IN THE SUPREME COURT OF BELIZE A.D. 2019

Claim No. 295 of 2019

(MARIA HUTCHINSON CLAIMANT
(
(AND
(
(BELIZE TEACHING SERVICE COMMISSION 1st DEFENDANT/APPLICANT
(
(THE BOARD OF MANAGEMENT OF BELMOPAN
(COMPREHENSIVE SCHOOL 2nd DEFENDANT
(
(AMILCAR UMANA 3rd DEFENDANT
(ALAN SLUSHER
(DR ANGEL CAL
(PASTOR LAUNCELOTT LEWIS
(as members of the Investigative Team
(investigating the Claimant

BEFORE THE HONORABLE MADAM JUSTICE MICHELLE ARANA

Kileru Awich for the Defendants/Applicants

Alistair Jenkins of Magali Marin Young & Co. for the Claimant/Respondent

1. This is an Application to Strike Out Claim. The substantive claim is for several orders and declarations including an order for certiorari quashing the decision of the Belize Teaching Commission (BTC) recommending the retirement of the Claimant as Principal of Belmopan Comprehensive School (BCS) based on the recommendation of the Board of Management of the BCS, as well as an Order reinstating the Claimant as Principal of BCS.

2. The Defendant/Applicant seeks to strike out this Claim on the basis, *inter alia*, that the claim is an Abuse of the process of the court in that the Claimant has failed to exhaust all other remedies available to her prior to seeking judicial review. The Claimant/Respondent resists this Application on the basis that there are exceptional circumstances which ground her claim for judicial review. The court now examines these submissions and renders its decision on the Application to Strike out the Claim.

3. Legal Submissions on behalf of the First and Second Defendants

1. The Claimant was granted leave to commence judicial review proceedings against several decisions of the Defendants in an ex parte Application for leave.

2. On the 1st August 2019 the First Defendant filed a Strike Out Application pursuant to **Rules 26.3(1)(b)** and **26.3(1)(c)** of the **Supreme Court (Civil Procedure Rules 2005** ('CPR'). That Strike Out Application is also being made pursuant to the inherent jurisdiction of the Court to prevent its processes from being abused. There are 4 Grounds for the Strike Out Application. Those 4 Grounds are:

    (1) Judicial Review under **Part 56** of the **CPR** is a remedy of last resort against administrative decisions to which **Part 56** of the **CPR** is applicable.

    (2) The Claimant has failed to exhaust all adequate and alternative remedies available to her under the **Education and Training Act Cap. 36:01** of the Substantive Laws of Belize

Revised Edition 2011 before bringing this claim for judicial review.

(3) The Claimant's failure to exhaust all adequate and alternative remedies available to her under the **Education and Training Act Cap. 36:01** makes the bringing of this claim an abuse of the Court's processes.

(4) Alternative to the above grounds, the Claimant's failure to exhaust all adequate and alternative remedies available to her under the **Education and Training Act Cap. 36:01** discloses the Claimant's lack of reasonable grounds for bringing this claim by way of judicial review.

GROUND 1 Judicial Review under Part 56 of the CPR is a remedy of last resort against administrative decisions

3. Conteh CJ in ***Belize Telemedia Limited Etal v Attorney General of Belize Etal*** Claim No. 464 of 2008 **[TAB 1]** repeated the well-known principle in Administrative Law that permission to commence judicial review under **Part 56** of the **CPR** will be refused or if previously granted, will be set aside if the Applicant has failed to exhaust all other means of adequate alternative remedies open to the Applicant. The learned Chief Justice stated that principle to be equally applicable to claims for other Administrative Orders under **Part 56** of the **CPR**.

4. ***Belize Telemedia Limited Etal v Attorney General of Belize Etal*** **[TAB 1]** was not a claim for judicial review. It was a Claim for declarations under **Part 56** of the **CPR** where the Defendant applied for the claim to be struck out

under **Part 26** of the CPR because the Claimant had not availed itself to the statutory appeal process under the **Income and Business Tax Act** as an alternative remedy to seeking declaratory relief under **Part 56** of the **CPR**. The substantive issues in the claim were in relation to Business Tax assessments. The then Chief Justice stated as a principle applicable both to Applications to commence judicial review and claims for declarations under **Part 56** of the **CPR** the principle that permission to commence judicial review and relief under **Part 56** of the **CPR** will be refused where a Claimant has failed to exhaust a statutory Appeal procedure that could dispose of the matters being sought to be subjected to judicial review. Conteh CJ did so in the following terms[1]:

> *'Although the taxpayer's claim in the instant case is not for judicial review, I think the principle of not allowing a taxpayer to attack an appealable tax assessment, except in exceptional cases, outside of the statutory appeal procedure, should hold as well for other claims, such as the present, where only declarations are sought. I find nothing exceptional or rare in the taxpayer's assessment by the Commissioner of Income Tax of its tax liability to warrant the claim for declarations going forward outside of the statutory appeal procedure under the Act, and what the taxpayer has against the assessments could well be ventilated and resolved within the statutory processes provided for in the Act.'*

[1] *Belize Telemedia Limited Etal v Attorney General of Belize Etal* Claim No. 464 of 2008, SC at para. 45

5. The English Court of Appeal in ***Regina v Panel on Take-Overs and Mergers, Ex Parte Guinness PLC.*** **[1989] 2 WLR 863**[2] **[TAB 2]** has also made it clear that judicial review is a remedy of last resort and did so in the following terms:

   > *'...it is not the practice of the court to entertain an application for judicial review unless and until all avenues of appeal have been exhausted, <u>at least in so far as the alleged cause for complaint could thereby be remedied</u>. The rationale for this self-imposed fetter upon the exercise of the court's jurisdiction is twofold. First, the point usually arises in the context of statutory schemes and if Parliament directly or indirectly has provided for an appeals procedure, it is not for the court to usurp the functions of the appellate body. Second, the public interest normally dictates that if the judicial review jurisdiction is to be exercised, it should be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave to apply should be given.'*

GROUND 1 Submission 1: *The Claimant has failed to exhaust the alternative remedy of appealing to the TSAT.*

6. What is apparent from ***Belize Telemedia Limited Etal v Attorney General of Belize Etal*** **[TAB 1]** and ***Regina v Panel on Take-Overs and Mergers, Ex Parte Guinness PLC.*** **[1989] 2 WLR 863**[3] **[TAB 2]** is that judicial review is

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[2] At 885H
[3] At 885H

a remedy of last resort. A Claimant seeking leave to commence judicial review must have exhausted all statutory appeals and alternative remedies available to him. However, the Court will grant permission to commence judicial review notwithstanding a statutory appeal procedure that is available to a Claimant where it is demonstrated that the statutory appeal would not address and remedy the wrong complained of.

7. The First Defendant humbly submits that the Claimant has failed to exhaust the statutory appeals procedure under the **Education and Training Act**. This is an uncontroversial fact in that the Claimant admits[4] that she withdrew her appeal against the decision of the Teaching Service Commission ('TSC') which she lodged with the Teaching Service Appeals Tribunal ('TSAT'). This fact of the Claimant not using the statutory appeals procedure under the Act and failing to exhaust the available alternative remedy is also repeated in the First Affidavit of Delvitt Samuels at paragraph 12 which is filed in support of this Application.

Ground 2: The Claimant has failed to exhaust all adequate and alternative remedies available to her under the Education and Training Act Cap. 36:01 before bringing this claim for judicial review.

8. **Rule 93(24)** of the **Education (Amendment) Rules 2012 [TAB 3]** provides that the Teaching Service Commission *'may approve disciplinary action pursuant to section 41(3)(f) of the [Education and Training] Act, against a teacher where the following conditions are fulfilled –*

[4] See para 46 of the Claimant's First Affidavit.

> *(a) the Managing Authority provides complete documentation on a case;*
>
> *(b) where due process is evident*
>
> *(c) where grounds for suspension, termination, dismissal or other disciplinary action are supported by the evidence presented; and*
>
> *(d) there is no infringement on a teacher's constitutional rights.'*

Thakur Persad Jaroo v Attorney General of Trinidad &Tobago **[2002] 5 LRC 258 [TAB 4]** and the local Supreme Court judgment of Griffith J in ***Isaac Longsworth v Anglican Diocese of Belize Etal*** Claim No. 63 of 2018 **[TAB 5]**, provide a useful guide as to what constitutes *'due process'* or *'due process of the law.'*

9. The Judicial Committee of the Privy Council in ***Thakur Persad Jaroo*** in interpreting **section 4(a)** of the Trinidad & Tobago Constitution which reads:

> *'It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely—(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law'*

had this to say at paragraph 25 of its judgment in relation to the phrase *'due process'*:

'The police have extensive powers in relation to the seizure and detention of property. But enshrined in the requirement of due process is a declaration of the fundamental guarantee afforded under the Constitution to each and every individual that the powers of the police must be exercised lawfully and not arbitrarily. They exist to protect the interests of society, but their exercise must respect the rights of the individual.'

10. Griffith J at page 24 of her judgement in ***Isaac Longsworth*** stated the following in relation to 'due process':

    'Authorities are legion in public law on the subject of the entitlement of a person whose rights are being determined, to due process, meaning simply, those recognised means by which such a person is to be treated fairly. It will suffice for the Court only to mention a few of such decisions, for not only is this position entrenched in the common law, in the instant case it is expressly incorporated into statute.'

11. The First Defendant humbly submits that the pronouncements as to what constitutes *'due process'* as stated by the Courts in the ***Thakur Persad Jaroo*** and ***Isaac Longsworth*** judgments are not inconsistent with each other. Being treated fairly as described by Griffith J in ***Isaac Longsworth*** **[TAB 5]** is part and parcel of being treated according to the law or being treated *'lawfully and not arbitrarily'* as described in ***Thakur Persad Jaroo*** **[TAB 4].** Conversely, unfair treatment is unlawful and arbitrary.

12. An appeal against the decision of the Teaching Services Commission ('TSC') lies with the Teaching Service Appeals Tribunal ('TSAT'). The Teaching Service Appeals Tribunal is established under **section 19** of the **Education and Training Act. Section 20(1)(b)** of the **Education and Training Act [TAB 6]** defines the TSAT's jurisdiction to hear appeals from decision of the TSC. That jurisdiction is to *'hear appeals against the decisions or determinations of the Teaching Service Tribunal taken or made in the lawful exercise of its functions.'* **Section 20(3)** of the **Education and Training Act** states the TSAT's powers when disposing of an appeal against the decision or determination of the TSC. Under **section 20(3)** the TSAT *'may confirm set aside, modify or suspend the decision under appeal* <u>*or take such other action as it thinks fit.'*</u>

13. In the case at Bar the Claimant was retired in the interest of the profession by the Teaching Service Commission, the First Defendant. Paragraph 46 of The Claimant's First affidavit admits that the Claimant filed with the TSAT, an appeal against the TSC's decision, but that the appeal was withdrawn before it could be heard and disposed of. The reasons given in that same paragraph for the withdrawal of the appeal is that the Claimant was advised that any appeal to the TSAT *'would only be in relation to the findings of fact and the subsequent penalty.'* The First Defendant submits that this is misconceived. The Claimant should not be allowed to continue this Claim for judicial review because of wrong advice or an inaccurate belief as to the jurisdiction and powers of the TSAT when hearing and disposing of an appeal against a decision taken by the First Defendant.

GROUND 2: submission 1: *An appeal to the TSAT is an Adequate Alternative to Judicial Review because the Education and Training Act has not limited an appeal to the TSAT to findings of fact and penalties imposed.*

14. The First Defendant submits that an Appeal by the Claimant to the TSAT against the decisions of the Teaching Service Commission ('TSC') would, if successful, have the effect of granting the Claimant adequate remedies against the decisions which the Claimant seeks to subject to Judicial Review.

15. The Claimant's fixed date Claim implicitly states that the exceptional reason which should cause this Court to permit this claim to continue by way of Judicial Review is the averment that an appeal to the TSAT would only be in relation to the findings of fact and the subsequent penalty imposed against the Claimant and that it would not address the unlawfulness of the entire disciplinary procedure.[5] The First Defendant does not agree with this proposition by the Claimant. An Appeal to the TSAT against a decision by the TSC is a full merits appeal which is not limited to findings of fact and the subsequent penalty imposed against the Claimant.

16. The Legislature in Belize in other Acts dealing with appeals from tribunals and Courts has been specific by using express words whenever the Legislature intends to limit a right of appeal and the scope or grounds of any such appeal. The Legislature has chosen not to limit an appeal from the TSC to the TSAT to findings of fact and the subsequent penalty imposed against the Claimant or any other Appellant similarly circumstanced. Examples of legislation

[5] See para 19 of the Fixed Date Claim Form and para 46 of the Claimant's First Affidavit.

where the Legislature has limited the grounds or scope of an appeal include the **Court of Appeal Act Cap 90 [TAB 7]** and the **Supreme Court of Judicature Act** Cap 91 **[TAB 8]**.

