services. A public

officer, is of course appointed by the Public Service Commission in accordance with section 106(1) of the Constitution and is governed by the Public Service Regulations. The Public Service Regulations exclude persons to whom the Open Vote Regulations apply.

63. According to the evidence of Mr. Choco, his explanation (under cross examination), of open vote workers was that such workers are normally regarded as 'temporary' and would not be expected to work to age fifty-five. Mr. Choco also stated that a person employed against an established post but on a temporary basis, would be considered open vote as they would not have been appointed by the Public Service Commission. Mr. Choco further explained that 'temporary', applied not only to the nature of the employment where it was not an established position, but also where employment of an established position was on a temporary basis. In this regard Mr. Choco stated that the number of years of temporary employment could vary either according to nature of employment or period. In whichever case, he says, once a person is not appointed by the Commission, even if employed in relation to an established post, that person is an open vote worker.

    This was the employment status of the Claimant, as urged upon the Court by the learned Deputy Solicitor General. On the other hand, learned senior counsel for the Claimant's assertion is that the Claimant could not be an open vote worker as the Regulations, by definition did not apply to the post against which she was employed and she was so employed for thirteen years. It is considered by the Court that this situation is quite unorthodox.

64. The Claimant was clearly not appointed to the permanent establishment in her employment as School Feeding Coordinator as she was not appointed by the Commission. In equal measure of clarity however, the Court's interpretation of the definition of 'open vote worker' in the Regulations is unambiguous. 'Open Vote Worker' *means* an employee of any Government Department whose post is not provided for under any Head of Expenditure in the Estimates. In the first instance, the use of '*means*' in the definition signals that the definition is restrictive. The Court's interpretation is that once there is a post established under the Estimates, the person employed in relation to that post is not

meant to be employed as an open vote worker or subject to the Open Vote Regulations. A distinction can be shown however, where there is an established post and there is a substantive post holder, but for whatever reason – perhaps by means of maternity leave, study leave or other permitted absence - the substantive post holder is not carrying out the employment and it is desired to appoint someone on a temporary basis as a substitute. That temporary person in fact does not have a post provided for them in the Estimates and would properly be employed under the open vote and subject to the Open Vote Regulations, even though the work relates to an established post. It is clear also that there can be persons employed on contract in relation to an established post, but those contractually employed persons are nonetheless appointed by the Commission.

65. In considering the issue of the open vote against an established post, the situation must at all times be carefully scrutinized to ensure that the type of employment contemplated is properly categorized as open vote.

    A person employed in respect of an established post who in fact carries out duties in circumstances of de facto permanence ought not to be employed as an open vote worker for thirteen years. This determination accords with the Court's earlier construction of 'public office' having the meaning and character of an office of permanence as was stated in ***Yaw v Correria***[37]. It is considered that the correlation between the characterisation of permanence and establishment of a post by provision being made in the recurrent expenditure of the Government, is one that is clear and a matter of common sense. In this context the definition of 'open vote worker' (as not being applicable to a worker in respect of whom an established post exists), similarly accords with the nature of terms and conditions provided in the Open Vote Regulations, for example - the rate of pay being calculable on a daily basis (broken down even to parts of an hour); the categorization is of 'worker' (as opposed to officer); there is a correlation with the Labour Act and Workmen's Compensation Act with respect to conditions such as overtime, vacation, dismissal and termination; and the authority to the Head of Department to hire and dismiss workers.

[37] Supra fn 3

66. With respect to the Claimant, the evidence is that the post was established in the year 2000; there was no substantive appointee to the post; and the Claimant functioned and was recognized by all as the School Feeding Coordinator. Despite the designation of the Claimant for thirteen years as 'open vote', it is found that the Claimant's employment was of a permanent nature in respect of an established post. According to the law therefore, the Claimant ought not to have been subject to the Open Vote Regulations. This finding however, is not the end of the matter. The Claimant was never appointed by the Commission and she could hold no office unless so appointed, however, she was clearly employed by the Government under a contract of employment. The relief sought includes that the court declare that the Claimant was a public officer. The role of the Court is such that it is not permissible for the Court to make such an order.

The basis of the claim, in part, is that the power of appointment to public offices vests solely in the Public Service Commission. The Court can no more make a declaration that the Claimant was a public officer than can some other person or entity other than the Commission.

