COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division

2012/PUB/jrv/00033

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

McHARI INSTITUTE
(a.k.a McHARI INTERNATIONAL COLLEGE)

Applicant

AND

THE DEPARTMENT OF PUBLIC SERVICE

First Respondent

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Second Respondent

AND

D. SHANE GIBSON
Former MINISTER OF LABOUR AND NATIONAL INSURANCE
Minister with Responsibility for Public Service

Third Respondent

Before: **The Honourable Madam Senior Justice Indra H. Charles**

Appearances: Mrs. Yolanda Rolle of Kingdom Advocates & Associates for the Applicant
Mrs. Kayla Green-Smith of the Office of the Attorney General for the Respondents

Hearing Dates: 21 January 2020, 22 January 2020, 6 February 2020, 25 February 2020 and 1 June 2022

Judicial Review – Legal professional privilege - Whether Minute Paper is inadmissible – Irrationality – Not pleaded – Whether there were procedural irregularities – Whether correspondence between the partied satisfied the Applicant's right to be heard

These judicial review proceedings relate to the Decision of the Department of Public Service ("DPS") in 2012 which excluded the Applicant institution from its list of approved institutions after being included on its list in 2009.

The Applicant alleges that (i) there were several procedural irregularities which were contrary to the principles of natural justice and due process; and (ii) the decision breached its legitimate expectation that it would remain an approved institution, especially since it was never deregistered by the Ministry of Education.

The Respondents deny that there were procedural irregularities and contend that the Applicant was given an opportunity to be heard over the course of a few years when they wrote letters stating their case. With respect to the legitimate expectation, they assert that no legitimate expectation arose. Further and in any event, they contend that the Respondents were entitled to override the legitimate expectation having regard to the public interest.

HELD: dismissing the application for judicial review with costs to the Respondents to be taxed if not agreed

1. The fair hearing requirement was met by the employer offering the employee the opportunity to give a written statement because the employer had made the allegations clear: **Nicholas Simmons v Johnson Brothers Ltd. d/b/a Little Switzerland** 2018/CLE/gen/01417 and **Bahamasair Holdings Ltd. v Omar Ferguson** SCCivApp No. 16 of 2016 applied.

2. It cannot be said that the Applicant was not given an opportunity to make representations. The fact that the representations were made in writing instead of a full blown hearing does not affect the fairness of the decision making process. The DPS made the Applicant aware of the issue they had. The Applicant stated its case well before the final decision had been made. Further, the DPS asked questions about the programmes and made recommendations well before the Decision was made. Accordingly, it could not be said that the matter was predetermined: **R v Secretary of State for Home Department ex parte Doody** [1994] 1 AC 531 applied.

3. A legitimate expectation could arise either (i) by altering rights or obligations of that person which are enforceable by or against him in private law; or (ii) by depriving him of some benefit or advantage which either he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or he has received some assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn: **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374 at page 408 applied.

4. A legitimate expectation could arise even in the absence of assurance of consultation or previous practice of consultation before the decision is made: **R v Rochdale Metropolitan Borough Council ex part Schmet** [1993] 1 FCR 306 at p. 323.

5. The test for determining whether frustrating a legitimate expectation is an abuse of power or not is whether there is sufficient public interest to override the legitimate expectation. The exercise of lawfully frustrating a legitimate expectation was set out in **Paponette and others v Attorney General of Trinidad and Tobago** [2010] UKPC 32.

JUDGMENT

Charles, Snr. J:

Introduction

[1] This is an application by McHari Institute (a.k.a. McHari International College) ("the Applicant") for judicial review, following this Court's grant of leave on 6 February 2013 of the decision by the Department of Public Service ("DPS") not to accept degrees/diplomas issued by the Applicant before 21 January 2009 and after 21 February 2012 ("the Decision").

[2] Aggrieved by the Decision, the Applicant seeks the following relief, namely:

a. An Order of Mandamus directing the PSC to rescind the Department of Public Service Circular No. 2 of 2012 dated 21 February 2012;

b. A Declaration that the Policy Statement on the Applicant from the Public Service dated 3 October 2012 is null and void, as having been made without affording the Applicant an opportunity to be heard;

c. A Declaration that the Respondents acted unfairly, arbitrarily and capriciously towards the Applicant;

d. A Declaration that the Applicant's right to be treated fairly with due process and in accordance with the Constitution and the rules of natural justice were breached;

e. An Order that all necessary and consequential directions be given;

f. Damages;

g. Costs and other relief.

[3] The DPS denies that there was procedural impropriety. They say that the Applicant was given an opportunity to be heard before any decision was made to rescind acceptance of his degrees and diplomas by the Ministry of Public Service. Further, the DPS contends that the public interest was sufficient to justify overriding the legitimate expectation.

Background facts

[4] The facts are largely not disputed between the parties.

[5] On 21 January 2009, the DPS' Centre for Human Resources issued Training Circular No. 1 of 2009, naming institutions and accredited organizations accepted by the Public Service. The Applicant was included on the list of institutions.

[6] On 21 February 2012, the DPS issued Circular No. 2 of 2012, excluding McHari from the list of colleges and universities whose degrees and diplomas would be accepted by the Public Service. The Circular expressly stated that it superseded Training Circular No. 1 of 2009.

[7] On 3 October 2012, the Public Service Commission ("PSC") issued a policy statement on the Applicant, directing the DPS not to accept degrees/diplomas obtained from the Applicant after 21 January 2009 and before 21 February 2012.

[8] On 19 November 2012, the DPS issued Training Circular No. 12 of 2012 which notified persons that degrees/diplomas from the Applicant would not be accepted. The parties dispute whether the Applicant was given notice and/or an opportunity to be heard before being excluded from the list of accepted institutions.

