COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PUBLIC LAW DIVISION

2017/PUB/jrv/00010

BETWEEN

BRIAN R. CHRISTIE

Applicant

AND

CIVIL AVIATION AUTHORITY

(Bahamas Air Navigation Services Division)

Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Tanya Wright of World Legal for the Applicant
Mr. Kirkland Mackey and Ms. Lukella Lindor for the Respondent

Hearing Dates: 7 May, 30 July 2018, 3 June, 4 June 2020

Public law – Judicial Review – Grounds for judicial review - Illegality – Irrationality and the *Wednesbury* unreasonableness – Procedural Impropriety Bias – whether application is a pure employment situation and therefore the public law remedy of certiorari not available

The Applicant is a retired Grade 1 Air Traffic Controller with the Bahamas Air Navigation Services Department; a division of the Civil Aviation Authority located at Windsor Field, New Providence, The Bahamas.

The Judicial Review proceedings relate to the decision made by the Respondent's internal Board of Inquiry that concluded that the Applicant was partially at fault for an Operational Error that occurred on 3 November 2016 which result in a loss of separation incident between two aircrafts at the Sir Lynden Pindling International Airport that nearly resulted in a collision. That decision along with the recommendation that the Applicant undergo remedial training was upheld by the Board of Directors of the Civil Aviation Authority following an appeal lodged by the Applicant.

The Applicant challenged those decisions on the grounds that they were unlawful, procedurally unfair, irrational, bias and a breach of the rule of natural justice.

The Respondent opposed the application and maintained that the actions of the Board of Inquiry and the subsequent decision of the Board of Directors were lawful and fairly done in accordance with the terms of the Industrial Agreement. Moreover, the Respondent asserts that the Applicant's action is a pure employment dispute and did not raise any element of public law and consequently, the action is not subject to judicial review.

HELD: dismissing the judicial review proceedings with no order as to costs

1. The judicial review process requires the Court to exercise a supervisory jurisdiction over public decision-making bodies to ensure that they do not exceed or abuse their powers while performing their duties: **Phillippa Michelle Finlayson v The Bahamas Pharmacy Council** [2017/PUB/jrv/0006]. However, the Court will not interfere with a decision that a public body has reached that was not irrational, illegal or procedurally unfair: **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 at 410-411.

2. An application for judicial review has not and should not be extended to pure employment situation: **Regina v. British Broadcasting Corporation ex parte Lavelle** [1983] 1 WLR 23 applied. There were no material issues raised by the Applicant or evidence led at trial that disclosed a public law element.

3. The relationship between the Applicant and the Respondent was derived from a private contract of employment (and the Industrial Agreement between the Government of The Bahamas and the Bahamas Air Traffic Controllers Union) with which no element of public law attached. Additionally, the involvement of the Union and the Tribunal support the position that this is a private law matter. The prerogative order of certiorari (quashing order) is only available where an applicant can show that a public law right which he enjoyed was infringed: **Bain (Re)** [1993] BHS J. No. 16 considered.

4. To allow the application for judicial review for a prerogative order to proceed without a public law element would be a misuse of the remedy of judicial review: **Bain (Re)** [1993] BHS J. No. 16.

5. This judicial review proceedings were brought by the Applicant in good faith seeking the sanctuary of the courts. It has raised an interesting point which I believe, adds to the jurisprudence and as such, in the exercise of my discretionary powers, I will make no order as to costs. **Daniel Mussington and Gervin Gumbs v The Attorney General of Anguilla,** Miscellaneous Suits Nos. 044 and 045 of 2001 considered.

JUDGMENT

Charles J:

Introduction

[1] This is an application for judicial review. The Applicant ("Mr. Christie") is unhappy with two decisions of his former employer, the Civil Aviation Authority ("the Respondent") namely:

(i) The decision of the Respondent's internal Board of Inquiry ("the Board") which concluded, among other things, that Mr. Christie was partially at fault for an operational error which occurred on 3 November 2016 in the

matter of a reported separation loss between airplanes CMP197 and C6KMC that almost resulted in a collision ("the Board's decision") and;

(ii) The decision of the Board of Directors of the Bahamas Civil Aviation Authority, the Respondent's appellate body ("the BCAA") heard on 8 February 2017 upholding the Board's decision.

