IN THE SUPREME COURT BERMUDA
CIVIL JURISDICTION
2008: No.259

IN THE MATTER OF an Application for Judicial Review
IN THE MATTER OF the Public Service (Delegation of Powers) Regulations, 2001

AND

IN THE MATTER OF the Twice Termination of Employment of LEYONI JUNOS by the MINISTER OF TOURISM AND TRANSPORT, first on 10 April 2008 and second on 22 May 2008, while the first termination was under Appeal

BETWEEN:

LEYONI JUNOS

Applicant

-v-

THE MINISTER OF TOURISM & TRANSPORT

Respondent

JUDGMENT

Date of Hearing: April 6-7, 2009
Date of Judgment: April 25, 2009

The Applicant in person
Mr. Gregory Howard, Attorney-General's Chambers, for the Respondent

Introductory

1. Pursuant to leave granted on October 20, 2008 without a hearing, the Applicant applied by Notice of Motion dated October 24, 2008 for an Order declaring that her employment had been unlawfully terminated and for an Order of Mandamus compelling the Respondent to reinstate her to her former position.

2. On October 23, 2008, the Applicant applied for an interim injunction restraining the Respondent from filling her position and for an interim order reinstating her to her former post. I adjourned this application to the inter partes hearing of her Notice of Motion. On October 30, 2008, I refused the Applicant's application for interim relief on the grounds that this Court had no common law or statutory jurisdiction to grant the relief sought in support of judicial review proceedings.

3. In the course of the hearing the Applicant complained that her termination was the result of improper political pressure brought to bear by the Minister of Tourism and Transport who is also presently the Premier. It is important to clarify at the outset that the Respondent is joined in these proceedings in an official and nominal capacity because the Applicant was employed in that Ministry. This style of action is commonplace in judicial review proceedings. References in this Judgment to the Respondent should be read as referring in substance to the Ministry and/or Department of Tourism. Where reference is made to the Minister personally, he will be referred to as such.

4. Mr. Howard for the Respondent invited the Court to adjudicate both the private law and public law position with a view to avoiding a multiplicity of proceedings. Accordingly, the Court is required to determine the following key private law issues: (1) was the employer entitled to terminate the Applicant's employment on seven days notice without cause, and unilaterally elect to bypass any applicable disciplinary procedural regime? And, assuming the termination was unlawful: (2) was the Applicant entitled to be paid beyond the termination date of her fixed term contract which expired on May 22, 2008? And (3) was the Applicant entitled to an order of reinstatement at common law?

5. Irrespective of whether the contractual interpretation question were to be resolved in favour of the Respondent, public law issues would still arise and the Applicant's claim would not be liable to be dismissed. The following crucial public law issues fall to be considered: (1) what were the public law rules which were applicable to the Applicant's employment and did they arise under statutory or contractual provisions or a combination of both? (2) did the premature termination of the Applicant's employment comply with the applicable statutory rules? (3) if the termination was unlawful on jurisdictional or procedural unfairness terms, did the Applicant have a

substantive legitimate expectation that she would be employed beyond the expiry of her fixed term contract and, if so, until what date? (4) if the Applicant is *prima facie* entitled to public law relief, should any potential relief be refused on discretionary grounds?

6. These questions are all complicated by the elaborate nature of the contractual documentation (which purports to incorporate into a three month contract the terms of the Public Service Commission Regulations, the Code of Conduct and the Collective Agreement between the Bermuda Government and the Bermuda Public Services Union ("BPSU")). The legal regimes purportedly incorporated by reference into the Applicant's contract are themselves not easy to digest, as regards the status of a temporary Government employee. Before attempting to answer the specific questions of law and fact upon which the present application turns, an attempt will be made to define for present purposes the wider legal framework within which the Applicant's employment contract was formed.

The constitutional status of public officers: are temporary Government employees 'public officers'?

7. Mr. Howard submitted that the definition of "public officer" in the Bermuda Constitution only embraced permanent holders of established offices. This submission must be rejected.

8. Section 82 (1) of the Bermuda Constitution provides as follows:

> "***Appointment etc., of public officers***
> *82 (1) Subject to the provisions of this Constitution, power to* **make appointments to public offices, and to remove or exercise disciplinary control over persons holding or acting in such offices***, is vested in the Governor acting in accordance with the recommendation of the Public Service Commission."*[emphasis added]

9. Certain public offices, such as judicial offices, are appointed by the Governor without regard to the Public Service Commission (section 82(4)). In addition, the Constitution contemplates that the power to make and terminate appointments and to exercise disciplinary control over public officers under section 82 may be delegated to other public officers:

> "***Delegation of Governor's powers***
> *83 (1) The Governor, acting in accordance with the recommendation of the Public Service Commission, may by regulations delegate, to such extent and subject to such conditions as may be specified in the regulations, the powers vested in him by section 82 of this Constitution (other than powers in relation to the offices referred to in subsections (2) and (4) (c) thereof to the*

Chairman of the Commission or to such public officers as may be so specified.

(2)Except in so far as regulations made under this section otherwise provide, any power delegated by such regulations may be exercised by any person to whom it is delegated without reference to the Public Service Commission."

10. Section 102 of the Constitution defines the following terms:

> *"public office" means, subject to the provisions of section 103 of this Constitution, an office of emolument in the public service;*
>
> *"public officer" means the holder of any public office, and includes a person appointed to act in any public office;*
>
> *...*
>
> *"the public service" means the service of the Crown in a civil capacity in respect of the government of Bermuda...*"

11. Section 103 defines those offices which are not "public" offices for the purposes of the definition contained in section 102. These include members of the House of Assembly or Senate, Supreme Court and Court of Appeal judges, members of the public Service Commission and other boards and employees of any corporation established by Government for public purposes which is not directly controlled (general policy direction apart) by either the Governor or any Government Minister. Mr. Howard was right in contending that the concept of a public office under the Constitution is clearly intended to apply primarily to established offices and permanent occupants of such offices. This submission is also supported by the assertion in Wade & Forsyth's '*Administrative Law'*, that the "*civil service comprises all the permanent and non-political offices and employments held under the Crown.*"[1] However, the Constitution also explicitly applies to limited-term public appointees as well:

> "*105. (1)* **References in this Constitution to the power to remove a public officer from his office shall be construed as including** *references to any power conferred by any law to require or permit that officer to retire from the public service and to* **any power or right to terminate a contract on which a person is employed as a public officer and to determine whether any such contract shall or shall not be renewed**."[emphasis added]

12. The marginal parameters of these constitutional provisions operation is, admittedly, less clear. It is clear, for instance, that someone appointed to act as a public officer ought for most purposes to be treated as a public officer. Section 104 expressly

[1] 9th edition (Oxford University Press: Oxford, 2004) at page 51.

contemplates acting appointments. It is unclear, on the other hand, whether persons appointed to fill non-established temporary posts in the public service may be said to "*the holder of a public office*" within the meaning of section 102 of the Constitution. When the holder of a temporary office in the public service may be regarded as a public officer may in part depend on the particular circumstances of the individual case and, more significantly still, on an analysis of statutory enactments made under the Constitution to regulate the public service. The constitutional provisions relating to the appointment of and disciplinary control over public officers must also be read in their context having regard to their underlying legislative purpose. The Bermuda Constitution, like most written Commonwealth constitutions, seeks to replicate the British structure of an independent civil service, in our case designated as a "public" service. The importance of this independence has been described as follows:

> "*Apart from Ministers who come and go with the tides of politics, government departments consist almost wholly of permanent career officials. Ministers, however, have increasingly felt a need for advice of a politically sympathetic kind and have brought numbers of personal advisers with them into their departments. But these are not civil servants and leave the department when the Minister goes. The detachment of civil servants from the political battle is an important element in preserving the stability of the state notwithstanding regular changes of government.*"[2]

The UK legislative approach to the Civil Service

13. In modern times, greater security of tenure for civil servants has replaced the older notion of civil servants being employed at the pleasure of the Crown. The essentially mediaeval notion of sycophantic advisers to the monarch, with those who invoke his or her ire being banished summarily from court, has been replaced by a more modern construct of officers of the Crown. In the UK, for instance, the Civil Service Code explicitly provides that civil servants are not required to follow instructions which involve impropriety, and "whistleblowers" are protected from victimization for disclosing wrongdoing under the Public Interest Disclosure Act 1998 (UK)[3]. Of course, these protections are subsidiary to the general duty of loyalty to Government Ministers and the Civil Service. As a matter of constitutional theory at least (the position being somewhat unclear in light of an unwritten constitution), in the UK the Royal prerogative can perhaps still be used to terminate public service without cause. It has never been suggested that this common law prerogative power has been retained under the Bermuda Constitution.