Law on judicial review

[9] In **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 at 410-411, Lord Diplock conveniently classified under three (3) heads the grounds upon which administrative action is subject to control by judicial review: (i) illegality, (ii) irrationality or "*Wednesbury unreasonableness*" and (iii) 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 (3) well-established heads in this way:

> **"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."**

[10] 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.

[11] In **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."**

[12] 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."**

Preliminary objection: admissibility of Minute Paper

[13] The Respondents seek to have the Minute Paper struck from the evidence in the proceedings on the ground that it is protected by legal professional privilege. Mrs. Green-Smith, who appeared as Counsel for the Attorney General, submitted that since it was advice between the Attorney General and the Ministry of Public Service, it was subject to legal professional privilege.

[14] It is well-established that documents that are considered legally privileged are to be kept private and confidential. That privilege is absolute. This was made clear by the House of Lords in **Three Rivers District Council v Bank of England (No. 5)** [2003] 3 WLR 667 at para 25:

> **"[25] Second, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute (cf *R* (*on the application of Morgan Grenfell & Co Ltd*) *v Special Comr of Income Tax* [2002] UKHL 21, [2002] 3 All ER 1, [2003] 1 AC 563), but it is otherwise absolute. There is no balancing exercise that has to be carried out (see *B v Auckland District Law Society* [2003] UKPC 38 at [46]–[54], [2004] 4 All ER 269 at [46]–[54], [2003] 2 AC 736). The Supreme Court of Canada has held that legal professional privilege although of great importance is not absolute and can be set aside if a sufficiently compelling public interest for doing so, such as public safety, can be shown (see *Jones v Smith* [1999] 1 SCR 455). But no other common law jurisdiction has, so far as I am aware, developed the law of privilege in this way. Certainly in this country legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document, cannot be set aside on the ground that some other higher public interest requires that to be done."**

[15] Mrs. Green-Smith argued that, in addition to the advice being headed "Legal land Confidential", it contains a clause which states "*This opinion has been prepared solely for use in connection with the above and should not be furnished to any other person, partnership, company, firm or entity outside the Government of the Bahamas without the express written consent of this office*."

[16] In my opinion, the Minute Paper is protected by legal professional privilege and is struck out. The Applicant should return that Minute Paper to the Office of the Attorney General within seven (7) days from today's date i.e. by 10 February 2023.

Preliminary objection: bound by pleadings

[17] The Applicant included in its submissions the "*Wednesbury unreasonableness*" as a ground for judicial review. Mrs. Green-Smith, however, objected to that submission contending that the Applicant is prevented from doing so in submissions since it was not included in their application for leave to apply for judicial review filed on 7 January 2013, which was referenced in the Originating Summons filed on 15 February 2013.

[18] I agree with Mrs. Green-Smith that the Applicant is precluded from grounding its judicial review application on the ground of unreasonableness. Its pleadings averred: (i) procedural impropriety namely that the DPS breached the principles of natural justice when it failed to afford its representatives a fair hearing and; (ii) that the DPS breached its legitimate expectation that they would not be unilaterally removed as an institution accepted by the DPS.

[19] It is well-established that parties are bound by their pleadings. In **Glendon Rolle t/a Lord Ellor & Co. v Scotiabank (Bahamas) Limited** 2017/CLE/gen/01294, this Court emphasized the importance of pleadings:

> **"[41] In Montague Investments Limited v Westminster College Ltd & Another [2015/CLE/gen/00845] – Judgment delivered on 31 March 2020 (Reported on BahamasJudiciary.com Website), this Court applied the principles emanating from Bahamas Ferries Limited and emphasized the necessity for proper pleadings. Pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what the issues between the parties are.**

[42] Shortly put, parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his (her) pleadings."

The issues

[20] There are two primary issues to be determined:

1. Whether there were procedural irregularities namely, whether the communication satisfied the obligation to give them an opportunity to be heard and;

2. Whether the Decision of the Respondents breached the Applicant's legitimate expectation that it would remain an approved institution, especially since it was never deregistered by the Ministry of Education.

The evidence

[21] Dr. Kevin Alcena, Dr. Leon Higgs and Mr. Robert Farquharson gave evidence on behalf of the Applicant. Mrs. Donella Bodie, Dr. Iva Dahl and Elma Garraway gave evidence on behalf of the Respondents.

Kevin Alcena

[22] Dr. Alcena filed Affidavits on 7 January 2013, 24 March 2017, 8 April 2019, 9 April 2019, 11 July 2019 and 5 February 2020 which stood as his evidence in chief at trial. He stated that he is the Vice-Chancellor and Chairman of the Board of Governors of the Applicant. He testified that he received no notice or opportunity to be heard with respect to the Decision to remove the Applicant from the list. He stated that the Policy Statement dated 3 October 2012 was the first time that he had notice of any intention to remove the Applicant from the list.

[23] Dr. Alcena referred to a letter from Deborah Fraser, the former Director of Legal Affairs. The letter dated 27 February 2012 addressed to the Permanent Secretary, Donella Bodie ("PS Bodie"), stated that there was a legitimate expectation regarding the Applicant's acceptance and approval to be included on the list of Public Service's list of accepted programs. He admitted that there were a number

of exchanges of correspondence between himself and the Ministry of Education ("MOE") over the years. However, he maintained that they never raised questions regarding the institution with him.

[24] Dr. Alcena maintained that he never received the letter relied on by PS Bodie dated 25 April 2007 that the Ministry of Public Service wrote to him asking questions concerning the revised Articulation Agreement. He said that it is a 'fraud" letter. After receiving the letter by the Ministry of Public Service in 2008 accepting certain degrees, the Applicant did not seek to be accredited by the National Accreditation and Equivalency Council of The Bahamas ("NAECOB") at that time because the NAECOB did not exist until 2016.

[25] Dr. Alcena denied that from 2009 to 2012, the Ministry of Public Service raised concern with him regarding the Articulation Agreement. He said all that he received was a letter from PS Bodie and then a letter from Ms. Keju stating that he was off the list.

