

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2019/0020

BETWEEN:

**[1] THE MINISTER OF AGRICULTURE, LANDS, HOUSING,
CO-OPERATIVES AND FISHERIES**

[2] NEVIS HOUSING AND LAND DEVELOPMENT CORPORATION

Appellants

and

EUSTACE NISBETT

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Terrence V. Byron for the Appellants
Mr. Patrice Nisbett for the Respondent

2020: October 30;
2021: March 2.

Civil appeal – Judicial review – Whether learned judge erred in finding that the Minister terminated the disbursement granted to respondent by the Cabinet – Whether claim by respondent was properly instituted as a claim for judicial review rather than a claim in private law of an employee and employer dispute – Whether respondent was entitled to relief in public law on his claim – Whether rules of natural justice may be imported in a private contractual relationship

The respondent, Mr. Eustace Nisbett, was employed as the Manager of the second appellant, Nevis Housing and Land Development Corporation (“the Corporation”) by virtue of a contract of employment. In May 2012, Mr. Nisbett applied to the Corporation and was granted study leave to pursue studies in law in the United Kingdom (“UK”). In addition, the Corporation agreed to grant Mr. Nisbett financial assistance for his studies, and in return, Mr. Nisbett was required to, among other

things, provide the Corporation with semester reports. The Cabinet of the Nevis Island Administration ("the Cabinet") also agreed to meet a portion of the cost for his studies, granting to him 80% of his tuition and living expenses.

Mr. Nisbett proceeded to the UK to pursue his studies and a few months later, Mr. Alexis Jeffers was appointed the Minister of Agriculture, Lands, Housing, Co-operatives and Fisheries. On 11th February 2013, the Minister wrote to Mr. Nisbett requesting him to provide a transcript of examination results for the semester ending December 2012. Mr. Nisbett responded informing the Minister that there were no such reports since the examinations were held annually and were not due until May-June 2013. By letter dated 13th February 2013 ("termination letter"), written on the Ministry's letterhead, the Minister informed Mr. Nisbett that all disbursements to him had been terminated until he provided the information requested. The Minister later wrote to Mr. Nisbett informing him that the Corporation had decided to terminate his employment with immediate effect.

Subsequently, the respondent instituted judicial review proceedings in which he sought several remedies including: (i) declarations that: (a) the termination of financial assistance granted by the Cabinet was contrary to law, null, void and of no effect; (b) his dismissal was unlawful, null, void and of no effect; (ii) certiorari quashing the decision to terminate the financial assistance; (iii) mandamus requiring the Corporation to forthwith reinstate him or alternatively to pay him such sums as would be due to him under the contract of employment; and (iv) vindictory damages. The learned judge having heard the evidence found in favour of Mr. Nisbett, finding that the Minister had no authority to terminate the disbursement to which the Cabinet had agreed, and that he had done so in breach of the rules of natural justice. The learned judge also found that Mr. Nisbett's dismissal was in breach of the principles of natural justice and the claim fell within the realm of public law. As such, the learned judge granted the reliefs sought and a declaration that Mr. Nisbett was entitled to any disbursement, salary and other remuneration lawfully due and owing to him pursuant to his contract and the decision of the Cabinet. The learned judge also awarded Mr. Nisbett damages and granted him liberty to make further submissions on the issue of vindictory damages.

Dissatisfied with the decision of the learned judge, the appellants have appealed to this Court. The main issues that arise to be determined are whether the learned judge erred in finding that the Minister terminated the disbursement granted to Mr. Nisbett by the Cabinet, and whether Mr. Nisbett was entitled to relief in public law on his claim.

Held: allowing the appeal; setting aside the orders of the learned trial judge; and ordering no costs in the court below and no costs on the appeal, that:

1. An appellate court will exercise great restraint before interfering with a finding of fact by a lower court. Where however, the court is satisfied that the finding of fact cannot be supported by the evidence, an appellate court will intervene.

Elefterescu v Royal College of Veterinary Surgeons 2020 UKPC 6 considered.

2. There is no evidence to support the learned judge's finding that the decision to terminate the financial assistance was the decision of the Minister. The learned judge having found that there was no communication from the Cabinet Secretary, and no evidence that the Cabinet made the decision to terminate the financial assistance, erroneously concluded that the Minister made a decision to terminate the financial assistance granted by the Cabinet. The learned judge having proceeded on this wrong basis, gave no consideration to whether 'all disbursements' included the financial assistance approved by the Cabinet. When the termination letter is read in the context of the discourse between the Minister and Mr. Nisbett, it is very clear that the Minister was referring to disbursements from the Corporation and not any disbursements from the Cabinet. Accordingly, the learned judge erred in his conclusion.
3. The approach to be adopted in determining whether a public law remedy such as judicial review is the appropriate course, is that the court must look at whether there is a public law element in the decision and whether the allegation involves suggested breaches of duties or obligations owed as a matter of public law; only then will the decision be reviewable. As it relates to the ordinary contracts of employment, there is no 'public law' element present. Further, employment by a public authority does not per se inject an element of public law, nor does the fact that the employee holds a senior post. Where statute provides for employment by a public body to be on certain terms, it would give rise to public law rights and if there is failure to comply by the public body, then public law remedies could be sought. In relation to Mr. Nisbett, his position as Manager of the Corporation was not a position fortified by statute. Although the Corporation had statutory powers to employ, there are no statutory provisions or limitation on the positions or the terms and conditions on which persons are to be employed. It is therefore clear that Mr. Nisbett's claim is concerned with the infringement of his rights under contract law and that the learned judge erred in his findings.

R v Panel on Take-overs & Mergers, Ex parte Datafin plc and another [1987] Q.B. 815 applied; **R v East Berkshire Health Authority ex parte Walsh** [1984] 3 All ER 425 considered; **R v Derbyshire County Council (ex parte Noble)** [1990] IRLR 332 considered; **Swan v Attorney General** [2009] UKPC 22 considered; **N.H International Caribbean Limited v Urban Development Corporation of Trinidad and Tobago and Hafeez Karamath Limited** Civ. Appeal No. 95 of 2005 considered.