14. In terms of elucidating what sort of tenure qualifies for a public employee being regarded as a civil servant in the UK, the position appears to be as follows. Crown employees of one year's standing may sue for unfair dismissal under the Employment

[2] Wade & Forsyth, *ibid*, page 53.
[3] See: *www. civilservicecommissioners.org.*

Act 1996[4]. However, additional protections are provided for civil servants under the Civil Service Management Code ("CSMC") made (after consulting the relevant trade unions) under the Civil Service Order in Council 1995. This Code applies to delegated authority appointments and prescribes general conditions which must be adhered to by Departments which have a general discretion to fix their own terms and conditions of appointment (section 2). Section 1.2.3 provides as follows:

> "*Casual staff have temporary appointments to meet short term needs. Such appointments may be made only where there is a genuine need to employ people for a short period, and must be for less than twelve months. In exceptional circumstances a casual appointment may be extended for a period up to a maximum of 24 months.*"

15. The UK CSMC seems to apply generally to casual and "permanent" staff. It appears to contemplate that even where a limited term contract permits termination on prior notice, the decision to terminate will be subject to similar appeal rights to those available in respect of disciplinary decisions. The following provision supports the Respondent's submission that premature termination by notice under the Applicant's contract is not unusual or bizarre in the temporary employment context:

> "***11.1.1****Because of the constitutional position of the Crown and the prerogative power to dismiss at will, civil servants cannot demand a period of notice as of right. But* **in practice departments and agencies will normally apply the periods of notice set out below, unless: employment is terminated by agreement***; or, if exceptionally, the civil servant is employed on a fixed-term or rolling contract which does not expressly provide that* [sic] *in practice such notice will be given if the employment is terminated prior to the maximum period of employment fixed by such a contract.* **On the expiration of such period of notice, the employment of the civil servant will terminate.**"[emphasis added]

16. Two weeks notice is the prescribed minimum notice period for "staff" employed for between one month and two years (section 11.1.2-which does not distinguish between casual and other staff). However section 11.1.5 of the UK CSMC also provides as follows:

> "*<u>Appeals</u>*
>
> ***11.1.5*** *When giving notice to staff, departments and agencies must draw their attention to their right of appeal to the Civil Service Appeal Board (see Section 12.1), and must give reasonable time for the person*

[4] Wade & Forsyth, page 66.

concerned (or their trade union) to decide whether there are sufficient grounds for appeal."

17. Section 12. 1 provides in salient part as follows:

> "***12.1.21*** **Civil servants must be given the opportunity to appeal to the CSAB if they are dismissed or retired early if, at the date of termination of their employment***:*
>
> ***a***. *they are UK based;*
>
> ***b***. **the dismissal is not on medical grounds***;*
>
> ***c***. **they have been continuously employed in the Civil Service for at least one year***;*
>
> ***d***. **their employment is not being terminated at the expiry of a fixed-term appointment in respect of which they have already agreed in writing before 25 October 1999 that they have no right of appeal***;*
>
> ***e***. *they were not taking part in industrial action, unless:*
>
> *– the dismissal was for taking part in protected industrial action; or*
>
> *– the department or agency has not dismissed all employees who were taking part in the industrial action at the same establishment at the date of dismissal or another of those dismissed at the time has been offered re-engagement within 3 months of the date of dismissal; and*
>
> ***f***. *they were not taking part in unofficial industrial action at the time of dismissal.*" [emphasis added]

18. In summary, the UK position, based on consultations with the relevant unions, appears to be that that employees who have been employed for at least one year have a right of appeal if their employment is terminated by notice before the end of a fixed term contract, provided that the dismissal is not on medical grounds, during a period when the employee was taking part in unofficial industrial action, or simply termination on expiry of a contract in respect of which they have agreed to waive their appeal rights. This framework may serve to explain how the apparently inconsistent notice and disciplinary provisions of the Applicant's contract were intended to operate in practice. And more broadly it suggests that there is nothing unique about temporary public servants who have been employed for a prescribed minimum period of time qualifying for similar security of tenure protections as permanent employees enjoy.

19. The UK position was not canvassed in argument, Mr. Howard electing to make the broad submission, based on the Bermuda Constitution and related subsidiary legislation, that these statutory instruments had no application to the present case. The UK statutory position is not relevant in any formal persuasive sense. However, because of Bermuda's status as a British Overseas Territory and the British antecedents of our Constitution, British civil service practice seems a useful illustrative guide as to Commonwealth practice in this regard. Indeed Appendix III (Recruitment Procedures) to the Conditions to Bermuda's Conditions of Employment and Code of Conduct was by its own terms adopted following the Final Report of the UK Civil Service College Review of the Public Service.

20. In the public law arena, it is often equally if not more instructive to consider judicial and/or legislative precedents in other Commonwealth countries which, like Bermuda, possess written constitutions. Canada is probably the Commonwealth jurisdiction other than Britain with which Bermuda has the closest legal ties.

The Canadian Public Service Commission Act ("the Canadian PSC Act")

21. The Canadian public service appears to be regulated by ordinary statute rather than under formal constitutional legislation. At the Federal level, at least, Canada like Bermuda has a Public Service Commission which has enacted regulations under the Public Service Employment Act[5]. The Canadian PSC Act expressly permits the Commission to exempt certain classes of employees from the application of the Regulations:

> "*20. (1) Where the Commission decides that it is neither practicable nor in the best interests of the public service to apply this Act or any of its provisions to any position or person or class of positions or persons, the Commission may, with the approval of the Governor in Council, exclude that position, person or class from the application of this Act or those provisions.*"

22. Section 50 of the Act expressly provides that it does not apply to casual workers, defined as workers who are employed for no more than 90 days in a year. However, section 50 (5) makes it clear that persons may be appointed to the public service on a fixed term contract for periods of even less than 90 days:

> "*Term appointments*
>
> *(5) This section does not affect the Commission's authority to appoint a person to or from within the public service, other than on a casual basis, for a specified term of ninety working days or less.*"

[5] 2003, Ch. 22

23. This legislative scheme is far clearer than its English counterpart in defining the extent to which "casual" or temporary workers are considered to be members of the public service. It provides a simple "90 days or less" rule for defining "casual" or temporary employees. However, the Canadian Act also explicitly contemplates that persons may be members of the public service if employed for shorter periods if the terms of a short-term contract make it clear that a person has been appointed to a public service post. In other words, whether or not a public officer is entitled to the statutory protections accorded to members of the public service appears in Canada not simply to be a question of whether an individual is employed on a permanent or temporary basis; it is also a question of construing the contractual nature of their appointment to the post in question.

24. Having considered when temporary public employees are considered to be part of the public service in two developed Commonwealth jurisdictions with which Bermuda has strong legal and professional ties, one can now turn to the central task of analysing our own legislative scheme.

The Bermudian Public Service Commission Regulations and Code of Conduct

25. The Public Service Commission Regulations 2001 ("the Regulations") are made by the Governor under section 84(5) of the Constitution. The Regulations do not amplify the definition of "public office" in section 102 of the Bermuda Constitution. Regulation 1 defines "*officer*" as meaning "*the holder of an office*", an "*office*" as a public office. There is no provision in the Regulations which suggests that they do not apply at all to the holders of temporary offices. On the other hand, at least one provision makes it explicitly clear that the Regulations do apply to temporary posts. Regulation 21 provides as follows:

> "*(1)…every appointment to an established office or to a temporary post in the public service exceeding one year from the date of appointment shall be …subject to a probation period of six months.*"

26. Since there is no provision in the Regulations excluding from their general application temporary posts of less than 12 months, it seems reasonable to assume that (depending on the nature of the post and the terms of any particular appointment), the Regulations do potentially apply to temporary posts of both more and less than twelve months' duration. This assumption is further supported by Regulation 1 which defines "*contract officer*" (without reference to any minimum contract period) as meaning "*an officer employed under a written agreement for a fixed period.*" As the present case concerns premature termination of a fixed term contract and the application of the statutory disciplinary code, it is also noteworthy that (a) regulation 33 deals with premature termination of contracts without any minimum length of notice restrictions, and (b) the First and Second Schedule prescribe the disciplinary regime without expressly excluding temporary post-holders.

27. The Regulations also contemplate that appointment powers may be delegated (regulation 9). Paragraph 12 of the Schedule to the Public Service (Delegation of Powers) Regulations 2001 ("the Delegation Regulations") delegates to the Head of the Civil Service and Head of Department all of the Governor's disciplinary powers in respect of "[a]*ny non-established office, including temporary employees.*" Regulation 2 defines the term "*office*" as a public office for the purposes of section 102 of the Constitution; "*non-established*" office is simply any office which is not established; and "*established office*" is defined as "*an office determined by the Governor acting on the advice of the Cabinet to be permanent".* A temporary office is by necessary implication a non-established office. The Delegation Regulations are made by the Governor under section 83(1) of the Bermuda Constitution; unless this aspect of these Regulations are to be regarded as *ultra vires* the Constitution, it may be inferred that temporary holders of non-established public offices are indeed public officers for the purposes of section 102 of the Bermuda Constitution.

28. It is at first blush somewhat surprising that the Schedule to the Delegation Regulations does not delegate "*all of the powers of the Governor*" in respect of non-established offices and temporary employees, as is specified in respect of various other specific employment categories. Paragraph 8 of the Schedule explicitly delegates the power to make acting appointments to the Head of the Civil Service, so a strict reading of the Delegation Regulations would result in the absurd result that (a) only the Governor could make appointments in respect of temporary employees and non-established officers, but (b) the power to discipline such employees alone was delegated to the Head of the Civil Service and Head of Department respectively. Paragraph 8 of the Schedule to the Delegation Regulations is also incongruous if literally read: for grades of PS 25 and below (the Applicant was hired at PS32 level), the power to appoint alone is delegated while the Governor retains both (a) disciplinary control and (b) the power to make appointments on transfer. The idea of the Governor exercising disciplinary control over the most junior public officers such as administrative assistants seems to be as obviously unworkable as is the notion of the Governor in conjunction with the Public Service Commission making appointments to non-established offices and in relation to temporary employees. This illogically narrow delegation of the power to discipline but not appoint officers in relation to non-established offices appears to have been derived from Items 7 and 11 of the Public Service (Delegation of Powers) Regulations 1979[6].

29. Although the Applicant sought to contend that she was not properly appointed from the outset because the appropriate approvals had not been obtained, I propose to assume that she was validly appointed and all the necessary approvals were obtained. This matter was not a central issue and was understandably not dealt with by the Respondent in argument or by way of evidence. Even if the requisite approval for her appointment was not received, the Respondent's employment of the Applicant under formal terms of employment would create a substantive legitimate expectation in her favour that she should be treated on the basis that she was validly appointed as a temporary officer in accordance with the Regulations of which the Code forms part.

[6] Title 2: 1(c), Revised Laws (1989).

Both the Regulations and the Delegation Regulations clearly define public officers in a manner which embraces temporary employees.