[26] Dr. Alcena said he was advised that the policy for approval of courses offered in The Bahamas had changed when he received an email from Chandra Sawyer Kem, Senior Executive Officer at the Ministry of Public Service. Thereafter, by letter dated 5 January 2016, the Applicant forwarded the required documents to then Permanent Secretary of Ministry of Public Service, Mrs. Hyacinth Winder Pratt.

[27] Having received no further communication, the Applicant sent several follow-up letters. They were later notified that the documents had been forwarded to NAECOB. Without firstly writing to the Applicant, the Respondents and/or NAECOB wrote to the Applicant's alumni and/or students advising them that since the Applicant was not registered with NAECOB, the Ministry of Public Service would not accept their degrees.

Dr. Leon Higgs

[28] Dr. Higgs filed Affidavits on 8 April 2019, 11 July 2019 and 18 June 2020 respectively. The Affidavits stood as his evidence in chief at trial. He said that he is the former Director of Higher Education and Lifelong Learning of the MOE. When he began in his position, the Applicant was an existing approved and recognised institution of tertiary education in The Bahamas.

[29] Dr. Higgs testified that, before August 2016, when NAECOB was formed, there was no Accreditation Board in The Bahamas for tertiary education institutions. Approvals and recognitions for tertiary education came only from the MOE through its Higher Education and Lifelong Learning Department of which he was the Director. While he was the Director, he asserted that queries were made regarding the Applicant's Articulation Agreement with three (3) institutions in Cuba.

[30] Dr. Higgs stated that he investigated the Applicant and provided his findings and conclusion in a memorandum to then Director of Training, Ophelia Cooper. In that memorandum, he stated that the Applicant was registered with the MOE since 2001 and the criteria that it would have had to satisfy to be registered with the MOE were the same as those required for recognition by the Ministry of Public Service. Further, he concluded that the Articulation Agreement was valid and ought to have been recognised and approved by the Department of Public Service and the PSC.

[31] Dr. Higgs stated that he can confirm that the memorandum was delivered to the Permanent Secretary of the MOE, Elma Garraway, the Deputy Director of Education, Ms. Paula Sweeting-Davis and the President of The Bahamas Public Service Union, Mr. John Pinder, on or about 7 May 2007.

[32] Dr. Higgs further stated that he observed that the Applicant always complied with the instructions and requests of the MOE. Further, he observed that the "goal post" was continuously changing with respect to the Applicant which frustrated him. He penned those frustrations in 2007 in two correspondence to the Permanent

Secretary of the MOE and the Public Service, copies of which he was unable to locate.

[33] According to him, in or about 2009, further queries were made regarding the Applicant's accreditation and qualifications of instructional staff by way of a directive from the Office of the Prime Minister for the MOE to investigate the Applicant. Pursuant to that directive, he along with three (3) other persons from the MOE and Public Service thoroughly investigated and jointly wrote a Minute Paper with his findings and conclusions on the Applicant. In the Minute Paper, Dr. Higgs said that the programmes offered by the Applicant were strong and the faculty had impeccable credentials.

[34] He said that he can confirm that the Minute Paper was delivered to the Permanent Secretary, Elma Garraway on or about 24 September 2010. After the Minute Paper, he was not instructed to deregister or nullify the recognition of the Applicant as an institution.

[35] After his retirement in 2013, Dr. Higgs was appointed as a board member of NAECOB in 2016.

[36] With respect to the independent review ordered by the Minister of Education to be conducted by Dr. Ethelyn London ("Dr. London") of the University Council of Jamaica, Dr. Higgs said that it was never done. However, he recalled hearing about the plan to have her evaluate the Applicant. He said that he knows Dr. London very well and she told him that there were qualified people in The Bahamas who could have done the evaluation. As a result, she declined.

Robert Farquharson

[37] Mr. Farquharson filed an Affidavit on 5 February 2020. It stood as his evidence in chief. He stated that from 2003 to 2009, he was the President of The Bahamas Communications and Public Officer Union and General Secretary of the National Congress of Trade Unions. During his time in those roles, he said that many union members were interested in further studies in their field and it was at that time he

became familiar with the Applicant and negotiated for the institution to become approved by the government circular for public servants to undergo further course of study.

[38] Also, at that time, many public servants had received certificates from the Applicant, which, he was advised (at the time) was approved by government requirements.

[39] Under cross-examination by Mrs. Green-Smith, Mr. Farquharson said that he was prompted to write to the PS to express support for the Applicant having regard to the false allegations about the institutions at that time. Mr. Farquharson said that he is a graduate of the Applicant. In that letter, Mr. Farquharson also asked whether his office received any complaints in the last semester regarding the programs, lecturers, organization and management of the Applicant.

[40] By letter dated 3 March 2010, then PS, Elma Garraway, wrote to Mr. Farquharson noting his support of the Applicant and stating that her office had not received any complaints regarding programmes, lecturers, organization or management. However, in his Affidavit, he stated that Ms. Garraway evidenced the MOE's support for the Applicant. Under further cross-examination by Mrs. Green-Smith, Mr. Farquharson said that Ms. Garraway stated that the MOE supported the Applicant because he drew that inference from Ms. Garraway's statement that her office had not received any complaints from students: "*it gave me the implication that she had no problems with McHari. But obviously there is no evidence in her letter specifically, express that she supports McHari*."

PS Donella Bodie

[41] PS Bodie filed an Affidavit on 2 May 2019 and a Second Affidavit on 31 January 2020 which stood as her evidence in chief at trial. She stated that she is the Permanent Secretary in the Ministry of Public Service and National Insurance.

[42] She stated that the Applicant was registered with the MOE in 1992. In June 1999, it requested registration for six (6) courses related to International Trust

Administration, including Diplomas, Associates and Bachelor's Degrees. The registration later expanded to graduate-level programmes.