4. The rules of natural justice may be imported in a private contractual relationship, but it would go to the rights and duties of the contract. It would not import the necessary public element to bring the matter in the realm of public law. It follows that the terms in clause 7 of Mr. Nisbett's contract of employment may import the rules of natural justice and that a breach of the rules of natural justice may result in a termination being unlawful.

R v East Berkshire Health Authority ex parte Walsh [1984] 3 All ER 425 applied; **Gary Nelson v The Attorney General et al** [ANUHCVP2012/0001] (delivered 26th May 2014, unreported) considered; **McLaughlin v The Governor of the Cayman Islands** [2007] UKPC 50 considered.

JUDGMENT

- [1] **THOM JA:** The issue that arises in this appeal is whether the claim by the respondent, Mr. Nisbett, seeking various declarations, certiorari and damages, was properly instituted as a claim for judicial review, rather than a claim in private law concerning an employee and employer dispute.
- [2] The learned judge was of the view that the claim fell squarely in the realm of public law and that judicial review proceedings was the correct course. The appellants, The Minister of Agriculture, Lands, Housing, Cooperatives, and Fisheries ("the Minister") and Nevis Housing and Land Development Corporation ("the Corporation") disagree with the learned judge's decision.

Background

- [3] In 2006, Mr. Nisbett was employed as the Manager of the Corporation on contract for three years. At the expiration of the contract, he continued to serve as Manager and in March 2011 he entered another contract with the Corporation for a further three years.

- [4] In May 2012, Mr. Nisbett applied to the Corporation and was granted study leave to pursue studies in law in the United Kingdom (“the UK”).¹ The Corporation also agreed to grant Mr. Nisbett financial assistance for his studies in the sum of nine thousand, seven hundred and forty-one pounds (£9,741).² In return, Mr. Nisbett was required to provide the Corporation with semester reports and make himself available for work with the Corporation during vacation periods.
- [5] Mr. Nisbett also sought and was granted financial assistance from the Cabinet of the Nevis Island Administration (“the Cabinet”) to meet a portion of the cost for his studies. By letter from the Cabinet Secretary dated 3rd August 2012, Mr. Nisbett was informed that the Cabinet had agreed to grant him eighty percent of his tuition and living expenses.³ In September 2012, Mr. Nisbett proceeded to the UK to pursue his studies. A few months later in January 2013, there was an election and new members were elected to the Nevis Island Administration. Mr. Alexis Jeffers was appointed the Minister of Agriculture, Lands, Housing, Co-operatives and Fisheries and he became the ex officio Chairman of the Corporation. A new Board of Directors was appointed to the Corporation.
- [6] On 11th February 2013, the Minister wrote to Mr. Nisbett requesting that Mr. Nisbett provide a transcript of examination results for the semester ending December 2012.⁴ Mr. Nisbett responded by email on the said day informing the Minister that there were no reports since the examinations were held annually and were not due until May-June 2013.⁵ Mr. Nisbett also pointed out that enrollment was annual and all documentation pertaining to his enrollment were submitted to the Corporation.
- [7] By letter dated 13th February 2013, the Minister informed Mr. Nisbett that all disbursements to him had been terminated until he provided the information

¹ Letter dated 19th June 2012 at p. 247 of the Record of Appeal Volume I.

² Supra n. 1.

³ Record of Appeal Volume I at p. 248.

⁴ Supra n. 3 at p. 249.

⁵ Supra n. 3 at p. 250.

requested. Mr. Nisbett responded reiterating that there were no examinations and therefore no result and no new registration. He offered to request the University to write to the Corporation confirming his status as a student if the Corporation so required. Mr. Nisbett did not receive a response to this request.

- [8] On 27th February 2013, the Minister wrote to Mr. Nisbett informing him that the Corporation had decided to terminate his employment with immediate effect.⁶

The Court Below

- [9] Mr. Nisbett instituted judicial review proceedings in which he sought several remedies including: (i) declarations that: (a) the termination of financial assistance granted by the Cabinet was contrary to law, null, void and of no effect; (b) his dismissal was unlawful, null, void and of no effect; (ii) certiorari quashing the decision to terminate the financial assistance; (iii) mandamus requiring the Corporation to forthwith reinstate him or alternatively to pay him such sums as would be due to him under the contract of employment; and (iv) vindictory damages.
- [10] The learned judge having heard the evidence found in favour of Mr. Nisbett, granted the declarations and certiorari, and granted a declaration that Mr. Nisbett was entitled to any disbursement, salary and other remuneration lawfully due and owing to him pursuant to his contract and the decision of the Cabinet. The learned judge also awarded Mr. Nisbett damages and granted him liberty to make further submissions on the issue of vindictory damages.
- [11] In finding for Mr. Nisbett, the learned judge found that the Minister, by his letter dated 13th February 2013, terminated the disbursement which the Cabinet had agreed to give Mr. Nisbett where the Minister had no authority to so do and he did so in breach of the rules of natural justice. In relation to the decision to terminate Mr. Nisbett's employment as contained in the letter dated 27th February 2013, the learned judge

⁶ Record of Appeal Volume I at p. 253.

found that the dismissal was in breach of the principles of natural justice and the claim fell within the realm of public law.

The Appeal

- [12] The appellants being dissatisfied with the decision of the learned judge, appealed on numerous grounds. However, at the hearing, Mr. Terrence Byron, counsel for the appellants, submitted that the issues in contention were firstly, whether the learned judge erred in finding that the Minister terminated the disbursement granted to Mr. Nisbett by the Cabinet, and secondly, whether Mr. Nisbett was entitled to relief in public law on his claim.

Issue 1: Whether the learned judge erred in finding that the Minister terminated the disbursement granted to Mr. Nisbett by the Cabinet

- [13] I will deal first with the decision contained in the letter of 13th February 2013. The letter, which was written on the letterhead of the Ministry of Agriculture, Lands, Housing, Cooperatives, and Fisheries (“the Ministry”), reads as follows:

“Dear Mr. Nisbett,

The letter sent to you dated June 19, 2012 from the Chairman of the Nevis Housing and Land Development Corporation, item #4 states: “You must provide official semester reports from the college.”

