

IN THE SUPREME COURT OF BELIZE, A. D. 2017

CLAIM NO. 177 OF 2017

BETWEEN:

(RUBEN REQUENA

CLAIMANT

(

(AND

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(PUBLIC SERVICES COMMISSION

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. William Lindo for the Claimant

**Ms. Briana Williams, Crown Counsel, and Ms. Kimberly Wallace, Crown Counsel
in the Attorney General's Ministry, for the Defendant**

J U D G M E N T

1. This is a claim for an order of certiorari and damages with interest on the basis of unlawful and/or unfair dismissal. The Claimant Ruben Requena was a Career Public Officer and Immigration Officer with over nine years standing in the Public Service at the time of his dismissal.

2. The Defendant, the Public Services Commission, is the Commission established under Section 105 of the Belize Constitution charged with the discipline and regulation of public officers.
3. The Claimant contends that the Defendant assumed jurisdiction without having a proper complaint before them, and that the procedure followed by the Defendant was improper, thereby unfairly dismissing him. The Claimant also contends that the Defendant violated principles of natural justice for not informing the client of his disciplinary hearing, and not giving him proper reasons for his dismissal.
4. The Defendant contends that the Claimant's misconduct amounted to abandonment of his post and that pursuant to the Public Service Regulations, the Claimant was properly dismissed.

Issues

5. These are the issues to be determined by the court:
 - i. *Whether the complaint of misconduct was properly before the Defendant;*
 - ii. *Whether the Defendant satisfied itself in accordance with Regulation 81(2) of the Regulations that the actions of the Claimant prima facie amounted to abandonment of service;*

- iii. *Whether the dismissal of the Claimant was unfair in view of the Defendant's failure and/or refusal to follow the regime as set out in Part 10 of the Regulations;*
- iv. *Whether the dismissal of the Claimant was unfair in view of the Defendant's failure and/or refusal to abide by the principles of Natural Justice;*
- v. *Whether, in the round, the manner in which the dismissal of the Claimant was carried out amounted to a deprivation of the Claimant's Constitutional right of protection of the law; and*
- vi. *The quantum of damages due to the Claimant, if the Court finds in favour of the Claimant*

6. Chronology of Events

<u>Date</u>	<u>Events</u>
2009	Requena joins the Public Service of Belize as an Immigration Officer Grade III attached to the Immigration and Nationality Department.
August 2015	Requena is assigned to the Philip S.W. Goldson International Airport ('PGIA') as an

Immigration Clerk Grade 1 stationed at the
Departure Area.

29th July, 2016

Director of Immigration informs Requena
that he has accumulated 50 working days'
vacation leave.

September 7th, 2016

Requena submits an application for vacation
leave to Edgar Cano, Port Commander of the
PGIA, seeking short leave from September
12th to September 23rd.

Short leave is approved.

September 9th to 23rd, 2016

Requena out on approved short leave and 3
days sick leave from September 9th to 11th,
2016.

October 5th to 9th, 2016

Port Commander out of office on short
leave.

October 6th, 2016

Requena is assisted by the Assistant
Administrator in receiving salary advance.

Request is made on this same October 6th, 2016 and by email sent to Port Commander seeking approval on application for long leave for medical reasons from October 3rd to 31st, 2016.

October 11th, 2016

Port Commander responds to email stating that he was unaware of the application but approved the leave, noting that the Claimant had already taken leave for the same medical reasons.

November 1st, 2016

Requena is expected back at work but did not appear. Letter sent the following day to the Director of Immigration and Nationality Services informing her of Requena's failure to report to his workstation.

November 7th, 2016

CEO of Immigration informs Requena by letter of the Department's recommendation to the Ministry of Public Service for his

dismissal and the cessation of his salary with effect from the 1st November, 2016.

November 9th, 2016

Memorandum P/135/16 Vol. III sent to Defendant lodging complaint of alleged misconduct against the Claimant, and recommending dismissal. Five attachments are attached to the memorandum.

December 7th, 2016

The Public Service Union sent a letter to the Public Services Commission on behalf of Mr. Requena. The letter stated Mr. Requena's version of events.

December 8th, 2016

Message No. 838 of 2016 submitted to the Public Services Commission for deliberation on the Claimant's dismissal.

January 10th, 2016

A meeting was held with representatives of the Union and the Director of Immigration and Nationality Services to determine if Mr. Requena's version of the events is true.

At this meeting it was determined that the Claimant had never applied for an additional 20 days of leave. Mr. Requena did not attend this meeting.

January 17th, 2017

The Secretary of the Commission directs that Requena be allowed to access his workplace and his salary reactivated.

January 30th, 2017

The Public Service Union sent a letter to the Public Services Commission withdrawing its support for Mr. Requena.

February 9th, 2017

The Public Services Commission deferred the decision on Mr. Requena's dismissal again. Message No. 833 of 2016 is presented to the Public Services Commission.

February 17th, 2017

Information Paper 8 of 2017 submitted to the Public Services Commission.