[2] Mr. Christie seeks the following relief:

1. A Declaration that the Board's decision dated 7 December, 2016 finding that he (Mr. Christie) was partly at fault for a controller operational error which occurred on 3 November 2016 was unlawful and or procedurally unfair;

2. A Declaration that the decision of the Board of Directors of the BCAA as a result of an appeal heard on 8 February, 2017 wherein the Board's decision was upheld was unlawful and or procedurally unfair and or in breach of natural justice.

3. An order quashing the decisions of the Board of Inquiry and the Board of Directors.

4. Pecuniary and non-pecuniary Damages flowing from the unlawful decisions and costs.

Factual summary

[3] The relevant facts are broadly not in dispute and can be shortly summarized. On 3 November 2016, Mr. Christie was the Local/Tower Controller and one Candace Bostwick ("Ms. Bostwick") was the Approach Controller at Sir Linden Pindling Airport when airplane CMP197 E190 nearly collided with airplane C6KMC E110 while doing a practice approach at the airport. This incident, referred to as an operational error ("OE"), was logged with the Respondent in its Daily Record of Facility Operation and was also reported to the duty operations officer, Mr. Lenn King.

[4] On 27 November 2016, Ms. Bostwick wrote to Wendy Major, the Chief Operation Officer (Officer-in-Charge) of Air Traffic Services, accepting FULL responsibility for her shortcomings in this situation.

[5] On 28 November 2016 the Board, under the chairmanship of Chief Operations Officer, Mr. Fredrick Lightbourn, was convened by the Respondent to investigate the OE which took place on 3 November 2016. The other members of the Board included Operations Officer, Donna Cash and Radar Supervisor, Jason Saunders.

[6] On 29 November 2016, Mr. Christie was advised that he was required to attend before the Board to be interviewed the following day at 11:00 a.m. He appeared at the meeting with Mrs. Dorsett, the Vice-President of Bahamas Air Traffic Controllers Union ("BATCU").

[7] During its investigation of the OE, the Board of Inquiry listened to the voice recordings of the transmissions between the tower controller and the aircrafts, transmissions between the approach controller and the aircrafts, and also to the tape recording between the approach controller and the tower controller. The Board of Inquiry also reviewed the relevant transcripts and four snap shots from the tower's SDD.

[8] The Board of Inquiry also interviewed Ms. Bostwick, Mr. Christie, Juan Rodgers (a Senior Air Traffic Controller), and Lenn King (Operations Officer).

[9] The Board found that the incident had its genesis on the tower's frequency when airplane C6KMC at time 22:15:21 indicated that he was missing the approach. Mr. Christie (the tower controller) did not ask the pilot of C6KMC the reason for missing the approach but simply acknowledged the missed approach and sent the pilot to the approach frequency. Also, Mr. Christie did not inform Ms. Bostwick (the approach controller) of the missed approach nor did he seek instructions or coordinate the rest of the flight. It was unanimously agreed by the Board that had Mr. Christie determined the pilot's reason for missing the approach and coordinated with Ms. Bostwick, the incident may not have occurred. Moreover, the

Board found that Mr. Christie bore some responsibilities for ensuring that the required separation between the subject airplanes was maintained and should have done so by not giving airplane CMP197 take-off clearance. The Board ultimately concluded that Mr. Christie (as well as Ms. Bostwick) were either unaware of their responsibilities as they relate to missed approaches or that they simply neglected to carry out their duties. As this case concerns Mr. Christie, it was recommended that he attends a remedial course.

[10] On 9 December 2016, Mr. Christie was informed in writing of the Board's findings and its recommendation that he undergo a remedial training course. Mr. Christie did not attend. He in turn lodged an appeal to the Board of Directors.

[11] On 8 February 2017, the Board of Directors heard the appeal and subsequently accepted the findings and recommendations of the Board. It concluded that should Mr. Christie refuse to submit to the recommended remedial training he would be subject to disciplinary actions.