30. Regulation 21 (1) of the Regulations provides that "*every appointment to an established office or to a temporary post in the public service exceeding one year from the date of appointment shall be made in accordance with the recommendation of the Commission subject to a probation period of six months*". This is the only general reference to a temporary post in the Regulations, which do not elsewhere provide that the Regulations only apply to temporary posts of one year or more. The Delegation Regulations explicitly delegate pursuant to section 83 of the Constitution the Governor's disciplinary powers in respect of temporary employees under section 82 (which is also the source of the power to appoint and remove public officers), without suggesting that those powers are limited to temporary employees appointed for any minimum period of time. Moreover Column 1 of the Schedule to the Delegation Regulations is headed "Public Offices", and paragraph 12 under column 1 states: "*Any non-established office, including industrial or temporary employees*". However, the status of temporary employees as public officers is made even more explicit by the Code made by the Governor as part of the Regulations made by him under section 84(5) of the Constitution.

31. According to Regulation 2(1) of the Regulations, "*'the Code' means the Conditions of Employment and Code of Conduct made by the Governor.*" Regulation 2(2) provides: "*These Regulations shall, where the context so requires or permits, be construed as one with the Code…*" Although the fact the Code was made by the Governor is not given prominence, the Introduction does in fact state that the document is "*issued under the authority of His Excellency the Governor on the recommendation of Cabinet and replaces General Orders.*"[7] Mr. Howard sought to relegate the Code's status to that of a policy document. In my judgment the Code's provisions are as much subsidiary legislation as the Regulations themselves because (a) the Regulations state that the Code and the Regulations should, where permissible, be read as one, and (b) the Code itself is made by the Governor, who is empowered to make regulations under the Constitution.

32. The Introduction to the Code states in bold text:

> "***All employees of the Civil Service are referred to as officers. Managers are officers who are section heads, operational managers, supervisors and superintendents***."

33. Paragraph 3.1.3 lists five "*main categories of employment*" including "*Temporary (normally for periods up to twelve months)*" and "*Casual (normally for short fixed*

[7] This statement does not cite the legislative authority under which the Code is made. If it is made as part of the Regulations themselves under section 84(5) of the Constitution, it would be more accurate to say that the Code was made by the Governor after consultation with the Premier and the Public Service Commission. The use of the UK legislative term "Civil Service" in the Code seems inapposite as the Bermuda Constitution creates a "Public Service".

periods)". It seems clear that both temporary and casual workers are considered by the Code to be "*officers*" and members of the Civil Service. Paragraph 3.1.4 contemplates that Bermudians will occasionally be appointed on a fixed term contract and that this will always be the case with non-Bermudian officers. By way contrast, paragraph 3.2.1 states: "*Consultants are not considered officers.*" So if it is desired to hire a temporary worker without appointing them as a public officer, the Public Service or a Ministry can simply "buy in" the required services on a consultancy basis.

34. The precise scope of the purely statutory entitlement of temporary officers to security of tenure greater than that provided to employees generally under the common law and/or the Employment Act is less than clear. Mr. Howard very rightly pointed out that one specific provision suggested that the otherwise applicable disciplinary process did not apply to temporary workers at all:

> "***7.5.4*** *A temporary officer whose conduct requires disciplinary action will be dismissed.*"

35. Does this mean that whenever any disciplinary offence has possibly been committed automatic dismissal of a temporary worker follows without recourse to any disciplinary procedure at all? Does the term "temporary officer" include or exclude the even lower category of "casual" officers described in paragraph 3.1.3 of the Code? This would (as regards temporary and casual employees of more than three months standing) be inconsistent with the Employment Act 2000, which binds the Crown, and provides statutory remedies for unfair dismissal for, *inter alia*, all workers employed for more than three months. Moreover, an introductory note to the Appeals section of the Code provides as follows:

> "**7.6 Appeals Process**
>
> *Principles related to the appeals process are described below. Details of the grievance procedure are prescribed in the Collective Agreement between Government and the Bermuda Public Services Association. The procedure for taking disciplinary action is set out in the Public Service Commission Regulations.*"

36. This note suggests that the grievance procedure under the Collective Agreement is formally incorporated into the Code. If the Grievance Procedure under the Collective Agreement forms part of the Code, construing the Code in a manner inconsistent with the following disciplinary related provisions of Article 34 of the Collective Agreement is somewhat problematic:

> "*ARTICLE 34: TEMPORARY AND PART-TIME OFFICERS*
>
> *34.1 All temporary relief, temporary additional and part-time officers employed after six (6) months of continuous service shall be entitled to pro-rated benefits and other terms and conditions of employment outlined*

in the Public Service Commissions Regulations 2001, and subsequent amendments, the Conditions of Employment and Code of Conduct and this Collective Agreement unless specifically exempted or excluded e.g., time off for Union activities, subsidised local or overseas training except in exceptional circumstances, non-applicable leaves based on length of service e.g., maternity or retirement leave, etc.

34.2In all cases, for employment greater than three (3) consecutive months, temporary relief, temporary additional and part-time officers will be provided with a written "Statement of Employment" (see attached addendum) that outlines the terms and conditions of service and will refer where appropriate, to other relevant documentation, e.g., the Public Service Commission Regulations 2001, and subsequent amendments, the Conditions of Employment and Code of Conduct and this Collective Agreement."

37. In any event, the Delegation Regulations themselves apply the disciplinary regime of the Regulations to temporary employees, so the Code can hardly be construed as authorising summary termination of temporary employees without the need to establish any form of disciplinary offence. And, for reasons which I shall come to, the question of the application of the disciplinary regime to the Applicant's case is only a peripheral concern.

Summary: temporary Bermudian public employees may depending on the facts of each particular case be entitled to the same statutory protections against dismissal as permanent public officers

38. These controversial issues are only addressed as a matter of broad principle at this juncture and will be considered further below. The same applies to the Code's provisions on termination of fixed term contracts, which must clearly be read in conjunction with the terms of the specific contract under which the Applicant was employed. As the Respondent's counsel aptly submitted, there is room for reasonable argument as to precisely what the Applicant's statutory termination rights are, in addition to the question of how her private law contractual position may have altered the general statutory rules in relation to her own employment.

39. However, it seems obvious that whether she is regarded as a casual officer or a temporary officer (both categories of employment are in ordinary parlance "temporary"), the Applicant was clearly for some purposes at least a member of the Bermuda Public Service pursuant to the provisions of the relevant legislative scheme read as a whole. And while the precise termination rights of such officers may be subject to argument, the statutory termination rules including the statutory protections against termination do potentially apply to the holders of non-established officers. As has been seen, this position is broadly consistent with the legal position in both Britain and Canada.

40. One uniquely Bermudian statutory interpretation conundrum is that while the disciplinary powers of the Governor under section 82 of the Constitution with respect to temporary public officers have been explicitly delegated under the Delegation Regulations, it appears that the related powers of appointment and removal in relation to temporary post-holders have, probably inadvertently, not been expressly delegated as well. This point need not decided in the context of the present application.

What were the Applicant's termination rights under her contract and/or statute?

The contractual position

41. On April 10, 2008 when her employment was purportedly terminated by the Acting Director of Tourism, the Applicant had been continuously employed since on or about August 20, 2007 for nearly eight months. It appears that she was initially employed on an unwritten contract basis for an anticipated duration of at least 18 months and possibly 2 years (until the African Diaspora Heritage Trail ("ADHT") Bermuda Foundation was in a position to hire a its own Director). However, when her Employment Act particulars of employment were given to her three months later, the position was formalised as being on a three months fixed term basis. This was consistent with the manner in which her employment was documented by the Department internally from the outset[8]. She was initially employed as "*ADHT Administrator*" using a vacant "*Manager Administration Post*". The same internal documentation in November and February 2007-2008 subsequently described her job title as "*Relief Manager*", although her terms and conditions of employment retained the "Administrator" title. All the internal Departmental documentation described her as a "*temporary employee*".

42. At the material time the operative Statement of Employment was signed on February 14, 2008 and expired on May 22, 2008 ("the Contract") and most importantly provided as follows:

> "**Start date***: August 20, 2007…*
>
> **Termination of Service***: with the exception of dismissal on disciplinary grounds, in which case the period of notice to be given is entirely within the discretion of the disciplinary authority, the minimum notice of termination of appointment to be given to you shall be* **one (1) week before the last day of service**.
>
> *You may terminate your service, provided you give your Department Head one (1) week's notice in writing…*
>
> **Termination date***:* **May 22, 2008**…

[8] Respondent's Record of Affidavits and Consent Documents TABS 3-4.

> **Employment Contract***:* **This statement of employment, together with the C.E.C.C., P.S.C. Regulations, and the current B.P.S.U. Collective Agreement between Government and the B.P.S.U constitute your statement of employment with Government.** *This statement of employment shall supersede any other statement of employment previously made between the parties.*" [emphasis added]

43. My initial view was that it was clear beyond argument that the employer's right to terminate on seven days notice ought to be construed as, in effect, notice of termination on expiration of the Contract or notice of non-renewal. I found Mr. Howard's suggestion that the employer could terminate without cause at any juncture of a fixed term contract quite astonishing. On reflection, it is possible to see how a layman and/or a lawyer could in good faith read the Contract in such a way. This is for the very simple reason, which I overlooked when pouring scorn on the Respondent's construction argument in the course of the hearing, that employment contracts do routinely contain premature termination without cause clauses, as well as notice of termination on expiry clauses. If clearly drafted, however, there should be little difficulty in distinguishing a premature notice of termination clause from a notice of non-renewal clause. And regard must be had to the wider public law statutory context when interpreting a contract in relation to a public officer, irrespective of whether it expressly incorporates the otherwise applicable statutory provisions by reference as occurred in the present case.