Additionally, it is an established fact that registration for the new classes are done at the beginning of a new semester.

To this end, with immediate effect, all disbursements have been terminated until the above condition is met.”

- [14] The learned judge found that the decision to terminate the disbursement was made by the Minister and not the Cabinet. He found support for this conclusion in the fact that there was no evidence to show that the decision to terminate the disbursement was a decision of the Cabinet. The letter was not written by the Secretary to the Cabinet who pursuant to section 62 of the **Constitution** of Saint Christopher and

Nevis, was the person responsible for conveying the decisions of the Cabinet to the appropriate person or authority.

- [15] The learned judge noted that when the Cabinet decided to grant the financial assistance to Mr. Nisbett, the decision was conveyed by the Cabinet Secretary. Further, the letter was written on the letterhead of the Ministry. The learned judge therefore found that the decision to grant the assistance having been made by the Cabinet, meant that the Minister had no legal authority to terminate the assistance, that the termination was therefore illegal, and even if the decision was made by the Cabinet it was illegal since Mr. Nisbett was not given a hearing before the decision was made.
- [16] Mr. Byron submitted that in so finding, the learned judge erred since there was no evidential basis to support the finding. Mr. Nisbett in response referred the Court to several extracts in the transcript of the Minister's testimony which he submitted supported the finding of fact made by the learned judge.
- [17] This issue relates to findings of fact by the learned judge. The principles on which an appellate court would interfere with the findings of fact by a judge have been stated in several decisions of this Court and more recently the Privy Council in **Elefterescu v Royal College of Veterinary Surgeons**.⁷ An appellate court will exercise great restraint before interfering with a finding of fact by a lower court. Where however, the court is satisfied that the finding of fact cannot be supported by the evidence, an appellate court will intervene. It is on this basis that the appellants seek the intervention of this Court. I will turn now to consider the evidence in relation to this issue.
- [18] At the trial before the learned judge, there were three witnesses. The respondent, the Minister and Mr. Boncamper, the Manager of the Corporation. Only the

⁷ 2020 UKPC 6.

respondent and the Minister gave evidence on this issue. The respondent's evidence was that he received a letter dated 3rd August 2012 from the Cabinet Secretary informing him that the Cabinet had approved his request for financial assistance and would meet eighty percent (80%) of his tuition and living expenses and that he was required to follow up with the Permanent Secretary in the Human Resources Department. Mr. Nisbett left for the UK on 12th August 2012, at which time he had not yet received any portion of the financial assistance promised by the Cabinet. However, he understood that the money would be sent. Mr. Nisbett led no evidence whether he made any follow up at any time with the Permanent Secretary in the Human Resources Department or the Cabinet Secretary about the sums promised. He agreed that he never received any of the sums from the Cabinet either before the elections or after the elections when the members of the Cabinet were elected. The respondent's case was simply that the reference to 'all disbursements' in the letter of 13th February 2013 included the financial assistance promised by the Cabinet.

[19] The Minister's evidence was that he had not written the letter, he had no recollection of writing the letter of 13th February 2013. The letter was subsequently shown to the Minister and to his counsel and the Minister agreed that he had written the letter.⁸ He testified that when the letter was written he was not aware that the Cabinet had approved financial assistance to Mr. Nisbett. He was only aware of the assistance from the Corporation. He denied that he terminated financial assistance to Mr. Nisbett which was approved by the Cabinet.

[20] In my view, this issue turns on the interpretation of the phrase 'all disbursements' in the letter of 13th February 2013. The discourse between the Minister and Mr. Nisbett commenced with an email from the Minister to Mr. Nisbett on 11th February 2013 requesting information from Mr. Nisbett in relation to his study leave from the Corporation. The Minister's email of 11th February 2013 states:

Dear Mr. Nisbett,

⁸ Record of Appeal Volume 1 at pages 167-168.

The records reveal that study leave was approved for you for the period September 2012 to June 2015. Kindly furnish the transcript or academic results of your performance for the semester ending December 2012. Additionally, kindly furnish information regarding your continued enrolment and the institution that you are currently attending.

Your timely response will be appreciated.”

- [21] Mr. Nisbett responded to the Minister by email of even date, explaining to the Minister why the information requested could not be provided. Mr. Nisbett’s email of 11th February 2013 continues:

“Good afternoon Ms. Grant,

Please acknowledge this correspondence of acknowledgment of receipt of your (sic) email and attached correspondence, dated 11th February 2013.

I wish to further advise that my degree is on an (sic) annually exam basis as such I would not be able to provide semester results or any results until I have taken my examination. My examinations are scheduled for May and July annually and as per my study leave arrangement, those results would be forwarded at that time.

Additionally, my enrollment is continued and formal registration is only required at the beginning of the school year. The appropriate enrollment letter for year two cannot be forwarded until I have progressed pass year one.

Nonetheless, all of my current documentation was presented as part of my request for study leave and therefore should be present on my file held at the Nevis Housing and Land Development Corporation (NHLDC).

Be there the need for any further clarification, please do not hesitate to contact me.”