[43] At the point of registration, there were significant concerns on the part of the MOE regarding course content, assessment methods, instructional materials, faculty etc.

[44] In August 2000, the Applicant was advised that due to major deficiencies in its proposed degree offerings, neither the MOE nor the PSC was likely to grant recognition of the programmes. Notwithstanding that concern, however, in May 2001, approval was granted for these programmes by the Permanent Secretary, MOE. There is no indication that the concerns raised were resolved before this approval.

[45] On 8 January 2002, the Permanent Secretary in the Ministry of Public Service wrote to Dr. Alcena noting his communication regarding the offerings at the Master's degree level. Further, the letter acknowledged that the MOE had approved various programmes but the Department was awaiting the National Equivalency Committee status report in order to process the Applicant's request.

[46] On 8 June 2005, the Department of Public Service wrote to Dr. Alcena advising him that a meeting was held with delegates from the Ministry of Superior Education in Cuba at which time the Collaboration Agreement with his institution was clarified as an "association". Further, the letter noted that the Applicant did not have an Articulation Agreement with the Ministry of Higher Education in Cuba.

[47] On 17 August 2005, Dr. Alcena wrote the PS stating that the department had inundated Cuba with requests for more information which the Cuban Ministry of Higher Learning had provided.

[48] On 19 September 2005, Dr. Kenneth Francis, President and Deputy Chairman of the Applicant wrote the PS enclosing a Complimentary Act of Modification of the Articulation Agreement.

[49] On 21 June 2006, the PS wrote to Dr. Alcena regarding the Applicant's request for recognition of their course syllabi. The Ministry advised that it was unable to proceed with the request until the queries and deficiencies outlined in the "Review of your Programmes" dated 17 August 2000 were addressed. In response to that letter, on 23 June 2006, Dr. Alcena wrote outlining facts that demonstrated their compliance with the issues raised.

[50] On 7 November 2006, the PS wrote to Dr. Kenneth Francis advising that the PSC did not accept the Articulation Agreement. It noted that the Articulation Agreement did not meet the requirements of the Ministry of Public Service's policy for designation of approved institution. In response thereto, on 16 January 2007, Dr. Alcena wrote to the Permanent Secretary of the Ministry of Public Service enclosing a revised Articulation Agreement.

[51] On 2 March 2007, Dr. Alcena wrote the PS, informing that their attorneys advised them to resubmit the Articulation Agreement. On 25 April 2007, the Ministry of Public Service wrote Dr. Alcena, asking questions concerning the revised Articulation Agreement.

[52] On 28 June 2007, the Ministry of Public Service wrote Dr. Alcena requesting an up-to-date review of programmes which were registered by the MOE. In response, Dr. Alcena wrote on 7 September 2007 listing the discontinued courses and the courses approved by the MOE.

[53] On 21 September 2007, 27 September 2007 and 3 October 2007, Dr. Alcena wrote letters to the Ministry of Public Service requesting an urgent response regarding the review and registration of programmes.

[54] On 3 October 2007, the Permanent Secretary of the Ministry of Public Service wrote Dr. Alcena, notifying him that only the programmes included in the 28 June 2007 letter would be considered for approval.

[55] By Memorandum dated 5 December 2007, the PS of the Ministry of Public Service wrote the Applicant informing them that it was registered with the Ministry of Education to offer degree programmes contained therein.

[56] Dr. Alcena wrote the PS of Ministry of Public Service on 11 June 2010 informing that the Human Resources Director at Port Department requested the timetable and course outline for a student. Dr. Alcena requested an investigation into the alleged biasness of the HR Director against students at the Port Department and her refusal to process their diplomas through the Department of Public Service.

[57] On 1 July 2011, Dr. Alcena wrote PS Bodie seeking assistance with extending the Applicant's information to the PSC, as graduates had been denied recognition by the PSC for requisite salary adjustments and other amenities extended to public officers who presented proof of academic advancement while in service.

[58] The Applicant has declined to seek additional Articulation Agreements with accredited bodies, as recommended by the Ministry of Public Service or to seek accreditation with one of the usual bodies accepted by the Public Service. Notably, the Applicant has been advised more than once as to prevailing policy regarding accreditation and has been supplied with samples of acceptable Articulation Agreements.

[59] On 3 October 2007, Dr. Alcena was advised that the matter was still under review. The Ministry advised him that meetings were being held to resolve the matter. Dr. Alcena wrote several times requesting updates and advising that students had filed lawsuits against the Applicant.

[60] Under cross-examination, PS Bodie said that before NAECOB, the process for registration was done by the Ministry of the Public Service. The Public Services Commission would check whether the institution which provided the degree or certification to the public servant was accredited by a body listed in their documents to determine whether they would accept the certification or degree of the institution. In determining whether it would accept the degree or certification,

the Ministry of Public Service would look to see whether the institution was aligned with one of the accrediting bodies.

[61] Under further cross-examination, PS Bodie stated that if an institution does not satisfy the Department of Public Service, the procedure is that it would be notified in writing. She said that the notification to the institution as to 'unsatisfaction' in writing should come before the dissemination of the circular stating same.

[62] PS Bodie clarified the difference between registration and recognition. She said that although an institution may have been registered with the MOE, the employer/Public Services reserves the right to determine whether they will recognize the institution for payment of salary, increases, promotions, awards, the main criterion being alignment with an accrediting body listed in the circular.

Dr. Iva Dahl

[63] Dr. Dahl filed an Affidavit on 2 May 2019 which stood as her evidence in chief at trial. She stated that she is the Director of NAECOB and was appointed to that position on 3 January 2016. Most of Dr. Dahl's evidence spoke to the current process and criteria of accreditation under NAECOB and is therefore not very useful for the determination of the issues.

[64] NAECOB was populated on 24 August 2016. A grandfathering process was implemented whereby an institution in good standing with the MOE was of August 2016 was given two (2) years to comply with NAECOB's criteria for registration and subsequently be eligible to apply for accreditation.