44. Where a contract contains both species of notice clause, no question as to the construction of the clause will likely arise. The notice clause in the present case, viewed juxtaposed against the selected clauses reproduced above in a sequential fashion, is far more clearly understood than when the clause is interspersed between a melange of unrelated provisions. The seven days before the "*last day of service*" seems to me to signify the termination date specified, rather than an arbitrary date selected by the employer. As the Contract was drafted by or on behalf of the Respondent, any ambiguities of construction must be resolved in the Applicant's favour. A contractual term in a three months contract entitling the employer to terminate *at any time* on seven days notice (in respect of its second renewal period and in Bermuda where statute law protects private and public employees of three months standing from unfair dismissal) is not one which any employee would be likely to freely agree to. Moreover the Contract expressly incorporates the Collective Agreement, Article 22 of which states as follows:

> "**ARTICLE 22:** ***Terminations***
> *21.1 As defined in Section 4.6 of the Conditions of Employment and Code of Conduct*."

45. Paragraph 4.6 of the Code does not make provision for premature termination without cause at the election of the employer. It permits termination (a) on expiration of a contract; (b) on public interest or compulsory retirement grounds, or (c) summarily

for gross misconduct. Paragraph 4.6 does make provision which emphasises the need to distinguish between these two species of notice in the termination context:

> "***4.6.2*** *In all cases except summary dismissal for gross misconduct Government shall give notice, or payment in lieu of notice, in accordance with the terms and conditions outlined in the officer's letter of appointment. In cases of gross misconduct the officer's appointment will be terminated immediately.*
> ***4.6.3*** *In the case of termination due to the expiry of contracts, it is the responsibility of the Head of Department to give the required notice in writing to the officer concerned with a copy to the Director of Personnel.*"

46. In the first case, payment in lieu of notice must mean either (a) payment of the balance of the contract monies if premature termination without cause is not mandated by the relevant appointment terms, or (b) if a premature termination without cause notice is permitted by the contract, payment in lieu of notice. In the second case, termination on expiry of contract, the requisite notice must also be given according to the terms of the relevant contract. Regulation 33 of the PSC Regulations (considered further below) does contemplate that premature termination may be provided for under a fixed term contract. By way of contrast, the importance of a termination on expiry notice in a public officer's limited term contract flows ultimately from the fact that section 105 of the Constitution equates a decision not to renew a contract with a decision to remove someone from office.

47. Paragraph 4.6 of the Code contemplates that fixed term contracts will specify the amount of notice which must be given of termination on expiry and the Applicant's Contract incorporated the Collective Agreement, which provides in turn that termination shall be in accordance with paragraph 4.6. Termination on expiration is expressly contemplated as a mode of termination by paragraph 4.6 of the Code, and premature termination is not. In my judgment a limited term contract entered into by a public officer in respect of an established or temporary post which contains a notice of termination clause may be presumed because of the surrounding statutory and constitutional context to be specifying a minimum period of notice of termination to be given by the employer *upon expiration*. Clear words would be required to construe the only termination of contract clause (particularly in a short-term contract) as a termination *at any time* clause as opposed to a notice of termination on expiration clause. The sort of wording that one would expect to see by way of evidencing such a mutual intention would be along the following lines: "<u>either party</u> may terminate this contract <u>at any time</u> on not less than seven days notice in writing." Alternatively, one might expect something along the following lines: "<u>Without prejudice to the termination date specified below</u>, the employer may <u>at any time</u> terminate this contract <u>without cause,</u> upon not less than one month's notice in writing."

48. That type of wording would also be a more logical and simple formulation if, in the present case, the employer's premature termination right was the mirror image of the

employee's termination right in the "Termination of Service" clause in the Contract. The separation of the two limbs of this clause in a very deliberate manner suggests an attempt by the draftsman of the clause to separate apples from oranges. The employer's termination power is not a discretionary power to give notice of premature termination without cause; it is an *obligation* to give "*minimum*" notice of non-renewal at the end of the Contract. The employee's termination power is more akin to a discretionary power, but in substance obliges the employee to give at least seven days notice of her intention to exercise her discretionary right to resign either (a) prior to the expiry of the Contract, or (b) not to seek renewal when expiration occurs. The exceptional nature of premature termination of a public service contract of appointment by agreement is reflected in the fact that (a) it is not a mode of termination explicitly identified in clause 4.6 of the Code; and (b) regulation 33 provides that where a contract does permit premature termination the operative decision must be made by the Head of the Civil Service. This is only consistent with the constitutional parity of the three powers conferred primarily on the Governor by section 82(1) of the Constitution in relation to public officers: (a) appointment, (b) removal (including a decision not to renew a contract on expiry), and (c) disciplinary control.

49. So the premature termination of the Contract constituted a breach of contract as a matter of private law. I further find that the Applicant's private law contractual right was to be employed until May 22, 2008 when the Contract expired in any event. So, as a matter of private law, the Applicant (who accepts she was paid to May 22, 2008) is entitled to no further relief in respect of the wrongful premature termination of the Contract-on the assumption that she has been paid (or the Respondent continues to offer to pay her) until the expiration date .

The Applicant's statutory public law protections independently of her private law contractual position

50. The relevant provisions of the Code on termination of employment are as follows:

> "*Appointments in the Civil Service may be subject to termination by:*
>
> *(a)* **Expiration of contract**.
> *(b) Retirement on the grounds of age.*
> *(c) Retirement on the grounds of a medical condition.*
> *(d) Retirement by agreement.*
> *(e) Dismissal or retirement in the public interest.*
> *(f) Dismissal for gross misconduct.*
> *(g) Termination or retirement on abolition of office or to facilitate Departmental contraction or re-organization.*
> *(h) Summary dismissal for gross misconduct of the description set out in section 25 of the Employment Act 2000.*

> *4.6.1 An officer may be summarily dismissed for gross misconduct which is directly related to the employment relationship or which has a detrimental effect on the employer's business and* is *of such a nature that it would be unreasonable to expect the employer to continue the employment relationship…*
>
> *4.6.2* **In all cases except summary dismissal for gross misconduct Government shall give notice, or payment in lieu of notice, in accordance with the terms and conditions outlined in the officer's letter of appointment**...
>
> *4.6.3* **In the case of termination due to the expiry of contracts, it is the responsibility of the Head of Department to give the required notice in writing to the officer concerned with a copy to the Director of Personnel.**" [emphasis added]

51. In the *Evans* case*,* I held that these provisions read with the relevant Collective Agreement and statutory provisions which formed part of the applicant's contract gave that applicant the right to three months notice that the fixed term contract would not be renewed on its expiry. In the present case the question is whether the employer's seven days notice of termination should be construed as an unfettered *right to terminate* without cause at any point in the Contract's duration, or simply an obligation to give at least seven day's notice of termination (i.e. non-renewal) before the relevant expiration date. Ms. Junos, appearing in person, astutely submitted that the permissible grounds of premature termination of a fixed term contract were defined by paragraph 4.6 of the Code. This must be right for two fundamental reasons, but subject to one important qualification. Firstly, the Code has statutory force, and while it may be the case that certain provisions may be contracted out of, clear words would be required to justify construing a contract as departing from otherwise statutory provisions. And secondly, the Contract in the present case expressly incorporates the Code in any event.

52. The qualification to the proposition that paragraph 4.6 of the Code comprehensively defines the statutory grounds on which termination may take place is that regulation 33 of the Regulations must also be taken into account. Regulation 33 provides as follows:

> "**Premature termination of contract**
> *33 Where an officer is serving under a contract which provides for termination by notice before the expiration of the period of service stipulated therein and the Head of Department considers that the contract should be so terminated, he shall report the matter in*

writing to the Head of the Civil Service who shall determine whether such course be taken."

53. This provides a mandatory procedural mechanism for a fixed term contract which does provide for premature termination. The Head of Department may initiate the premature termination action; but the Head of the Civil Service must make the operative decision. This seems designed to protect the security of tenure of contract officers in that a person more detached than the Head of Department with whom they have ongoing contact is required to make the operative decision as to whether or not their employment should be brought to a premature end. This hierarchy of decision making runs in parallel to the disciplinary regime under which the Head of the Civil Service alone has the right to terminate for gross misconduct and/or impose gross misconduct penalties, but Permanent Secretaries and Heads of Department must institute disciplinary proceedings in the first place (Regulations, First and Second Schedules; Code, paragraph 7.5).

54. Accordingly, where premature termination takes place pursuant to the terms of a contract, the decision-making process is the same as that for gross-misconduct with the important exception that the officer has no fair hearing rights. Nevertheless if the parties have agreed that the employer may terminate prematurely upon giving certain notice (an agreement which would be more commonplace in a contract of employment with a term of three years rather three months), such a clause would provide in effect for two expiration dates for the contract: (a) the full-term of the contract; and/or (b) the term as abbreviated by either party giving the requisite notice of "premature" termination.

55. Accordingly, premature termination of a fixed term contract, or unlimited forms of public service employment, may take place (a) in accordance with the terms of a contract (expiration at end of the contract period or at the end of a prescribed premature termination notice period); (b) by various forms of retirement; (c) termination in the public interest; (d) termination due to abolition of post and (e) summary termination for gross misconduct. Obviously, as Mr. Howard submitted, premature termination may take place by mutual agreement; however paragraph 4.6.1 of the Code is clearly addressing termination which officers are compelled to accept– either because of prior agreement (expiry of contract/reaching retirement age) or because the employer has asserted some other legal right to bring the employment relationship to an end (i.e. gross misconduct termination). The list of termination grounds is not expressed as a non-exhaustive one. Resignation by an officer is separately dealt with by paragraph 4.5.1, and must also be in accordance with the officer's terms of appointment (the Contract required the Applicant to give seven days prior notice of termination of the agreement).