67. The position is analogous to the decisions of the Courts in respect of the role of the Courts in judicial review proceedings. In **O'Reilly v Mackman**[38], Lord Diplock remarked with respect to the role of the Courts:-

> *"[the] temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body on whom the exclusive jurisdiction to determine facts had been conferred by Parliament."*

More particularly, in **Rutherford v Commissioner of the Geology and Mines Commission,**[39]the Court of Appeal of Guyana found that the issuance of a 'cease order' to miners operating in the Country's interior by the Court at first instance to have been inappropriate and expressed the following:-

[38] [1982] 3 All ER 1124 at 1132
[39] (2011) 78 WIR 354

"The repository of the power to make that judgment was the Commissioner. By issuing the directive to the Commissioner, the court inferentially exercised the power exercisable by the Commissioner and determined that it was absolutely necessary that the order should be issued. A judicial review court has no jurisdiction to substitute its own opinion for that of the statutorily identified person or authority charged with the authority to determine the question. It is in this regard that the learned judge fell into error…"

In the circumstances, it is found that the Claimant was not a public officer and the Court has no power to declare her as such.

However, albeit not a public officer, the Claimant was improperly classified and treated as an open vote worker, according to the circumstances of her de facto and continued employment against the established post of School Feeding Coordinator.

68. The question still remains of what rules or terms and conditions of service the Claimant was governed by in her employ with the Government. Both sides have proceeded on the basis that the answer to that question is either (a) open vote or (b) public service regulations and if not one, then by default, the other. It is considered that the position must be adjudged no more and no less according to what existed in reality. The reality was, that on the face of the multitude of correspondence both from, to and between the Claimant, her superiors and Heads of Department, the subject of the regularisation of the Claimant's employment by means of a recommendation to the Public Service Commission for appointment was consistently within the awareness of and brought to the attention of the Claimant's Head of Department and the Ministry of Finance. Although the tenor in which the Claimant's position was generally regarded in the correspondence from her superiors was consistently favourable and supportive, the final uncomplicated administrative step of submitting her case to the Public Service Commission was never effected.
69. There has been no allegation of bad faith or malice towards the Claimant in explanation of the failure to carry out that final uncomplicated administrative step of recommendation to the Commission. Short of such bad faith or malice, the Court has to conclude that the Departmental failure to place the matter of the Claimant's appointment

in the hands of the Commission as the proper authority, is to be attributed to sheer negligence, ineptitude or sloth. Unfortunately, it matters not which one of those reasons is the true reason for the failure to act – for regardless of the reason, the consequences to the Claimant remain the same. The consequence of the failure to act to advance the Claimant's appointment by the Commission, is that one set of rules does not apply to the Claimant (the Public Service Regulations) and the other set was improperly applied to the Claimant's detriment. It is considered that the Claimant's employment status was simply irregular and this irregularity was occasioned by a failure of the Government to act according to law. This irregularity in the Claimant's status both gave rise to and compounded the circumstances of the Claimant's dismissal.

The circumstances of the Claimant's dismissal

70. The Claimant as learned senior Counsel submitted, was on the one hand found to be in breach of the Public Service Regulations (regulations 19 and 20) and subjected to an investigatory process with a view to 'disciplinary proceedings'. On the other hand, the Claimant was dismissed with reference to the Regulation 24 of the Open Vote Regulations (dismissal for cause). The reasons advanced for the Claimant's dismissal were gross insubordination by reason of a late submission of a response to the allegations made against her and engaging in conduct unbecoming of a public officer. In light of the Court's finding that the Claimant's employment status was irregular and not according to law, it is not considered that there is need for extensive discussion or even resolution of the circumstances of her dismissal. The redress afforded by the finding of the constitutional breach of protection of the law will cover whatever consequences arise from the dismissal.
71. This position notwithstanding, if all things could have been considered equal regarding the Claimant's employment status, a pithy analysis of her dismissal would have been that (i) the time for submission of the report demanded of the Claimant was unreasonable

given the indication that disciplinary proceedings with a view to dismissal were contemplated; (ii) it would have to be an exceptional circumstance in which the late submission of a report (where the time allotted was short to begin with) could reasonably be found to constitute gross insubordination; (iii) based on the facts of the matter, the consequence of dismissal was disproportionate to the alleged misconduct. Within the context of the breach of constitutional right claimed, the circumstances of the Claimant's dismissal are considered secondary to the primary concern of the consequences of the irregularity of her employment status.