17. The first Example is **section 49(2)** of the **Court of Appeal Act** which reads:

> *'An appeal under subsection (1) of this section may be made on the following grounds,*
>
> *(a) against the acquittal, on any ground of appeal which involves a question of law alone;*
>
> *(b) with the leave of the Court or upon the certificate of the Judge who tried the accused that it is a fit case for appeal against the acquittal, on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court or Judge to be a sufficient ground of appeal.*
>
> *(c) with the leave of the Court, against the sentence passed on conviction on the ground that it is unduly lenient, unless the sentence is one fixed by law.'*

18. A second example where the Belizean Legislature has expressly limited the grounds or scope of an appeal is **section 111** of the **Supreme Court of Judicature Act** which reads:

> *'The following grounds of appeal and no other*[6] *may be taken, namely, that…*

[6] Emphasis Added.

Section 111 of the **Supreme Court of Judicature Act** then goes on to list 12 paragraphs, (a) to (l) expressly stating 12 specific grounds under which an appeal can be made to the Supreme Court of Belize from the Inferior Court. That provision expressly prohibits any other grounds of appeal except the 12 grounds listed in paragraphs (a) to (l) of **section 111** of the **Supreme Court of Judicature Act.**

19. The Appellate Committee of the House of Lords in ***Wiseman v Borneman*** **[1971] AC 297** at **310 [TAB 9]** provides a helpful guide as to how the Courts must treat statutory tribunals set up by the Legislature to make final determinations affecting parties' rights and duties and the implied duty of such Tribunals to uphold fairness and prevent procedural impropriety. Lord Guest in that case had this to say:

> *'It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent upon the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made upon the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly. The dictum of Byles J. in Cooper v. Wandsworth Board of Works*, *14 C.B.N.S. 180, 194 is clear to this effect and has been followed in many subsequent cases.'*

20. The First Defendant humbly submits that an appeal by the Claimant to the TSAT provides the Claimant with not only an alternative remedy, but one which is also palpably superior to any remedy available to the Claimant under **Part 56 CPR** Judicial Review Proceedings. The TSAT is empowered by **section 20(3)** of the **Education and Training Act** when disposing of an appeal to *'set aside, modify or suspend the decision under appeal <u>or take such other action as it thinks fit</u>*[7]. The last of these powers is wide ranging. It empowers the TSAT to take such other action as it thinks fit which indicate the Legislature's awareness that different appeals may raise different circumstances of varying degrees. Whereas relief under judicial review in the context of the case at Bar is limited to certiorari, mandamus, an injunction, restitution or damages. The list of relief under **Rule 56.2(3)** of the **CPR** is exhaustive.

21. By express provision in **Rule 93(24)** of the **Education (Amendment) Rules 2012** ('EAR 2012'), the TSC may approve disciplinary action pursuant to **section 41(3)(f)** of the **Education and Training Act**, against a teacher where amongst other things *'due process is evident.'* It is therefore submitted that an appeal to the TSAT by the Claimant would also address the fairness of the entire process that has led to the Claimant being retired in the interest of the profession by the TSC on the recommendation of the Board of Management of Belmopan Comprehensive School, the Second Defendant. The First Defendant so submits due to the fact that **Rule 93(24)** of the **EAR 2012** requires the TSC to be satisfied that due process is evident in the procedure that has led to the Claimant's matter coming before the TSC. The finding of

[7] Emphasis Added.

due process being evident as required by **Rule 93(24) EAR 2012,** is in fact a determination by the TSC. The TSC has to determine that due process is evident along with the other requirements in **Rule 93(24)** of the **EAR** before the TSC can go on to *'approve disciplinary action* [recommended by the Managing Authority of Belmopan Comprehensive School] *pursuant to section 42(3)(f) of the Act against a teacher.'* **Section 20(1)(b)** of the **Education and Training Act** prescribes the TSAT's jurisdiction on appeal *'to hear appeals against the decisions or determinations of the Commission taken or made in the lawful exercise of its functions.'* It is therefore humbly submitted that the TSAT has jurisdiction to hear an appeal against the fairness of the procedure that has led to the Claimant being retired in the interest of the profession. Secondly, it was open to the Claimant to appeal to the TSAT on grounds articulating that the procedure employed by the First, Second and Third Defendants was unfair and or ultra vires on the basis that the correct interpretation of the TSAT's jurisdiction and the available grounds of appeal is that the grounds of appeal to the TSAT are not restricted to findings of fact and any penalty imposed. The Legislature has not used express words to limit the grounds of appeal as is the case in the **section 49(2)** of the **Court of Appeal Act** and **section 111** of the **Supreme Court of Judicature Act**. An appeal to the TSAT is a full merits appeal which to use the words of Conteh CJ in ***Belize Telemedia Limited Etal v Attorney General of Belize Etal*** **[TAB 1],** would allow the Claimant to have her allegations of ultra vires and procedural impropriety or unfairness to *'be ventilated and resolved within the statutory processes provided for in the Act.'* Such an appeal being a full merits appeal would also allow the alleged cause for complaint of the Claimant to be thereby be remedied within the meaning in ***Regina v Panel on Take-Overs and Mergers, Ex Parte Guinness PLC.*** **[TAB 2]** where the Privy Council

stated that Judicial Review will be unavailable where alternative remedies that can address the complaints of the Claimant have not been exhausted.

GROUND 2: Submission 2: *An appeal to the TSAT is an Adequate Alternative to Judicial Review because the TSAT is under an implied statutory duty to apply fairness.*

22. The First Defendant further submits that an appeal to the TSAT by the Claimant would address any unfairness in the procedure leading to the Claimant's retirement in the interest of the profession because a Statutory duty to apply principles of natural justice is implied in **section 20** of the **Education and Training Act**. The learning in ***Wiseman v Borneman*** **[1971] AC 297** at **310 [TAB 9]** that *'if the statute is silent upon the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied'* is applicable to the case at Bar. **Section 20** of the **Education and Training Act** is silent on the question of procedural fairness or natural justice. There is no express provision in that section or elsewhere in the **Education and Training Act** that is contrary to the implication that natural justice needs to be applied by the TSAT. As such, it is humbly submitted that on the authority of ***Wiseman v Borneman*** the Claimant had an adequate alternative remedy to judicial review of the allegedly unfair decisions reached by the First, Second and Third Defendants. An Application of natural justice principles by the TSAT under the implication made under the rule in ***Wiseman v Borneman*** would effectively address any unfairness of the entire procedure used to retire the Claimant. That would encompass the allegedly unfair manner in which the investigation was carried out, the

allegedly unfair manner in which the Second Defendant arrived at its decision to recommend retirement to the TSC and the allegedly unfair manner in which the TSC arrived at its decision to retire the Claimant.

GROUND 2: Submission 3: *An appeal to the TSAT is and adequate alternative remedy to judicial review because such an appeal would address not only the alleged procedural impropriety and unfairness in the process leading to the retirement of the Claimant, but also any allegation of ultra vires by the First, Second and Third Defendants.*

23. The First Defendant further submits that an obligation on the TSC to determine that due process is evident as required by **Rule 93(24)** of the **EAR 2012** and the full merits appeal available before the TSAT against the determinations of the TSC mean that the TSAT is empowered to decide on questions of unfairness, ultra vires and or irrationality in the appointment of the Investigative Team by the Second Defendant; the compilation of the Investigative Team's Report; the conduct of the hearing before the TSC. A finding of due process being evident is a determination to be made by the TSC. An appeal lies with the TSAT *'against the decisions or determinations of the Commission taken or made in the lawful exercise of its functions.'* See **section 20(1)(b)** of the **Education and Training Act.**

24. Due process according to ***Thakur Persad Jaroo***[8] **[TAB 4]** includes the obligation to exercise a power, statutory or otherwise, *lawfully and not arbitrarily.* In the context of the case at Bar, due process would include the

[8] [2002] 5 LRC 258 at para 25

requirement that the Second Defendant exercises its power to appoint an investigative team in conformity with **Rules 93(6)** and **(7)** of the **EAR 2012.** Therefore, the TSC is required to determine the question whether the Second Defendant's appointment of the Investigative Team was intra vires **Rules 93(6)** and **(7)** of the **EAR 2012** when the TSC is required by **Rule 93(24)** of the **EAR 2012** to determine that due process is evident. In other words, The TSC would have to determine that the Second Defendant lawfully exercised its power to appoint an Investigative Team consisting of the Third Defendants as members of the Investigative Team. The TSC in the same connexion when considering whether due process is evident has to determine whether the appointment of the Investigative Team was arbitrary. All questions of fairness and ultra vires fall under the TSC's statutory duty to determine whether due process is evident amongst other matters in **Rule 93(24) EAR 2012** before going on to decide under **Rule 93(24)** whether or not to approve disciplinary action pursuant to **section 43(1)(f)** of the **Education and Training Act.**

25. The First Defendant therefore humbly submits that an appeal to the TSAT against the determinations of the TSC being a full merits appeal is an adequate alternative remedy to bringing this claim by way of judicial review. The question of whether due process is evident is a finding by the TSC which can be appealed to the TSAT. Due process includes not only the obligation to act fairly and not arbitrarily, but also an obligation of lawfulness in that any decision that conforms with due process must be made lawfully and not ultra vires the authorizing statute. The due process requirement is imposed on the First, Second and Third Defendants in their appointment of an investigative team; the conduct of the investigation; the compilation of the investigative team's report; the hearing before the TSC and the findings of the TSC. The

Claimant had an adequate alternative remedy for the allegations of ultra vires, arbitrariness and procedural impropriety by way of the statutory appeal to the TSAT but chose not to utilize this adequate alternative remedy.

GROUND 2: Submission 4: *The Claimant's Claim is not exceptional so as to warrant a departure from the general rule that judicial review is unavailable where adequate alternative remedies have not been exhausted.*

26. The Privy Council in ***Harley Developments v Inland Revenue Commissioner*** **[1996] STC 440** at **449 [TAB 10]** stated the conditions that need to be satisfied before the Courts depart from the general rule that Judicial Review is unavailable where there is an adequate alternative remedy by way of statutory appeal available to a Claimant. The Privy Council did so in the following terms:

> *'Their Lordships consider that, where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed.'*

27. Abuse of power in the context of judicial review was explained by the English Court of Appeal in ***R v Inland Revenue Commissioners, ex parte Unilever plc and related application*** **[1996] STC 681** at **695 [TAB11]** in the following terms:

> *'Unfairness amounting to an abuse of power' as envisaged in* Preston *and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law*

principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson MR said in R v ITC, ex p TSW*: 'The test in public law is fairness, not an adaptation of the law of contract or estoppel'.*

28. The First Defendant humbly submits that the decisions of the TSC which accepted the recommendation of the Second Defendant to retire the Claimant in the interest of the profession after the TSC determined that **Rule 93(24)** of the **EAR 2012** had been complied with are not illogical, immoral or both, nor do they amount to the TSC acting conspicuously unfair. The Claimant in her Fixed Date claim also does not make any such claim against the TSC. All allegations of unfairness are in relation to the Second and Third Defendants. The Second and Third Defendants did not make the decision to which an appeal lies with the TSAT. The Appealable decision was and is made by the TSC. As such, there is no abuse of power on the part of the TSC. It may however be that the TSC made a finding of fact in relation to **Rule 93(24)** of the **EAR 2012** which may be unsupported by the evidence before the TSC if the Claimant were to succeed in showing that there was no due process due to the alleged breaches by the Second and Third Defendants. This however, does not mean that Judicial Review should be available to the Claimant. She has failed to exhaust an adequate alternative remedy and that bars her from bringing this claim as a claim for Judicial Review given that her case lacks any exceptional feature. An error of fact as to whether due process was evident is a determination which can be appealed to the TSAT. The Claimant

failed to prosecute her appeal. She withdrew it before it could be heard and disposed of by the TSAT. The Claimant has not satisfied the rule in ***Harley Developments v Inland Revenue Commissioner*** **[1996] STC 440** at **449 [TAB 10].** The Claimant has failed to demonstrate that the First Defendant abused it powers.

GROUND 2: Submission 5: *The fact that the time limit for appealing to the TSAT has elapsed and the fact that the Claimant was given incorrect advice by her previous counsel in relation to the appeal to the TSAT are not exceptional features warranting this claim proceeding as a Claim for Judicial Review notwithstanding the failure to exhaust all adequate alternative remedies.*

29. The First Defendant humbly submits that the fact that the time limit for appealing to the TSAT and the fact of incorrect legal advice on the TSAT's jurisdiction and available grounds of appeal does not necessitate this matter proceeding by way of judicial review. The Claimant has a remedy open to her in relation to the incorrect advice which may have resulted in the time limit for appealing to the TSAT expiring. It is open to the Claimant to pursue a claim in Tort against her previous counsel in relation to the incorrect advice. Such claim if proven to be true would provide the Claimant with damages which would make good any default by her previous counsel in giving the Claimant incorrect advice in relation to the TSAT's jurisdiction and the grounds of appeal which the Claimant was open to pursue before the TSAT. In any event leave to commence judicial review is routinely refused where there has been a delay where a claim is not brought within 3 months of the decision complained of. Therefore, the fact that time for appealing to the TSAT may have expired is not exceptional in that the Courts readily refuse

leave to commence judicial review where there has been a delay which the Claimant is at fault; which in turn leaves any claimant who has delayed in filing a claim for judicial review without any remedy. Nothing would be exceptional in the Claimant being left without a remedy because of incorrect advice by her previous counsel. In the case at Bar the Claimant would not be left without a remedy as she has a cause of action against her previous counsel.