56. The ground of termination which the Respondent contends was embodied in the Contract is permitted by paragraph 4.6.1 of the Code as read with regulation 33 of the Regulations. However, no such clause was in law and/or in fact included in the

Contract. It would theoretically have been open to the Respondent to employ the Applicant under a contract which permitted premature termination without cause on seven days notice although such a clause in such a short contract in respect of an officer who had previously served two prior three months terms would border on oppressive. But even if this construction of the termination clause in the Contract is wrong, the purported termination by the Head of Department without reference to the Head of the Civil Service was still unlawful because it was *ultra vires* regulation 33. The operative decision would in any event have been made by the wrong person and would be invalid on the same basis as occurred (albeit in the Education context) in the *Evans* case.

57. On or about April 10, 2008 the Applicant received the following letter from the Acting Director of Tourism :

> "**Re: Notice of termination of employment**
>
> *Please be advised that the purpose of this missive is to serve as notice for termination of your employment effective April 18, 2008.*
>
> *The department appreciates your services as a temporary employee over the past months and wishes you well in all your future endeavors.*"

58. The premature termination which occurred (or purportedly occurred) was unlawful and in breach of these statutory protections designed to secure the employment of public officers at a level higher than ordinary private law employment contracts. This is because it was not based on any of the prescribed statutory termination grounds and there was no contractual agreement for premature termination by the employer without cause. Moreover, having regard to the Applicant's admitted status as a temporary employee of more than six months standing, she was clearly a public officer entitled to the benefit of the applicable statutory code.

59. Alternatively, if premature termination was permissible under the Contract as the Respondent contends, the operative decision was made by the wrong person and was accordingly null and void in any event. In *Evans-v- Minister of Education*[2006]Bda LR 52-a case in which it was argued that sub-delegation had occurred- I held as follows:

> "*73. That delegation of even a purely clerical statutory power of constitutional pedigree may not be inferred in the absence of positive evidence of delegation was recognized by this Court in Whitter-v- Director of Public Prosecutions [2002] Bda LR 33. Here section 452 of the Criminal Code authorised the Director to certify his consent to prosecution, and section 71 of the Constitution expressly provided that the Director of Public Prosecutions' powers to institute and discontinue proceedings "may be exercised by him in*

person or by officers subordinate to him acting under and in accordance with his general or special instructions". L.A. Ward CJ (as he then was) held:

> *"I would therefore conclude that the Director of Public Prosecutions is authorised to delegate his power to sign certificates pursuant to section 452 of the Criminal Code to subordinate officers in his department. However, where the fact of such delegation is challenged the onus of proof is on the Director of Public Prosecutions to establish that such delegation did in fact take place. The mere fact that a Crown Prosecutor signed the Certificate is not conclusive evidence that the delegation was in fact made to that particular officer. The Gazette Notice should have been produced as evidence of the delegation."*

74. *This decision strongly supports the view that, when one is concerned with the delegation of constitutional powers even of a purely administrative character, the fact that an express power to delegate exists does not absolve the Crown, where authority is challenged*[9]*, to produce positive evidence of a formal delegation. Section 27 of the Interpretation Act 1951 may well be permissive, and not mandatory, as to how delegation or sub-delegation should occur. No authority has been cited or found which explicitly supports the view that the courts may imply the power to sub-delegate constitutional powers, in the absence of an express power so to do. Even if it is open to this Court to draw such an inference, in the absence of an express power to sub-delegate (applying persuasive authority dealing with ordinary statutory powers), the need for cogent evidence that such delegation occurred must be great indeed. In my view, in the present context, the authority of the Chief Education Officer could properly be challenged in argument, in support of the general and un-particularized plea that the termination of the Applicant's employment was unlawful by virtue of contravening the 2001 Regulations, as the Respondent's own evidence raised an issue as to whether or not sub-delegation had occurred. The position might well have been otherwise if, on the face of the evidence before the Court, there was no basis for concluding that a person other than the Permanent Secretary had made the decision complained of.*

75. *That evidential threshold is not reached in the present case where the most that the Respondent could rely upon was the bare assertion in the*

[9] No challenge was understandably made, for instance, to the implied assertion on page 1 of the Contract that (a) the Permanent Secretary had made the decision to grant a contract renewal, and (b) validly authorised the Senior Manager of the Ministry's Human Resources Department to sign the Contract on the Ministry's behalf. Both parties positively relied on the validity of the Contract when executed according to its terms.

termination letter that the Chief Education Officer was acting on the Permanent Secretary's behalf: " I have concluded that you have not shown cause why you should not be terminated. Accordingly, I am informing you, on behalf of the Permanent Secretary, that your services are terminated effective August 31, 2004." All the evidence before the Court suggests that the operative decision was made by the Chief Education officer, and there is no evidence whatsoever that the Permanent Secretary was in any way involved."

60. In the present case there is no suggestion that the power to terminate was delegated by the Head of the Civil Service to the Applicant's Head of Department. On the contrary, the Respondent's internally inconsistent and unsustainable case is that (a) the Contract permitted premature termination, and (b) (despite the fact that regulation 33 unarguably mandates that the Head of the Civil Service make the relevant termination decision) the Head of Department was entitled to validly make the premature termination decision.

61. This is no trifling common law technicality; section 105 of the Constitution equates the decision not to renew a fixed-term contract with removal from office. For reasons analogous to those set out in my judgment in *Evans-v-Minister of Education* [2006] Bda LR 52, I find that the power conferred by the Governor on the Head of the Civil Service by regulation 33 was (a) too important to be sub-delegated by him; and (b) no evidence of a purportedly valid sub-delegation was adduced by the Respondent in any event.

62. Moreover, even if the termination was construed as a form of actual or constructive disciplinary action, the Delegation Regulations mandate the application of the Regulations which would lead to the same legal result.

The failure to entertain the Applicant's appeal

63. By letter dated April 22, 2008, the Applicant appealed her purported termination of employment to the Head of the Civil Service on the grounds that regulation 33 of the Regulations had been infringed because her Head of Department had no lawful authority to prematurely terminate the Contract. Receipt was acknowledged the following day by Acting Head of the Civil Service Robert Horton. A substantive response was not as quickly forthcoming. And when it came by letter dated August 25, 2008, the Head of the Civil Service declined to entertain the Applicant's appeal on the ground that regulation 33 did not apply to her case.

64. The reasons for the delay are hardly mysterious. In the first instance, the BPSU grievance was dealt with and the Applicant was properly offered pay until May 22, 2008, the full extent of her private law rights. Secondly, at the request of the Head of

the Civil Service, the Assistant Secretary to the Cabinet Ellen-Kate Horton creditably attempted to compromise the Applicant's persistent claims for reinstatement, acknowledging her public law rights. By letter dated July 18, 2008, it was openly admitted that the Applicant had a "*realistic expectation*" of being employed for a year, and was offered payment until September 30, 2008. But still, Oliver Twist-like, the Applicant asked for more. When it was clear that the settlement negotiations would not bear fruit, Mr. Kenneth Dill the Head of the Civil Service on August 25, 2008 wrote in material terms as follows:

> "*...it is my considered opinion that your termination was in accordance with your signed Statement of Employment, and therefore, section 33 of the Public Service Regulations does not apply. Furthermore, the Head of the Civil Service cannot act on a matter that has not been referred to him pursuant to section 33 of the Public Service Regulations. I would also note that there is no indication that you were terminated for Gross Misconduct and therefore, sections 5-8 of the Second Schedule of the Public Service Regulations do not apply either.*"

65. This analysis of the Applicant's legal position, perhaps based on advice received from the Attorney-General's Chambers, is a two-faceted distillation of the Respondent's case in response to the present application. Only the second point, namely that no right of appeal existed need be addressed at this stage. This point has far more substance to it, on reflection, than initially appeared to be the case in the course of the hearing. Because the documentary record strongly suggests that: (a)the Acting Director of Tourism genuinely believed that the Contract could be prematurely terminated on seven days notice without cause; (b) there is no or no clear evidence that the termination constituted the improper imposition of a disciplinary penalty, and (c) the Regulations only confer a right of appeal against disciplinary decisions.

66. So even though I have found that (a) the Contract did not provide for termination without cause, and (b) even if it did, regulation 33 was infringed, I find that the Head of the Civil Service was right to decline to entertain the Applicant's purported appeal on the grounds that she had no valid right of appeal in respect of a non-disciplinary unlawful termination.

Summary: the Applicant's statutory public law rights were infringed by an unlawful premature termination of the Contract

67. In summary, the purported termination of the Applicant's public law rights was unlawful on two alternative grounds. My primary finding is that the Contract did not permit premature termination at all and so the termination by notice purportedly effected by the Acting Director of Tourism's April 10, 2008 letter contravened paragraph 4.6 of the Code. This is because the factual basis of the termination was in statutory an d contractual terms an impermissible one.

68. In the alternative, if premature termination was permissible under the Contract, the purported termination was unlawful because the relevant decision was (in breach of regulation 33 of the Regulations) made by an unauthorised person.

69. In either case, the Applicant had no statutory rights which were infringed by the refusal to entertain her appeal, because those rights were not engaged by a termination on non-disciplinary grounds. I will separately explain below why what purported to be a termination without cause was not in substance a "covert" disciplinary dismissal, triggering the appeal machinery in any event.

70. It remains to consider what public law relief, if any, the Applicant is entitled to claim for breach of her public law rights over and above her private law entitlement to be paid until the expiration of the Contract, an entitlement which is not in dispute. Standing by themselves, the mere findings that the Contract was terminated unlawfully as a matter of public law as well as private law does not entitle the Applicant to any additional uniquely public law relief.

Did the Applicant have a substantive legitimate and/or reasonable expectation that she would be employed for at least two years so as to entitle her to a declaration that her employment with the Respondent is still subsisting?