The Resolution of the Claimant's employment status

72. As was alluded to earlier, Saunders J's dissenting judgment in ***Lucas & Carillo v the Attorney General et al***[40], offers relevant guidance on the approach to interpreting and applying the right to protection of the law. In particular, the following words of Saunders J bear repeating:-

> *"The right to protection of the law may successfully be invoked whenever the State seriously prejudices the entitlement of a citizen to be treated lawfully, fairly or reasonably and no cause of action is available effectively to assuage consequences to the citizen that are deleterious and substantial."*

The Court has found that the Open Vote Regulations were improperly applied to the Claimant but at the same time she was not appointed to the public service so the Public Service Regulations do not apply. In the absence of any cause of action founded on these statutory provisions, an action at common law for wrongful dismissal or unfair dismissal

[40] Supra paras 50 - 55 herein

is what the Claimant would have to rely on for redress. Much in the way Saunders J considered the ordinary actions of libel and slander ineffective to redress the Claimants in ***Lucas & Carillo***, the Court in the instant case considers an action for wrongful dismissal wholly ineffective as a means of redress to the Claimant.

73. With respect to the ineffectiveness of an action for wrongful dismissal as redress for the Claimant's circumstances - when stripped to its core, the Claimant was for thirteen years (i.e. from the date of establishment of the post) treated as an open vote worker whilst the employment she performed had been sanctioned by the Legislature as deserving of appointment as a public officer. Additionally, during those thirteen years it was clearly and consistently within the contemplation of the Claimant's superiors that her employment status was irregular, but there was an unfathomable failure to submit the claimant's employment into the hands of the Public Service Commission to be regularised.

    A clear consequence of this failure was that the Claimant was for thirteen years deprived of the protection and advantages of being a public officer, which include the terms and conditions relating to security of tenure, retirement benefits, vacation, and sick leave. The absence of protection in relation to security of tenure is evident in the circumstances which materialised in the Claimant's dismissal.

74. The Court also considers the frustration and demoralisation of being obliged to perform and in fact performing qua tenured public officer whilst being deprived of the status of full appointment, particularly where there was continuous support from her supervisors for her appointment. It is recognised, that given that the final decision for appointment was a matter for the Commission, it cannot be said that the Claimant was in fact deprived of appointment and the benefits that accompanied it. However, the failure that the Court has been asked to find and declare, is that the failure to recommend her appointment and submit same to the Commission, resulted in round, in the Claimant being treated unfairly in her employment. It is found that the Claimant was treated unfairly firstly by being subjected to the Open Vote Workers Regulations whilst employed over a period of

time against an established post in circumstances that cannot be said to have been intended as temporary. The Claimant was also treated unfairly having been asked to perform the duties of an established post for thirteen years whilst being deprived of the opportunity for formal appointment to the post. Finally, the Claimant was treated unfairly in her dismissal, having been held to the standard of a public officer in her conduct but having been dismissed in the manner of an open vote worker without the safeguards to which the post was entitled.

75. The consequences to the Claimant of this unfair treatment are not only considered substantial within the context of the public service but it is also considered that the action of wrongful dismissal would not afford a remedy sufficient to redress the consequences of the unfair treatment suffered by the Claimant. Finally, with respect to conduct of the Government, it is found that whether by reason of negligence or incompetence, the Government as public employer, fell well below an acceptable standard of fairness towards the Claimant as employee insofar as she was in effect strung along the path of non-appointment with no good reason for thirteen years. Further, whether deliberately or by long standing misapprehension of the law, the misapplication of the Open Vote Workers Regulations to the Claimant insofar as she was employed in respect of an established post was egregious, especially considering the risks associated with non-appointment, one of which materialised in the form of dismissal without the safeguards of the Public Service Regulations.

76. Whether the Claimant would have been appointed as a matter of certainty is not the point; whether the Claimant was deservedly dismissed or would nonetheless have been dismissed is not the point. The point is that there was a law which provided that in the Claimant's circumstances she ought not to have been subject to the Open Vote Regulations; and that she ought not to have been subjected to performing in an established post as anything other than a public officer appointed by the Public Service Commission. The Claimant was not afforded that opportunity even after thirteen years of service and the result was exposure to a lesser status than what was intended by virtue of the establishment of the post as a public office. It is therefore concluded that the failure

to submit the Claimant for appointment as a public officer when she had been employed for thirteen years in the established post of School Feeding Officer and the accompanying categorisation and purported dismissal of the Claimant as an open vote worker, amounted to a breach of the Claimant's Constitutional right to protection of the law. The question of what relief is to be afforded to the Claimant consequent upon the finding of this breach now arises.

The Claimant's entitlement to Constitutional and other relief claimed.