[12] The investigation of the OE, the Board of Inquiry and the Appeal process were provided for pursuant to the terms of the Industrial Agreement between the Government of The Bahamas and The Bahamas Air Traffic Controllers Union 1 March 2013 - 31 May 2017 ("the Industrial Agreement").

[13] On 4 May 2017, Mr. Christie filed an application for leave to apply for judicial review. Leave was granted on 25 October 2017 for Mr. Christie to commence judicial review proceedings against the Respondent.

The Decisions

[14] The impugned Decisions, which are the subject of this application for judicial review, are:

i. The Decision of the Board that Mr. Christie was partially at fault for the OE that occurred on 3 November 2016 that almost resulted in the collision of airplanes CMP197 and C6KMC and for Mr. Christie to attend remedial

training course; and

ii. The Decision of the Board of Directors of the BCAA upholding the aforementioned Board's decision and recommendation.

Judicial Review and the role of the Court

[15] In paragraphs 130 to 134 of **Phillippa Michelle Finlayson v The Bahamas Pharmacy Council** [2017/PUB/jrv/0006] – Judgment delivered on 5 June 2019 [unreported] and upheld on appeal on 20 June 2020 I fully set out the role of the Court in judicial review matters. For convenience, I will simply repeat it.

[16] Judicial Review is the method by which the Court exercises a supervisory jurisdiction over public decision-making bodies to ensure that those bodies observe the substantive principles of public law and do not exceed or abuse their powers while performing their duties.

[17] In **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 at 410-411, the House of Lords has confirmed that powers derived from the prerogative are public law powers and their exercise amenable to the judicial review jurisdiction. Lord Diplock conveniently classifies under three heads the grounds upon which administrative action is subject to control by judicial review as illegality, irrationality or "*Wednesbury unreasonableness*" and procedural impropriety with a caveat for further development on a case by case basis which may add further grounds such as the principle of "proportionality". That said, he explained the three well-established heads in this fashion:

> **"By "illegality, as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."**
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> **By irrationality, I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided**

> **could have arrived at it. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…."**
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> **I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice".**

[18] Judicial prudence dictates that the Court, in exercising this power, must however be careful not to overstep its supervisory role. It must not interfere with a decision that a public authority has reached that was not irrational, illegal or procedurally unfair. [Emphasis added]

[19] **I**n **Bethell v. Barnett and Others** [2011] 1 BHS No. 30, a judicial review proceeding which involved a decision by the Judicial and Legal Services Commission, Isaacs Sr. J. (as he then was), described the court's role in judicial review proceedings as follows: (at para 85):

> **"I must caution myself that this is a judicial review and not an appeal. Thus, the only questions I must answer are: was the decision of the JLSC to appoint the Applicant as the DLRRC irrational; and was the Applicant treated unfairly. I remind myself of the manner in which Gordon, JA put the position in *Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States*, Civil Appeal No. 9 of 2006 at paragraph 31. He opined:**
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> > **"I remind myself that the function of the court in judicial review is not to act as an appellate forum from the body whose decision is being challenged. If the process was fair and the decision not deviant, then the order sought under the judicial review must be refused.""**

[20] In judicial review proceedings, the applicant has the onus to prove that a ground for review exists and warrants a hearing by the Court. In **Standard Commercial Property Securities Limited and others (Respondents) v. Glasgow City Council (Appellants) and others** [2006] UKHL 50 at para [61], the House of Lords confirmed that the onus is on the claimant [applicant] to establish a case, and in

so doing, affirmed the approach taken by Lord Brightman in **R v Birmingham City District Council Ex p O** [1983] 1 AC 578:

> **"The onus is on Standard (the claimant) to establish that, in deciding that an indemnity for their costs represented the best price or best terms that could reasonably be obtained, Glasgow reached a decision which was ultra vires or which no reasonable authority could have reached: *R v Birmingham City District Council Ex p O* [1983] 1 AC 578, 597C-D per Lord Brightman."**

Grounds upon which Judicial Review is sought

[21] Mr. Christie premises his application for judicial review on the following grounds namely (1) Illegality, (2) Irrationality, and (3) Procedural Impropriety (inclusive of bias and breach of natural justice).