Ground 2: Submission 6: *The eleven facts stated by the Claimant as amounting to exceptional circumstances are in fact unexceptional circumstances that cannot cause a Court to allow this Claim to continue by way of Judicial Review.*

30. The Claimant filed and served a Third Affidavit in this claim on Friday 27th September 2019. That Affidavit lists eleven facts which the Claimant urges this Honourable Court to accept as being exceptional so as to permit this judicial review claim to continue notwithstanding the Claimant's failure to exhaust the adequate alternative remedy of appealing to the TSAT. The eleven factors are stated at paragraphs 14(1) to 14(11) of the Claimant's Third Affidavit.

31. The First Defendant submits that the fact that an appeal to the TSAT from a decision or determination of the TSC is a full merits review provides the answer as to why those eleven factors are unexceptional. The eleven facts alleged either allege unlawful delegation or ultra vires, bias, breaches of natural justice and arbitrariness on the part of the Defendants. A full merits appeal to the TSAT would address questions of alleged unlawful delegation or ultra vires, bias, breaches of natural justice and arbitrariness on the part of the Defendants. This is so because as submitted earlier, the TSAT has an

implied duty to apply principles of fairness under the rule in ***Wiseman v Borneman*** **[1971] AC 297** at **310 [TAB 9].** Such a duty imposes on the TSAT the obligation to ensure that principles of natural justice are adhered to in the determinations of the TSC whose decision is appealable to the TSAT. This in turn ensures that any appeal to the TSAT would remedy any procedural impropriety which includes remedying any bias, breaches of natural justice and arbitrariness by the First Defendant and the Second and Third Defendants whose decisions and or recommendations were acted upon by the First Defendant.

32. Secondly, as submitted earlier, the TSC is to ensure that due process is evident before going on to make a determination on whether or not to approve disciplinary action pursuant to **section 41(3)(f)** of the **Education and Training Act.** The Due process determination by the TSC is an appealable decision which can be appealed to the TSAT. Due process includes treating persons before a Tribunal or Administrative Body fairly. Being treated fairly as described by Griffith J in ***Isaac Longsworth*** **[TAB 5]** is part and parcel of being treated according to the law or being treated *'lawfully and not arbitrarily'* as described in ***Thakur Persad Jaroo*** **[TAB 4].** Therefore, an appeal to the TSAT on the question of due process would not only address any unfairness in the procedure but also the lawfulness and any questions of arbitrariness. This in turn shows that the eleven factors that are purported to be exceptional are in fact decisions which an appeal to the TSAT could fully address and decide in the Claimant's favour if the Claimant proves its case on appeal to the TSAT.

33. It should be borne in mind that the appealable decision is the decision of the TSC which can be appealed to the TSAT. The facts as presented in the Claimant's Affidavits in this claim do not demonstrate any abuse of power by the TSC, the First Defendant. Taken at its highest the decision of the First Defendant may have been wrong on a question of fact. That question of fact being whether due process was evident. That however does not establish an abuse of power within the meaning of ***R v Inland Revenue Commissioners, ex parte Unilever plc and related application*** **[1996] STC 681** at **695.** In any event an error of fact determined by the TSC can be *confirmed set aside, modified or suspended by the TSAT or the TSAT may take such other action as it thinks fit.*[9] This is sufficient to remedy any unlawful delegation or ultra vires, bias, breaches of natural justice and arbitrariness on the part of the Defendants. A successful appeal to the TSAT would have the effect that the eleven complaints made by the Claimant at paragraphs 14(1) to 14(11) of her Third affidavit would be of no effect as if those decisions had never been made by the Defendants. The wide power of the TSAT to take such other action as it thinks fit is wide enough to allow the TSAT to order a fresh investigation free of the complaints of the Claimant and thus removing any possibility of the same material being used on any fresh disciplinary procedure being instituted against the Claimant.

Ground 2: Submission 6: *It is not an exceptional feature that the decisions by the Second and Third Defendants are allegedly tainted by ultra vires.*

[9] Section 20(3) Education and Training Act

34. The Claimant's Third Affidavit states as a further exceptional circumstance, the alleged ultra vires in respect of the Second and Third Defendants appointment of an Investigative Team and the investigation conducted by that team. This is one of the reasons advanced by the Claimant for this matter to proceed by Judicial Review notwithstanding the failure to prosecute her Appeal before the TSAT. The reason put forward by the Claimant is that *"a statutory appeal in relation to the unlawful investigation and unlawful decisions by the 1st and 2nd Defendants, which are also ultra vires the Education and Training Act and the Education (Amendment) Rules, would be tainted by such unlawfulness. Such an appeal implicitly recognizes or presupposes that the decisions and actions of the Defendants are lawful decisions from which a proper appeal could lie."* The First Defendant humbly submits that this is misconceived. Appellate Tribunals and Appellate Courts exists to correct any unlawfulness in the sense of a decision being incorrect at law; which has been made by the Court or Tribunal from which such decision is being appealed from. Allowing this claim to proceed by way of Judicial Review would amount to usurping the appellate jurisdiction of the TSAT which the Legislature has granted to the TSAT.

GROUND 3 Submission 1: *The Claimant's failure to exhaust all adequate and alternative remedies available to her under the Education and Training Act Cap. 36:01 makes the bringing of this claim an abuse of the Court's processes.*

35. **Rule 26.3(1)(b)** of the **CPR** empowers the Court to Strike out a statement of Case where such statement of case is an abuse of process of the Court. ***Regina v Panel on Take-Overs and Mergers, Ex Parte Guinness PLC.*** **[1989] 2**

WLR 863[10] **[TAB 2]** decided that *'if Parliament directly or indirectly has provided for an appeals procedure, it is not for the court to usurp the functions of the appellate body.'*

36.Conteh CJ in ***Belize Telemedia Limited Etal v Attorney General of Belize Etal***[11] **[TAB 1]** accepted that an abuse of process is established where a Claimant in a Part 56 claim has failed to exhaust all adequate alternative remedies available to it. The former Chief Justice did so in the following terms:

> *'39. I can only therefore in the circumstances say that the thrust of Ms. Young SC's application is irresistible: she argued and submitted that by the scheme and intendment and provisions of the Act, there are sufficient and ample provisions for an alternate remedy available to the taxpayer's complaints against the assessment of the Commissioner of Income Tax. Therefore, she urged that the taxpayer's claims for declarations should, pursuant to Rule 26(1)(e) and (j) of the Supreme Court Rules, 2005, be dismissed and that further under the inherent jurisdiction of the Court the claims should be dismissed as an abuse of the process of the Court.*
>
> *40. I must, ineluctably, agree. I am satisfied that all the avenues or tiers of redress against assessment of a taxpayer's liability to pay tax I have outlined in paras. 37 and 38 above* ***were*** *and* ***are*** *available to the taxpayer in this case.'*

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[10] At 885H
[11] At paras 39 to 40

37. The First Defendant respectfully submits that it is an abuse of the Court's process for this Claim to continue notwithstanding the availability of a full merits statutory appeal to the TSAT which has not been exhausted by the Claimant as demonstrated in the submissions made under Grounds 1 and 2 of these submissions. As such, this Honourable Court in applying the dicta in ***Regina v Panel on Take-Overs and Mergers, Ex Parte Guinness PLC.*** **[1989] 2 WLR 863**[12] and ***Belize Telemedia Limited Etal v Attorney General of Belize Etal***[13] should strike out the Claimant's statement of case and dismiss this Claim as against the First Defendant and the Second and Third Defendants pursuant to **Rule 26.3(1)(b)** of the **CPR**. It is an abuse of process for the Claimant to ask this Court to usurp the statutory functions of the TSAT while at the same time asking this Court to disregard the rule that judicial review is unavailable where all adequate alternative remedies have not been exhausted and there are no exceptional circumstances. The Court also has the inherent jurisdiction to guard its processes from being abused.

38. This Strike Out Application has been made by the First Defendant. The success of this strike out Application and the granting of the relief sought by the First Defendant has the effect of the claim having to be dismissed not only as against the First Defendant but all of the Defendants. Judicial review cannot proceed against the Second and Third Defendants if the Court accepts and agrees with the First Defendant's submissions. A failure to exhaust all adequate alternative remedies to judicial review and the lack of exceptional circumstances touching on the Claimant's case are a bar to this claim

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[12] At 885H

[13] At paras 39 to 40

proceeding and a bar to the Claimant obtaining any relief under **Part 56** of the **CPR.**

GROUND 4: *The Claimant's failure to exhaust all adequate and alternative remedies available to her under the* ***Education and Training Act Cap. 36:01*** *discloses the Claimant's lack of reasonable grounds for bringing this claim by way of judicial review.*

39. The First Defendant further submits that the Claimant's failure to exhaust the adequate alternative remedy of appealing to the TSAT is not only an indication that this Claim is an abuse of process. It also demonstrates that the Claimant's Claim discloses the Claimant's lack of reasonable grounds for bringing this claim by way of judicial review. As, such this Claim should be struck out and dismissed because judicial review is only available where adequate alternative remedies have been exhausted, except where it can be shown that there are exceptional circumstances which should permit the claim proceeding. The Claimant's case lacks any exceptional feature. The matters complained of could have been resolved by a full merits appeal to the TSAT. This was not done. Therefore, the First Defendant humbly submits that the Claimant's statement of case should be struck out and dismissed pursuant to **Rule 26.3(1)(c)** of the **CPR** in the alternative to being dismissed pursuant to **Rule 26.3(1)(b)** of the **CPR.** The Claimant discloses no reasonable basis for bringing this claim without having exhausted the adequate alternative remedies while at the same time lacking any exceptional circumstances.

CONCLUSION

40. Judicial review is a remedy of last resort. The Claimant's Claim demonstrates that this claim for judicial review is not being properly brought in the Claimant's search of a remedy of last resort. A full merits statutory appeal to the TSAT was available to the Claimant when the First Defendant made the decision to retire the Claimant in the interest of the profession. Such full merits appeal would have addressed any unfairness, procedural impropriety, ultra vires, irrationality or arbitrariness complained of in the decisions of the Defendants. The Claimant chose not to utilize this statutory appeal process. The Claimant now asks this Court to countenance an abuse of process by having this claim proceed by way of judicial review. The First Defendant has demonstrated that there is nothing exceptional about the Claimant's case. The First Defendant therefore respectfully asks this Honourable Court to strike out and dismiss Claim 295 of 2019 pursuant to **Rule** to **Rule 26.3(1)(b),** alternatively pursuant to **Rule 26.3(1)(c)** of the **CPR** and under the Court's inherent jurisdiction to prevent its processes from being abused and for Costs and any further Order as the Court may deem just.

<u>Legal Submissions On Behalf of the Claimants/Respondents</u>

Administrative Leave and Investigation

41. The Claimant was placed on administrative leave effective the 1st October, 2018. An investigation was thereafter launched by the 2nd Defendant to investigate complaints made against the Claimant.

42. The 2nd Defendant appointed an Investigative Team comprising of Mr. Amilcar Umaña, Mr. Alan Slusher, Dr. Angel Chan and Pastor Lance Lewis. The said Investigative Team was therefore not fully comprised of members of the 2nd Respondent, but also included members of the general public, being Mr. Alan Slusher, Dr. Angel Chan and Pastor Lance Lewis.

43. The said Amilcar Umaña, was also one of the staff members of the BCS who had made complaints against the Applicant, the Applicant having removed Mr. Umaña as the head of the department of the Information Technology Department while she was the principal of BCS.

1. Mr. Umaña was also the chairperson of the Investigative Team, charged with investigating the complaints made against the Claimant. The said investigation and Investigative Team was tainted by the bias of the said Amilcar Umaña, who was a disgruntled member of staff.

2. During the investigation conducted by the Investigative Team, several members of staff of BCS were interviewed, but the Investigative Team failed to interview the Claimant. At no point in time during or after the investigative process, was the Claimant questioned by the Investigative Team or allowed to answer the complaints made against her.

3. After the investigation was concluded, the Claimant was not provided with a transcript or record of the interviews conducted during the investigative process.

4. On the 6th November 2018, the Claimant received a letter dated the 5th November 2018, informing her that the Investigative Team had presented its findings to the

Second Defendant and informing her of the charges laid against her. The Claimant was placed on interdiction with 50% of her salary and was informed of a hearing to be held before the Second Defendant on the 21st November 2018.

5. Of its own motion, the Second Defendant adjourned the hearing date to the 28th November 2018.

6. By a letter dated the 26th November 2018, the Defendant's former attorney-at-law, Ms. Audrey Matura, wrote the Second Defendant requesting an adjournment of the hearing since the hearing date clashed with another court date she had before the Supreme Court of Belize. The Second Defendant refused to grant the adjournment citing that the adjournment would take the hearing outside of the 30 days' deadline as prescribed by the *Education (Amendment) Rules*.

7. An *ex parte* hearing therefore proceeded on the 28th November 2018, in the absence of the Claimant and her former attorney-at-law. Mr. Umaña also sat as a member of the Second Defendant presiding over the *ex parte* hearing of the 28th November 2018.

8. By a letter from the Second Defendant dated the 15th January 2019, the Applicant was informed that a recommendation had been made to the First Defendant. The said letter, did not provide the Claimant with the Second Defendant's decision, its reasons nor what the recommendation was. To date, the Second Defendant has still not provided the Claimant with its reasons in writing.