- [22] The Minister then responded with the letter dated 13th February 2013, stopping all disbursements until the information was provided. In this context, the correspondence passing between the Minister and Mr. Nisbett show that both the Minister and Mr. Nisbett were dealing with the terms of the study leave granted by the Corporation. No mention was made of financial assistance from the Cabinet in any of the correspondence passing between the Minister and Mr. Nisbett. There was no evidence that the letter of 3rd August 2012 from the Cabinet Secretary was sent to the then Chairman of the Corporation or to the Corporation. The letter shows that

it was copied to the British High Commission in Barbados. There is no evidence that it formed part of Mr. Nisbett's file at the Corporation or that the Corporation ever received a copy of the letter. Further, there was no evidence to support the learned judge's finding at paragraph 36 of the judgment that '...yet [Mr. Jeffers] claims to have merely communicated the decision in his letter dated 13th February 2013.'⁹ The transcript of the trial before the learned judge reveals no such evidence from the Minister. Indeed, the Minister's evidence is to the contrary. The learned judge was persuaded by this erroneous finding as he proceeded into a detailed discussion into the procedure for communicating decisions of the Cabinet and having found there was no communication from Cabinet, and no evidence that the Cabinet made the decision he concluded that the decision was made by the Minister. The learned judge having proceeded on the wrong basis that the decision to terminate the financial assistance was the decision of the Minister, gave no consideration to whether 'all disbursements' included the financial assistance approved by the Cabinet. It appears that it was merely assumed without further analysis that the term included or referred to the financial assistance which had been approved by Cabinet. In my view, when the letter is read in the context of the discourse between the Minister and Mr. Nisbett, it is very clear that the Minister was referring to disbursements from the Corporation and not any disbursements from the Cabinet.

[23] In my opinion, the approach adopted by the learned judge led the judge into error. The learned judge was required to first determine whether the phrase 'all disbursements' included the financial assistance from the Cabinet. It was only if the learned judge determined the phrase included the financial assistance approved by Cabinet, that he could then consider whether it was terminated by the Minister, purporting to do so on behalf of the Cabinet.

⁹ *Eustace Nisbett v Minister of Agriculture, Lands, Housing, Cooperatives & Fisheries et al* NEVHCV2014/0030 (delivered 12th April 2019, unreported) at para 36.

Issue 2: Whether Mr. Nisbett was entitled to relief in public law on his claim

- [24] In relation to the decision to terminate Mr. Nisbett contained in the letter dated 27th February 2013, the learned judge found that it fell within the realm of public law and Mr. Nisbett was entitled to public law remedies.
- [25] In finding for Mr. Nisbett, the learned judge accepted the submission on behalf of Mr. Nisbett that his claim was in the realm of public law since it seeks a review of the legal justification of the actions of the appellants and the general fairness of the process by which the decisions were made. The learned judge also relied on the following passages referred to him by Mr. Nisbett in **R (on the application of Beeson) v Dorset County Council**¹⁰ where Laws LJ stated that '[t]he basis of judicial review rests on the free-standing principle that every action of a public body must be justified by law and at common law the High Court is the arbiter of all claimed justification',¹¹ and in **Sheffield City Council v Smart**¹² where Laws LJ also stated that '...the exercise of power by any public authority is strictly limited to the scope and purpose of the power's granted (sic) and subject also to the common law's insistence on rationality and fairness...'.¹³
- [26] In paragraph 29 of his judgment, the learned judge stated:
- "In essence the claimant argues that this case falls squarely within the realm of public law as it seeks to review the legal justification, or lack thereof of the action of the defendants and the general fairness in the process by which these decisions were made. For my part, I find much force in the relevance of the authorities cited (sic) by the claimant and authorities from our own courts have supported this."
- [27] The learned judge concluded his reasoning on this issue in paragraph 33 as follows:
- "In my view, the substance of the claimant's case falls squarely within the realm of public law. He does not claim breach of contract but rather seek a review of the way the decision to terminate his employment and nullify his study leave was made. He contends that the way he was dismissed from his employment

¹⁰ [2004] LGR 92.

¹¹ Ibid at para 17.

¹² [2002] LGR 467.

¹³ Ibid at para 20.

was in breach of the rules of natural justice in that he was not given an opportunity to be heard. I notice that the letter attempted to dismiss the claimant for cause. On the basis of the authorities, he would have been entitled to a fair hearing and this is the basis of the claim which he had brought before this court. These are matters of public law and are properly before this court for consideration.”

- [28] Mr. Byron submitted that the learned judge fell into error in relying on the cases of **R (on application of Beeson)** and **Sheffield City Council**, since the passages to which the learned judge referred, when read in context, provide no assistance to Mr. Nisbett’s case. He contends that the relevant authorities are **Ridge v Baldwin**,¹⁴ **R v East Berkshire Health Authority Ex parte Walsh**,¹⁵ **Tucker, R (on application of) v National Crime Squad Director General**.¹⁶ Mr. Byron further submitted that, the test ‘whether a decision of a public authority is amenable to judicial review’, is the test stated in **R v Civil Service Union, ex parte Bruce**.¹⁷ In **R v Civil Service Union**, Roch J stated that:

“There are two questions in this case. First, can the appellant’s claim to relief be brought by way of judicial review? Second if it can, should the relief sought by the appellant be granted?... The answer to the first question turns on whether the applicant is seeking to enforce some public right or the performance or proper performance by some public or other similar authority of a public duty on the one hand, or a private right arising by contract or statute or under the common law on the other hand. If it is the first, then judicial review is available, subject to the Court’s discretion. If the second, then judicial review is not available.”¹⁸

Mr. Byron submitted that when this test is applied, Mr. Nisbett’s claim falls squarely in the realm of private law; his claim relates to private rights arising by contract.

- [29] Mr. Patrice Nisbett on behalf of Mr. Nisbett, urged the Court to uphold the decision of the learned judge since there was no legal basis to interfere with his decision. Mr. Patrice Nisbett submitted that, Mr. Nisbett’s dismissal was contrary to the rules of

¹⁴ [1964] A.C. 40.

¹⁵ [1984] 3 All ER 425.

¹⁶ [2003] EWCA Civ 03.

¹⁷ [1988] 3 All ER 686.