February 27th, 2017

The Commission informs Requena by letter that he has been dismissed from the Public Service with effect from the 28th February, 2017 in accordance with Regulation 85(3)(a), and that he has the right of appeal against its decision.

5th to 6th December, 2018

Trial of the instant claim takes place before Madam Justice Arana.

Legal Submissions on behalf of the Claimant

7. Whether the complaint of misconduct was properly before the Defendant

Mr. Lindo submits on behalf of the Claimant that the Chief Executive Officer (CEO)'s recommendation to the Ministry of the Public Service that the Claimant be dismissed is in stark contravention of the Belize Constitution (Public Service) Regulations 2014 ('the Regulations') as the CEO of the Ministry of Immigration stated in her recommendation that Requena was in violation of Regulation 82(1)(c) of the Regulations. He cites Regulation 81(2)(c) which states that the CEO or Head of Department shall apply the procedure set out in subregulations (3) and

(4). While the Ministry under Regulation 4(3) shall serve as secretariat to the Commission, this does not mean and does not absolve the CEO of the Ministry of Immigration from acting procedurally improper by recommending the dismissal of the Claimant. It is therefore submitted that the recommendation was *ultra vires* the Regulations, and therefore rendered the Commission devoid of any jurisdiction to exercise its power of discipline over the Claimant.

8. *Whether the Defendant satisfied itself, in accordance with Regulation 81(2) of the Regulations, that the actions of the Claimant, prima facie, amounted to abandonment of service.*

Regulation 82(1) (c) reads as follows:

“A minor misconduct is any of the following:

(a) ...

(b)...

(c) failure, without good and sufficient cause, to report for duty at the allotted time and place or is absent without proper authorization.”

Mr. Lindo contends on behalf of the Claimant that Regulation 81(2) states that the CEO or Head of Department **shall** apply the procedure set out in sub-regulations (3) and (4).

Regulation 81(2):

(2)“Where an act of misconduct is alleged to have occurred and the Chief Executive Officer or head of department considers that disciplinary measures may be necessary, the Chief Executive Officer or head of department shall apply the procedure set out in subregulations (3) and (4).

(3) For the purpose of subregulation (2), the following procedure shall apply -

(a) The Chief Executive Officer shall submit the case of alleged misconduct to the Commission within two weeks from the date the alleged misconduct occurs;

(b) The Commission shall examine the case and based on the result of the examination, issue a letter to show cause to the relevant public officer;

(c) The person affected shall respond to the letter to show cause within two weeks from the date of receipt of the letter to show cause;

(d) The Commission shall, on receipt of the response under paragraph (c), examine the response and determine whether a hearing is necessary;

(e) Where the Commission determines that a hearing is necessary, the Commission shall -

i. set a date for hearing within seven days from the date of receipt of the response;

ii. Convene the hearing and determine the case; and

iii. Convey the decision to the public officer affected.

(4) The procedure under subregulation (3) shall -

(a) ensure the rights of all parties are protected;

(b) be consistent with the conditions of employment;

*(c) **begin with an investigation;***

(d) **ensure that the public officer affected receives notice and details of the case under consideration;**

(e) **guarantee all parties the right to be heard;**

(f) **guarantee all parties the right to representation;**

(g) **ensure unbiased decision-making;**

(h) *guarantee all parties the right to appeal; and*

(i) *ensure that the process is completed within sixty days.”*

(emphasis added)

8. Mr. Lindo submits that the legislative purpose of Regulation 81(3) and (4) is, *inter alia*, to ensure that the Commission must first satisfy itself that there is a *prima facie* case made out against the public officer before the levy of a formal charge against the public officer. This is manifest by the language of sub-regulation 81(3)(a) and (b) which provide that the CEO must first submit their complaint to the Commission. Thereafter the Commission must make a preliminary finding as to the veracity of the complaint and only after it has been satisfied that a *prima facie* case has been made out, it may then decide to issue a ‘show cause’ letter to the

public officer. In support of his contention that the Claimant had not abandoned his post, Mr. Lindo cites Lord Hughes in ***Seetohul v. Omni Projects Ltd.*** (2015) UKPC 5. In delivering the decision of the Board, Lord Hughes said:

“7. ...

*In our view, a distinction must be drawn between abandonment of work and absence from work. Absence is a mere fact independent of any mental element. Abandonment, on the contrary, implies a specific intent - viz the intent of the worker not to resume work and to treat the agreement as dead. On such a view, there is no conflict between the 2 enactments. **To plead abandonment of work implies saying two things: first, the worker was absent from work and second, he intended not to resume work.** The effect of section 7(3) is that the employer will not be allowed to prove that specific intent unless he has first taken steps to remove any possible controversy - viz by calling on the worker to resume work. But section 7(3) in no way debars the employer from proving the mere fact of absence from work. He may do so if, for instance, it is relevant to a defence based on*

section 6(5). We hold that in this case the defence was not abandonment of work, but absence from work coupled with a failure to notify illness.”