Decision by the Belize Teaching Service Commission

9. By an email from the Second Defendant to the Applicant's former attorney-at-law on the 25th January 2019, with a letter dated the 18th January 2019, attached, the said Second Defendant informed the Claimant that the First Defendant had approved its recommendation, that the Claimant be retired in the interest of the profession.

10. By a letter dated the 30th January 2019, from the First Defendant to the Claimant, which was received by the Claimant via registered mail on the 15th February 2019, the First Defendant informed the Claimant of its decision that the charges against her were proven.

11. By a letter dated the 20th February 2019, the Second Defendant informed the Claimant of the First Defendant's decision, providing the Claimant, for the first time, with the judgement of the First Defendant.

I. Submissions

12. The 1st Defendant asserts that the claim herein ought to be struck out because judicial review under Part 56 of the *Supreme Court (Civil) Procedure Rules* is a remedy of last resort against administrative decisions, that the Claimant has failed to exhaust all available remedies, and that the Claimant has failed to exhaust her right to a statutory appeal pursuant to the *Education and Training Act*.

13. The Court of Appeal of Belize in ***Bevans v Public Services Commission*** B. L. R. 155 [**TAB 1**] dealt with the issue of when judicial review proceedings are suitable where there is an alternative remedy and especially where the legislature

has provided a statutory appeal procedure. In that case, the appellant was informed that the Public Services Commission was contemplating his dismissal because he was charged with the criminal offence of extortion. At the hearing, the appellant raised a preliminary point that the Public Service Commission had no jurisdiction to embark on the hearing as it was precluded from doing so by virtue of the provisions of the Schedule to the General Orders for the Public Service Regulations. The commission overruled the preliminary objection, and, as a result, the appellant applied for and was granted leave to make an application for judicial review of that decision. The Court outlined the general rule as it relates to claims for judicial review where there is an alternative remedy, especially where there is a statutory appeal at p. 158:

> *"...One starts off with the general proposition that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure it was only exceptionally that judicial review would be granted. In determining whether an exception should be made and judicial review granted it is necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and to ask itself, what in the context of the statutory provisions, was the real issue to be determined and whether the statutory appeal procedure is suitable to determine it. See Re Birmingham City Council ex parte Ferrero Ltd. (1993) 1 ALL E.R. 530."*

14. The Court of Appeal in *Bevans* then laid out the approach to the application of the general principle, referring to the dictum of Sir John Donaldson MR in *Reg v Chief Constable Exp. Calveley [1986] 1 Q.B. 424:*

"…This like other judicial pronouncements on the interrelationship between remedies by way of judicial review on the one hand and appeal procedures on the other, is not to be regarded or construed as a statute. It does not support the proposition that judicial review is not available where there is an alternative remedy by way of appeal. It asserts simply that the court in the exercise of its discretion will very rarely make this remedy available in these circumstances."

15. The Claimant says, firstly, that it is only a general rule that judicial review proceedings are not appropriate where there is an alternative remedy available. Though there is a statutory appeal procedure provided by the *Education and Training Act*, such an appeal is not a suitable alternative remedy in light of the exceptional circumstances of this case.

Exceptional circumstances

16. The Claimant says that it is useful to address fully what courts have regarded as exceptional circumstances which would warrant an application for judicial review in cases where a statutory appeal is available.

17. In *Bevans,* the issue raised for judicial review was in relation to the jurisdiction of the Public Service Commission, in relation to which the Court of Appeal said, "*Although one which can be decided by the Commission is clearly an issue fit for judicial review...A challenge to jurisdiction is unusual.*"

18. The Supreme Court of Belize in ***The Belize Bank Limited et al v The Central bank of Belize*** Claim No. 433 of 2010 [**TAB 2**] referred to *Bevans* in its

determination of whether there were exceptional circumstances in the case therein, making judicial review appropriate despite the statutory appeal available. At paragraphs 18 and 19 the Court said:

> *"18. The claim in this matter is for an administrative order under Rule 56.7 of the Supreme Court (Civil) Procedure Rules 2005 asking for certain declarations and injunction mentioned above. In this claim by the claimants, what are the real issues to be determined; and is the statutory appeal procedures suitable to determine them. The real issues to be determined are whether the Central Bank exceeded its jurisdiction and acted ultra vires section 36(5) of the Act when it issued the directive; whether the directive itself contravenes section 6 of the Constitution; and further whether section 36(5) of the Act violates section 6 of the Constitution and therefore unconstitutional. These are serious questions of public law. Though the Appeal Board is constituted of a judge of the Supreme Court and two other members who have knowledge of banking, finance and other related disciplines, I do not think that the statutory appeal procedure, the Appeal Board, as constituted under the Act is suitable to determine these public law issues.*
>
> *19. Would the other two members of the Appeal Board, people trained in economics and accounting, be able to grapple with these public law issues and assist in determining them? I do not think so, and I have serious doubts whether the Appeal Board is suitable to determine the claims made by the claimants."*

19. The High Court of Antigua and Barbuda also outlined what could amount to exceptional circumstances in ***Gary Nelson v The Attorney General et al*** CLAIM NO. ANUHCV 2008/0552 [**TAB 3**]. In that case, the claimant filed a claim for judicial review to quash the decision of the Police Service Commission that terminated his appointment on the basis that the said commission and the Minister of Justice failed to exercise their power reasonably or lawfully in terminating his services. The claimant also claimed that he had a legitimate expectation to a fair hearing before his services were terminated. The Commission thereafter filed an application to strike out the claim on the basis that the Claimant had an alternative remedy, particularly a statutory appeal to the Public Service Board of Appeal which could also deal with any alleged unfairness. The Court found that the matters complained of fell within the realm of public law and outlined the circumstances in which a claim for judicial review is available at paragraphs 44 to 46:

> *"[44] It is well settled that judicial review is the procedure by which the Court exercises supervisory jurisdiction over tribunals and public bodies. It is also the means by which the Court controls the exercise of governmental powers. The Court in the exercise of this jurisdiction is not concerned with the merits of the decision of the body or tribunal but seeks to ensure that the body or tribunal has acted properly or within the ambit of its power in arriving at its decision; in a word the Court is concerned with the legality of the decision made.*
>
> *[45] Applicants for judicial review can properly challenge decisions of public bodies on three well recognized grounds (though they are not exhaustive) namely: illegality, irrationality and procedural impropriety. See Lord Diplock*

1196 in Council of Civil Service Unions v Minister of Civil Service [1984] 3 W.L.R 1174.

[46] Judicial Review has also been approached from the following three bases namely:

(1) Abuse of jurisdiction

(2) Abuse of discretion

(3) Violation of the Rules of natural justice."

20. The Court in *Gary Nelson* also found that there were exceptional circumstances in the case to warrant a claim for judicial review. It noted that the private law remedies, being the statutory appeal, were unable to address some of the alleged infractions of public rights which included breach of the rules of natural justice.

21. In ***Wayne Warner James v The Attorney General of the Commonwealth of Dominica et al*** CLAIM NO. DOMHCV2016/0226 [**TAB 4**] the Court considered whether to grant the applicant leave to apply for judicial review and, in doing so, whether there was a suitable alternative remedy available to the applicant therein. It was argued that a statutory appeal was available to the applicant. The Court granted leave to apply for judicial review, noting that there were exceptional circumstances of the case at paragraph 89:

"[89] I would agree with Learned Counsel Mr. Richards that there are unusual circumstances in this case warranting the granting of leave even though there is the option of appealing the COP's decision those circumstances being:

I. *the alleged breach of natural justice;*

II. *the perceived negative implications of the decision of the applicant's reputation which amongst other things convey the impression that the applicant is guilty of criminal misconduct and that he could not be entrusted with a licence to keep a firearm;*

III. *the applicant's claim for damages and mandamus which will not be available in the appeal process;"*

22. From the above authorities, it is clear that where the issues do not involve any challenges to findings of fact, but are in relation to fairness, the principles of natural justice, abuse of power, and the legality of the decision, a claim for judicial review would be appropriate, even where a statutory appeal process exists.

23. At the very least, the First Defendant accepts that an abuse of power is an exceptional basis for pursuing a claim for judicial review,[14] but asserts that there is no exceptional circumstance in the Claimant's case.

24. The Court of Appeal in ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue*** SLUHCVAP2016/0007 [**TAB 5**] noted that unfairness, in breach of the principles of natural justice, can amount to an abuse of power stating at paragraphs 24 and 26:

"[24] In my judgment, the appellant's complaints with respect to the natural justice point are unassailable. The exercise of the Comptroller's statutory

[14] Paragraphs 26 and 27 of First Defendant's Submissions on Strike Out Application

function or power does not render his decision immune from judicial review; for as Lord Scarman reminds us in his third proposition in Ex p Preston, ***unfairness in the purported exercise of a power can be such that it is an abuse or excess of power****. In dismissing the judicial review claim and holding that judicial review was unnecessary, the learned judge erred in not paying proper regard to the principle of fairness.*

…

[26] ***I am of the view that there was undoubted unfairness by the Comptroller in the exercise of his statutory function and power which amounted to an abuse of power.*** *I agree with the appellant's contention that even if the learned judge was correct in holding that the Comptroller did not change the basis of the assessment, he should have concluded that the Comptroller did not take the precautions aimed at achieving a fair trial of the issues, such as notifying the appellant in advance that he intended to change his reasons and rely on a different section, and giving the appellant an opportunity to advance new grounds of objection. For the reasons given, the Comptroller's conduct was unfair, violated the principles of natural justice, and amounted to an abuse of process." [Emphasis added]*

25. The Claimant has alleged multiple instances of unfairness in breach of her right to be heard and to a fair hearing by the Defendants. The Claimant says that such unfairness amounts to an abuse of power, which said abuse of power the First Defendant accepts as amounting to an exceptional circumstance.

26. The Claimant says, therefore, that there are exceptional circumstances which ground her claim in judicial review. The Claimant's claim is that the decisions

and actions by the Defendants are tainted with bias, unlawful, arbitrary, ultra vires the *Education Act* and the *Educations (Amendment) Rules* and contrary to principles of fairness and natural justice for the following reasons,

(1) By appointing members of the general public to the Third Defendant, namely Mr. Alan Slusher, Dr. Angel Cal and Pastor Launcelot Lewis, the Second Defendant delegated it duties contrary to the *Education Act* and the *Education (Amendment) Rules*;

(2) The Second and Third Defendants were tainted by the bias of Mr. Amilcar Umaña, the chairman of the Third Defendant, who was also a disgruntled member of staff of the BCS that had made complaints against the Claimant. Mr. Umaña also presided as a member of the Second Defendant at the *ex parte* hearing of the 28th November 2016;

(3) During the investigation, the Third Defendant failed to interview the Claimant, in breach of her right to be heard and in breach of the principles of natural justice;

(4) After the investigation, the Third Defendant failed to provide the Claimant with transcripts or recordings of the 15 interviews which it had conducted, contrary to rule 93(10)(b) of the *Education (Amendment) Rules.* Since these interviews resulted in damning findings against the Claimant, which led to her suspension, and, ultimately, the recommendation that she be retired in the interest of teaching the profession, the principles of natural justice also require that the Claimant be provided with transcripts or recordings of the said interviews. Not being provided with the same, the claimant did not receive a fair hearing;

(5) Since the 6th November 2018, the Claimant has only received 50% of her salary, which ceased completely in July, 2019. The unlawful and unfair actions by the Defendants have had a serious negative impact on the Claimant;

(6) The Second Defendant held an *ex parte* hearing on the 28th November 2018, in the absence of the Claimant and her former attorney-at-law, in breach of the Claimant's right to be heard and the principles of natural justice;

(7) When the Second Defendant informed the Claimant that it made a recommendation to the First Defendant, it failed to state what the recommendation was or what its decision had been. This is despite the fact that the Second Defendant had made its decision and recommendation to the First Defendant from the 5th December 2019;

(8) The Second Defendant did not provide reasons for its decision in writing or otherwise, and to date, the Claimant has still not received the Second Defendant's reasons in writing or otherwise, in breach of the principles of natural justice;

(9) Despite not being informed of the Second Defendant's decision and recommendation, an article was published in the Reporter entitled, "*Teaching Service Commission to Decide the fate of Suspended Principal*." The Second Defendant therefore failed to submit its

recommendation to the First Defendant under confidential seal as required by the rule 93(17) of the *Education (Amendment) Rules*;

(10) The First Defendant approved the recommendation of the Second Defendant without conducting a further investigation and having a further hearing in accordance with the rule 93(18) of the *Education (Amendment) Rules*, in breach of the Claimant's right to a fair hearing;

(11) The decisions and actions by the Defendant are therefore unlawful, arbitrary, and *ultra vires* the *Education and Training Act* and the *Education (Amendment) Rules, and* contrary to the rules of fairness and the principles of natural justice.

27. Each of the allegations above fall within one or more of the three general categories as stated by the Court at paragraphs 45 and 46 of *Gary Nelson*, above. In fact, the First Defendant admits at paragraph 31 of its skeleton arguments that, "*The eleven facts alleged either allege unlawful delegation or ulta vires, bias, breaches of natural justice and arbitrariness on the part of the Defendants.*"

28. Surely, these serious and quite numerous breaches of the Claimant's right to be heard and her right to a fair hearing throughout the entire disciplinary processes by the Defendants are such that there was, in fact, an abuse of power by the Defendants, as noted by the Court of Appeal of St. Lucia in *Unicomer*.