¹⁸ Ibid at 697.

natural justice in that he was not given a hearing before he was dismissed. These issues, learned counsel contends, are in the realm of public law and not private law and he contends further that Mr. Nisbett's claim was not for breach of contract or wrongful dismissal. He relied on the cases of **Gary Nelson v The Attorney General et al**¹⁹ and **Attorney General v Isaac**.²⁰

[30] At paragraphs 13. 1 and 13. 2 of his written submissions on which he relied at the hearing,²¹ learned counsel outlined the following:

“13. 1. In **Attorney General v Isaac**, Lady Black speaking for the Privy Council sought to provide some clarification on the factors that determine whether an application should be one for Judicial Review. At paragraph 41, the Privy Council held the view that in scrutinizing an application for Judicial Review, it is of central importance to consider whether relief in the form at any of the orders listed in CPR 56. 1 (3) as sought. This reinforced Lady Black's dicta at paragraph 33 ‘that the mere fact that it is a claim against a public body that does not make it a claim for judicial review, something more is needed.’ The Learned Lady (sic) added at para. 34 that: CPR 56 1 (3) is the ‘only’ guide in the rules to what constitute an application for judicial review as this rule contains the prerogative powers and that there is no doubt that the presence or absence of a claim for these prerogative remedies will always be important and potentially determinative. It was here held that the list of remedies provided by CPR 56. 1 (3) is not exhaustive but is appropriate where an applicant is seeking reliefs such as certiorari or a quashing order.”

[31] At paragraph 13. 2, learned counsel stated, ‘[a]t paragraph 41 of the Privy Council's argument, Lady Black agreed that where a claimant sought to have the decision or action quashed then an application for judicial review would be required.’

[32] Learned counsel submits that based on the above-mentioned paragraphs in **Attorney General and another v Isaac**, in determining whether judicial review was applicable, the court was required to consider the nature of the remedies sought. The remedies sought by Mr. Nisbett were remedies which could be granted on judicial review. The learned judge was therefore correct in granting the reliefs.

¹⁹ ANUHCVP2012/0001 (delivered 26th May 2014, unreported).

²⁰ [2018] UKPC 11.

²¹ Submissions in response to Appellant's Submissions filed on 25th May 2020.

[33] In my view, learned counsel's analysis of **Attorney General and another v Isaac** is incorrect. In **Attorney General and another v Isaac** the issues that were before the Privy Council are outlined at paragraph 10 of the judgment as follows:

"The two issues identified by the parties for the determination of the Board are as follows:

- i. Whether the fixed date claim form filed by Ms. Isaac was an application for judicial review?
- ii. Whether the nature of the claim was a private law claim involving an employment dispute for which the appropriate forum was the Industrial Court, notwithstanding that Ms. Isaac was employed by a public authority?"

[34] While the second issue is the same issue in this appeal, the Board did not make a definitive ruling on the issue. In paragraph 12 of the judgment, the Board stated: '[i]t is undesirable that the Board should become too involved with this second issue at this stage. There are in fact, ongoing proceedings in the Industrial Court brought by Ms. Isaac against the Board of Education....' The Board further stated in paragraph 13 that:

"The appellants maintain the position before the Board that the Cabinet was Ms. Isaac's employer and say that the Attorney General is ready to be as the employer in proceedings in the Industrial Court. That is not, however, Ms. Isaac's case. In the absence of the awaited ruling from the Industrial Court on the point, it seems to the Board that the present appeal must proceed upon the basis of the contention of Ms. Isaac as the claimant in an application for an administrative order that the Board of Education is her employer. Assuming that to be the case, her fixed date claim in the High Court is not against her employer, but against other public bodies, namely the Attorney General as representative of Cabinet and the Minister of Education. As things stand, therefore, her claim has the appearance of a public law claim rather than a purely private law claim."

[35] The Board was concerned with whether Ms. Isaac's application in which she sought certain declarations was properly instituted pursuant to rule 56.1(1)(b) of the Civil Procedure Rules 2000 ("CPR") and was not a claim for judicial review within CPR 56.1(1)(c) and therefore leave of the Court was necessary. The Board proceeded on the basis that it was a claim in public law and having examined CPR 56.1(1) determined that the mere fact that a claim was a claim in public law was not sufficient

to make it a claim for judicial review. The Board found that while CPR 56.1(3) provides guidance as to what constitutes an application for judicial review, it does not provide an exhaustive definition of judicial review. Further an application for prerogative remedies would not necessarily mean that it is an application for judicial review. The focus of the discussion and decision of the Board was not whether the claim was in public law or private law. The Board, for the purpose of dealing with the first issue, only proceeded on the basis that it was a public law claim. The Board agreed with the lower courts that Ms. Isaac's application was not an application for judicial review but for declaration within CPR 56.1(1)(b).

[36] I will now examine the cases on which the learned judge relied. In **Sheffield City Council v Smart**, Mr. Smart was a non-secure tenant of the Council. As a result of complaints of nuisance by neighbours, the Council obtained a possession order against him. He challenged the possession order on the basis that it was in contravention of his rights in Articles 6 (1) and 8 (2) of the European Convention on Human Rights ("the Convention"). The issue was whether the judicial review jurisdiction was sufficient to comply with the requirements of Article 6 (1) and 8 (2). Article 6 (1) requires that in determining civil rights, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 8 deals with the right to respect for private life, home, and correspondence; while Article 8 (2) prohibits interference with the Article 8 right by a public authority except in specific circumstances such as where necessary in a democratic society, in the interest of national security or public safety.

[37] In considering this issue, the court in examining the scope of the judicial review jurisdiction stated that:

"As is very well known that jurisdiction exists and has long existed, as the means by which the exercise of power by any public authority is strictly limited to the scope and purposes of the powers granted and subjected also to the common law's insistence on rationality and fairness."²²

²² Supra n. 12.

This is a general principle of judicial review which a court considers on judicial review applications. The court was not considering whether judicial review was the appropriate course on the facts of the case. Indeed, it was common ground that the decision of the Council to serve a notice to quit was amenable to judicial review. There was therefore no contention whether the matter was a public law matter.