9. Mr. Lindo submits that in the case at bar, the Commission needed to have satisfied itself of two elements in order to discipline the Claimant on the offence of abandonment of post. First, by finding that he was absent from work and secondly, by finding that the Claimant did in fact possess the mental element of not planning to return to work. There is no evidence of any finding of such an intention by the Commission. No one appeared before the Commission to testify; the Claimant was not invited to make any representations or to appear before the Commission. Yet Mr. Requena was dismissed for abandonment of his post. It is therefore submitted that the Commission failed to adhere to s. 81(3)(b) by not making a preliminary decision as to whether in fact the Claimant had in fact abandoned his post, or whether he was absent from work without proper authorization.

10. *Whether the dismissal of the Claimant from the Public Service was unlawful in view of the Defendant’s failure and/or refusal to follow the regime as set out in Part 10 of the Regulations?*

Mr. Lindo argues on behalf of the Claimant that Part 10 of the Regulations sets out a clear and structured regime for the Commission to follow in exercising its Constitutional power of discipline over public officers. Sub-regulation 81(4) provides that the Commission ought to, when exercising its powers under sub-regulation (3):

“(a) Ensure the rights of all parties are protected;

.....

(d) Ensure that the public officer affected receives notice and details of the case under consideration;

(e) Guarantee all parties the right to be heard;

(f) Guarantee all parties the right to representation;

(g) Ensure un-biased decision-making;...”

Regulation 87 further provides that:

“87. The Commission shall not be bound by the rules of evidence usually applicable to proceedings in a court but the Commission shall -

(a) adhere to the principles of natural Justice;

(b) Act independently, impartially and seriously;

(c) conduct its proceedings in a timely manner; and

(d) adjudicate matters before it in accordance with the principles of ‘on the balance of probabilities.’”

Mr. Lindo contends on behalf of the Claimant that the Commission, upon receipt of a complaint against a public officer ought to act in a manner which satisfies the legislative intention of these regulations. The evidence shows that the only notification the Claimant received about disciplinary action, pursuant to regulation 81(1)(d) was the letter from the CEO informing him that recommendation for disciplinary action to be taken was being forwarded to the Commission. Mr. Lindo further argues that there was an egregious departure from the regime under Part 10 of the Regulations where the Commission requested a copy of the Claimant’s file from the Ministry of Immigration highlighting purported infractions of the Regulations dating back to the year 2015 in direct contravention of regulation 81(3)(a) which clearly provides a limitation period of two weeks. The Commission also decided that the Claimant was not entitled to the benefit of the Regulations by:

- a) Depriving him of the opportunity to show cause why he should not be dismissed;

- b) Depriving him of the opportunity to confront his accusers;
- c) Depriving him of the opportunity to make representations before the Commission;
- d) Depriving him of an unbiased and independent decision

Mr. Lindo argues that the effect of non-compliance with these regulations involves an examination of what the framers of the Regulations intended to achieve by setting out the disciplinary regime as promulgated in Part 10 of the Regulations. The purpose of this regime is to ensure that public officers subject to discipline be afforded a hearing and the opportunity to rebut any allegation of wrongdoing against them. It is therefore submitted that the dismissal of the Claimant involved a series of material breaches and a wholesale disregard by the Commission to follow their own Regulations, neither of which can be said to have been *de minimis* when the Claimant's fate in the public service hung in the balance. The Commission's decision to dismiss the Claimant was therefore *ultra vires* the Regulations.

11. *Whether the dismissal of the Claimant was unfair in view of the Defendant's failure and/or refusal to abide by the principles of Natural Justice?*

Mr. Lindo argues that when statutory power is being exercised, especially one concerning dismissal, the person affected must be afforded a fair hearing in all the circumstances. He cites Lord Mustill in ***R v. Secretary of State for the Home***

Department ex p Doody:

“My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well-known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an

opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will often require that he is informed of the gist of the case which he has to answer.”

Mr. Lindo submits that in the case at bar the Claimant was deprived of any hearing before the Commission notwithstanding the fact that there was no impediment which prevented the Commission from inviting the Claimant to make representations prior to a decision being made. The evidence is that that the Commission already made up its mind that the Claimant would have been dismissed from the public service as made patently clear by their correspondence dated

*“Please note that **the Commission deferred the dismissal of Mr. Requena, Temporary Immigration Clerk 1, until the next meeting.**”*
(emphasis added)

In addition there is an admission that the decision to dismiss the Claimant on the 23rd February, 2017 was a result of him ‘*abandoning his post and his*

previous attendance misconduct.' There is no mention about any prior attendance misconduct and even if there was, Mr. Lindo argues that the Commission would not have had the jurisdiction to entertain such a charge by virtue of the limitation period under sub-regulation 81(3)(a) of the Regulations. He further submits that the concept of procedural fairness, or natural justice, requires that persons that will be affected by administrative decisions be given adequate notice of a disciplinary hearing or decision to allow them to:

- a. Make representations on their own behalf;
- b. Appear at the hearing; and
- c. Effectively prepare their own case to answer the case that they have to meet.