Composition of Appeals Tribunal

29. The Claimant also states that this Court ought also to consider the composition of the Teaching Service Appeals Tribunal ("**TSAT**") in determining whether

such an appeal would be appropriate in light of the solely public law issues raised by the Claimant, as the Court stated in *The Belize Bank Limited et al.* Section 19(2) of the ***Education and Training Act*** [**TAB 6**] sets out the composition of the TSAT, being an attorney-at-law of not less than five years standing, the Labour Commissioner, the chairperson of the National Council for Education or his nominee and the chairperson of the National Council for Technical and Vocational Education and Training or his nominee.

30. As asked by the Court in *The Belize Bank Limited et al*, will these persons be able to grapple with these public law issues and assist in their determination? While the chairperson of the TSAT is an attorney, the Claimant says that the other members of the TSAT would not be able to properly assist in the determination of these issues which are appropriate for judicial review and which this Honorable Court is equipped to dispose of. While the Labour ommissioner sits on the said tribunal, none of the issues raised by the Claimant is in relation to any labour or labour law issues. The said TSAT is therefore not the appropriate tribunal to determine these public law issues of great significance and consequence to the Claimant.

31. The Claimant further states that an appeal could not be appropriate in the circumstances, since she was not provided with the transcript or recordings of the 15 interviews conducted by the Third Defendant and she has still not received the reasons for the decision taken by the Second Defendant, in writing or otherwise. These are important documents and information which were relied on by the First Defendant and which are pertinent to any appeal by the Claimant to TSAT. The Claimant and her attorney-at-law would not be able to advocate properly in any such appeal. The Court in *Wayne Warner James* noted at paragraph 26:

"Steps cannot be taken in a meaningful manner unless the person knows the reason for the decision in question."

32. The Claimant says that while an appeal is not appropriate in the circumstances, she could not, in any event, pursue any meaningful appeal without the interviews and the reasons of the Second Defendant on which the decision of the First Defendant is based.

Which decision appealable

33. The First Defendant also asserts at paragraph 33 of its skeleton arguments that the appealable decision is the decision of the First Defendant only and the facts do not demonstrate any abuse of power by the First Defendant. The First Defendant says that at its highest the decision of the First Defendant may have been wrong on the question of fact, the fact being whether due process was evident.

34. If the First Defendant is correct that the appeal to the TSAT is in relation to the decision of the First Defendant only, then clearly such an appeal would not amount to a suitable alternative remedy, since the allegations of unlawfulness, bias, and breach of the principles of natural justice are in relation to the decisions and actions by the Second and Third Defendant as well. There would therefore be no remedy available to the Claimant as against the decisions and actions by the Second and Third Defendant in such an appeal since the appeal would be in relation to the decision of the First Defendant only.

35. The Claimant also states that there is, in fact, an allegation of breach of her right to a fair hearing by the First Defendant. This breach is as a result of the First

Defendant's failure to conduct a further investigation and hearing to allow the Claimant to be heard in her defence pursuant to rule 93(18) of the ***Education (Amendment) Rules, 2012*** [**TAB 7**] which provides:

> *"93(18) The Commission may, upon receipt of the submission if it thinks fit, cause further investigation to be made into the matter and where it is necessary, the teacher may be asked to appear before the Commission and be given a reasonable opportunity to be heard in his own defence, with or without an agent to assist or act on his behalf at the hearing."*

36. The Supreme Court of Belize has interpreted that rule to mean that the First Defendant should conduct its own investigation and hearing so as to afford due process and a fair hearing to an accused, especially in circumstances as the present where the disciplinary hearing before the Second Defendant, which led to the recommendation and decision by the First Defendant, proceeded in the absence of the Claimant and her former attorney-at-law.

37. In ***Isaac Longworth v The Anglican Diocese of Belize et al*** Claim No. 63 of 2018 [**TAB 8**] the Court noted that the Commission's discretion pursuant to rule 93(18) of the *Education (Amendment) Rules*, in circumstances as the present, where the accused was not heard at the disciplinary proceedings before the managing authority and held that the Commission's failure to even consider the exercise of their power pursuant to section 93(18) amounted to a failure to afford him natural justice. This is especially so since the Commission is carrying out a quasi-judicial function.

38. Contrary to what the First Defendant says, then, there is an allegation of breach of the rules of natural justice being made by the Claimant against the First

Defendant which is appropriate in a claim for judicial review. Contrary to what the First Defendant states, the Claimant's claim is not in relation to any finding of fact by the First Defendant that there was due process in the disciplinary process taken against the Claimant.

39. The Claimant says that, in any event, the unlawful decisions and actions by the First Defendant. See paragraph 104 of *Juanita Lucas v The Chief Education Officer et al Claim No. 252 of 2008*.[15]

40. The Claimant also states that while ***Belize Telemedia Limited et al v Attorney General et al*** Claim No. 464 of 2008 [**TAB 9**], relied on by the First Defendant, does restate the general principles in relation to judicial review and exceptional circumstances, the facts of that case can be distinguished from the facts of the Claimant's case. In fact, the real issue and allegation by the Claimant in *Belize Telemedia Limited et al* was in relation to an objection by the tax payer to the Commissioner of Income Tax's assessment of tax and its liability to pay tax, which the Claimant says involved a factual finding exercise by the Commissioner of Income Tax. At paragraphs 26 and 32 the Court said:

> *"26. What the taxpayer seeks in the proceedings before me are several declarations to impugn the assessment of its liability to pay business tax and the attempts taken by the Commissioner of Income Tax to enforce that liability.*
>
> *32. Assessment it should be remembered, is an evaluation or estimation exercise…"*

[15] Paragraph 30 of the Skeleton Arguments on behalf of the Claimant dated the 4th June, 2019

41. *Belize Telemedia Limited et al* did not involve any allegation of bias, unlawfulness of the decision made, or breaches of the taxpayers' right to be heard and to a fair hearing, which the Claimant says are exceptional circumstances.

42. While the First Defendant says that the *Education and Training Act* did not expressly limit the appeal to the TSAT to findings of fact and the penalties imposed, the Claimant says that the TSAT is not a court of law with unlimited jurisdiction as the Supreme Court of Belize, as the First Defendant seems to argue. The Claimant says that the issues raised are serious public law issues which are appropriate for a claim in judicial review and determination by this Honourable Court. There are exceptional circumstances in the Claimant's case which warrant a claim for judicial review, and the Claimant says that it was on that basis that this Honourble Court granted leave to apply for judicial review by the Order of the 4th July 2019.

II. Conclusion

43. In light of the exceptional circumstances of this case, the Claimant says that the First Defendant's application to strike out the claim ought to be dismissed with costs to the Claimant.

The Substance of the Claimant's Submissions

44. The substance of the Claimant's submissions in response to the First Defendant's submissions on the Strike Out Application is that the Claimant's Claim is exceptional which warrants the bringing of this Claim for judicial review in the

face of an adequate alternative remedy by way of statutory appeal. The Claimant goes on to submit that the composition of the Teaching Service Appeals Tribunal ('TSAT") makes it inappropriate for the TSAT to deal with an appeal dealing with the issues raised in this claim for judicial review. These submissions in reply address the Claimant's arguments against the First Defendant's Strike Out Application.

Exceptional Circumstances

45. It is submitted that the Claimant in her submissions correctly states the law by stating the general rule that judicial review will be refused or will not be available where the Claimant has failed to exhaust adequate alternative remedies. The Claimant acknowledges that the law on this point is properly stated in the First Defendant's submissions and does so by citing decisions that support the proposition of law made by the First Defendant. Those decisions include ***Bevans v Public Service Commission*** **3 Bz LR 155 [TAB 1]**; ***The Belize Bank Limited Etal v The Central Bank of Belize*** Claim No. 433 of 2010 **[TAB 2]**. The Claimant's submissions, however, fail to establish that the Claimant's claim presents exceptional circumstances justifying a departure from the general rule that judicial review will be refused or will not be available where the Claimant has failed to exhaust adequate alternative remedies such as a statutory appeal procedure.

Submission 1: *The claimant has failed to establish exceptional circumstances that justify a departure from the general rule that judicial review will be refused or will not be available where the Claimant has failed to exhaust adequate alternative remedies. The local judgments of the Court of Appeal and the*

Supreme Court of Belize in ***Bevans v Public Service Commission*** and ***The Belize Bank Limited Etal v The Central Bank of Belize*** *cited in support of the Claimant's submissions are distinguishable and cannot be properly relied upon by the Claimant to establish exceptional circumstances justifying a departure from the general rule.*

II. The First judgment cited in support of the Claimant's submission is ***Bevans v Public Service Commission*** **3 Bz LR 155.** This is a decision of the Court of Appeal of Belize where the Court at page 158 to page 159 of the Report states:

> *"One starts off with the general proposition that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure it is only exceptionally that judicial review would be granted.*[16] (Emphasis Added) *In determining whether an exception should be made and judicial review granted it is necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case*[17]*and to ask itself , what in the context of the statutory provisions, was the real issue to be determined and whether the statutory appeal procedure is suitable to determine it. See Birmingham City Council ex parte Ferrero Ltd. (1993) 1 ALL ER 530 …This like other judicial pronouncements on the interrelationship between remedies by way of judicial review on the one hand and appeal procedures on the other, is not to be regarded or construed as a statute. It does not support the*

[16] Emphasis Added
[17] Emphasis Added

proposition that judicial review is not available where there is an alternative remedy by way of appeal. It asserts simply that the court in the exercise of its discretion will very rarely make this remedy available in these circumstances[18]*"*

49. What was in issue in ***Bevans v Public Service Commission* 3 Bz LR 155 [TAB 1]** was the jurisdiction of the Public Service Commission of Belize to determine whether the Appellant should be dismissed from the Public Service.[19] A statutory appeal was available to the Belize Advisory Council, but it was not pursued by the Appellant. The Court of Appeal (Georges P, Young and Liverpool JJA) decided that the issue of jurisdiction was one which was fit for judicial review notwithstanding the statutory appeal procedure. The Court of Appeal also opined that a challenge to jurisdiction is *unusual.*[20] Furthermore, that an appeal on the basis of jurisdiction was available before the statutory appeal body, the Belize Advisory Council, but that it remained unclear whether the Belize Advisory Council would entertain an interlocutory appeal against the Public Service Commission's decision that the latter had jurisdiction to determine whether the Appellant should be dismissed from the Public Service. The Court was of the view[21] that the Belize Advisory Council *might* determine that the Appellant's appeal should await full determination of all the issues before the Public Service Commission before entertaining any appeal. The Appellant would then, according to the Court of Appeal, be *compelled* to defend his case on the merits in

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[18] Emphasis Added
[19] *Bevans v Public Service Commission* Bz LR 155 at 156 and 160
[20] Ibid at page 161
[21] Ibid

circumstances where he could sustain a successful challenge to the Public Service Commission's jurisdiction to determine whether the Appellant should be dismissed from the Public Service. These circumstances are what the Court of Appeal decided were the exceptional circumstances in that Appellant's case. The Court of Appeal expressly states these factors as exceptional circumstances in the context of the case before the Court at page 161 of the Report of the Appeal Case in ***Bevans v Public Service Commission*** **3 Bz LR 155 [TAB 1].**

50. The judgement of Legall J in ***The Belize Bank Limited Etal v The Central Bank of Belize*** **Claim No. 433 of 2010 [TAB 2]** applying the dicta from ***Bevans v Public Service Commission*** **3 Bz LR 155** is cited by the Claimant in support of her submission that exceptional circumstances obtain in the Case at Bar. In ***The Belize Bank Limited Etal v The Central Bank of Belize*** Legall J held that the real issue to be decided was whether the Central Bank had jurisdiction[22] to issue certain directives to the Claimant Bank and whether such directive breached section 6 of the Constitution.[23] The learned trial judge then went on to hold that the composition of the statutory appeal board, The Banks and Financial Institutions Appeals Board; being a judge of the Supreme Court and 2 members trained in economics and accounting was unsuitable for determining these questions of public law. The questions of public law being issues of jurisdiction and constitutional validity of the directives in question.

[22] Emphasis Added
[23] Emphasis Added

51.It is humbly submitted that both ***Bevans v Public Service Commission*** **3 Bz LR 155** and ***The Belize Bank Limited Etal v The Central Bank of Belize*** **Claim No. 433 of 2010** do not assist the Claimant in establishing that her case presents this Honourable Court with exceptional circumstances that justify a departure from the general rule that that judicial review will be refused or will not be available where the Claimant has failed to exhaust adequate alternative remedies. The Case at Bar as pleaded in the Claimant's 3 Affidavits does not challenge the First Defendant's jurisdiction and it does not allege any breaches of the enforceable rights in **sections 3** to **19** of the **Belize Constitution**. There is no mention in the Claimant's Fixed Date Claim that she seeks any relief under the Constitution. Therefore, those examples of exceptional circumstances which obtained in both ***Bevans v Public Service Commission*** and ***The Belize Bank Limited Etal v The Central Bank of Belize*** **[TAB 2]** are clearly distinguishable from the Case at Bar. The exceptional circumstances in ***Bevans v Public Service Commission*** **[TAB 1]** and in ***The Belize Bank Limited Etal v The Central Bank of Belize*** were questions of jurisdiction and in the latter case a question of jurisdiction and constitutional validity. In the Case at Bar the jurisdiction of the First Defendant and constitutional validity are not under scrutiny before this Honourable Court. It is submitted that ***Bevans v Public Service Commission*** and in ***The Belize Bank Limited Etal v The Central Bank of Belize*** do not assist the Claimant whatsoever in establishing exceptional circumstances by way of example nor analogy.