[65] Registration certifies that an institution has met the criteria for provision of education in the Education Act. Registration is different from accreditation. Institutions registered with NAECOB are not necessarily accredited by NAECOB.

Elma Garraway

[66] Ms. Garraway filed an Affidavit on 18 March 2020. She stated that she is the former Permanent Secretary of the MOE, having retired on 18 May 2012. She spent 20

years as a classroom teacher. She was a member of the Executive Management Team in the MOE. In that capacity, she said that she became acquainted with tertiary level institutions, including the Applicant, which was registered or applying for registration with the MOE in accordance with section 29 of the Education Act.

[67] During the period between 1993 and 1999, Ms. Garraway said that she became aware of the meticulous regulations and policies that the Tertiary Section and the Equivalency Committee of the MOE and the Ministry of Public Service were required to use in evaluating courses, programmes and institutions seeking registration.

[68] As PS from 2007 to 2012, she became aware of requests made by several organizations seeking verification of the quality of the programmes offered by the Applicant, its accreditation and qualifications of instructional staff.

[69] Pursuant to the directive of the Office of the Prime Minister, the Applicant was investigated. Dr. Higgs determined that "*the programmes are strong especially since the curriculum was designed in Cuba and modified for the Bahamian community.*" Notwithstanding Dr. Higgs' conclusion, however, Ms. Garraway stated that Cuban accrediting bodies are not consistent with international best practices and agreements/articulations are made between institutions and not between countries. Therefore, the Minister of Education was advised to order a qualitative evaluation of the Applicant by experts of a reputable body.

[70] The evaluation never took place. A request was made to Dr. London of the University Council of Jamaica to conduct the evaluation but she declined. Ms. Garraway stated that there is no evidence of this correspondence which she believed took place via e-mail. The computers used in the execution of duties as PS were cleared upon her retirement. However, Ms. Garraway referred to Dr. Higgs' Affidavit filed on 5 February 2020 in which he referred to his conversation with Dr. London.

[71] On 21 December 2010, Dr. Alcena stated that he would not cooperate with an evaluation out of Jamaica, as the process was contaminated having regard to the remarks of a senior officer at a Tertiary Section Meeting in the MOE. He said that he was willing to cooperate with a team from England or the United States.

[72] Having regard to the establishment of NAECOB since 2016, it was her view that the Applicant would be required to conduct a self-study on the path to obtaining accreditation in The Bahamas.

[73] Under cross-examination by Mrs. Rolle, Ms. Garraway distinguished registration with MOE and accreditation. She said that 'registered' means that they applied to the MOE and they were provided with the kind of documentation that the Ministry required for a school or institution to be registered. The Ministry does not give accreditation. That is done by an independent body. She said that the Applicant was registered before she came to the MOE and its registration does not mean that they were aligned with an international body. She further stated that by being registered, the Applicant was permitted to offer courses for which they applied for registration.

The issues

Whether there was procedural impropriety

[74] The Respondents assert that there was correspondence before the Decision was made to remove the Applicant from the list of accepted institutions. According to Mrs. Green-Smith, the correspondence satisfied their obligation of natural justice to the Applicant. On the other hand, the Applicant contends that the Decision was not made in accordance with the principles of natural justice since they were not informed of it and were not given an opportunity to be heard.

[75] The determination of procedural propriety or impropriety requires both questions of fact and questions of law. What was the extent of correspondence? Does that correspondence constitute the fair hearing requirement? In **Nicholas Simmons v Johnson Brothers Ltd. d/b/a Little Switzerland** 2018/CLE/gen/01417, this Court

was faced with the question of whether the invitation to write a statement in response to allegations of stealing satisfied the employer's obligation to offer a fair hearing for the purpose of a reasonable and fair investigation before deciding to terminating him. In **Simmons**, the Court relied on **Bahamasair Holdings Ltd. v Omar Ferguson** SCCivApp No. 16 of 2016 where it was held that the employee's right is to make representations could be in person or in writing and it does not necessarily require a full-blown hearing. Although **Simmons** was a case of employment, the question was whether the offer to provide a written statement satisfied the fair hearing requirement for summary dismissal. At para. 65, this Court stated:

> **"As recently as a week ago, this very issue was considered by this Court in Lenora McKenzie v Wemco Security & Collections Limited 2016/COM/lab/00074 – (Judgment delivered on 10 March 2022) where the Court applied the principles derived from Omar Ferguson and held that the employee's right to natural justice in being summarily dismissed is satisfied by giving the employee an opportunity to make representations before the decision is made (in writing or in person) and there need not be a full blown hearing. The process is not necessarily unfair because the decision has been made quickly. The degree of investigation required depends on the circumstances. In some circumstances, no investigation is warranted."**

[76] The Court reasoned that the fair hearing requirement was met by the employer offering the employee the opportunity to give a written statement because the employer had made the allegations clear. At para. 57, the Court continued:

> **"In my judgment, the Company conducted a reasonable and fair investigation before terminating Mr. Simmons. The Company held a meeting on 22 September 2014 and thereafter, offered him the opportunity to give a written statement. Mr. Simmons himself stated that, at the meeting, Mr. Howard made it clear to him that the Company suspected that he was guilty of stealing. The 17 fact that he was not told which items and/or how many items were missing and/or who his accusers were did not prevent him from giving an explanation or justification. He was told what he needed to know to respond namely that the Company suspected that he was guilty of stealing items found to be missing as a result of the inventory audit. If Mr. Simmons required further information to answer to the allegations, he could have said so. No evidence was led to suggest that Mr. Simmons asked for further information to assist him in dispelling the suspicions**."