The Decision of the Board (1st Decision)

[22] Mr. Christie alleged that the decision of the Board to assess partial liability on him was irrational in that having regard to the full admission and acceptance of liability by Ms. Bostwick, the unsanctioned status of the Radar System and the standard operating policies regulations and guidelines, no reasonable authority could ever have come to that decision.

[23] He next alleged that the said decision is unfair and/or that there was procedural impropriety in that there was a failure to take into account critical and relevant evidence of independent eyewitness to the incident.

[24] Mr. Christie also alleged that there was procedural impropriety and/or illegality in that (i) his representative at the hearing was repeatedly denied the opportunity to address the committee (ii) he was not given adequate notice of the hearing and (iii) he was not provided with information relative to the evidence in the Boards possession in sufficient time for the hearing or at all.

[25] Mr. Christie finally alleged that the inclusion of Frederick Lightbourn on the Board was in breach of natural justice and created a real danger of bias.

The Decision of the Board of Directors (2nd Decision)

[26] Mr. Christie alleged unfairness or illegality and/or breach of natural justice in that he was not present or permitted to be present at the hearing of his appeal nor was he given prior notice of the hearing.

Grounds opposing application for Judicial Review

Pure employment law dispute

Submissions by Counsel

[27] One of the grounds raised by the Respondent for opposing the application for judicial review is that the nature of the action brought by Mr. Christie indicates that it is a pure employment dispute and no evidence was adduced at trial that points to a public law element. In this regard, Mr. Mackey who appeared for the Respondent, insisted that Mr. Christie cannot therefore maintain his application for judicial review.

[28] Learned Counsel Ms. Wright, who appeared for Mr. Christie, argued that if there was any evidence that this was a pure employment action, the Respondent ought to have raised it at the date of the hearing of the application for leave since it was done *inter partes*.

[29] I should point out that, at the leave stage, the Court is not concerned with the merits of the case but whether the applicant has met the three threshold requirements for leave namely (i) was the application made promptly; (ii) whether there is an arguable case and (iii) whether the applicant has sufficient interest in the action.

[30] That said, it seems to me that a good starting point is to determine whether this case is amenable to judicial review. If it is not, then it disposes of that action.

[31] In dealing with the issue of pure employment dispute, learned Crown Counsel Mr. Mackey refers to the case of **Regina v. British Broadcasting Corporation ex parte Lavelle** [1983] 1 WLR 23. Woolf J, in addressing the issue of whether an application for judicial review under Order 53 rule 1 was the appropriate procedure in that case, at page 30, stated:

> **"…There is nothing in rule 1 or section 31 which expressly extends the circumstances in which the prerogative remedies of mandamus, prohibition or certiorari are available. Those remedies were not previously available to enforce private rights but were, what could be described as, public law remedies. They were not appropriate, and in my view remain inappropriate remedies, for enforcing performance of ordinary obligations owed by a master to his servant. An application for judicial review has not and should not be extended to pure employment situation. Nor does it, in my view, make any difference that what is sought to be attacked is a decision of a domestic tribunal such as the serious of disciplinary tribunals provided for by the B.B.C.". (**Emphasis added**)**

[32] The position in **Lavelle** was subsequently approved by the English Court of Appeal in **Law v National Greyhound Racing Club Ltd** [1983] 1 WLR 1302 and recently applied in the case of **R (Arthurworrey and another) v Haringey London Borough Council** [2002] ICR 279. Moreover, in **National Greyhound Racing Club** [supra], the Court of Appeal in expressing their agreement with the decision of Woolf J in **Lavelle** pointed to two decisions of the House of Lords that they viewed as implicitly supporting the position in **Lavelle**: **O'Reilly v Mackman** [1983] 2 A.C. 237 and **Cocks v Thanet District Council** [1983] 2 A.C. 286.

[33] Learned Crown Counsel Mr. Mackey also referred to the cases of **McClaren v Home Office** [1991] 1 CR 824, 836B – 838B, and **Wandsworth London Borough Council v A** [2000] 1 WLR 1246.