The Claimant accepts that in a case of abandonment of service a hearing may not be possible as the Commission might be unable to locate the public officer. However, the facts of the instant case do not support abandonment as the Claimant returned to work. Mr. Lindo contends that the instant case concerns whether or not the Claimant was on approved leave as a result of following what appears to be a flawed procedure. He points out that the Commission went on to overrule the decision of the Director of Immigration

to suspend the Claimant, as admitted by the Director in cross-examination, and directed the CEO of the Immigration and Nationality Department in Exhibit "MC12" that "*Mr. Requena be allowed to access his working place until a final decision is made by the Public Services Commission.*" Mr. Lindo contends that the act of allowing the Claimant back to his workplace, thereupon estopped the Commission from proceeding with the charge of abandonment of service against the Claimant. The mental element required to prove abandonment fell away when the Claimant was allowed to return to his workplace and assigned to a different unit in the Immigration Department.

12. Mr. Lindo further submits that the failure and/or refusal of the Commission to afford the Claimant a hearing before the decision to dismiss him from the public service violated his entitlement to natural justice, that is, the right to be heard before the Commission. Furthermore, the Commission is under a common law duty to afford the Claimant with reasons for its decision. This requirement is not limited to a bare incantation of the regulations which he allegedly violated, but rather, as a further requirement of natural justice, intelligible reasons which would allow him to advance an appeal of the decision made. In support of this submission, Mr. Lindo cites Legall J. in ***Maria Guerra v The AG*** Supreme Court

Claim No. 371 of 2010. After considering the common law position and the Powers of the Commission, Legall J. said:

“The Commission has wide powers under the regulations. These powers include discipline of public officer such as dismissal, retirement and suspension from duty. The Council has the power to dismiss appeals against dismissals. Thus both bodies effectively have the power to take away the right to work from a public officer. This power can adversely affect the livelihood of the individual. The individual ought to know the reasons of the Commission and the Council for taking away his livelihood and the right to work as a matter of fairness and justice. ...

22. The Commission and the Council are not required to give their reasons in a form similar to a judgment of a court. In giving their reasons for a decision, a brief statement of the facts, and a concise statement of the way in which they arrived at their decision are enough. See **Ex parte Cunningham** above. The point to be borne in mind is to give to the claimant, and resulting possibly along the process to the court, a brief idea of the thinking of the Commission and the Council in arriving at their decisions in the matter before them. The giving of reasons for decisions by public authorities affecting the right to work of individuals, is not only

fair and just, but goes to some extent to prevent notions of arbitrary, or discriminatory, or abusive or a biased exercise of power by the authority concerned, which in turn engenders public confidence in the system of administrative justice. In my view, the failure by the Commission and the Council to give reasons for their decisions breached the claimant's right to be heard." (emphasis added)

Mr. Lindo repeats the submission that the manner in which the dismissal of the Claimant was carried out by the Commission, *inter alia*, flouting the strictures of its own Regulations resulted in a wholesale disregard of the Claimant's entitlement to natural justice and rendering the decision unfair in the circumstances.

13. Mr. Lindo indicated that he abandons the final ground, i.e., whether in the round the manner in which the dismissal of the Claimant was carried out amounted to a deprivation of the Claimant's Constitutional Right of protection of the law.

14. On the issue of quantum of damages, Mr. Lindo submits that if the Court finds in favor of the Claimant, then the Claimant would be entitled to the remuneration that would have attached to his office. He cites Lord Bingham of

Cornhill in delivering the judgment of the Board of the Privy Council in ***Dr. Astley McLaughlin v His Excellency the Governor of the Cayman Islands*** [2007]

UKPC 50:

“It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap) the dismissal is, as between the public authority and the office holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal...” (emphasis added).

In conclusion, Mr. Lindo says that as the Claimant was earning \$3,083.55 monthly or \$37,002.63 annually, he is entitled to his full remuneration as from the 28th day of February, 2017 (being the effective date of dismissal) until judgment.

Legal Submissions on behalf of The Defendant

15. Ms. Briana Williams, Crown Counsel, submits on behalf of the Defendant that the applicable law in the instant case would be found in Part 10 of the Public Service Regulations 2014 at Regulation 81, 82(1)(c), (2)(r)(i) , 84, 85(3)(a) and Regulation 219 under Part 20.

“81.(1) A public officer who, without reasonable excuse, does an act or omission which –

(a) amounts to failure to perform in a proper manner any duty

assigned to him including discourtesy to members of the public;

(b) contravenes any provision of these Regulations governing the conduct of public officers; or

(c) is prejudicial to the efficient conduct of the public service, or bring the public service into disrepute,

is liable to disciplinary proceedings for that misconduct in accordance with the provisions of this Part.

(2) Where an act of misconduct is alleged to have occurred and the Chief Executive Officer or head of department considers that disciplinary measures

may be necessary, the Chief Executive Officer or head of department shall apply the procedure set out in subregulations (3) and (4).