Submissions and the law

77. The Claimant seeks a number of declarations as well damages arising from the now determined breach of her Constitutional right to protection of the law. It is found that the constitutional infringement addresses the totality of all claims made by the Claimant and particularly, given that the Court has found that the Claimant cannot be declared a public officer, the specific reliefs claimed by way of judicial review are not available. With respect to any claim for wrongful dismissal at common law, the effectiveness of this as a remedy would have been severely limited given the eight weeks pay in lieu of notice, severance and vacation pay that the Claimant was issued upon her dismissal. An appropriate declaration of the breach of protection of the law will be styled according to the Court's findings but a declaration alone cannot be considered sufficient redress for the Claimant in the circumstances. The Court will therefore now consider the question of damages or any further redress as may be available under section 20 of the Constitution.

78. It is well established in the Caribbean, and recently restated in Belize in the ***Maya Land Rights Case***, that the redress afforded in section 20(1) of the Constitution may take the form of an award of monetary compensation for a violation of constitutional rights[41]. At paragraph 7 therein the Court continued that there were three requirements a claimant must satisfy in order to obtain a monetary award under section 20 of the Constitution. These are "*(1) the existence of a constitutional right for his or her benefit; (2) a contravention of that right; and (3) that a monetary award is the appropriate remedy or redress for the*

[41] [2015] CCJ 16 @ para 6

contravention". With respect to this case, the first two elements are already satisfied, however one must still make a determination with respect to the appropriateness or otherwise of a monetary award. In further consideration of the award of damages, regard is had to **Maharaj v Attorney-General of Trinidad & Tobago**[42] which made clear that damages would include not only pecuniary but also non pecuniary loss. Lord Diplock, delivering the judgment on behalf of the Board, said as follows in relation to the breach of unlawful deprivation of liberty therein:-

> *"The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration."*

79. In the instant case, the breach is one of protection of the law, arising from a failure on the part of the Government to make provision for the Claimant's employment status according to law. With respect to damages, learned senior counsel on behalf of the Claimant claims both a pecuniary and non-pecuniary award, the former quantified with reference to the Claimant's salary (including benefits), from the date of her dismissal in June, 2013, on the basis that she was unlawfully dismissed. The Claimant also seeks re-instatement of her position with the Government on the basis that she went to great lengths to obtain higher qualification with a view to remaining and advancing in the public service. As authorities all tend to find (short of a nullified dismissal), the re-imposition of the employer/employee relationship where it has broken down is never an option readily considered. Albeit the Claimant was not a public officer, she was nonetheless employed on a contract of services with the Government and having been paid salary in lieu of notice and benefits due her up to the date of her dismissal, she was in fact dismissed. Therefore, even if the Claimant were found to have been wrongfully or unfairly dismissed, the redress due would be damages and the terminated employment relationship would

[42] (1978) 30 WIR 310

stand. Having not been adjudged a public officer, re-instatement is not an option the Court can consider within the circumstances of the case.

80. With respect to the appropriateness or not of an award of damages, further guidance is taken from Saunders J in **Lucas & Carillo v Attorney-General** as follows[43]:-

> *"Not every finding of constitutional breach will yield monetary damages. But a mere declaration that an arm of government has acted in contravention of the Constitution constitutes in itself powerful relief, even in circumstances where the victim can establish no entitlement to monetary damages. Any notion that a finding of constitutional infringement should be premised on an applicant's ability to establish an entitlement to monetary damages must be rejected."*

It was stated further:-

> *"…When assessing the possibility of damages on a constitutional application, courts must be wary of being fixated on financial loss and trivialising or dismissing altogether, personal injury that is neither physical nor economic.*
>
> *Distress, anxiety, hardship, mental and emotional trauma, these all constitute damage that must be taken into account when the State violates the supreme law to the prejudice of the citizen…"*

81. With respect to what that compensation should be, learned senior counsel on behalf of the Claimant submits that the Claimant has suffered financial loss as a consequence of the breach of her Constitutional right to protection of the law. In particular, the loss claimed is a total sum of **$210,961.31** comprised of the following - (i) the amount the claimant would have earned had she not been dismissed; (ii) the difference between the salary paid to her as open vote worker versus what she would have been paid had she been appointed to the post; (iii) amount of gratuity; (iv) retirement benefits; and (v):- vacation accrued at the rate of appointed public officer to the post. The Defendants on the other hand contend that the Claimant had firstly not mitigated her loss as she was obliged to do and additionally, had she not been dismissed, the Claimant would have

[43] Lucas & Carillo v Attorney-General, supra @ paras 154 & 155 of judgment.

qualified for a gratuity, but not pension. The award considered as appropriate by the Defendants is submitted as equivalent to six months' salary and gratuity payment.