[38] In **R (on application of Beeson) v Dorset Country Council**, Mr. Beeson was an elderly man. His home was his only major asset. He suffered a stroke and was hospitalised. After release from hospital, he was in receipt of home care financed by the Council. He subsequently transferred his home to his son. About two years later his health deteriorated and he needed residential care. He sought assistance from the Council but his application was refused. In reaching the decision, the Council was required to apply Regulation 25(1) of the UK's The National Assistance (Assessment of Resources) Regulations 1992. Mr. Beeson instituted judicial review proceedings. Two issues arose in the proceedings- firstly, whether the Council had correctly construed and applied Regulation 25(1) in reaching its' decision. The learned judge held it had not. There was no appeal from this finding. The second issue was whether the Regulation 25(1) decision making procedure was contrary to Article 6(1) of the Convention. It is this second issue which was considered by the Court of Appeal. Lord Justice Laws formulated the issue on appeal in paragraph 15 as follows:

“... this appeal requires the Court to revisit what has become well-trodden ground: the impact of ECHR Article 6 upon a statutory regime in which decisions affecting the distribution of particular public benefits or protections (or, sometimes the imposition of burdens) are taken by an internal administrative body or official, subject to suspension of the decisions legality by judicial review or an equivalent statutory appeal. The questions which most characteristically arise in litigation relating to such a scheme are the very questions which face us here: (i) does the scheme's operation involve a determination of the claimant's civil rights and obligation within the meaning of Article 6 (1)? And (ii) if so, is the second stage adjudication sufficient taking the decision-making process, to 'cure' the want of compliance with Article 6 inherent in the first stage, it being accepted that the internal or administrative decision-maker lacks the independence which Article 6 (1) requires?”²³

²³ [2004] LGR 92 at para 15.

[39] It is in this context that Laws LJ stated at paragraph 17 (which contains the excerpt which the learned judge referred to in his judgment) that:

“Now in the context of these public law schemes involving decisions at two tiers, the first in a broad sense administrative. The second certainly judicial, it is in our judgment necessary to expose two points of contrast between this evolution of the jurisprudence of the European Court of Human Rights and the approach taken by the common law. The first is that whereas under the Convention it is a necessary condition for the subjection of the exercise of power by public authorities to the rule of law that the decision under scrutiny should at least affect the citizen’s private legal rights or obligation, the common law treats such a consideration with indifference. Whether or not executive action touches the citizen’s rights in private law is at common law irrelevant to the availability of judicial review to test the action’s legality. (Private rights may be material to satellite questions of standing and damages but it is unnecessary to take time with those.) The basis of judicial review, rests in the free-standing principle that every action of a public body must be justified by law, and at common law the High Court is the arbiter of all claimed justification.”

[40] The last sentence on which the learned judge referred to in his judgment cannot be construed to mean that the court was stating that every action of a public or statutory body is subject to judicial review, but rather their actions in the performance of their public or statutory duties are subject to judicial review.

[41] The issue before the learned judge was not a novel issue. The issue was considered in several cases including **R v Derbyshire County Council (ex parte Noble)**.²⁴ There the Council terminated the appointment of Dr. Noble as deputy police surgeon. The Council gave no reasons for the decision nor did it give Dr. Noble an opportunity to make representations. Dr. Noble applied for judicial review of the decision and sought an order of certiorari to quash his dismissal and an order of mandamus that he be reinstated. His main contention was that the Council had acted unfairly and in breach of the rules of natural justice. His application was rejected in the lower court on the preliminary issue that judicial review was not appropriate because there was no element of public law. His appeal to the Court of

²⁴ [1990] IRLR 332.

Appeal was also dismissed. In so doing the court in applying the reasoning in **Ex parte Walsh** stated:

“Although there is no universal test as to when judicial review is or is not available, the approach which the courts now adopt is to look at the subject-matter of the decision which it is suggested should be subject to judicial review and then come to a decision as to whether judicial review is appropriate.”

[42] The court reasoned that the decision being challenged by Dr. Noble concerned a claim arising out of the termination of the applicant's private contract for services. The remedies sought by the applicant did not arise out of some breach of a public duty placed upon the Council related to the exercise of powers granted to them. A public element could not be injected into the case by showing that police surgeons have public functions. In giving Dr. Noble notice to terminate his contract, the Council was not performing a public duty or exercising a public function. Consequently, there was not the public law element which was required to make Dr. Noble's termination an appropriate subject of an application for judicial review.

[43] In **Ex parte Walsh** on which Mr. Byron relied, a senior nursing officer employed by a health authority under a contract which incorporated the Whitely Council Agreement was dismissed by the Council for misconduct. He sought judicial review on the basis that his dismissal was in breach of natural justice and pursuant to the Agreement, the district nursing officer had no power to dismiss him.

[44] The issue in **Ex parte Walsh** was whether Mr. Walsh's complaints which fell into two categories: (1) the district nursing officer's power to act on behalf of the authority in dismissing him; and (2) the extent to which the failure to observe the rules of natural justice in the procedures which led to his dismissal, gave rise to any right to judicial review. In addressing the issues, Purchas LJ stated:

“In my judgment it is difficult to see how private rights with appropriate remedies arising from a contract involving a pure master and servant relationship can be distinguished from private rights arising in tort such as that considered in **Davy v Spetthone Borough Council**. In my judgment the enquiry ought to be

directed towards the rights alleged to be infringed and the remedies sought rather than the status enjoyed qua contract or appointment.”²⁵

[45] In addressing the issues, Purchas LJ also highlighted the need to distinguish between whether or not an obligation to obey the rules of natural justice in master and servant cases encapsulated in the expression 'audi alteram partem' is imported into a contract of employment and whether that invokes of necessity, the supervisory powers of the court,²⁶ as the presence of one does not necessitate action by the other. Purchase LJ states:

“There was a good deal of argument on the question of whether the dismissal itself terminated the contract of employment as well as ending the employment itself. However, within the restricted ambit of the present inquiry, I cannot, for my part, see how these matters, which may well be of importance on the trial of the substantive issues, can be critical to the consideration of the preliminary issue with which the judge was concerned.