(3) For the purpose of subregulation (2), the following procedure shall apply

–

(a) the Chief Executive Officer shall submit the case of alleged misconduct to the Commission within two weeks from the date the alleged misconduct occurs;

(b) the Commission shall examine the case and based on the result of the examination, issue a letter to show cause to the relevant public officer;

(c) the person affected shall respond to the letter to show cause within two weeks from the date of receipt of the letter to show cause;

(d) The Commission shall, on receipt of the response under paragraph (c) examine the response and determine whether a hearing is necessary;

(e) Where the Commission determines that a hearing is necessary the Commission shall –

(i) set a date for hearing within seven days from the date of receipt of the response;

(ii) convene the hearing and determine the case; and

(iii) convey the decision to the public officer affected.

(4) The procedure under subregulation (3) shall –

(a) ensure the rights of all parties are protected;

(b) be consistent with the conditions of employment;

(c) begin with an investigation;

(d) ensure that the public officer affected receives notice and details of the case under consideration;

(e) guarantee all parties the right to be heard;

(f) guarantee all parties the right to representation;

(g) ensure unbiased decision-making;

(h) guarantee all parties the right to appeal; and

(i) ensure that the process is completed within sixty days.

82. (1) A minor misconduct is any of the following –

.....

(c) failure, without good and sufficient cause, to report for duty at the allotted time and place or is absent without proper authorization;

.....

(2) A major misconduct is any of the following –

.....

(r) any of the following acts committed by a public officer as a second offence –

(i) unauthorized absences and failure to satisfactorily correct behaviour after such absences are brought to that public officer's attention;

(ii) any case of tardiness or unauthorized absence where such case is made more serious due to the attendant circumstances or the penalty made more severe in consideration of the seriousness of the misconduct;

84. (1) *Where a public officer commits an act of major misconduct, the Chief Executive Officer shall notify the public officer of the grounds for disciplinary action and request the public officer, to explicate himself, within ten days of the date of the request.*

(2) Where the public officer fails to respond to the notice under subregulation (1) or acts in such a manner as to obstruct the process, the Chief Executive Officer shall report the matter to the Commission accordingly.

(3) The Chief Executive Officer shall, immediately, forward to the Commission a report containing the following information –

(a) the grounds for disciplinary action;

(b) the public officer's explanation; and

(c) such other reports and documentary evidence relevant to the case.

(4) The Commission may with assistance from the Chief Executive Officer cause further investigation into the matter within ten days from the date of receipt of the report under subregulation (3).

(5) Where the Commission is informed of an alleged act of major misconduct by a public officer and the Commission is of the opinion that it is in the public interest or the reputation of the public service so requires, in accordance with regulation 92, the Commission may suspend the public officer from duty with full pay for sixty days in the first instance and an additional thirty days thereafter if necessary.

(6) The public officer may request to appear before the Commission with a union representative, an attorney-at-law or any other person required for assistance at the hearing and the Commission shall approve such request.

(7) If any witnesses are called to give evidence, the public officer, his union representative, attorney-at-law or such other person shall be entitled to be present and to put questions to the witnesses.

(8) No documentary evidence shall be used against the public officer unless he has previously been supplied with a copy thereof or given access thereto.

(9) Subject to the findings pursuant to subregulation (4), (7) and the procedures under regulation 81, the Commission may –

(a) dismiss the case;

(b) impose a penalty under regulation 83(5)(b);

(c) demote the public officer;

(d) dismiss the public officer;

(e) retire the public officer in the public interest; or

(f) impose some other appropriate penalty as specified in regulation 85.

(10) A procedure under this regulation, where practicable, shall be concluded within ninety days from the date of notice under subregulation (1).

.....

85.

(3) A public officer may be dismissed –

(a) if proven to be absent from duty for five consecutive days without permission from his supervisor or head of department, from the first day of absence; or

.....

219. A public officer who is absent from duty without permission for five consecutive working days or more shall be deemed to have abandoned his post.”

Ms. Williams submits on behalf of the Defendant that the decision to dismiss the Claimant was done fairly and properly in accordance with the Belize Public Service Regulations 2014 (“the Regulations”). It is submitted that the role of the court is to exercise its supervisory jurisdiction over the Defendant to determine whether or not the procedure applied, which resulted in the decision to dismiss the Claimant was fair, and properly done in accordance with the law.

16. Addressing the first issue, Ms. Williams contends that while the Claimant alleges that the recommendations submitted in the memorandum of November 9th, 2016 was *ultra vires* as the Defendant should have ensured that there was merit to the complaint, Ms. Williams argues that the memorandum of November 9th, 2016 was merely a recommendation based on the Claimant’s actions. The wording of the memorandum does not make it *ultra vires* much less renders the Defendant devoid of jurisdiction. The requirement of regulation 81(3)(a) is that the case of the alleged misconduct is submitted, which was done.