71. The applicable law has been summarised by Manse LJ in the English Court of Appeal as follows:

> *"The public law doctrine of legitimate expectation exists as a common law control on the exercise of powers by a public body. If a public body, by words and conduct, creates or encourages a legitimate expectation, the expectation may, according to the circumstances, be viewed as procedural or substantive: see R v. North and East Devon HA, ex p. Coughlan [2001] QB 213, (decided July 1999) para. 57. Lord Woolf CJ there identified as the relevant question: "But what was their legitimate expectation?". His answer was that it might merely be (1) to oblige the public authority to "bear in mind the previous policy or other representation, giving it the weight it thinks right, before deciding whether to change course" (in which case he suggested that the court would be confined to reviewing the decision on Wednesbury grounds); or it might be (2) to give persons affected by the potential change to be consulted before any decision was taken; or it might be (3) to entitle persons affected to a substantive benefit and, in a proper case, to entitle them to object that any change would be so unfair that it would be an abuse of process for the authority to change course."*[10]

[10] *Rowland-v-Environment Agency* [2003] EWCA 1885, paragraph 129. Where the change of course complained of raises no issues of macro-political policy and is limited to either the applicant or a narrow group of persons, the court is more likely to restrain the abuse of power involved: *R-v-Secretary of State for*

72. Mr. Howard sensibly conceded that the Applicant did have a legitimate or reasonable expectation of being employed by the Respondent beyond the expiry of the Contract on May 22, 2008, but hotly contested the notion that that such expectation would extend to such period as would entitle her to a declaration that she continues to be employed today. He also requested the Court to consider the private law position with respect to reinstatement at common law, to avoid a multiplicity of proceedings in relation to this matter-a remedy which will be also be considered separately below.

73. The Applicant advanced her case for reinstatement and/or a declaration that she had a legitimate expectation of being employed until beyond the date of the hearing in two ways. Firstly, she contended that she was improperly employed under successive three month "temporary relief" contracts when it was contemplated at the outset that she would be employed for at least two years. Secondly, and alternatively, she contended that it was implicitly agreed that she should be employed by the Respondent until such time as the ADHT Foundation became independent of Government, whenever that date might be.

74. The purpose of the public law doctrine of legitimate expectation is to prevent public authorities from departing from promises they have made (and which in private law may be non-binding) in circumstances where such departure would be so unfair as to constitute an abuse of the interests of good administration. A judicial review applicant for relief based on the doctrine of legitimate expectation has quite a high evidential and legal threshold to meet.

75. The Applicant's own evidence probably best reflects the high point of what her expectations were when she was hired, before one even considers how reasonable the expectations were in objective terms. In a private email dated July 24, 2007 (less than a month before she started work), she wrote as follows:

> "*I have been offered the job of Director of the new African Diaspora Heritage Trail Foundation. It is a temporary post (for 1.5-2 years) responsible for helping to set up the Foundation so it ultimately operates independently of the Government…*"

76. The Respondent clearly contemplated hiring the Applicant for such a period. The temporary post was proposed by then Acting Director of Tourism Jasmin Smith in a May 25, 2007 memorandum to the Secretary to the Cabinet because she considered it "*unlikely we will secure a secondee for a two year period.*"[11] The post was clearly a managerial one, because the salary was based on a vacant managerial post. Moreover, the Premier's then Chief of Staff in a September 8, 2007 email referred to the Applicant as the "*new Director for the ADHT*"[12]. The same email stated: "*Ms. Junos now has full dominion over all ADHT matters.*" This view is consistent with the April

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Education and Employment, ex p. Begbie [2000] 1 WLR 1115, per Laws LJ at pp.1130f-1131c. These authorities were cited in the *Evans* case, which was referred to in argument.

[11] TAB D/3, Respondent's Record of Affidavits and Consent Documents.

[12] Fifth Junos Affidavit, TAB 7.

18 2007 Foundation Board Minutes, which contemplated that the new Director would "*develop the organisation, establish the membership structure and work toward achieving all of those things that were resolved during the last annual conference.*"[13] Before she was contracted, the Respondent on July 26, 2007 forwarded to the Applicant the text of the ADHT 2006 Conference Resolutions, which strongly suggests that her job was anticipated to entail implementing the same[14]. Nevertheless, her initial formal job title was clearly "Administrator", with the then Acting Director reporting in a September 5, 2007 "*Staffing Matters update*" that the Applicant:

> "*...joined the Department of Tourism on a temporary basis. Whilst with us she will be working as an ADHT Administrator and handling all ADHT administration matters along with the Director and the ADHT Foundation Board.*"

77. The reference to "Director" probably meant the Director of Tourism, the Applicant's Head of Department. The Respondent's evidence on balance supports the Applicant's assertion that the temporary post was at the beginning intended to last until the Foundation became independent of the Ministry of Tourism. There is no clear basis for finding that employment for any minimum period of time was promised by the Respondent, however. According to then Acting Director Jasmin Smith, in a July 24, 2007 telephone discussion with the Applicant:

> "*I advised…that I…we could not guarantee length of employment. I told her it could be a few weeks or a few months. I further advised her that the aim of the Department was to set up the ADHT Foundation and once established, the ADHT would operate outside of the Department of Tourism and at that time she would have an opportunity to seek employment with the Foundation.*"[15]

78. Having regard to the fact that the ADHT Foundation has now advertised and filled the post of Director, it is impossible to find that the Applicant has a legitimate expectation of still being employed by the Respondent today. Even if the Foundation is not yet independent of the Ministry, it would be highly artificial to suggest that the Respondent led the Applicant to believe that she would be employed as a public officer indefinitely and without regard to whether or not the Director post was actually filled. The essence of the expectation was temporary Government employment with an opportunity to apply for a permanent Foundation post. The Applicant can complain of being deprived by a breach of her public law rights of the opportunity to apply for the permanent post; she cannot complain that it is unfair that

[13] Fifth Junos Affidavit, TAB 1, pages 2-3.
[14] Fifth Junos Affidavit, TAB 4.
[15] Affidavit dated December 5, 2008, paragraph 3. I prefer Jasmin Smith's version of the understanding reached with the Applicant when she was initially hired to the conflicting assertion by Ian Macintyre in his First Affidavit that the "*expiry 'event' was not the autonomy of the ADHT Foundation, but the ADHT Conference in August 2008*" (paragraph 4). Smith effectively hired the Applicant; Macintyre did not.

the post has been established with continued Government funding, because that administrative fact is wholly detached from any interference with her own public law rights.

79. For these reasons, the Applicant's claim for a declaration that as a matter of public law she continues to be a public servant in the employ of the Respondent must be dismissed. She had no legitimate expectation in this regard.

Did the Applicant have a legitimate and/or reasonable expectation that she would be employed until the Foundation hired a permanent Director?

80. Mr. Howard fairly conceded that the most generous view of the duration of any legitimate expectation of post-May 22, 2008 employment embraced the period ending with the date when the permanent Director was advised of her selection: February 19, 2009. This date emerged from a contract handed in by Counsel on the second day of the hearing.

81. It is interesting to note as an aside, that this 3 year Contract contains both (a) a termination of service clause identical to that contained in the Contract applicable to the Applicant permitting either party to terminate the contract on one month's notice, and (b) a separate period of service clause, requiring each party to give three months notice of non-renewal. Clause (a) in this context must probably, despite its somewhat unusual terms, be construed as a premature termination clause; this is because clause (b) explicitly makes separate provision for notice of non-renewal. The draftsman of this document clearly had in mind the distinction between premature termination and termination by expiration.

82. However, an earlier date may be extracted from the January 16, 2009 ADHT Foundation Board Minutes which reveal that the new Director was introduced to the Board on that date. Bearing in mind that there is typically a gap between notification of selection and taking up a post, as occurred in this case, it seems appropriate to infer that the Applicant's employment in her temporary position would have continued until February 19, 2009 at least. Defining the period for which the Applicant had a legitimate expectation of being employed by the Respondent for by reference to the date when the Foundation actually put in place a permanent Director cannot fairly be described as generous. This would merely be consistent with what the then Acting Director of Tourism agrees was orally represented to the Applicant before she was hired. Moreover it seems clear that the Contract was unlawfully terminated in partial reliance on an equally unlawful verbal warning purportedly administered on April 4, 2008. Because of this collateral public law breach (addressed in further detail below), it would in my judgment be unfair to take into account the fact that-from the Respondent's perspective at least-as of April 4, 2008, the reasonable expectation of continued employment was limited to the period ending after the conclusion of the 2008 ADHT Conference.

83. Would it be an abuse of the process of good administration to permit the Respondent to depart from this representation? The pre-Contract representation cannot be viewed in isolation from the subsequent events. I reject the suggestion that the rolling three month short-term contracts were used in bad faith, having regard to the presumption of regularity in relation to official acts and what I consider to be inherently probable in all the circumstances of the present case. Nevertheless, the use of such short-term contracts beyond the initial three months period which appears to be standard practice for temporary relief workers was inconsistent with the spirit (if not the letter) of the Code.