[34] The Court, in conducting its own research, found the case of **Bain (Re)** [1993] BHS J. No. 16 and, in fairness to both parties, provided this case to both Counsel and sought their input as to its applicability to the present case. Learned Counsel Mr. Mackey was succinct and supports the reasoning in **Bain (Re).**

[35] On the other hand, learned Counsel Ms. Wright argued that **Bain (Re)** is distinguishable from the present case. She submitted that the question to be asked is whether the remedies arise solely out of private right and contract between Mr. Christie and the Respondent or upon some breach of a public duty placed upon that authority which relates to the exercise of the powers granted by statute....in

the course of providing a national service to the public. According to learned Counsel, this was the very question posed by Purchas L.J. in **Regina v. East Berkshire Health Authority exparte Walsh** (1965) 1GB 152 and quoted at paragraph 27 of **Bain (Re)** emphasizing the word “solely.” Paragraph 27 of **Bain (Re)** provides as follows:

> **“Finally, at page 181 Purchas L.J. posed the very question which, mutatis mutandis, I must address in the instant case: "did the remedies sought by the applicant arise solely out of a private right and contract between him and the authority or upon some breach of public duty placed upon that authority which related to the exercise of the powers granted by statute to them to engage and dismiss him in the course of providing a national service to the public?" Holding that the remedy sought by Walsh arose solely out of his contract of employment with the Health Authority as opposed to any public duty imposed upon the authority, he said at page 182:**
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> > **"In my judgment there is no arguable case which can be mounted upon the facts disclosed even if they are all assumed in favour of the applicant to the effect that the remedies sought by him stem from a breach which can be related to any right arising out of the public rights and duties enjoyed by, or imposed upon the health authority."**

[36] Learned Counsel Ms. Wright submitted that, on this question posed by Purchas LJ (supra), Gonsalves-Sabola CJ exemplified how flexible the relief of certiorari can be at paragraph 19 of **Bain (Re).** I also agree that the Court ought to be flexible in the application of the remedy of certiorari. But, the question still remains whether acts done by the Respondent in the area of private law i.e. the law of contract, were amenable to certiorari.

[37] This brings me once again to the facts of this case. Mr. Christie was a senior air traffic controller; one of the most senior person employed with the Respondent. According to Ms. Wright, the greatness of his public service is unequivocal. She relied on the instructive passage of Sir John Donaldson MR found at page 6 of **Bain (Re)** which reads ".....the public may have no interest in the relationship between servant and master in an ordinary case but where the servant holds office in a great public service, the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. She emphasized that

consequently, Mr. Christie's employment was not one of a pure question of contract.

[38] Learned Counsel further argued that **Bain (Re)** is distinguishable from the present case in the following situations namely:

(i) In **Bain (Re)**, the relevant Authority was The Bahamas Telecommunications Corporation ("BTC") established by The Bahamas Telecommunications Corporation Act whereas, in the present case, the relevant Authority was created by The Civil Aviation Act.

(ii) In **Bain (Re)**, the decision was made by the General Manager of the BTC for the transfer of Mr. Bain to another island (Grand Bahama): see page 3 paragraphs 12-13. In the present case, the decision was made by a Tribunal constituted to investigate an "accident". Accident is described by the Act as "includes any fortuitous or unexpected event by which the safety of an aircraft or any person is threatened. This said investigation was the exercise of its statutory right to investigate under the said Act.

(iii) In **Bain (Re)**, there was no "special statutory legislation" or instrument bearing directly on the right of the public authority to transfer Mr. Bain. It was held that there were no provisions in the Bahamas Telecommunications Act nor any regulations or other instrument which prescribed terms and conditions under which the transfer of such personnel shall be made. It fell to be governed by the common law: see page 8 paragraph 29. In the present case, the Tribunal and the rules and procedures created and/or negotiated for them approved by the Minister are specific. It is clear that these special provisions are the only means of determining the culpability of Mr. Christie in all the circumstances.