17. In response to the second issue where the Claimant alleges that there was a failure by the Defendant to establish a *prima facie* case that amounted to abandonment of service, Ms. Williams submits that it is completely unreasonable to expect the Defendant to determine if there was mental element of (the Claimant) not wanting to return. Learned Counsel says that paragraph 7 of the Seetahal case cited by the Claimant can easily be distinguished by paragraph 9 in the same case, where the Board of the Privy Council opined:

***“In the Board’s view, however, the distinction made in Aukloo is well founded in the statutory provisions, which must, as the Supreme Court held, be reconciled one with the other. Section 30(4) is concerned with a repudiatory breach, that is to say one which brings the contract to an end, whether the employee wishes to do so or not. Conversely, section 32(4) is concerned with an employee who deliberately abandons his job, subjectively intending to do so. There may be an overlap in some cases between the two situations, but they are not the same. An employee may well commit a repudiatory breach by way of unauthorized absence for several days but nevertheless hope that he will get away with it and remain in his employment-indeed that seems to have been the situation*”**

of the present plaintiff. Nor is it correct that abandonment is necessarily absence coupled with intention not to return. That is only one form of abandonment, which could equally involve no absence at all, for example where an employee denounces his job in the course of a heated argument with his employer. That there should be a requirement for a statutory safeguard of a written ultimatum to the employee in such a case makes perfectly good sense, but it does not follow that the statute imposes that requirement also in the case of an employee who commits a repudiatory breach, and it does not.”

Ms. Williams contends that the case at bar is similar to the ***Seetahal*** case in that the Claimant attempted to get away with unauthorized absences.

18. The third issue is “*Whether the dismissal of the Claimant from the Public Service was unlawful in view of the Defendant’s failure and/or refusal to follow the regime as set out in Part 10 of the Regulations.*” In response to this issue, Ms. Williams argues that it is reasonable to presume that a show cause letter was not necessary, since the Claimant had already received a letter dated 7th November, 2016 sent by the CEO of the Ministry to him, stating the exact details of his alleged misconduct, which he acknowledges he was in receipt of. Learned

Counsel further submits that even though the Defendant had not issued a 'show cause' letter to the Claimant, the Public Service Union sent a letter to the Defendant dated 7th December, 2016 (hereinafter "the Union letter") on the Claimant's behalf offering his version of the events, which the Claimant admitted under cross-examination he was aware of. The Defendant argues that this letter amounts to the Claimant showing cause. Ms. Williams submits that the Claimant does not allege that he did not authorize the letter, or that the information in that letter was incorrect; the contents of that letter still remain the Claimant's justification. Reference is made to ***Bullard v Public Service Commission*** BS 2001 SC 45 where Longley J. held:

"Third, in any event , it seems to me that the argument must fail for in context no reasonable person reading the letter would come to any other conclusion than that the letter was a show cause letter requiring him to explain his absence from duty for almost eight months otherwise face disciplinary action which might include dismissal. And while I would agree that care must be taken in drafting these charges, there is no prescribed format for doing so, and the letter in question, to my mind, sufficiently complies when considered in context with the surrounding circumstances."

Ms. Williams also submits on behalf of the Defendant that the Court should take into account the alleged misconduct of the Claimant, as this was not the first reported incident of the Claimant having attendance issues. The alleged misconduct therefore amounts to a major misconduct of abandoning his post. The Claimant claimed that he needed time for medical reasons, but he admits that he did not travel for the said purpose. He also did not submit a medical certificate or anything to substantiate his alleged necessary medical attention. Ms. Williams contends that the procedure set out in Regulation 84 should therefore apply, and Regulation 84(1) was done by the 7th November letter, Regulation 84(2) and (3) was done by the 9th November letter. Regulation 84(4) gives the Defendant the discretion to carry out further investigations dependent on the information received in the report. Regulation 84(5) was addressed when the Defendant informed the Ministry to allow the Claimant to return to his workplace until his matter was properly disposed. Regulation 84(6) was never done by the Claimant, but instead he chose to have the Union letter sent to the Defendant.

19. On the next issue as to whether the dismissal of the Claimant was unfair in view of the Defendant's failure and/or refusal to abide by the principles of natural Justice, Ms. Williams submits that it was within the Defendant's power under

Regulation 81(3)(d) to determine that a hearing was not necessary upon receipt of the Union letter. That Union letter gave a response to the allegations of misconduct by the Claimant; a hearing was also not needed due to the Claimant offering a poor excuse for failing to report to his work station, therefore amounting to the Claimant abandoning his post. Learned Counsel relies on ***Rees and Others v. Crane*** [1994] 1LRC 57 where it was determined that an oral hearing was not necessarily the only way the Defendant could be heard, but he was not treated fairly as he was suspended before being heard. This is not what happened in the case at bar, since it was on the Defendant's instruction that the Claimant was allowed back to work pending a decision. It is submitted that while a hearing was not held, the Claimant was treated fairly and had an opportunity to be heard when the Union letter was sent on his behalf. Full consideration of the letter was given by the Defendant, which resulted in a request for further investigations. The Claimant opted not to be present during those further investigation and alleges that he knew nothing of the meeting that occurred on January 10th, 2017. Learned Counsel cites ***Froylan Gilharry d.b.a. Gilharry's Bus Line v Transport Board*** BZCV2016/001 where Justice Wit held *inter alia* that:

“34. There are no rigid or universal rules as to what is needed to be procedurally fair. What is fair in relation to a case, depends on the circumstances of that case.