84. Paragraph 3.1.3 (c) provides that temporary employees are ordinarily hired for no more than twelve months and 3.1.3 (e) provides that casual employees are employed "*normally for fixed short periods*". A three month contract would appear to be consistent with a "*casual*" employee. Paragraph 4.1.1 of the Code provides for all new and promoted officers to serve a probationary period of six months. It is surely not accidental that the Collective Agreement requires temporary officers who have served for six months to be extended the full benefit of the Regulations. It would clearly be anomalous to treat as "casual" an officer who has in fact served in excess of the probationary period required of "permanent" public officers, because their security of tenure will be less than the permanent officer by virtue of the temporary worker's short-term contract. The special protections afforded to the terms and conditions of public officers' employment are not simply a perquisite of working in the Public Service. They are intended to buttress the duty of public servants to give independent and impartial advice to the elected Government of the day. Paragraph 7.01.10 of the Code provides in part:

> "…*officers have a right to expect to be able to undertake their duties and responsibilities without fear or favour, to be treated with respect for their professionalism, to expect fair and reasonable treatment by the Government and not to be required to act in any manner which:*
> *(a) Is illegal, improper, immoral or unethical.*
> *(b) Is in breach of the Constitution or a professional code.*"

85. For a public officer to be employed beyond the minimum time necessary on a temporary basis under rolling three month contracts, let alone under contracts which by the Respondent's own account can be terminated without cause at any time on seven days notice, seriously undermines the ability of the "temporary officer" to discharge their duties "*without fear or favour*". The Applicant's reference in argument to the position of a temporary magistrate (*Dattatreya Panday –v- The Judicial and Legal Service Commission* [2008] UKPC 33) is more apposite than initially appeared to be the case. A long-term temporary employee whose employment status is insecure and who is financially dependent on their position will be extremely vulnerable to having their professional independence improperly compromised.

86. The Applicant in the present case might be viewed by the more cautious to have had an almost reckless indifference to her own financial interests and perhaps an excessive zeal about propriety. Yet the final trigger for her purported termination was (as will be considered further below) possibly an overreaction to a somewhat mild disciplinary penalty purportedly imposed a few days after she had assumed mortgage obligations which depended on her maintaining her temporary post. Had she been employed on a more secure basis, her controversial missive might well never have been sent; alternatively, the communication- which itself seems to have provoked a gross over-reaction- might well have been articulated in less strident terms. The independence of the average man or woman on the Bermudian omnibus, placed in the Applicant's position, would in my judgment have been compromised to an extent which was inconsistent with the interests of good administration and the principles underlying the Regulations and the Code.

87. In addition, the Contract did not reflect the true status of the Applicant, who ought more properly have been employed on at least a yearly contract, having regard to the fact that the Acting Director herself was initially looking for a two-year secondee and the ADHT Foundation in the event took some 18 months to fill the Director post (had the Applicant not been terminated the post might well not have been filled for longer). It seems improbable that the Applicant was the only person who for little more than administrative convenience was hired on this inappropriate rolling short-term contract basis. The Acting Director who appears to have hired her on this basis advanced no rational justification for departing from the usual rule laid down by the Code of temporary officers being employed for more than three months. The Applicant's reliance by way of persuasive authority[16] on the following provisions of Clause 5 of the European Council Directive 1999/70 Concerning the Framework Agreement on Fixed-Term Work, was entirely on point:

> "*1. To prevent abuse arising from the use of successive fixed term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice…where there are no equivalent legal measures to prevent abuse, introduce…one or more of the following measures:*
>
> *(a)* **objective reasons justifying the renewal of such contracts or relationships***;*
> *(b) the maximum total duration of successive fixed-term employment contracts or relationships;*
> (c) *the number of renewals of such contracts or relationships.*" [emphasis added]

88. The Code has implicitly adopted a similar principle to that found in clause 5 (1)(a) of the said Directive by stating in paragraph by specifying that temporary employees are "normally" for no more than one year (paragraph 3.1.3(c)) and that casual workers are

[16] This was cited to explain why the Collective Agreement now dealt the rights of temporary employees to equal the benefit of the Regulations after six months service.

"normally" employed on short fixed term contracts (paragraph 3.1.3(e)). It appears from the forms exhibited to the Applicant's unchallenged Fifth Affidavit that the practice under the Code is as follows. A "*Temporary Relief Employee*" is hired using a form which states under the date boxes: "*(Not normally for less than three days or for more than 3 months)*". This clearly corresponds to the "casual" office category defined by paragraph 3.1.3(e). The Applicant also referred to a July 28, 2004 Human Resources Department Bulletin which states:

> "*Temporary relief appointments are for a one-time **only** period not to exceed three (3) months and extensions are approved in exceptional circumstances only.*"

89. Temporary Relief positions are seemingly within the remit of Heads of Department; on the other hand "*Temporary Additional Positions*", which do not appear to be one time only no more than three month positions, require the approval of the Secretary to the Cabinet. This category of temporary hiring corresponds more approximately to the "temporary" category as defined in the Code, albeit that the form does not mention any normal maximum length of service. The two temporary job categories are not just evidenced by the internal Government hiring forms, but are also cited in Article 34.1 of the Collective Agreement. It is somewhat concerning that the formal policy basis according to which temporary public officers are hired seems to be shrouded in mystery. Appendix III to the Code ("Recruitment Procedures") sheds little light on this topic. When one adds to this picture the absence of any reference in the Delegation Regulations to the delegation of the Governor's power to appoint and remove temporary officers at all, one is entitled to wonder whether the appointment processes in relation to non-established posts operate in something of a legal and policy vacuum.

90. In any event, these policy issues are referred to merely to illustrate that the Applicant was employed under a second written contract in February 2008 for a third three month period in breach what appears to have been the established practice under the Code-based on the limited material before the Court. And this falls to be taken into account when considering whether the circumstances surrounding the Applicant's termination were sufficiently unfair to support a legitimate expectation in her favour of employment beyond the expiry of her fixed term contract. The Contract was signed on February 14, 2008, almost six months after what was described as the start date, by which time Mr. MacIntyre had assumed the position of Acting Director of Tourism. He offers no explanation in his First Affidavit or Second Affidavit as to why such a short-term contract was considered appropriate, while asserting in the former that the anticipated expiry date was in August, six months away.

91. The absence of any attempt to justify the use of these rolling three months contracts is very cogent evidence that no or no serious consideration was given to the inappropriateness and unfairness of such hiring practices having regard to the letter and spirit of the Code. This unfairness is aggravated by the fact that the Applicant twice signed contracts under which the Respondent as her employer expressly

promised to be bound by, *inter alia*, the Code and the Collective Agreement. Moreover, there seems to be little appreciation of the express statutory and implied public policy requirements to enlarge rather than diminish the security of tenure of public officers so that they can carry out their official duties "*without fear or favour*". The response to the Applicant's complaints in these proceedings about the negative emotional impact her insecure tenure had on her was the following assertion, which is surprising in the present public law context: "*...an employer who hires someone on a temporary basis is not responsible for the employee's feelings.*"[17]

92. An additional element of unfairness which flows from a departure from good administrative practice in the management of the Applicant's temporary employment is the discrepancy between the level and description of the post which she was notionally filling (and being paid against) and her public job title. This discrepancy combined with the apparent absence of a job description seems to have contributed to a material extent to the friction which culminated in the termination decision.

93. As mentioned above, the Respondent's internal documentation reveals that the Applicant was initially employed PS 32 Grade against a vacant "Manager, Administration" post. Her initial job title was the same as her eventual Contract job title, "*African Diaspora Heritage Trail Administrator*". In November, the internal application which was stamped approved described her title as "*Relief Manager*". This time she was employed against a "*Manager, Communications*" post. Thirdly, an application for the February 22-May 22, 2008 period was approved against a policy and Planning Analyst post, again describing her position as "*Relief Manager*". Nevertheless, her written contracts retained the considerably more junior-sounding "Administrator" title. The evidence suggests that she was being paid as a manager and performing manager level work, albeit with a high level of administrative functions. Yet when she raised awkward questions (as a good manager but not necessarily a mere administrative employee would be expected to do) and the main contractor she was dealing with queried her job description, the lack of clarity about her role was used against the Applicant with the Respondent ultimately deciding to limit her role to purely administrative functions. This added another layer of unfairness flowing from the casual nature of the Applicant's employment status and undermining her right, acknowledge by the Code, "*to be treated with respect for* [her] *professionalism*".

94. For these reasons, independently of any question of whether the Applicant was covertly dismissed on disciplinary grounds, I find that it would constitute an abuse of process to deprive the Applicant of her legitimate expectation of being employed until such time as the ADHT foundation selected a permanent Director, which I find occurred no later than January 16, 2009 when the successful candidate was introduced to the Board. Had the unlawful April 10, 2008 termination not taken place, the Applicant's temporary employment would likely have continued until such time as the Director had been chosen. The fact that she did not bother to apply while these proceedings were pending does not in my judgment affect her reasonable expectation

[17] Second MacIntyre Affidavit, paragraph 23.

that but for the termination, she would have been able to apply. Nor is this conclusion affected by the apparent decision on April 4, 2008 only to keep the Applicant on until the end of the Conference; this "decision" was linked to a patently invalid verbal warning and was not communicated to her at the time in any event.

95. As a matter of public law, the Applicant's employment with the Respondent did not terminate until February 19, 2009, and she is accordingly entitled to receive all remuneration and other contractual benefits until then. These conclusions are evidentially based primarily on contemporaneous documentation the contents of which were not or not materially disputed, and which were created before the purported April 10, 2008 termination occurred.

Was the Applicant constructively dismissed for unjustifiable disciplinary reasons?

96. In my judgment this issue need not be decided and, in any event, is too factually controversial to be fairly determined on the basis of affidavit evidence alone, untested by cross-examination.

97. The issue need not be decided for two important reasons. Firstly, and most importantly, the Applicant's case that her employment was unlawfully terminated has been established on two alternative bases, at least one of which the Respondent cannot credibly challenge because it is crucially based on his own case. If the Contract did (contrary to my primary finding) permit the Respondent to terminate without cause on seven days notice as the Respondent contends, the purported termination was unarguably unlawful because it was effected by an unauthorised person in breach of regulation 33 of the Regulations.

98. Apart from the contention that the Applicant was not a public officer at all, no submission was advanced by the Respondent which provided any basis for the Court concluding that regulation 33 did not apply. And the regulation 33 point was not only the first ground of the present application filed on October 14, 2008, but was also the main ground on which the Applicant challenged her termination in her appeal letter of April 22, 2009. Almost one year after this point was first raised, the Respondent has not been able to formulate any (or any coherent) response to this straightforward argument. This is unsurprising in light of the fact that the straw-clutching submission that the Regulations and the Code do not apply to the Applicant at all was plainly untenable.