At the end of the day I find myself returning to the basic question: did the remedies sought by Mr Walsh arise solely out of a private right in contract between him and the health authority or on some breach of public duty placed on that authority which related to the exercise of the powers granted by statute to it to engage and dismiss him in the course of providing a national service to the public? In my judgment there is no arguable case which can be mounted on the facts disclosed, even if they are all assumed in favour of Mr Walsh 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 on the health authority. The only remedies sought by Mr Walsh arise solely out of his contract of employment with it, as opposed to any public duty imposed on the health authority.”²⁷

[46] I also find the decision of the Privy Council in **Swan v Attorney General**²⁸ to be quite apposite. In September 2003 Mr. Swan was appointed Chair of the Public Service Commission in the TCI and was paid an allowance of \$2500.00 rather than a salary. He was reappointed in September 2005 for a further two years. Mr. Swan contended that when the new constitution came into effect on 8th August 2006 the post became full time, and he was entitled to salary of \$8,640.00 per month instead

²⁵ [1984] 3 All ER 425 at 439 and 440.

²⁶ [1984] 3 All ER 425 at 442.

²⁷ Ibid .

²⁸ [2009] UKPC 22.

of the allowance of \$2,500.00. After discussions with the Governor, he was paid \$8,640.00 per month between August-November 2006. The Cabinet then decided that the salary should be reduced to \$2,500.00. Mr. Swan sought leave to seek judicial review of the Cabinet decision. The Chief Justice denied the application and the Court of Appeal upheld his decision.

[47] On appeal to the Privy Council, the Board, having identified the issue as whether the Chief Justice was correct in refusing leave, stated that to determine the issue it was necessary to identify the nature and the legal basis of the appellant's complaint. The Board, having examined the claim and affidavit evidence, concluded that Mr. Swan's complaint amounted to a straightforward private law claim in contract for \$15,000.00 being the difference in pay over a period of about three months.

[48] A similar approach has been adopted by the Court of Appeal of Trinidad and Tobago in **N.H International Caribbean Limited v Urban Development Corporation of Trinidad and Tobago and Hafeez Karamath Limited**.²⁹ There the issue was whether the decision to award tender after the tender procedure was reviewable under public law. In finding that the decision was not reviewable under public law, Kangaloo JA stated:

“Unless there is a public law element in the decision and unless the allegation invokes suggested breach of duties or obligations owed as a matter of public law, the decision will not be reviewable. The applicants must demonstrate that the allegations involve infringements of rights to which they are entitled as a matter of public law.”

[49] In sum, the judicial review jurisdiction is a supervisory function of the performance by a public body of the duties imposed upon it in the exercise of its statutory or other powers. Additionally, from the above cases the following propositions emerge:

- (a) The remedy of public law is only available where an issue of public law is involved.

²⁹ Civ. Appeal No. 95 of 2005.

- (b) Not every decision or action of a public body is amenable to judicial review.
- (c) Employment by a public authority does not per se inject an element of public law, nor does the fact that the employee holds a senior post. The position held may have some statutory restrictions upon dismissal either express or implied. In those circumstances this statutory underpinning will be the element of public law that will make judicial review applicable.
- (d) There is no 'public law' element in an ordinary relationship of employee and employer. If an employer breaches the contract of employment, then the employee will have a remedy in private law for damages and where there are statutory provisions for unfair dismissal an order for reinstatement and so on. However, where statute provides for employment by a public body to be on certain terms such as where a disciplinary body is established to which disputes affecting the employee and employer relationship must be referred, this would give rise to public law rights and if there is failure to comply by the public body, then public law remedies could be sought.

[50] The approach as emerges from the authorities to be adopted in determining whether a public law remedy such as judicial review is the appropriate course, is that the Court must look at the subject matter of the decision which it is suggested should be subject to judicial review and by looking at the nature of the attack on it. Unless there is a public law element in the decision and unless the allegation involves suggested breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable.

[51] As the Court noted in **R v Panel on Take-overs & Mergers, Ex parte Datafin plc and another**³⁰ the court must examine not only the source of the power that was

³⁰ [1987] Q.B. 815.

exercised but also the nature of power. Where the body is exercising public law functions, or if the exercise of its functions has public law consequences, then that may be sufficient to bring the body within the reach of judicial review.

[52] Applying the above approach, I will now examine Mr. Nisbett's claim. Mr. Nisbett in his amended fixed date claim states: 'The applicant applies for judicial review of the Respondent's decision to terminate his employment with the NHLDC contrary to the terms of the valid contract between the NHLDC and the Applicant and dated the 10th day of March 2011 ...'.³¹

[53] In his affidavit Mr. Nisbett deposed among other things that he was dismissed by the Board of NHLDC by letter dated 27th February 2013.³² Prior to his dismissal he was not given an opportunity to respond to any of the allegations in respect of which he was dismissed, neither was he given a hearing before he was dismissed. While his contract of employment sets out the terms on which he could be dismissed, his dismissal was contrary to the terms of the contract. Mr. Nisbett referred to clause 7 of the contract which reads as follows:

"If the person engaged will at any time neglect or refuse at any cause (except ill health not caused by his own misconduct) to perform his duty or to comply with any lawful order or will disclose any information respecting the affairs of the NHLDC to any unauthorized person, or will in any manner misconduct himself the NHLDC may dismiss him and on such dismissal all rights and advantages or (sic) his engagement will cease."³³

[54] The Corporation was established pursuant to section 4 of the **Nevis Housing and Land Development Ordinance**.³⁴ The functions of the Corporation are set out in section 6 of the Ordinance and read as follows:

"The functions of the Corporation shall be as follows:

(a) To develop schemes for housing and the more efficient and economical use of the agricultural land vested in the Corporation.

³¹ Record of Appeal Volume 1 at p. 212.

³² Ibid at p. 236.

³³ Record of Appeal Volume I at p. 270.

³⁴ Cap. 4:01 (N) of the Revised Laws of Saint Christopher and Nevis.

- (b) To provide for the development of water supplies to such Corporation land.
- (c) To encourage conservation of soil; and
- (d) To provide training facilities to formers and workers in project developed by the corporation.”