[77] In **R v Secretary of State for Home Department ex parte Doody** [1994] 1 AC 531, Lord Mustill explained that fairness often requires the person being adversely affected to be consulted before the decision is made. Lord Mustill said at p. 560:

> **"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness 15 will very often require that he is informed of the gist of the case which he has to answer".[Emphasis added]**

[78] In **Phillipa Michelle Finlayson v The Bahamas Pharmacy Council** 2017/PUB/jrv/00006, the Applicant, a graduate of McHari Institute, commenced judicial review proceedings against the decision of the Bahamas Pharmacy Council to revoke her licence to practice as a Pharmacist after the Council was advised by the DPS that the Master of Science Degree in Clinical Pharmacy was not approved by the DPS. The Council was not satisfied as to the accreditation of McHari Institute. The Court noted that McHari Institute had failed to produce documentation that it was accredited by any of the accrediting organizations that the DPS recognized and by which degrees/institutions are accepted at face value by the DPS.

[79] Although in **Finlayson**, this Court did not decide whether the decision making process was procedurally improper since the Applicant's case was not sufficiently framed toward that head of judicial review, it extensively set out the law on procedural fairness:

> **[192] The law is that the decision-making process by public authorities is subject to review to ascertain whether the body acted in a fair manner towards a person/body affected by its decision. This ground of judicial review has become known as procedural fairness. The learned authors of Halsbury's Laws of England, Volume 61A (2018) shed some light on this ground in this way:**
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> > **"Procedural fairness, or the duty to act fairly, are the terms now generally used to describe the range of procedural standards which are applied to the administrative decision-making process. They encompass both specific statutory requirements as to consultation, notice or hearings, and the requirements of natural justice derived from common law."**
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> **[193] The ground has adopted the natural justice and due process principles, inclusive of the right to fair notice and the right to be heard. The principle is variously expressed as being a rule against bias and a rule against predetermination. It has also been described as an aspect of the requirement that decisions must be made fairly. In Steeples v Derbyshire County Council (1985) 1 WLR 256, pg. 258, paragraph 3, letter C., the court held:**
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> > **"That, although the decision of the planning committee had been fairly and properly made, natural justice required that the decision to grant planning permission should be seen to have been fairly made; that in deciding whether the decision was seen to have been fairly made the court had to ask whether a reasonable man, who was not present when the decision was made and was unaware that it had in fact been fairly made, but who was aware of all the terms of the council's agreement with the company, would think that there was a real likelihood that the agreement had had a material and significant effect on the planning committee's decision to grant permission; and that applying that test, the decision was not seen to have been fairly made and was either void or voidable as being in breach of natural justice."**
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> **[194] The appropriate tests to apply in deciding whether the decision is to be seen as fair has been succinctly put by Webster J in Steeples at page 287:**

"First,…through whose eyes do I look? It seems that I should look through the eyes of a reasonable person hearing the relevant matters…

Secondly, what knowledge should I impute to the reasonable person? There are alternatives. The first is that he is to be taken to know only of matters known to the public to have occurred before the decision (perhaps including matters known to the public before the issue of proceedings). The second alternative is that he is to be taken to know of matters, whether in fact known or available to members of the public or not, which are in evidence at the trial. In my view, the second alternative is the lower one…

Thirdly, is a decision unfair only if it is actually seen to be unfair? Or is it unfair if there is a real likelihood that it would be seen to be unfair? Or is it enough in order to show that it is unfair, that there is a reasonable suspicion that it will be seen to be unfair? Which of these tests is to be applied may depend, in my view, on the nature of the decision-making body in question. Where the body is a judicial tribunal it may be that any doubt that justice is seen to be done is enough…On the other end of the scale, where the body in question is primarily administrative, it may be that its decisions are invalid (when they are in fact fair) only when they actually appear to be unfair

Fourthly, what amounts to a fetter upon the discretion in question? In the absence of direct authority on this question, it seems to me that anything constitutes a fetter for this purpose at the very least if a reasonable man would regard it as being likely to have a material and significant effect one way or another on the outcome of the decision in question; and it may very well be that something appearing to have less of an effect than that might constitute a fetter

Fifthly, what knowledge is to be imputed to a hypothetical reasonable man about the workings of the county council and their committees? …the hypothetical reasonable man is to be taken to know all the relevant facts, then there is no good reason why those facts should exclude the fact that the county council have delegated their planning powers to, inter alia, the planning committee in question.

Sixthly and finally, is the hypothetical reasonable man to be taken to have attended the meeting or to know of my conclusion that the decision was in fact fairly

> **made?...he is not to be taken to have attended the meeting or to know that in fact the decision was fairly made."**

[80] Mrs. Rolle submitted that the Decision was made prematurely. The failure of the DPS to communicate the Decision to the Applicant and the failure to afford the Applicant the opportunity to be heard on issues raised against it were procedural improprieties.

[81] I do not agree with Mrs. Rolle. The documentary evidence, particularly those referenced in the evidence of PS Bodie, demonstrates that the Applicant's main representative, Dr. Alcena, was given a fair hearing before the Decision was made to remove it from the list of institutions accepted by the DPS. In its letter dated 8 June 2005, the DPS clearly stated that it had an issue with the Applicant's Articulation Agreement. The letter also stated the contents of a "typical" Articulation Agreement and recommended that the Applicant seek an Articulation Agreement with a college/university accredited by one of the bodies approved by the DPS, which were listed. By a four (4) page letter, the Applicant's representatives responded to that letter, contending that its Articulation Agreement satisfied the requirements of an acceptable Articulation Agreement. Further, the Applicant argued that the Cuban institution with whom it had the Articulation Agreement ensures "*that the level of academic quality between both parties remain[s] high*." and that "*The Cuban educational system (primary and post-secondary) has been ranked by notable international organisation such as UNESCO as top 3 in the world*."

[82] By these letters, the DPS made clear its issues with the Articulation Agreement and the Applicant argued its case by responding to the DPS' concerns. Its intention was to convince DPS to accept its Articulation Agreement. Similarly, in response to the DPS' review of its programmes, by letter dated 23 June 2006, the Applicant, in detail, addressed the concerns of the DPS related to its programmes.