Submission 2: *The judgment of the High Court of Antigua and Barbuda in* ***Gary Nelson v The Attorney General, The Minister of Justice & The Police Service Commission*** **CLAIM No. ANUHCV 2008/0552** *cited in support of the Claimant's submissions is distinguishable and cannot be properly relied upon by*

the Claimant to establish exceptional circumstances justifying a departure from the general rule.

52. The High Court of Antigua and Barbuda in ***Gary Nelson v The Attorney General, The Minister of Justice & The Police Service Commission*** **CLAIM No. ANUHCV 2008/0552 [TAB 3]** had to determine whether to strike out a Claim for judicial review. The Claimant had been granted permission to challenge the decisions of the Second and Third Defendants in that claim in judicial review proceedings. The substantive Claim was that the Second and Third Defendants had exercised their powers of dismissal of the claimant unreasonably and unlawfully.[24] The First Defendant in that claim was sued in their representative capacity. The Defendants sought to have the Claim struck out on the ground amongst others, that the Claimant had failed to exhaust alternative remedies before seeking judicial review in the High Court. The Defendants unsuccessfully argued that the Claimant ought to have exhausted the statutory appeal procedure and that in any event the claim was one which could properly be disposed of under private law in an action for breach of contract. The High Court of Antigua and Barbuda held that the nature of the claim raised public law issues which could not be properly addressed in a claim for breach of contract. It was on this basis that the High Court of Antigua and Barbuda refused the Application to strike out the Claim for judicial review. The ratio of the trial judge in that claim reads:

> *"[51] Mr. Nelson has sought a number of public law remedies. I do not hold the view that Mr. Nelson was*

[24] *Gary Nelson v The Attorney General, The Minister of Justice & The Police Service Commission* Claim No. ANUHCV 2008/0552 at para [2]

obligated to appeal to the Public Service Appeal Board instead of filing the claim for Judicial Review. The law has moved on and there is no absolute duty to exhaust his other rights before instituting public law proceedings; this is particularly so where as in the case at bar, the private law remedies that may be available to a complainant are unable to address some of the alleged infractions of public rights. Accordingly, I refuse to accede to the Commission's request to strike out Mr. Nelson's claim on that ground. If any further reason is needed to support this view, it is found in the exceptional circumstances that are present in this case which warranted the Court to exercise its discretion by giving him leave to bring the claim.

53.It is submitted that the ratio of ***Gary Nelson v The Attorney General, The Minister of Justice & The Police Service Commission*** **Claim No. ANUHCV 2008/0552 [TAB 3]** does not assist the Claimant in showing this Honourable Court that the Claimant's case presents exceptional circumstances warranting a departure from the general rule; that judicial review will be unavailable where a Claimant has failed to exhaust alternative remedies such as a statutory appeals procedure. The trial judge sitting in the Antiguan High Court in ***Gary Nelson v The Attorney General, The Minister of Justice & The Police Service Commission*** decided the strike out application by determining that an action for breach of contract or other private law action would fail to address questions of public law which were central to the claim. These questions of public law were whether the Second and Third Defendants decision to dismiss the Claimant were unreasonable and or unlawful. The powers of the Public

Service Appeal Board in ***Gary Nelson*** were unsuitable because of the restrictive remedies under the Antiguan Constitution which were available on appeal to that body.

54. The Teaching Service Appeals Tribunal ('TSAT') in the Case at Bar has a statutory power on appeal, to *'confirm, set aside, modify or suspend the decision under appeal or take such other action as it thinks fit'* pursuant to **section 20(3)** of the **Education and Training Act** Cap. 36:01 **[TAB 4].** It is submitted that this characteristic of the remedies available before the TSAT are a strong indication that the TSAT does in fact provide remedies which are suitable to address the issues raised in this judicial review claim. The power of the TSAT to take *'such other action as it thinks fit'* is also remedy which the Public Service Appeal Board in ***Gary Nelson v The Attorney General, The Minister of Justice & The Police Service Commission*** **[TAB 3]** did not have jurisdiction to award.[25] The remedies which the TSAT of Belize is empowered to grant to an appellant are wider in scope than the remedies which the Public Service Appeal Board in ***Gary Nelson*** had jurisdiction to grant. The Power of the Public Service Appeal Board on appeal under **section 108** the **Constitution of Antigua and Barbuda [TAB 5]** are to *'affirm or set aside the decision appealed against <u>or make any other decision which the authority or person from which the appeal lies could have made</u>.'* **Section 20(3)** of the **Education and Training Act [TAB 4]** is wider than the Antiguan provision. In Belize the TSAT has the power to take *'such other action as it thinks fit'*

[25] The remedies which the Police Service Commission can award under section 108 of the Constitution of Antigua & Barbuda **[TAB 5]** are to affirm or set aside the decision appealed against <u>or make any other decision</u> ***<u>which the authority or person from which the appeal lies could have made</u>***.

which is wide enough to provide the Claimant with an adequate alternative remedy to judicial review.

55. The First Defendant in the Case at Bar has not sought to argue that the Claimant ought to have pursued some private law remedy such as one for breach of contract. A breach of contract claim was one of the alternative remedies argued as being adequate by the Applicants/Defendants in ***Gary Nelson.*** The First Defendant's Strike Out Application is founded on the argument that an appeal to the TSAT against the First Defendant's decision would provide the Claimant with an adequate alternative remedy to judicial review which is capable of addressing the public law breaches alleged by the Claimant. Under **Rule 93(24)** of the **Employment (Amendment) Rules 2012 [TAB 6],** The First Defendant:

'may approve disciplinary action pursuant to section 41(3)(f) of the [Education and Training Act]*, against a teacher where the following are fulfilled –*

(a) The Managing Authority (The Second Defendant) provides complete documentation on a case;

(b) Where due process is evident

(c) Where grounds for suspension, termination, dismissal or other disciplinary action are supported by evidence presented; and

(d) There is no infringement on a teacher's constitutional rights.'

56. The requirement at **Rule 93(24)(d)** of the **Employment (Amendment) Rules 2012** is not an issue in the Case at Bar. The Fixed Date Claim does not seek any relief under the Constitution. The TSAT would clearly be

inappropriate in the context of this claim had the Claimant sought relief under the Constitution because any Constitutional Claim has to be determined at First instance by the Supreme Court.[26]

57. It is therefore humbly submitted that the First Defendant must make a finding of fact that due process and other matters stated in **Rule 93(24)** of the **Employment (Amendment) Rules 2012 [TAB 6]** are evident before going on to approve the Claimant's retirement in the interest of the profession. An appeal by the Claimant to the TSAT that due process was not evident which is an appeal against a finding of fact by the First Defendant, if successful, would undo any recommendation made to the First Defendant by the Second Defendant which was based on an investigation carried out by the Third Defendant. A successful appeal to the TSAT that due process was not evident in the Claimant's case would also quash any decision made against the Claimant by the First and Second Defendants which were the result of the investigations carried out by the Third Defendant.

58. The Legislature in Belize has expressly provided in **section 20(1)(b)** of the **Education and Training Act** Cap. 36:01 **[TAB 4]** for the TSAT to *'hear appeals against the decisions or determinations of the* [First Defendant] *taken or made in the lawful exercise of its functions.'* The Claimant's Fixed Date Claim has not claimed against the First Defendant any ultra vires, irrationality or an abuse of power. Therefore, the Case at Bar is not like the case in ***Gary Nelson v The Attorney General, The Minister of Justice & The Police Service Commission*** **[TAB 3]** where the Second and Third Defendants in that

[26] Section 20(1) Belize Constitution

Antiguan case had against them; claims of unreasonable and unlawful exercise of those Defendants' powers to dismiss the Claimant in that case. A private law action for breach of contract in ***Gary Nelson*** was clearly unsuitable to address those questions of public law. The Claimant in the Case at Bar is seeking certiorari of the First Defendant's decision to retire her in the interest of the profession. The reason for seeking certiorari against the First Defendant is because of alleged defaults by the Second and Third Defendants. These alleged defaults by the Second and Third Defendants led to the Claimant's matter coming before the First Defendant which then made the decision to retire the Claimant in the interest of the profession.

59. It is respectfully submitted that contrary to what the Claimant has submitted, an appeal to the TSAT would provide the Claimant with an adequate alternative remedy to judicial review. This adequate alternative to judicial review has not been exhausted and the Claimants case lacks any exceptional feature which warrants this Honourable Court in departing from the general rule that judicial review will not be available where the Claimant has failed to exhaust alternative remedies available to him. The First Defendant also urges this Honourable Court to note that ***Gary Nelson v The Attorney General, The Minister of Justice & The Police Service Commission*** **[TAB 3]** is distinguishable from the Case at Bar in that the alternative remedy which that Court determined was unsuitable for determining the questions of public law was the alternative remedy of a claim in private law for breach of contract and the statutory appeal to the Public Service Appeal Board. The remedies available under a private law claim or statutory appeal in that case were clearly inadequate because of the ineffectiveness of the remedies available thereunder and the restrictive scope of remedies available before the Antiguan Public

Service Appeal Board. ***Gary Nelson v The Attorney General, The Minister of Justice & The Police Service Commission*** does not assist the Claimant whatsoever in establishing exceptional circumstances by way of example nor analogy. The case is distinguishable from the Claimant's case because the TSAT has the power to grant wider remedies than those which the Public Service Appeal Board in Antigua and Barbuda. The TSAT can even take such action as it thinks fit in the context of the appeal. This is a power which the First Defendant whose decision is being appealed, did not have jurisdiction to take.

Submission 3: *The judgment of the High Court of Dominica in* ***Wayne Warner James v The Attorney General of the Commonwealth of Dominica Etal*** and the judgment of the Court of Appeal of Eastern Caribbean in ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue*** *cited in support of the Claimant's submissions are distinguishable and cannot be properly relied upon by the Claimant to establish exceptional circumstances justifying a departure from the general rule.*

60. The statutory appeals procedures in ***Wayne Warner James v The Attorney General of the Commonwealth of Dominica Etal*** **Claim No DOMHCV2016/0226 [TAB 7]**; ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue*** **Claim No. SLUHCVAP2016/0007 [TAB 8]** where respective appeals to the High Court from the decisions of the Commissioner of Police and the Comptroller of Inland Revenue. These two decisions are distinguishable and unique when compared with the Case at Bar. A statutory appeal to the High Court from the decisions complained of would essentially bar the Claimants in those cases from pursuing judicial review. The

High Court in those jurisdictions is a Court of unlimited jurisdiction in the same manner as the Supreme Court of Belize. Judicial Review would not lie against a decision by the High Court on appeal from the decisions of the Commissioner of Police and the Comptroller of Inland Revenue. The Claimant would be barred from making a collateral challenge against the manner in which the decisions of the Commissioner of Police and the Comptroller of Inland Revenue had been reached. An Appeal from the High Courts of those jurisdictions to the Court of Appeal would be solely on the merits of the decisions complained of and not the decision-making processes. The Claimant in the Case at Bar would if unsuccessful on appeal to the TSAT still have the remedy of Judicial Review against the decision of the TSAT dismissing her appeal. ***Wayne Warner James v The Attorney General of the Commonwealth of Dominica Etal*** and ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue*** are uniquely distinguishable cases when compared with the Case at Bar. Those two decisions do not assist the Claimant whatsoever in establishing exceptional circumstances by way of example nor analogy.

Submission 4: *The internal inconsistencies in* the judgment of the Court of Appeal of Eastern Caribbean in ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue*** *cited in support of the Claimant's submissions and that judgment's departure from binding authority in Belize are compelling reasons for this Honourable Court to refuse to follow the reasoning and result reached in that case.*

61. The First Defendant humbly submits that the Eastern Caribbean Court of Appeal decision in ***Unicomer (Saint Lucia) Limited v Comptroller of Inland***

Revenue **[TAB 8]** is in itself internally inconsistent in terms of the test outlined therein as the applicable test for determining whether judicial review should be available where a statutory appeals procedure has not been pursued. Secondly, ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue*** is at odds with Belizean authority on point emanating from the Court of Appeal of Belize in ***Bevans v Public Service Commission*** **3 Bz LR 155 [TAB 1].** The internal inconsistency in ***Unicomer (Saint Lucia) Limited*** appears at paragraphs [17] and [21] of the Eastern Caribbean Court of Appeal's judgment in that appeal.

62.Paragraph 17 of ***Unicomer (Saint Lucia) Limited*** reads:

> *'…The court may, in exercising its discretion, **decline** to grant judicial review*[27] *notwithstanding the existence of an alternative remedy if it is satisfied that the alternative remedy is for some reason clearly unsatisfactory, inappropriate or ineffective or fails to provide "fair, adequate or proportionate protection". The test of "exceptionality" went only to whether or not the alternative remedy provided "fair adequate or proportionate protection."*

63.Paragraph [21] of ***Unicomer (Saint Lucia) Limited*** **[TAB 8]** reads:

> *As indicated, the existence of an alternative remedy does not necessarily preclude the grant of judicial review. Where the*

[27] Emphasis Added

alternative remedy is inappropriate, unsatisfactory or ineffective to address the complaints, judicial review can lie.