The Court's Consideration

82. As has been pointed out before, the Claimant was never appointed a public officer and whilst her appointment might have been expected had a recommendation been submitted to the Commission, it was not a certainty, given that the decision to appoint rested entirely with the Commission. Additionally, the gravamen of the breach of the Claimant's right to protection of the law has been determined as the sustained and unfathomable failure on the part of the Government to treat her fairly and according to law, by taking uncomplicated administrative steps to advance her employment according to the requirements of the established post in which she functioned. This failure resulted in certain consequences for the period of thirteen years, which included disadvantages in tenure and financially as well.

    In this context, the words of Saunders J in ***Lucas & Carillo***[44] above are found applicable in the instant case so as to entitle the Claimant to a monetary award of compensation. The basis upon which that monetary award should be made is however another issue.

83. From the authorities submitted on behalf of the Claimant[45] it is clear, that damages do include consequential loss flowing from breach of a constitutional right – so that in cases of unlawful deprivation of liberty (**Ramesh Maharaj v Attorney-General of Trinidad & Tobago**)[46] or breaches arising out of a wrongful dismissal - loss of earnings or other consequential loss can appropriately be quantified where they are occasioned as a result of the breach. In further consideration of this point, reference is made to Archie CJ in **Maharaj v Attorney-General of Trinidad & Tobago**[47]who expressed strong views on the

[44] Supra fn 43.
[45] **Ramnarine Jorsingh v Attorney-General** (1997) 52 WIR 501; **Attorney-General of Trinidad & Tobago v Ramanoop** [2006] 1 AC 328.
[46] (No.2) (1978) 30 WIR 310
[47] (2015) 86 WIR 537 @541

modern classifications of awards of damages for breaches of constitutional rights. In particular, he was concerned with the development of 'vindicatory damages' as an award separate and apart from 'compensatory damages', the former now being used to express a Court's displeasure at the manner in which rights were infringed. Chief Justice Archie recognised that there are those cases, (citing *Attorney-General for Trinidad & Tobago v Ramanoop*)[48], where it was appropriate that an award of damages reflect the disapproval by the Court of the conduct occasioning breach, the seriousness of the right breached and to act as a deterrent against future conduct.

84. However, it was his view that any award of damages as redress for breach of a constitutional right should remain a single award, even if it goes outside the bounds of ordinarily quantifiable pecuniary loss.

On this point Chief Justice Archie stated thus[49]:-

> *"So, to make it clear, 'compensation' or 'damages' in the context of an award or 'redress' pursuant to s. 14 of the Constitution may include, but have never been confined to compensation in the sense of readily quantifiable pecuniary loss. In fact the court, in the exercise of its discretion to afford redress is concerned only with what is appropriate in the circumstances and is not obliged to compensate the complainant for pecuniary loss."*

It is considered that this quote encapsulates the approach that the Court must have in a case such as this. Because of the particular circumstances relating to the non-appointment on the one hand versus the finding of a breach of protection of law in terms of the continued employment of the Claimant as an open vote worker, the proper award is not considered to be an arithmetical quantification of what the Claimant may or may not have earned as an appointed public officer.

[48] Ibid @ paras [6-7]; Ramanoop (supra fn 45) concerned a breach occasioned by 'outrageous and violent conduct' of police officers.
[49] Maharaj (2015) supra 2 para [8].

85. In this regard, of the authorities submitted in support of the issue of damages, that of **Clement Wade v Maria Roches**[50]is found to be of greatest assistance. This was an award by the Court of Appeal of Belize in the sum of $60,000 in 2005, (reduced from the trial judge's award of $150,000) as redress for a breach of her constitutional right against discrimination on the basis of sex. The claimant in this case was dismissed from a catholic school when as a single woman she became pregnant. The Court of Appeal found that the amount awarded by the trial judge ($150,000) was excessive given the absence of evidence upon which to base that award and the more appropriate amount was found to be $60,000. In coming to this conclusion, Morrison JA referred to the decision of the Belize Supreme Court in **George Enrique Herbert v The Attorney-General.**[51]This decision was cited with approval, particularly with regard to the approach to an assessment of damages under section 20(2) of the Constitution.