> Unlike **Bain (Re)** it could not be governed by the common law. In the present case, the Respondent was performing its statutory duties on behalf of the Minister laid out at Part 11 Section 3 and Part 111 Section 5 (2) (a) –(w) of the Act including but not limited to:
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> (i) the investigation in such manner as may be prescribed including by means of a Tribunal established for the purpose of any accident arising out of or in the course of air navigation and occurring either in or over The Bahamas;
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> (ii) minimize or prevent the use or effectiveness of apparatus used in connection with air aviation;
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> (iii) securing the safety of and efficiency of air regulation;
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> (iv) and importantly, in pursuance of statutory mandate to promote the safety and efficiency in the use of civil aircraft.

[39] Ms. Wright submitted that these distinguishable features of **Bain (Re)** are important as they underscore the great public service, on which the Master of the Rolls placed some importance. She however admitted that "public service" and "high grade" per se are not determinative of there being a public law element. She further submitted that the manner by which the Respondent constituted the Tribunal and the process it underwent did not relate to its own performance as employers in a pure master and servant context but rather the performance of their duty or the exercise of their powers as an authority to provide service for the public at large.

[40] Unquestionably, Ms. Wright fought very hard to demonstrate to the Court that this is not a matter of pure employment law contract: see paragraphs 5 to 37 of her written submissions dated 4 June 2020.

Analysis and findings

[41] Mr. Christie seeks, among things, an order quashing the aforementioned Decisions. A quashing order (i.e. an order of certiorari) is a prerogative remedy available as a relief on a judicial review application in the event of a breach of public law right. There are a number restrictions on the availability of judicial review seeking a prerogative remedy one of which is that only public law claims are justiciable through judicial review.

[42] Where a body derives its functions and authority from a contract or an agreement judicial review is usually not available. In this case, the two boards whose decisions are the subject matter of scrutiny, appear to derive their function and authority pursuant to the provisions of the Industrial Agreement. It seems to me then that the issues raised by Mr. Christie at trial are of a pure employment nature with respect to purported breaches of the Industrial Agreement.

[43] In my judgment, Mr. Christie ought to have pursued a remedy for breach of his employment contract and/ or breach of the provisions of the Industrial Agreement with the Industrial Tribunal or the usual common law action and not by way of judicial review. The case of **Bain (Re)** is helpful in addressing the issue. In brief, the case concerns the application for judicial review for an order to quash and prohibit the directive from the General Manager of the BTC (establish by an Act of Parliament) for the transfer of Mr. Bain ("the Applicant") to Freeport, Grand Bahama from Nassau, New Providence. The main issue for determination was whether the relationship between the Applicant and the BTC was one of master and servant or derived from a private contract of employment with which no element of public law attached as certiorari and prohibition are only available where an applicant can show that a public law right which he enjoyed was infringed. In dealing with the issue at hand, I quote extensively from the judgment of Gonsalves-Sabola C.J. from paragraphs 21 to 26 where he explained that:

> **"21 This court pronounces itself as recognizing flexibility instead of rigidity in the application of the remedy of certiorari but, on the basis of the authorities just discussed, only so far as concerns the body**

against whom it may be granted. The subject matter to which certiorari may properly be directed remains a separate and distinct issue. As I understand him, Counsel for the Corporation holds fast to the line that even if the Corporation were amenable to certiorari, the order can never properly issue in relation to acts of the Corporation done in the area of private law which, in the instant case, is the law of contract.

22 Counsel for the Corporation placed reliance on the case of Regina v East Berkshire Health Authority ex parte Walsh (1985) 1 Q.B. 152. The facts are important. Walsh, a senior male nursing officer was employed by the Health Authority under a contract which incorporated the Whitley Council agreement on conditions of service. Walsh was purportedly dismissed for misconduct by district nursing officer. He applied for judicial review under Order 53 of the English R.S.C. which, relative to the orders of certiorari and prohibition, is on all fours with the local Order 53 of the R.S.C. Walsh sought an order of certiorari to quash his dismissal on certain grounds. The Health Authority raised a preliminary point whether the subject matter of application entitled Walsh to apply for judicial review. It was held at first instance that certiorari was an available remedy on the facts of the case. The Health Authority appealed to the Court of Appeal. Sir John Donaldson M.R., dealt with the preliminary point on the basis of the assumption, just as I have done in this case, that all the applicant's complaints were valid, then he went on to consider whether, nevertheless, judicial review was not wholly inappropriate and the application for it, a misuse of the Order 53 procedure.