64. It is submitted that the above passages from ***Unicomer (Saint Lucia) Limited*** are irreconcilable. The two passages cited from that Appeal decision came from a single unanimous judgment of the Eastern Caribbean Court of Appeal. In one paragraph that Court is saying that judicial review <u>may be refused</u> where there is a failure to utilize a statutory appeal procedure even though exceptional circumstances make the statutory appeal *'unsatisfactory, inappropriate or ineffective'* or where the statutory appeal procedure *'fails to provide fair, adequate or proportionate protection.'* In paragraph [21] that Court then goes on to essentially say judicial review should be available notwithstanding the failure to utilize a statutory appeals procedure where such statutory appeal *'is inappropriate, unsatisfactory or ineffective to address the complaints.'* This internal inconsistency from an Appellate Court sitting in a foreign jurisdiction is good reason for this Honourable Court in Belize to refuse to follow the reasoning and the result reached in ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue.***

65. It is submitted that a more compelling reason why this Honourable Court should refuse to follow the reasoning and the result reached in ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue*** **[TAB 8]** is the fact that ***Unicomer (Saint Lucia) Limited*** misstates the law that is applicable in Belize and the Commonwealth Caribbean by stating two inconsistent propositions in law in a manner that departs from the Court of Appeal of Belize's reasons for decision in ***Bevans v Public Service Commission*** **3 Bz LR 155 [TAB 1]** which are in line with earlier Privy Council authority in

Harley Developments v Inland Revenue Commissioner **[1996] STC 440** at **449 [TAB 9]** which remains binding in Belize and the Commonwealth Caribbean. ***Bevans*** states the law in a clear and succinct manner in a judgment that does not have any internal inconsistencies in the following terms:

> *"One starts off with the general proposition that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure* *it is only exceptionally that judicial review would be granted.* (Emphasis Added) *In determining whether an exception should be made and judicial review granted it is necessary for the Court to look carefully at the suitability of the statutory appeal* *in the context of the particular case* (emphasis added) *and to ask itself, what in the context of the statutory provisions, was the real issue to be determined and whether the statutory appeal procedure is suitable to determine it. See Birmingham City Council ex parte Ferrero Ltd. (1993) 1 ALL ER 530 …This like other judicial pronouncements on the interrelationship between remedies by way of judicial review on the one hand and appeal procedures on the other, is not to be regarded or construed as a statute. It does not support the proposition that judicial review is not available where there is an alternative remedy by way of appeal. It asserts simply that the court in the exercise of its discretion will* *very rarely make this remedy available in these circumstances* (emphasis added)*"*

66.The First Defendant therefore, humbly submits that ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue*** **[TAB 8]** does not assist this Court in determining this Strike Out Application. That Eastern Caribbean Court of Appeal decision does not assist the Claimant by way of example or analogy. The test or tests stated in ***Unicomer (Saint Lucia) Limited v Comptroller of Inland Revenue*** are contrary to the law as stated in ***Bevans v Public Service Commission*** **3 Bz LR 155 [TAB 1]** which are in line with earlier Privy Council authority in ***Harley Developments v Inland Revenue Commissioner*** **[1996] STC 440 [TAB 9].**

<u>**Submission 5:**</u> *The internal inconsistencies in the judgment of the Eastern Caribbean Supreme Court in* ***Wayne Warner James v The Attorney General of the Commonwealth of Dominica Etal*** **Claim No DOMHCV2016/0226 [TAB 7]** *cited in support of the Claimant's submissions and that judgment's departure from binding authority in Belize are compelling reasons for this Honourable Court to refuse to follow the reasoning and the result reached in that case.*

67.Paragraph [52] of ***Wayne Warner James*** reads:

> *'The grant of leave is a matter within the discretion of the Court. The Court when considering a leave application must take into account any alternative remedy that may be available to the applicant as where there is an alternative remedy and it has not been exhausted Judicial Review will not normally be available, <u>put in other words leave will not be granted where there is a suitable alternative remedy unless there are exceptional circumstances existing.'</u>*

68. The First Defendant humbly submits that paragraph [52] of ***Wayne Warner James*** **[TAB 7]** is internally inconsistent and this inconsistency is good cause for this Honourable Court to refuse to follow the reasoning and result reached in ***Wayne Warner James.*** Paragraph [52] of that judgment starts off by correctly stating that leave to commence judicial review will not be granted <u>where there is a suitable alternative remedy</u>. The Eastern Caribbean Supreme Court in ***Wayne Warner James*** then creates an internal inconsistency in its reasoning by going on to say that leave will not be granted where there is a suitable alternative remedy *<u>'unless there are exceptional circumstances existing.'</u>*

69. It is respectfully submitted that the mere fact that the alternative remedy is in fact *'suitable'* means that there cannot conceivably be any exceptional circumstance warranting the grant of leave to commence judicial review. Otherwise, the alternative remedy would not be characterized as being *'suitable.'* The existence of exceptional circumstances naturally mean that the alternative remedy is in fact *'unsuitable.'* It follows that an exceptional circumstance cannot persuade a Court acting reasonably to grant leave once an alternative remedy is in fact suitable. The fact that an alternative remedy is suitable means that the alternative remedy is effective and that judicial review cannot provide the Claimant with a more suitable remedy.

70. It is respectfully submitted that a more compelling reason why this Honourable Court should refuse to follow the reasoning and the result reached in ***Wayne Warner James*** is the fact that ***Wayne Warner James*** misstates the law that is applicable in Belize by stating two inconsistent propositions in law

in a manner that departs from the Court of Appeal of Belize's reasons for decision in ***Bevans v Public Service Commission*** **3 Bz LR 155 [TAB 1].** The law in Belize is that *'One starts off with the general proposition that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure it is only exceptionally that judicial review would be granted.'*[28]

71. The First Defendant, therefore, humbly submits that ***Wayne Warner James v The Attorney General of the Commonwealth of Dominica Etal*** **[TAB 7]** does not assist this Court in determining this Strike Out Application. That Eastern Caribbean Supreme Court decision does not assist the Claimant by way of example or analogy. ***Wayne Warner James*** does not properly state the applicable law in the Case at Bar.

Submission 6: *The remarks of the High Court of Antigua and Barbuda in* ***Gary Nelson v The Attorney General Etal*** **Claim No. ANUHCV2008/0552** *in relation to the proper procedure to be followed when challenging leave previously granted are obiter and in any event, the circumstances of that case differ from those in the Case at Bar.*

72. The High Court of Antigua and Barbuda at paragraph [53] of ***Gary Nelson v The Attorney General Etal*** **Claim No. ANUHCV2008/0552 [TAB 3]** states:

> *'It is clear that the effect of the Commission's application, in part, is to challenge the leave that the Court granted to Mr. Nelson to institute the claim. I agree that if the Commission was*

[28] *Bevans v Public Service Commission* 3 Bz LR 155 at 158 to 159

of the view that that Court had improperly exercised its discretion in granting Mr. Nelson leave to institute the proceedings, it ought to have utilised the correct procedure to challenge the order of that Court. It is not open to the Commission, to indirectly challenge the leave that was granted by that Court by seeking to have Mr. Nelson's claim struck out. This is not the correct procedure for the Court to embark on an examination as to whether the leave was properly granted. In any event, I do not share the view that leave was improperly granted.'

73. The First Defendant humbly submits that the outcome of ***Gary Nelson*** was determined in the paragraphs preceding paragraph [53]. Paragraph [53] is therefore obiter in respect of the remarks made by the Court regarding the proper procedure for challenging leave previously granted. The specific paragraph which disposes of the Claim in ***Gary Nelson*** is paragraph [51] where the trial judge in the Claim says:

'Mr. Nelson has sought a number of public law remedies. I do not hold the view that Mr. Nelson was obligated to appeal to the Public Service Appeal Board instead of filing the claim for Judicial Review. The law has moved on and there is no absolute duty to exhaust his other rights before instituting public law proceedings; this is particularly so where as in the case at bar, the private law remedies that may be available to a complainant are unable to address some of the alleged infractions of public rights. Accordingly, I refuse to accede to the Commission's

request to strike out Mr. Nelson's claim on that ground. If any further reason is needed to support this view, it is found in the exceptional circumstances that are present in this case which warranted the Court to exercise its discretion by giving him leave to bring the claim.'

74. It is respectfully submitted that the remarks at paragraph [51] of ***Gary Nelson*** **[TAB 3]** show that any remarks in that judgment at paragraph [53] in relation to the proper procedure for challenging leave are in fact obiter. They are remarks that were unnecessary to resolve the claim in ***Gary Nelson***.

75. The First Defendant further submits that the Strike Out Application in ***Gary Nelson*** was in fact a challenge to leave previously granted and was improperly brought as an Application to Strike Out the Claim therein. The reasons for this submission are the following. The Applicants in ***Gary Nelson*** filed 5 grounds in support of the strike out Application labelled (a) to (e) at paragraph [3] of the judgment. The 5th Ground in support of the Application was that *'The decision complained of is an entirely operational matter and is not amenable to judicial review."*[29] It is humbly submitted that this 5th Ground by stating that the decision complained of was not amenable to judicial review is a clear indication that the Application in ***Gary Nelson*** was a challenge to the grant of leave which was being brought erroneously as an Application to Strike Out the Claim therein. The Applicants in that Claim by arguing that the decision was not amenable to judicial review were seeking to impugn the grant of

[29] *Gary Nelson v The Attorney General Etal* Claim No. ANUHCV2008/0552 **[TAB 3]** at para [3]

permission as opposed to the merits of the Application for judicial review which should be brought as a Strike Out Application.

76. The First Defendant in the Case at Bar is not seeking to impugn the grant of leave. The First Defendant is seeking to have the Claim struck out because it is an abuse of the Court's processes and because the Claim discloses a lack of reasonable grounds for bringing this claim by way of judicial review. This postulate is due to the Claimant's failure to exhaust the statutory appeal procedure in circumstances that are not exceptional so as to warrant a departure from the general rule that judicial review will be unavailable where a statutory appeal procedure has not been exhausted. The First Defendant has not submitted to this Court that the decisions complained of are not amenable to judicial review. The First Defendant has not made this Strike Out Application on any such ground. The First Defendant accepts that the decisions complained of are amenable to judicial review notwithstanding the failure to exhaust the statutory appeals procedure, but only where exceptional circumstances are shown to exist. The Claimant has failed to show that such exceptional circumstances exist. The Claimant has failed to utilize the cases cited in support of her submission by way of example or analogy that any exceptional circumstances exist.

Submission 7: *The TSAT and its composition are suitable to effectively resolve the issue of whether due process was evident in the Claimant's Case.*

77. The Claimant has sought to persuade this Honourable Court that the TSAT is unsuitable to deal with the grievances raised by the Claimant. This submission by the Claimant is based on the observations in both ***Bevans v***

Public Service Commission **[TAB 1]** and ***Belize Bank v Central Bank*** **[TAB 2].** In the former case the Court of Appeal of Belize had observed that *'... it is necessary for the Court to look carefully at the suitability of the statutory appeal <u>in the context of the particular case</u>*[30]*and to ask itself, what in the context of the statutory provisions, was the real issue to be determined and whether the statutory appeal procedure is suitable to determine it.'*[31] In the latter case Legall J applied the observations made by the Court of Appeal in ***Bevans.***

78. The First Defendant submits that in the context of the Case at Bar, given the allegations made in the Claimant's 3 affidavits against the First, Second and Third, the real issue to be determined is whether due process was in fact adhered to in the process culminating with the decision of the First Defendant to retire the Claimant. The First Defendant is under a duty to determine whether due process is evident rather than whether the principles of natural justice have been adhered to as implied in paragraph 10 of the Claimant's Third Affidavit. A finding of due process is one of several decisions or determinations under **Rule 93(24)** of the **Education Amendment Rules 2012 [TAB 6]** that is to be made by the First Defendant, before the First Defendant may approve disciplinary action pursuant to **section 41(3)(f)** of the **Education and Training Act [TAB 4]**. **Section 20(1)(b)** of the **Education and Training Act** expressly provides for an appeal against the decisions or determinations of the First Defendant taken in the lawful exercise of its functions. It is submitted that the First Defendant was acting in the lawful exercise of its functions to '*approve disciplinary action, for major offences, against teachers*

[30] Emphasis Added
[31] at page 158 to page 159

in the teaching service,' when it first determined that due process was evident and when it made the decision to retire the Claimant. Neither the Fixed Date Claim nor the Claimants 3 affidavits impugn the First Defendant's jurisdiction to approve disciplinary action, against the Claimant. As such, it is respectfully submitted that an appeal to the TSAT against the First Defendant's finding of fact that due process was evident would be both effective and suitable to determine the real issue affecting the Claimant's claim. The TSAT is suitable and effective in resolving the Claimant's grievances because **section 20(1)(b)** of the **Education and Training Act [TAB 4]** expressly provides that the TSAT shall hear appeals against decisions or determinations of the First Defendant taken in the lawful exercise of its functions. Furthermore, there has not been any allegation of an abuse of power by the First Defendant in neither the Fixed Date Claim nor the Claimant's 3 affidavits. Authority in support of this submission comes from ***Harley Developments v Inland Revenue Commissioner*** **[1996] STC 440** at **449 [TAB 9]** where the Privy Council states:

> *'Their Lordships consider that, where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed.*

79. The TSAT is comprised of an attorney-at-law of not less than five years standing, who shall be the Chairperson; the Labour Commissioner; the chairperson of the National Council for Education or his nominee *the* chairperson of the National Council for Technical and Vocational Education and Training or his nominee. It is submitted that this body of persons are

suitable as a body to determine whether the First Defendant was correct in deciding that due process was evident. The TSAT can look at the reasons for decision of the First Defendant, particularly the section relating to procedure and ask itself whether what is described by the First Defendant as the procedure followed in the Claimant's case includes everything that was required of the Second and Third Defendants under the **Education Amendment Rules 2012 [TAB 6].** Due process includes adhering to the written law under which the process involved in reaching the challenged decisions and the challenged decisions were made. The TSAT is not going to have to grapple with any question of unconstitutionality or questions of public law relating to jurisdiction as raised in ***Belize Bank v Central Bank*** **[TAB 2] and or** ***Bevans*** **[TAB 1].**

80. These submissions have demonstrated that exceptional circumstances do not exist in the Claimant's claim. Therefore, this Honourable Court should give effect to the clear legislative intention in **section 20(1)(b)** of the **Education and Training Act [TAB 4]** where the Legislature has decided that an appeal against the First Defendant's finding of due process being evident should be challenged on appeal to the TSAT.