35. The primary consideration in deciding whether there is a right to be heard in a particular instance is fairness. Moreover, the question whether there is a right to be heard in an administrative process may be subsumed in the broader question of whether the course of action adopted by the decision-maker was fair. But what is fair? It is a very broad concept that might require some mapping exercise in the field of administrative law, for example, by focusing on principles of proper and fair administration, such as duty to apply due care when preparing a decision or the principle of proportionality.”

Adopting the reasoning of the CCJ in ***Froylan Gilharry***, the Defendant contends that there was procedural fairness in this case based on the circumstances. The complaint against the Claimant was properly lodged against him, and caused him to seek representation from the Public Service Union. The Union letter sent on the Claimant’s behalf allowed for him to show cause and be heard. Dismissal was more than fair considering that this was not the first time the Claimant had

failed to report to work, and he offered a poor excuse as to why he did not ensure for further investigation. The Union rescinded their representation of the Claimant.

20. In answer to the Claimant's contention that the Defendant had a common law duty to give reasons for its decision, Ms. Williams says that listing the sections of the Regulation was sufficient in offering reasons, as held by this court in ***Marlon Hernandez v. The AG*** Claim No. 769 of 2010. In the instant claim, the letter sent to the Claimant dated 23rd February, 2017 specifically states the sections contravened which are Regulation 219; Regulation 85(3)(a) therefore allowed for his dismissal. The reasons are not of a complex nature. The Claimant was found to have abandoned his post as he did not report to work on 1st November, 2016, and he did not have proper authorization to have done so. The Claimant did not properly apply for long leave and failed to ensure that he had the necessary approval, but still proceeded on leave for medical attention which he has not received to date. Ms. Williams argues that it is important to note that the Claimant never denied not reporting to his workplace and makes no attempt to justify his reasons for not doing so. It is also important to note that the Claimant worked at the international airport where time and scheduling are of the utmost importance. Reliance is placed on

Callendar Widmark v. Commissioner of Police (2001) 63 WIR where a police officer failed to report to duty and it was not until he was charged with illegally withdrawing from the Police Force that he offered an excuse with medical certificates as to why he did not report to work. It was held that the officer did not have a lawful excuse for failing to report, since he did not have the necessary permission. Chang JA in dismissing his appeal stated thus:

“Since an inspector, subordinate officer or constable is deemed to have illegally withdrawn from the Police Force under s 37A(1)(b) only after he has omitted or failed to proffer a lawful excuse for his unauthorized absence from duty for twenty-four hours or more, It must necessarily mean that he must be afforded a reasonable opportunity to proffer a lawful excuse after the expiry of the twenty-four hours of unauthorized absence from duty. In terms of time, a reasonable opportunity must depend on the circumstances of the particular case. Since a dishonest excuse is no excuse at all and an unlawful excuse is also no excuse at all, a lawful excuse must necessarily mean an excuse which is both honest and reasonable in the circumstances of the particular case.

Ultimately, a court of review can finally determine whether the inspector, subordinate officer or constable has been afforded a reasonable opportunity of proffering an excuse and whether the excuse, if proffered, can be viewed as reasonable.

Nothing in s 37A(1)(b) inclines me to the view that anything more than a reasonable opportunity to proffer an excuse is required to satisfy the requirements of natural justice. In the instant case, the appellant was afforded a reasonable opportunity of proffering an honest and reasonable excuse. Bearing in mind the duration of his unauthorized absence from duty, the excuse of illness which he proffered by way of medical certificates could not have been viewed as reasonable, even if honest, since the duration of his illness did not cover the extensive duration of his absence.

The appeal is therefore dismissed.”

Ms. Williams submits that in the instant claim the Claimant similarly did not have a lawful excuse as he failed to secure the proper authorization from his Port Commander, and has been unable to sufficiently verify that he took long leave for his stated purpose.

In conclusion, Ms. Williams states that on a balance of probabilities, an ordinary employer would find that the Claimant having been a public servant for almost eight years, exhibited a complete disregard for the rules and procedure established for obtaining long leave, so dismissal was more than warranted. There was no prejudice or disadvantage to the Claimant in any way, which is evident by the initial representation the Claimant had in the Union letter, which resulted in him showing cause and being heard. The Claimant was also invited to be a part of further investigations, where he would have had a second opportunity to state his version of events, but he chose not to attend. There was absolutely no unfair treatment to the Claimant, as after he was heard he was given reasons for his dismissal and informed of his right to appeal. The Claim should therefore be dismissed in its entirety, and costs awarded to the Defendant to be paid by the Claimant.