86. After adopting statements to the effect that courts were released from the constraints of obligations at common law in assessing damages under section 20(2), Morrison JA extracted the following passage of Conteh CJ in *Herbert*, describing it as 'the appropriate approach' to assessment[52]:-

> *"Therefore, I think, a court should be astute in the making of awards of damages for breaches of fundamental rights in order to ensure both a vindication of those rights and to register disapprobation for the violation. Therefore, I think the more egregious the violation and, especially if accompanied by contumely or callous disregard, the more serious or condign the award of damages should be. For it is only by awarding an appropriate level of damages, where the court so decide(s) to make an award, for breaches of fundamental rights, can the courts fulfil their role as sentinels of these rights and thereby induce respect for them and their*

[50] Belize Civil Appeal No. 5 of 2004
[51] Action No. 398 of 2003, Belize Supreme Court
[52] Ibid @ para 5.

observance. Every case, of course, would depend on its own facts and circumstances."

Morrison JA went on to state that what was 'appropriate', may be simplified where the breach has a private law analogy[53] but in the final analysis, the question of an assessment under section 20(2) of the Constitution was to be decided on the particular facts of each case, the nature of the breach and the egregiousness of the conduct complained of by the citizen, always bearing in mind, the solemnity and sacred nature of the Constitution.[54]

87. Taking into account the approach as referred to above in ***Wade v Roches,*** the references made therein to *Herbert*, and the prior discussion about vindicatory damages in ***Maharaj*** (2015), the Court considers that there is no applicable precedent that can readily be used to make a comparable award in this case. It has already been stated that an award based on calculation of benefits that the Claimant might have earned had she been appointed is not the appropriate basis for the award. In the circumstances, the Court considers the nature of the breach and the seriousness of the conduct.

    On the one hand, when compared with breaches arising from deprivation of liberty or property of a citizen, the breach complained of in the instant case is not the most egregious. This notwithstanding, there is a deliberate scheme of insulation of public officers provided by the Constitution and the effect of the Defendants' omissions in respect of the Claimant is to have defeated the purpose and intent of those provisions – whether intentionally or not. The length of time over which the Defendants' conduct subsisted renders the omission worthy of the Court's express disapproval and the effects of the Defendants' conduct on the Claimant were serious and substantial. The award to the Claimant is to be more than nominal.

88. The award of $60,000 in ***Wade v Roches*** offers a useful guide insofar that the nature of the breach therein is considered more serious, but the length of time the breach persisted

[53] Ibid @ para 7.
[54] Ibid @ para8.

and its consequences to the Claimant herein are greater. On the flip side, the award is also balanced by the fact that the Claimant must hold some ownership for her choices. Employment with the Government is not a right and it was open to the Claimant to recognise the failures on the part of the Government and at some point throughout her years of service make a decision in her own best interests to seek out employment offering better conditions of service. Whilst she is not to be penalised for not so doing, it must be fairly recognised that she was free to make alternative choices in her own best interest. The award in favour of the Claimant is assessed at $80,000 upon the breach of her Constitutional right to protection of the law and the Claimant is entitled to prescribed costs on this amount. The Claimant did not succeed on all issues, however, it is considered that within the circumstances of the claim and the breach found, the Claimant is entitled to 90% of her costs.

Final Disposition

89. The claims are disposed of in the following manner:-

(I) It is hereby respectively declared as follows:-

(a) The enactment of the Government Workers (Open Vote) Regulations, 1992 by the Governor-General pursuant to section 106(3) of the Constitution was not ultra vires section 106(1) of the Constitution;

(b) The provision for open vote workers as a separate category of workers in the public service is valid and not in breach of the Constitutional rights to protection of the law and equal protection of the law.

(c) The continued employment by the Government of the Claimant as an open vote worker in the capacity of School Feeding Coordinator along with the failure to recommend her appointment as a public officer to the post of School Feeding Coordinator amounted to a breach of the Claimant's constitutional right to protection of the law;

(d) The Claimant is entitled to damages arising from the breach of her constitutional right to protection of the law as declared in paragraph (c) herein.

(II) The Claimant is awarded the sum of $80,000.00 as damages for the breach of her constitutional right to protection of the law.

(III) Prescribed costs are awarded to the Claimant on the amount of damages awarded at a proportion of 90%.

(IV) Post judgment statutory interest only is awarded on the damages awarded plus costs, at the rate of 6% per annum from the date of judgment until payment. This judgment takes effect from the 30th September, 2016.

Dated this day of October, 2016.

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Shona O. Griffith
Supreme Court Judge