Submission 8: *The First Defendant's failure to conduct a further investigation and to have the Claimant appear before the First Defendant are not exceptional circumstances in the context of the Case at Bar.*

81. The Claimant's First Affidavit at paragraph 37 and paragraph 31(10) of her written submission suggest that the First Defendant's failure to conduct a further investigation and to have the Claimant appear before the First

Defendant breached the Claimant's right to be heard and to a fair hearing. These failures by the First Defendant are part of the facts which the Claimant says create exceptional circumstances in the Claimant's claim because these failures amount to breaches of **Rule 93(18)** of the **Education Amendment Rules 2012 [TAB 6]**. The First Defendant humbly submits that **Rule 93(18)** of the **Education Amendment Rules 2012** is discretionary. It is permissive and not mandatory. The Claimant does not have a right to a further hearing and the First Defendant is not obligated to make further investigations. The Claimant has not pleaded these failures to conduct a further investigation and a further hearing as abuses of power by the First Defendant or as a decision tainted by a lack of jurisdiction by the First Defendant. Therefore, there is no basis for this Honourable Court to make a finding that these actions were abuses of power. Consequently, the First Defendant's failure to conduct a further investigation and to have the Claimant appear before the First Defendant are not exceptional circumstances that should permit this claim proceeding by way of judicial review. The law as stated in ***Harley Developments v Inland Revenue Commissioner*** **[1996] STC 440** at **449 [TAB 9]** is that *'where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed.'* ***Bevans v Public Service Commission*** **[TAB 1]** is in line with ***Harley Developments.***

Submission 9: *The absence of transcripts of interviews carried out by the Third Defendant and the absence of reasons for the decision taken by the Second Defendant do not make the Claimant's case exceptional.*

82. It has to be borne in mind that an appeal to the TSAT is against the decisions or determinations of the First Defendants. It is not an appeal against the decisions of the Second and or Third Defendants. The Claimant was provided with the First Defendant's reasons for decision. The Claimant acknowledges this at paragraphs 35 and 36 of her First and Second Affidavits. The Claimants written submissions state that an appeal to the TSAT would not be appropriate in the circumstances, since the Claimant was not provided with the transcript or recordings of the 15 interviews conducted by the Third Defendant and she has still not received the reasons for the decisions taken by the Third Defendant and the Second Defendant. The Claimant goes on to argue that these reasons for the decisions of the Second and Third Defendants are important documents and information which were relied upon by the First Defendant and which are pertinent to any appeal to the TSAT.

83. The First Defendant humbly submits that the lack of the transcript or recordings of the 15 interviews conducted by the Third Defendant and the absence of reasons for decision taken by the Third Defendant and the Second Defendant do not mean that steps cannot be taken in a meaningful manner by the Claimant on appeal to the TSAT. The appealable decision is the decision of the First Defendant. The Claimant has both the decision of the First Defendant to retire her in the interest of the profession and the reasons for that decision by the First Defendant. It is submitted that the decision and reasons for decision by the First Defendant provide the Claimant with sufficient

material to be able to properly challenge the decision of the First Defendant on appeal to the TSAT. The submission made by the Claimant in this regard would hold true if the appealable decision under **section 20(1)(b)** of the **Education and Training Act** was the decision of the Second and Third Defendants, in that it would be necessary for the Claimant to be provided with the transcripts of interviews by the Third Defendant and the reasons for the decision taken by the Second and Third Defendants. In the Case at Bar the First Defendant's position is that the Claimant needs to have appealed the First Defendant's decision to the TSAT before seeking judicial review. Secondly, that an unsuccessful appeal in itself would not prevent the Claimant from seeking judicial review against the decision of the TSAT taken on appeal from the decision of the First Defendant.

84. Furthermore, there is sufficient information in the First Defendant's written decision to enable the Claimant to seek to establish that due process was in fact not evident in the proceedings and actions taken by the Second and Third Defendant which resulted in the decision of the First Defendant. The written decision of the First Defendant which also contains the reasons for the decision is exhibited as exhibit **MH 1-16** of the Claimant's First Affidavit and as exhibit **MH 2-16** of the Claimant's Second Affidavit. The first page of those reasons for decision contains a paragraph stating the procedure followed by the Second and Third Defendants. The second page of those reasons for decision goes on to explain why the First Defendant came to the conclusion that the procedure followed by the Second and Third Defendants was in conformity with due process. It is submitted that the First Defendant's reasons for decision provide the Claimant with sufficient material to be able to appeal the First Defendant's finding that the procedure employed by the Second and

Third Defendants was in conformity with the principles of due process. The Claimant can on appeal to the TSAT meaningfully challenge whether the procedure outlined in the First Defendant's reasons for decision amount to due process being evident in the Claimant's case.

85. The Claimant has further argued at paragraph 39 of her submissions that if the First Defendant is correct in saying that an appeal to the TSAT in the circumstances of this case only lies against the decision of the First Defendant, such an appeal would not be suitable because the allegations of unlawfulness, bias, and breach of principles of natural justice are in relation to the decisions of the Second and Third Defendants as well. The Claimant's argument goes on to say that there would be no remedy against the Second and Third Defendants' decisions. The First Defendant humbly disagrees and submits that a successful appeal against the finding by the First Defendant that due process was evident in the procedure leading to the matter coming before the First Defendant would essentially undo any decision by the First Defendant based on the decisions, actions or omissions of the Second and Third Defendants. Secondly, if an appeal to the TSAT also lies against the decisions of the Second and Third Defendants in addition to an appeal against the First Defendant's decisions, there is sufficient material to challenge the First Defendant's finding of due process. If such appeal is successful against the First Defendant, the failure of the Second and Third Defendants to provide reasons for their decisions and the transcripts of interview by the Third Defendant would become a moot point. A successful appeal against the First Defendant's finding of due process in the procedures employed by the Second and Third Defendants is sufficient to dispose of the Claimant's complaints raised in this judicial review claim in their entirety. The TSAT's power under

section 20(3) of the **Education and Training Act [TAB 4]** to *'confirm, set aside, modify or suspend the decision under appeal* *<u>or take such other action as it thinks fit'</u>* is wide enough to ensure that the decisions taken by the Second and Third Defendants cannot be relied upon in any future rehearing of the Claimant's case by the Second and or First Defendants if any new hearing(s) were to be ordered by the TSAT upon a successful appeal by the Claimant to the TSAT.

Submission 10: *The Claimant's allegations against the First Defendant are those contained in the Claimant's 3 affidavits and the Fixed Date Claim expressly states the reliefs sought by the Claimant.*

86. Paragraph 43 of the Claimant's submissions argue that there is an allegation of a breach of the rules of natural justice being made against the First Defendant and that contrary to what the First Defendant says, the Claimant's claim is not in relation to a finding of fact by the first Defendant that there was due process in the disciplinary process taken against the Claimant. The First Defendant respectfully submits that the fact that the Claimant characterizes a decision as breaching principles of natural justice does not necessarily mean that such characterization is in fact correct or proven. The factual basis for the Claimant's allegation that the First Defendant breached the principles of natural justice comes from paragraphs 10 of her Third Affidavit and paragraph 37 of her Second Affidavit. The basis for the allegation is that the First Defendant breached the principles of natural justice by failing to conduct a further investigation and a further hearing pursuant to **Rule 93(18)** of the **Education Amendment Rules 2012.**

87. It should be borne in mind that **Rule 93(18)** of the **Education Amendment Rules 2012** is discretionary. It is permissive and not mandatory. None of the Claimant's affidavits have averred that the First Defendant exercised its discretion illegally, arbitrarily or unreasonably. The First Defendant is endowed with the power to make a decision without conducting a further investigation or a further hearing. Therefore, this failure to conduct a further investigation or a further hearing should have been challenged by the Claimant as being an improper exercise of discretion. The Claimant has not sought to challenge it on those grounds in her Judicial Review Claim. The fact that to **Rule 93(18)** of the **Education Amendment Rules 2012** permits the First Defendant in clear words to reach a decision without a further investigation or further hearing means that the decision of the First Defendant to reach a decision on the Claimant's case cannot in itself make the procedure employed by the First Defendant unfair in the sense described by the Claimant. It should also be considered that the Claimant absented herself from the hearing of the 28th and 29th November 2018 before the Second Defendant without providing any good reason. See the paragraph 8 of the Affidavit of Mr. Delvitt Samuels in support of this Strike Out Application.

Conclusion

88. The Applicant/First Defendant respectfully submits to this Honourable Court that the Fixed Date Claim in Claim 295 of 2019 be Struck Out and dismissed with Costs. The Claimant has failed to show this Court that exceptional circumstances exist in the Claimant's case which warrant a departure from the general rule that judicial review will be unavailable where a Claimant has failed to exhaust a statutory appeals procedure or an adequate alternative

remedy. None of the cases cited by the Claimant support her submissions that exceptional circumstances exist. None of those cases are on all fours with the claimant's case. Those cases cited in support by the Claimant are either distinguishable or contrary to the law as stated by the Court of Appeal of Belize in ***Bevans v Public Service Commission*** **3 Bz LR 155 [TAB 1]** and the Privy Council in ***Harley Developments v Inland Revenue Commissioner*** **[1996] STC 440.** ***Bevans v Public Service Commission*** **was** decided 1 month after and is in line with the decision of the Privy Council in ***Harley Developments*** even though the former makes no mention of the latter.

89.DECISION

I wish to thank counsel for these comprehensive legal Submissions which have been invaluable in assisting this court in determining this Application to Strike out this Claim. Having reviewed the submissions for and against this Application, I find myself in agreement with the highly cogent arguments of the Defendants/Applicants. The general rule, on which both counsel agree, is that the Claimant should exhaust her remedies under the statutory regime which the legislature has provided under the Education Act. Judicial review is a mechanism of last resort. When I apply the test which both parties have referred to in their arguments, that is, the test whether there are exceptional circumstances of the case at bar which would justify this court granting judicial review of this matter, I find that there are no such exceptional circumstances in this case. As Mr. Awich has submitted, rightly in my view, the eleven points raised by Mr. Jenkins on behalf of the Claimant/Respondent as exceptional circumstances can be fully addressed by the statutory body designed by the legislature to deal with these appeals, the Teaching Services Appeals Tribunal (TSAT).

Looking at the structure of the TSAT under the Education Act, I agree with Mr. Awich's submissions that the members of the TSAT are qualified and competent to address the concerns raised by the Claimant/Respondent in her claim. As Mr. Awich has elucidated in his submissions, the TSAT is comprised of an attorney-at-law of not less than five years standing, who shall be the Chairperson; the Labour Commissioner; the chairperson of the National Council for Education or his nominee and the chairperson of the National Council for Technical and Vocational Education and Training or his nominee. I agree that this body of persons is suitable to determine whether the First Defendant was correct in deciding that due process was evident. This is so especially since the TSAT is required to be guided in its deliberations by principles of natural justice in determining the matters before it. I also agree that looking at the relief sought by the Claimant, the scope of relief which the Act enables the TSAT to grant is wide enough to encompass what is being claimed since under **section 20(3)** of the **Education and Training Act** the tribunal has the power to *'confirm, set aside, modify or suspend the decision under appeal* ***or take such other action as it thinks fit'***. The Claimant, if her appeal is successful, would be able to get her job back and her emoluments reinstated. In relation to the declarations sought, if the appeal succeeds the TSAT would necessarily have to consider whether the other Defendants acted fairly and whether Ms. Hutchinson received due process from the Commission in the manner in which it reached its decision to retire her in the public interest. There is no challenge to jurisdiction or challenge to constitutionality of the decision which would take this case out of the realm of ordinary circumstances and place it in that of extraordinary circumstances. The Claimant's failure to exhaust all

her remedies under the statutory regime before seeking judicial review therefore amounts to abuse of process of the court. For these reasons, I grant the Application to Strike Out this Claim. Costs awarded to the Defendants/Candidates to be paid by the Claimant/Respondent to be agreed or assessed.

Dated 15th this day of September 2021

Michelle Arana
Chief Justice (Acting)
Supreme Court of Belize