Decision

21. I wish to thank Counsel for the Claimant and the Defendant for their submissions which have been invaluable in assisting this court in determining this matter. Having reviewed all the evidence in this case, and considered submissions filed on behalf of both parties in this claim, I am of the view that the Claimant has established his case on a balance of probabilities. The

Defendant on its own admission failed to adhere to the regulations which are mandatory in governing the discipline of public officers. I fully agree with Mr. Lindo's submissions that the decision of the Commission was unfair and should not be allowed to stand. In adhering to the regulations with regard to the basic requirement of issuing a 'show cause' letter under Regulation 81(3)(b) to the Claimant, this failure is a total breach of the Regulations designed to protect the rights of public officers. I must say that I find it untenable that a public officer who, on January 29th, 2014, had accumulated so many days leave that he was told by the Chief Executive Officer that he was obligated to take leave (or he would lose that leave) was in fact terminated from his job on February 27th because he took (unauthorized) leave. I refer to the letter Exhibit "RR1-2" informing Mr. Requena that he is entitled to 50 days leave which are the maximum number of days allowed under the Public Service Regulations. I also find that it was unacceptable that the Commission held a disciplinary hearing and made a decision to terminate the Claimant without first inviting the Claimant to that hearing and giving him an opportunity to be heard, thereby failing to abide by the principle of Natural Justice. I believe the Claimant when he said that he submitted his long leave application to the Administrative Assistant at the same time that he applied for his salary advance. I find that

there was a proper complaint of misconduct before the Commission as the evidence shows that the Claimant was in fact absent from his post without leave. I agree with Ms. Williams that the Claimant as a Public Officer of several years standing ought to have known that his leave could not be approved by the Administrative Assistant. He ought to have ensured that his leave was approved before proceeding on long leave. However, I find that there was a failure by the Public Service Commission to follow the strict guidelines set out in the Regulations which govern the discipline of Public Officers. I also take note that this takes entire saga did not occur in a vacuum, as the evidence at trial revealed that the Claimant was battling the serious illness of malignant testicular cancer since 2007. In spite of his illness, the Claimant managed to accumulate 50 working days of vacation leave as of 29th February, 2016. While I am fully cognizant of the fact that the officer was less than stellar with regard to his behavior on the job, as shown by previous warning letters sent to him, this does not absolve the Commission of its duty to be fair to him. As Mr. Lindo rightly pointed out, under Regulation 81(3)(a) the Commission is limited in deliberating only on matters that are within the two-week timeframe of the particular complaint that is before them. In other words, previous complaints cannot be used to bolster or justify terminating a public officer. It is not the culmination of

prior conduct, it is the substantiation by evidence of present conduct coupled with intent that should be the basis of the decision. The evidence shows that the Claimant was due back at work on November 1st, 2016. On November 2016, he was told by the Chief Executive Officer Ms. Diana Locke that he was not to return to work until he had heard from the Public Service Commission. In listening to the evidence as it was being given by the CEO and the Port Commander, I could not shake the feeling that they were exasperated with the previous behavior of the Claimant and were fed up with his frequent tardiness to work coupled with his unexcused and unauthorized absences from work in 2015 and 2016. When asked under re-examination by Ms. Williams what was the reason or real motive for recommending the dismissal of Mr. Requena, CEO Locke stated, *"In my fair assessment of him, Mr. Requena was not a model nor was he an Immigration Officer who had the best interest of the department at heart. There were just too many occasions when he failed to be a team player."* It was only upon further prompting by Ms. Williams that the CEO alluded to the point that Mr. Requena had absented himself beyond the time had had requested for leave.

This court is in no way condoning the behavior of Mr. Requena in absenting himself from work or being late to his job and strongly condemns such

disrespect for duties as a Public Officer. However, as Mr. Lindo rightly pointed out, disciplinary procedures should have been taken against Mr. Requena by the Department, as those instances arose in 2015 and 2016. But to take the draconian step of terminating this Public Officer on the fifth day of his absence from work on this occasion is in all circumstances untenable.

So it appeared that when this issue of absence from work arose on November 1st, 2016, it was as if this were the final straw and the opportunity to recommend his dismissal that the Department had been waiting for, thus giving rise to a perception of bias against the Claimant. This is the reason why the Public Service Commission should have strictly applied the safety precautions that are designed to protect the public officers from unfair dismissal by ensuring that the important safeguards on the right to work is protected by adhering to the mandatory steps of the Regulations. Failure to follow the Regulations, especially the failure to hear from the Claimant directly, as well as the failure to provide the Claimant with copies of the documentation supporting the case of alleged misconduct contrary to Regulation 84(8) made the decision to terminate the Claimant unfair. This is so especially in light of the fact that the Union decided at the last minute not to represent the Claimant at the disciplinary hearing, (a situation akin, in my view, to the common occurrence of counsel deciding for

whatever reason no longer to represent a client at trial). In all these circumstances, these breaches of mandatory Regulations resulted in the decision to terminate the Claimant being unfair, and must be set aside.

The relief sought by the Claimant is therefore granted. Damages are awarded in the sum of \$111,007.89 plus Interest pursuant to s. 166 of the Supreme Court of Judicature Act at rate of 6% per annum until date of payment/date of judgment. This is based on the fact that the Claimant earned \$37,002.63 per annum and is entitled to his full remuneration from the 28th February, 2017 (date of dismissal) until date of judgment.

Costs granted to the Claimant to be paid by the Defendant, to be agreed or assessed.

Dated this Wednesday, 18th day of March, 2020

Michelle Arana
Supreme Court Judge