23 It is instructive to read the excerpt from his judgment now about to be quoted, in the course of which he set out the ratio of the judge at first instance. At page 162 the Master of the Rolls said:

> **"The remedy of judicial review is only available where an issue of "public law" is involved, but, as Lord Wilberforce pointed out in Davy v Spelthorne Borough Council [1984] A.C. 262, 276, the expressions "public law" and "private law" are recent immigrants and, whilst convenient for descriptive purposes, must be used with caution, since English law traditionally fastens not so much upon principles as upon remedies. On the other hand, to concentrate on remedies would in the present context involve a degree of circularity or levitation by traction applied to shoe-strings, since the remedy of certiorari might well be available if the health authority is in breach of a "public law" obligation, but would not be if it is only in breach of a "private law" obligation.**[Emphasis added]
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> **The judge referred carefully and fully to Vine v National Dock Labour Board (1957] A.C. 488; Ridge v Baldwin [1964] A.C. 40 and Malloch v Aberdeen Corporation 1971 1 W.L.R. 1578. He seems to have accepted that there was no "public law" element in an "ordinary" relationship of master and servant**

and that accordingly in such a case judicial review would not be available. However, he held, on the basis of these three cases and, in particular, Malloch's case, that the applicant's relationship was not "ordinary." He said:

> **"The public may have no interest in the relationship between servant and master in an ordinary' case, but where the servant holds office in a great public service, the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is not a pure question of contract. The public is concerned that the nurses who serve the public should be treated lawfully and fairly by the public authority employing them... It follows that if in the exercise of my discretion I conclude that the remedy of certiorari is appropriate, it can properly go against the respondent authority."**

24 The Master of the Rolls went on to observe that none of the three decisions of the House of Lords referred to was directly concerned with the scope of judicial review under R.S.C., Order 53 at pages 164 to 165, he continued:

> **"In all three cases there was a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff. In Vine v National Dock Labour Board [1957] A.C. 488 the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismiss given by that scheme. In Ridge v Baldwin [1964] A.C. 40 the power of dismissal was conferred by statute: section 191(4) of the Municipal Corporations Act 1882 (45 & 46 Vict. c50). In Malloch v Aberdeen Corporation [1971] 1 W.L.R. 1578 again it was statutory: section 3 of the Public Schools (Scotland) Teachers Act 1882 (45 & 46 Vict. c18). As Lord Wilberforce said, at pages 1595-1596, it is the existence of these statutory provisions injects the element of public law necessary in this context to attract the remedies of administrative law. Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a "higher grade" or is an "officer." This only makes it more likely that there will be special statutory restrictions upon dismissal, or other underpinning of his employment: see per Lord Reid in Malloch v Aberdeen Corporation, at page 1582. It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different but the interest of the public per se is not sufficient.**

I have therefore to consider whether and to what extent the applicant's complaints involve an element of public law sufficient to attract public law remedies, whether in the form of certiorari or a declaration. That he had the benefit of the general employment legislation is clear, but it was not contended that this was sufficient to attract administrative law remedies. What is relied upon are statutory restrictions upon the freedom of the authority to employ senior and other nursing officers on what terms it thought fit. This restriction is contained in the National Health Service (Remuneration and Conditions of Service) Regulations 1974 (S.I. 1974 No. 296), which provides by regulation 3(2): [Emphasis added]

"Where conditions of service, other than conditions with respect to renumeration, of any class of officers have been the subject of negotiations by a negotiating body and have been approved by the Secretary of State after considering the result of those negotiations, the conditions of service of any officer belonging to that class shall include the conditions so approved."

"The conditions of service of, inter alios, senior nursing officers were the subject of negotiations by a negotiating body, namely the Whitley Council for the Health Service (Great Britain) and the resulting agreement was approved by the Secretary of State. It follows, as I think, that if the applicant's conditions of service had differed from those approved conditions, he would have had an administrative law remedy by way of judicial review enabling him to require the authority to amend the terms of service contained in his contract of employment. But that is not the position. His notification of employment dated 12 May 1975, which is a memorandum of his contract of employment, expressly adopted the Whitley Council agreement on conditions of service."