[83] In November 2006, the PSC notified the Applicant that it did not accept the Articulation Agreement because it did not meet the requirements of DPS' policy for designation of approved institutions. The Applicant then submitted an amended version of the Articulation Agreement. The next communication from the DPS, which Dr. Alcena stated he never received, required answers to certain questions and again listed the accrediting boards accepted by the Public Service. Thereafter, the Applicant sought updates on the matter having regard to the Applicant's alumni being denied salary increases and questions as to the institution's acceptability by the Port Department, a department of Public Service.

[84] Even if Dr. Alcena never received the letter (having seen him and observed his demeanour, I did not believe him) asking the Applicant's representatives to answer questions, there were other instances where the Ministry raised concerns or flat out rejected aspects of its programme and the Applicant's pleaded its case. The DPS notified the Applicant that it had received the modified Articulation Agreement after it had already said what it considered to be conditions for an acceptable Articulation Agreement and also after it listed its accepted accrediting bodies and recommended that the Applicant become accredited with one.

[85] As Lord Mustill stated in **R v Secretary of State for Home Department ex parte Doody** [1994] 1 AC 531, "*The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects*."

[86] It cannot be said that the Applicant was not given an opportunity to make representations. The fact that the representations were made in writing instead of a full blown hearing does not affect the fairness of the decision making process. The DPS made the Applicant aware of the issue they had. The Applicant stated its case by seeking to satisfy the DPS as to the quality of the Articulation Agreement and the institution with whom they had the Agreement and by amending the Articulation Agreement, all of which was done well before the Decision had been made. Further, the DPS asked questions about the programmes and made

recommendations well before the Decision was made. Accordingly, it could not be said that the matter was predetermined. In my judgment, the process was fair.

[87] The DPS made it clear in November 2006 that it did not accept the Articulation Agreement by reason that it did not satisfy the criteria. It is true that once the Applicant submitted the modified Articulation Agreement, it was not notified of the decision to remove it from the list before the policy statement and the subsequent circular reiterating same. It would have assisted the Respondents' position that it accorded with natural justice principles had it notified the Applicant of its decision prior to issuing the policy statement and circular along with the reasons for its decision. However, the failure to do so, in my judgment, does not render the procedure unfair. It is clear that the DPS' conclusion from November 2006 obtained notwithstanding the Applicant's modification to the Articulation Agreement and arguments that the programme was good.

Whether the DPS breached the Applicant's legitimate expectation to remain as an accepted institution

[88] The Applicant contends that it had a legitimate expectation that it would remain on the list of approved institutions. It acknowledges that there are circumstances under which a decision maker can lawfully frustrate a legitimate expectation but Mrs. Rolle contends that there was no interest in this case that rises to the requisite standard to override the legitimate expectation. Mrs. Green-Smith, however, submitted that the DPS was entitled to override the legitimate expectation.

[89] Mrs. Rolle submitted that the Applicant had a legitimate expectation of continued recognition and registration with the MOE and the Public Service. In support, she relies on the evidence of Dr. Higgs that the criteria required to be registered with the MOE were the same as the criteria required for recognition by the DPS. As it was never deregistered and its recognition was never nullified by MOE, said Mrs. Rolle, it remained recognised, registered and accepted to offer Bachelors, Masters and Doctorate Degrees in The Bahamas and its Articulation Agreements were recognised and approved by the MOE.

[90] I accept the evidence of Ms. Garraway and PS Bodie that registration with the MOE permitted the Applicant to offer instruction on approved subject areas but that the DPS reserved the right to approve and therefore recognise institutions of their choice. I also accept that approval was largely based on accreditation with the list of its approved accrediting bodies. It follows that Mrs. Rolle's submission that registration with the MOE affected the Applicant's right to be approved by the DPS and that the failure to deregister the Applicant gave rise to a legitimate expectation is untenable.

[91] Mrs. Rolle contended that the failure to consult the Applicant before the Decision was made exacerbated the legitimate expectation. As stated, the Applicant was consulted before the Decision was made. It was given the opportunity to state its case and it did. It follows that even by the definition of a legitimate expectation as asserted by Mrs. Rolle, the expectation that the Applicant would remain an approved institution by the DPS does not, in law, amount to a legitimate expectation.

[92] Mrs. Rolle cited **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374 at page 408, where Diplock LJ set out two (2) ways in which a legitimate expectation could arise. She submitted that the Applicant's expectation that they would remain on the DPS' list of accepted institutions amounted to a legitimate expectation in accordance with (b):

> **"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:**
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> **(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or**
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> **(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons**

for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a "legitimate expectation" rather than a "reasonable expectation," in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences. The recent decision of this House in *In re Findlay* [1985] A.C. 318 presents an example of the latter kind of expectation. "Reasonable" furthermore bears different meanings according to whether the context in which it is being used is that of private law or of public law. To eliminate confusion it is best avoided in the latter.)"

[93] Mrs. Rolle further argued that because the Decision was made without giving the Applicant the opportunity to comment, its expectation to remain approved by the DPS amounted to a legitimate expectation in accordance with (b).