[55] Section 10 which deals with the officers and employees of the Corporation reads as follows:

- “1. The Board may appoint and employ on such terms and conditions as it thinks fit, officers and employees for the proper and efficient administration and performance of the Corporation.
- 2. The Governor-General may with the approval of the Public Service Commission authorize the transfer on secondment any public officer from the service to the service of the Corporation.
- 3. The Corporation shall pay from its funds to the Government such contributions in respect of such officers deemed to be seconded from the service of the Government of Saint Christopher and Nevis to the service of the Corporation in accordance with the rules of the Public Service Commission.
- 4. The Corporation shall not offer employment to any such officer except on terms and condition certified under the hand of the Chief Establishment Officer to be in his opinion not less favorable than these enjoyed by that Officer in his substantive post.
- 5. The Corporation may engage the services of experts and persons qualified in the practice of a profession where it is considered expedient.”

[56] The question that arises is to what extent Mr. Nisbett’s complaints have a statutory underpinning or some other element of public law sufficient to attract public law remedies.

[57] In relation to his dismissal, Mr. Nisbett’s position as Manager was not a position fortified by statute. There is no provision in the statute for the office of Manager. His conditions of service were not conditions laid down in the statute. His position and conditions of service are all based on his contract of employment. Mr. Nisbett’s complaint is essentially that the Corporation failed to comply with conditions in his contract of employment and not with any statutory provision express or implied in relation to his employment.

[58] In my view, Mr. Nisbett's claim is concerned with the infringement of his rights under contract law. Mr. Nisbett's relationship with the Corporation was one purely of employee and employer. Although the Corporation had statutory powers to employ, there are no statutory provisions or limitation on positions or the terms and conditions on which persons are to be employed. There was therefore no breach of any statutory provisions in the termination of Mr. Nisbett. Mr. Nisbett's termination related to the private contractual relationship between himself and the Corporation. His rights and remedies for any breach of his contract of employment by the Corporation is in contract law. The fact that he was employed by the Corporation, a public body would not be sufficient to invoke the public law element to bring them within the realm of public law. The breach complained of does not relate to any public element to bring it within the realm of public law. The breach complained of does not relate to any public law rights enjoyed by Mr. Nisbett nor is there any public duty imposed by the Corporation in relation to his employment. It is not sufficient to create a public law obligation to simply say that the Corporation is a public body carrying out public functions pursuant to statute. Where a corporation's statutory function is to carry out public functions, then any contract of employment that corporation enters, its obligations and duties in relation to the contract will be in accordance with the terms and conditions of the contract unless there is also some element that gives rise to a public law obligation. Mr. Nisbett's employment with the Corporation, a statutory body, did not mean he was a public officer.

[59] I turn now to his contention that the fact that he was not given a hearing before dismissal was a breach of natural justice which led to his dismissal being unlawful, null and void.

[60] It is not disputed that Mr. Nisbett's services were terminated without giving him a hearing. The issue however is whether the rules of natural justice are imported into his contract of employment and if so whether such a breach gives rise to a remedy in public law.

[61] The breach of the rules of natural justice upon which Mr. Nisbett relies does not in any way relate to any failure by the Corporation to comply with any powers or duties imposed upon it by statute. In **Ex parte Walsh** the court acknowledged that the rules of natural justice may be imported in a private contractual relationship, but it would go to the rights and duties of the contract. It would not import the necessary public element to bring the matter into the realm of public law. In my view, the terms in clause 7 of the contract may import the rules of natural justice. A breach of the rules of natural justice may result in a termination being unlawful. However, as pointed out in **Ex parte Walsh** the importation of the rules of natural justice does not automatically bring the matter into the realm of public law. In **Ex parte Walsh**, Purchas LJ stated:

“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* [1963] 2 All ER 66 at 71, [1964] AC 40 at 65 to which Sir John Donaldson MR 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, Mr. Walsh's contract of employment related to its conduct as employer in a pure master and servant context and not to the performance of its duties, or the exercise of its powers as an authority providing a health service for the public at large. The importation of the rules of natural justice by direct reference or by implication into a contract (sic) of employment 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...”³⁵

[62] This distinction also escaped the learned judge in this case. The case of **Gary Nelson v The Attorney General et al**, where the learned judge relied on the dissenting judgment of Blenman JA, must be distinguished since in that judgment Gary Nelson was being treated as a public officer. This is also the distinguishing feature between Mr. Nisbett's case and the case of **McLaughlin v The Governor**

³⁵ Supra n.15 at 441.

of the Cayman Islands,³⁶ where a claim for judicial review was successful when the appellant being a public officer was retired due to the abolition of his office in breach of Regulation 29 of the Public Service Commission Regulations which required the officer to be given an opportunity to make representations.

Conclusion

[63] As demonstrated above, the learned judge erred in his determination of the matter. Firstly, there was no evidence to support the learned judge's finding that the decision to terminate the financial assistance was the decision of the Minister. Secondly, this was a matter of private contract law. The remedies sought by Mr. Nisbett arose solely out of a private right in contract between him and the Corporation and not because of some breach of a public duty placed upon the Corporation related to the exercise of statutory powers which have been granted to the Corporation. The claim concerns contractual law principles which attract private law principles and private law remedies. Mr. Nisbett has simply failed to establish a public law element in his termination that would bring his claim within the realm of public law. Mr. Nisbett was not a public officer. He did not hold an office which was underpinned by any statutory provision and there was no statutory underpinning in relation to the dismissal in Mr. Nisbett's terms and conditions of contract.

[64] It is not sufficient to create a public law obligation to simply say that the Corporation is a public body carrying out public functions pursuant to statute. Where a corporation whose statutory function is to carry out public functions, enters into a contract of employment, its obligations and duties in relation to the contract will be in accordance with the terms and conditions of the contract unless there is also some element that gives rise to a public law obligation.

[65] For the reasons stated above, I would allow the appeal and set aside the orders of the learned judge. On the issue of costs, in accordance with Part 56.13(6), having regard to the circumstances of this case the respondent did not act unreasonably in

³⁶ [2007] UKPC 50.

making the application. I would therefore award no costs in the court below and no costs on the appeal.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar [Ag.]