25 In further elucidation of his process of thought, the Master of Rolls concluded on page 165 as follows:

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

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

26 May L.J. at page 172 did not find, in the words of Lord Wilberforce in the case of Malloch v Aberdeen Corporation (1971) 1 W.L.R. 1578 at 1594, that Walsh's conditions of service were "fortified by statute" and consequently did not think that "the considerations which determine whether he was validly dismissed go beyond (the applicant's) contract." At page 180 Purchas L.J. set out his perception of the relationship between Walsh and the Health Authority. He said at page 180:

"However, in my judgment, the relationship between the applicant and the health authority was one which fell within the category of "pure master and servant" although the powers of the authority to negotiate terms with their employees were limited indirectly by statute and subordinate legislation. Any breach of those terms of which the applicant complains related solely to the private contractual relationship between the health authority and him and did not involve any wrongful discharge by the health authority of the rights or duties imposed upon it qua health authority. The rules of natural justice may well be imported into a private contractual relationship, vide the category of employee/master relationship envisaged in the first of the three categories described by Lord Reid in Ridge v Baldwin [1964] A.C. 40 to which Sir John Donaldson M.R. has already referred but in such circumstances they would go solely to the question of rights and duties involved in the performance of the contract of employment itself. The manner in which the authority terminated, or purported to terminate, the applicant's contract of employment related to their conduct as employers in a pure master and servant context and not to the performance of their duties, or exercise of their powers as an authority providing a health service for the public at large. The importation by direct reference or by implication into a contract of employment of the rules of natural justice does not of itself import the necessary element of public interest which would convert the case from the first category envisaged by Lord Reid into one in which there was an element of public interest created as a result of status of the individual or the protection or support of his position as a public officer. With great respect to the judge, it is this

distinction which seems to have escaped him ..." (Emphasis supplied).

[44] In the present case, I have to consider whether and to what extent Mr. Christie's complaints involve an element of public law sufficient to attract public law remedies, be it in the form of certiorari or a declaration.

[45] Powerful though the arguments of learned Counsel Ms. Wright are, I am afraid that I am unable to find that Mr. Christie's contract of employment was anything other than a pure employment law contract.

[46] **Bain (Re)** has clearly set out the legal principles and I see no reason why I should depart from this well-reasoned Judgment. I adopt the lucid pronouncements made by Gonsalves-Sabola CJ.

[47] In the end, I agree with learned Counsel for the Respondent that this is a pure employment law contract. I also agree that the involvement of the Union in the Tribunal augmented the view that this is a private law matter. I will therefore dismiss the judicial review proceedings. This of course, disposes of the entire application for judicial review. The Court needs not trouble itself with the other grounds of appeal raised by Mr. Christie.

Costs

[48] The Respondent, being the successful party in these proceedings, is entitled to its costs. The Respondent has asked for Costs on the basis that the application was bound to fail since it is a pure employment law contract.

[49] Many years ago, in **Daniel Mussington and Gervin Gumbs v The Attorney General of Anguilla,** Miscellaneous Suits Nos. 044 and 045 of 2001, I presided as the judge in these consolidated constitutional applications. The Applicants were unsuccessful and the Attorney General sought costs on the ground that the applications were frivolous and bound to fail. On 10 October 2001, I delivered a written judgment. On the issue of costs, I stated:

> **"However, in Constitutional matters, if a claim made by an unsuccessful applicant against the State was brought in good faith to test a matter of public interest, the Court should be hesitant to award costs against the suppliant citizen seeking the sanctuary of the courts. As a result, I do not think that it is fair to award such Costs against the Applicants".**

[50] Although this case is not of a constitutional nature or of public interest, it strikes me as one in which I should judicially exercise my discretion and make no order as to costs. Mr. Christie has raised an interesting point which, in my opinion, adds to the jurisprudence in this gray area of law. Unfortunately, he was unable to persuade me that I should depart from the applicable legal principles enunciated by Gonsalves-Sabola in **Bain (Re).**

Dated this 1st day of July, A.D., 2020

Indra H. Charles
Justice