[94] Mrs. Rolle correctly stated that a legitimate expectation could arise even in the absence of assurance of consultation or previous practice of consultation before the decision is made. In support, she cited **R v Rochdale Metropolitan Borough Council ex part Schmet** [1993] 1 FCR 306. At page 323:

> **"For the respondents, it was submitted that for there to be a legitimate expectation of consultation, there must be shown to have existed either a practice of consultation or a promise of consultation. The respondents relied upon the statement in the opinion of Lord Fraser in the CCSU case at page 401B where his Lordship said:**
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> > **"Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."**
>
> **The respondents submitted, correctly, that there was no promise of consultation in the present case, nor any practice of consultation.**
> **In my judgment, legitimate expectation is not confined in the way suggested on behalf of the respondents. Lord Fraser in the CCSU case, immediately below the passage cited above, said:**
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> > **"But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law."**

> **His Lordship then went on to refer to the speech of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, [1982] 3 All ER 1124, where the legitimate expectation was not that the prisoner would be consulted but that the prisoner would receive remission of his sentence.**
>
> **In my judgment, the parents of children at extra district schools already receiving travel passes had a legitimate expectation that that benefit would continue until there had been communicated to them some rational grounds for withdrawing it on which they had been given an opportunity to comment."**

[95] As I stated in relation to the "procedural fairness" head of judicial review, the Applicant *was* given the opportunity to state its case in response to the DPS' reluctance. Further, it has not shown any evidence that it received the assurance of the DPS that it would not be removed from the list without first giving it the opportunity to advance its case to remain on the list. Applying the distinction between a "legitimate expectation" and "reasonable expectation" as set out in **Council of Civil Service Unions v Minister for the Civil Service,** while the Applicant's expectation of being approved by the DPS was reasonable having regard to its acceptance in 2009, the expectation does not, in law, amount to a legitimate expectation. As I stated, in the circumstances, the DPS' failure to provide written reasons before effecting the Decision by issuing the Circular was not detrimental in the circumstances. The DPS articulated its reason for its reluctance to continue to approve the Applicant a number of times before the Decision was made. As a result, the failure to state reasons for the Decision was unnecessary because it could not be said that the Applicant was unaware of the reason for the Decision.

[96] In this respect, Mrs. Green-Smith's submission that registration with the MOE did not mean that the Applicant could reasonably expect to be automatically approved by the DPS is relevant. Mrs. Rolle urged the Court to find that because the Applicant was never deregistered by the MOE, it could legitimately expect to have remained accepted by the DPS. Having heard the evidence, it is clear that the effect of being registered with MOE was merely that it could provide instruction on

certain courses. I am satisfied that it did not follow from MOE registration that the Applicant was guaranteed approval by the DPS.

[97] Notwithstanding that I have concluded that the Applicant's expectation was a mere reasonable expectation as opposed to a legitimate expectation, I will go on to consider whether it was lawful for the DPS to frustrate that expectation. Both Counsel agreed that there are circumstances under which legitimate expectations could be overridden but while Mrs. Green-Smith argued that this was one of the situations where the legitimate expectation could be overridden, Mrs. Rolle contended that it was not.

[98] The test for determining whether frustrating a legitimate expectation is an abuse of power or not is whether there is sufficient public interest to override the legitimate expectation. The exercise of lawfully frustrating a legitimate expectation was set out in **Paponette and others v Attorney General of Trinidad and Tobago** [2010] UKPC 32. At para 34, Sir John Dyson SCJ said:

> **"[34] The more difficult question is whether the government was entitled to frustrate the legitimate expectation that had been created by its representations. In recent years, there has been considerable case law in England and Wales in relation to the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation. Some of it was referred to by Warner JA in her judgment. The leading case is *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, [2000] 3 All ER 850, 97 LGR 703. Lord Woolf MR, giving the judgment of the Court of Appeal said, at para 57:**
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> > **"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive,* not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."**

[99] Sir John Dyson SCJ went on to explain that the question is whether there is sufficient public interest to override the legitimate expectation. At paras 36 and 37, he said:

> **"[36] The critical question in this part of the case is whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise. This raises the further question as to the burden of proof in cases of frustration of a legitimate expectation.**
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> **[37] The initial burden lies on an Applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the Applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the Applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest."**

[100] In **Finlayson**, although the Court determined that there was no legitimate expectation, it addressed the circumstances in which a decision-making authority would be permitted to derogate from legitimate expectation. It reasoned that the risk of a lack of competence of persons issuing medicine to the public was such a threat to public health and safety that it justified resiling from a legitimate expectation. At paras 188 -189, the Court stated:

> **[188] In the present case, the overriding public interest is the health and safety in the dispensation of medicine to members of the general public. The duty of the Council is to register persons who meet the educational requirements and must act in a manner to safeguard the public's interest. To abdicate this responsibility would expose the public to persons lacking the competencies to provide quality pharmacy care and increases the possibility of medication errors. The evidence of both Dr. Rolle and Dr. Scott accentuated that the public interest (safety) is of utmost importance and is the overriding consideration of the Council.**
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> **[189] Furthermore, the evidence with respect to public safety remained unchallenged by the Applicant even though she stated that there have been no complaints against the 17**

McHari graduates. To my mind, that is not the point. Public safety will and must be a critical concern of the Council at all times."

[101] Mrs. Rolle submitted that there is no overriding interest in this case. However, the Applicant offered a wide range of courses, encompassing many different disciplines and by being approved by the DPS as an institution whose degrees and certificates it would accept, public servants attended (and would have attended) the institution. Public servants would have been promoted based on their qualifications obtained therefrom. The competence of public servants promoted based on certain qualifications is the relevant interest. The duty of the DPS is to ensure that public service agencies operate efficiently. The risk of public servants are/would be promoted with questionable competence to do so negatively impacts public service generally. That is, in my judgment, a sufficient public interest to override a legitimate expectation if there was one.

Conclusion

[102] No legitimate expectation arose in favour of the Applicant. Further and, in any event, even if there was legitimate expectation, the implications of the competence of public servants being at risk, the DPS was justified. Because the Applicant was given the opportunity to state its case before the Decision was made and the evidence clearly demonstrated that the DPS' Decision to remove the Applicant from the list was not predetermined, there were no procedural irregularities to ground its judicial review claim.

[103] Accordingly, the judicial review proceedings are dismissed. As the successful parties, the Respondents are entitled to their costs to be taxed if not agreed.

Dated this 3rd day of February 2023

Indra H. Charles
Senior Justice