99. No need to formally and fully consider a third alternative basis for impugning the validity of the termination decision properly arises in all the circumstances of the present case. It would in my judgment be inconsistent with the Overriding Objective in Order 1A of the Rules of the Supreme Court (which requires the Court to avoid wasting the Court's and the parties' time and resources) to pursue such an inquiry. This particularly the case as the evidence placed before the Court by the Applicant on the covert disciplinary termination issue was not on its face strong.

100. The second ground of the present application was that the termination was "*dishonest and malicious*", and the supplementary grounds are based on the premise that the disciplinary regime was accordingly brought into play and wrongly not followed. Courts only make findings of dishonesty on the basis of very clear evidence, and rarely in the absence of oral evidence and cross-examination. Such processes are not typically deployed in judicial review proceedings such as these. If it were necessary to consider this issue on the basis of the affidavit evidence alone, I would find that the Affidavits do not disclose any clear case that the Applicant's employment was terminated as a covert disciplinary measure.

101. There is in any event no evidence that *prior to* the Applicant's termination any legally valid disciplinary finding was ever made against her and in my judgment her employment ended with a clean disciplinary record. There was clear evidence that a purported verbal "warning" was administered and recorded by the Acting Director at the conclusion of the Foundation Board of Director's meeting on April 4, 2008. This "penalty" was imposed for an unarticulated misconduct offence which the Applicant was not given any or any fair opportunity to respond to was quite obviously invalid and of no legal effect for failure to comply with the following mandatory provisions of the Regulations (First Schedule):

> "*1.The Head of Department shall prepare a written statement of the alleged disciplinary offence, give a copy to the officer in question, discuss it with him and provide him with an opportunity to state his case.*
>
> *2. At the end of the discussion, the Head of Department may, if he so determines, give to the officer an oral warning that further disciplinary action may be taken if further misconduct occurs, and also give the officer advice on how he may avoid further misconduct.*"

102. It is agreed that in the absence of the Applicant from the meeting, the Applicant's performance was discussed in some way. But the contemporaneous notes of the Acting Director suggest that the main issue was the *relationship* between the Applicant and Henderson, not the Applicant's performance as such. The Acting Director's notes do support the view that a decision was taken to clarify the Applicant's role and take her out of the loop of direct communications with the event organizers, Henderson: "*Legal & secretary excused: Administrator problems. Relationship between Admin + HAI. Warning-30 days. Monitor. Clear, defined role.*"[18]

[18] Respondent's Record, TAB 20. The notes are written on an Agenda for the relevant Board meeting.

103. Against this factual background and without oral evidence and cross-examination it is difficult to discern what disciplinary offence the Applicant could properly have been accused of, let alone to conclude that covert disciplinary action was taken against her in making the termination decision. The First MacIntyre Affidavit, responding to the Applicant's First Affidavit which accused her former Head of Department of lacking the courage to stand up to the Minister's alleged political interference, suggests that the termination decision was based on "*no single reason ... it was by then painfully obvious that she was unsuitable*" (paragraph 33). It is deposed that the April 9, 2008 letter "*convinced me finally that she was not the right person for this position and that she would continue to focus on her 'private agenda' at the expense of the efficient administration of the Foundation's affairs*" (paragraph 27). This is a robust refutation of the suggestion that the termination decision was simply made at the improper behest of the Minister, who of course had no right to institute disciplinary action against a public servant or to decide on their removal.

104. The Applicant's deposed that after the April 4, 2008 meeting she was concerned about the unfairness of her treatment. She sought advice from the Ombudsman, and as a result wrote an open letter on April 9, 2008 to all of the Foundation Board members setting out her side of the story which was not permitted to tell at the meeting, in effect to set the record straight. Just over one hour after sending her email, she was summoned to the Cabinet Office where, in the presence of her Permanent Secretary and Head of Department, the Minister questioned her about why she had sent the letter. The following day, she received the termination letter. By her own account, however, she was not accused of any disciplinary offence at this meeting; and the contents of her "setting the record straight" letter do not raise any obvious grounds of misconduct.

105. The Applicant essentially (a) rather stridently complained that it was uncivilised for her to have been denied a hearing before being warned on April 4; and (b) castigated Henderson as a problematic service-provider, for reasons which were explicitly set out. It was sent to Foundation Board members who, one would assume, were entitled to receive the letter. Indeed, it seems likely that the Minister received a copy of this missive in his capacity as Chairman of the Board, and is at least arguable that it was in this capacity that he convened the *ad hoc* April 9, 2008 meeting. By her own account, the Minister did not in the Applicant's presence call for any disciplinary action to be taken against her, let alone (like the impetuous monarch in '*Alice and Wonderland*') shout: "*off with her head!*".

106. Be that as it may, and whatever the motivations for the termination decision may have *included,* the dominant rationale appears (based on the documentary record before the Court and without further inquiry) to have been that the Contract could be terminated without cause. It is difficult to reject the possibility, as Mr. Howard persuasively argued, that the termination which took place by letter dated April 10, 2008 was never looked at through a disciplinary lens. The sequential nature of the meeting with the Minister on April 9, 2008 and the termination letter on April 10, 2008 is insufficient to support an inference that political interference was the operative cause of the

termination. This Court can only analyse evidence in legal as opposed to radio talk show terms.

107. In fairness to Henderson, the service-provider which has been much mentioned, there is no basis for any suggestion that the web-site inaccuracies they were criticised for were motivated by anything more than excessive enthusiasm to start raising funds for the Foundation. And the Applicant's concerns amounted to no more than a demand for greater consultation with the Department of Tourism. When a Government Department hires a private contractor to perform services at the taxpayer's expense, it is the duty of public officers involved in negotiating and implementing the contract to ensure that the people's money is well spent. When the Government sensibly provides checks and balances, as occurred here, to ensure that the ADHT Conference would be planned by Henderson under the Department of Tourism's supervision, it would have been quite astonishing if disagreements did not arise. There is in all such situations probably a natural tension between the desire of a service-provider to attain maximum autonomy to "get the job done" and the public servant's wish to retain an appropriate level of monitoring control. This natural tension may well have been exacerbated in the present case by a heady cocktail of aggravating factors including (a) the Applicant's poorly defined job description, (b) her intellectual horsepower and combative spirit (on full display in these proceedings), and (c) (according to the Applicant at least) Henderson's ability to communicate directly with the Minister.

108. There is no direct or circumstantial evidence in the affidavits which suggests that the termination decision would probably have been taken on disciplinary grounds in any event, even if the Contract had *not* been viewed by the Respondent's senior public servants as entitling them to prematurely terminate the Applicant's employment without cause.

Is the Applicant entitled to an order of reinstatement at common law?

109. The accepted wisdom in Bermuda has been that the Courts do not specifically enforce contracts of employment so that at common law the remedy of reinstatement for wrongful termination is unavailable. However, the Applicant placed before the Court an Ontario Superior Court of Justice 2000 decision which suggests that such assumptions may be wrong: *National Ballet of Canada –v- Kimberley Glasco and Canadian Equity Association*[19]. In this case, in an arbitration proceeding pursuant to a collective agreement (a) the employee claimed reinstatement before the expiration of her contract of employment; (b) the arbitral tribunal ordered by way of interim relief that her employment shall be deemed to continue throughout the proceedings, and (c) this interim reinstatement order was upheld by the Superior Court despite the fact that it was "*highly unusual to find such an order in the employment context, outside of unionized workplaces….Nevertheless reinstatement is a remedy commonly used in the unionized setting, in the application of human rights law, and in the protection of office holders* " (paragraph 45).

[19] 00-CV-188925.

110. Mr. Howard conceded that the common law discretion to order reinstatement as a remedy for wrongful termination might potentially exist, but pointed out that (a) the context in the *National Ballet of Canada* case was an exceptional one, and (b) that the element of mutual confidence and friction flowing from the termination had to be taken account. Moreover his fundamental submission on the private law rights of the Applicant was that the Contract expired on May 22, 2008 in any event. In my judgment all of these points are sound.

111. A precondition for reinstatement at common law must be proof that but for the wrongful termination, the claimant would still have been employed at the date when the proceedings were instituted at least, if not when the proceedings concluded. Here, the proceedings were commenced months after the Contract would have expired in any event and as a matter of private law at least, the Applicant had no automatic right of renewal exercisable at her sole option. On this ground alone, reinstatement must be refused.

112. In any event, the Applicant here was not employed to practise a profession in the only context in which she could be so employed, falling within the exceptional category of case which the Ontario Superior Court in the National Ballet of Canada case considered might justify an order of reinstatement: "*for example, where the individual derives a unique personal benefit from the performance of the work and would not otherwise be able to practise his vocation*" (per Swinton J at paragraph 50).

113. And, even if this primary ground for rejecting the reinstatement claim is wrong, in my judgment the mutual confidence necessary for employment to continue was broken by the uncompromising manner in which the Applicant has pursued the present proceedings. She has (without obvious justification) accused her former supervising officers of malice and cowardice and, in the course of the hearing of her application, has made materials available to the press which can only have embarrassed the Respondent. These actions (not improper in and of themselves) were wholly inconsistent with the actions of an employee who while challenging the legality of their termination, is simultaneously able to demonstrate their capacity to reassume their former position in a harmonious manner. Of course, the Applicant was a litigant in person, apparently unemployed and facing foreclosure of her mortgage, pursuing a claim against a Respondent who is not only a Minister but is Premier as well. It is in these circumstances not completely surprising that, like many "underdogs", she was unable to avoid over-stating her case. But understanding the way in which the application was advanced makes it no more plausible that reinstatement, if legally available, is an appropriate remedy.

Are there any discretionary grounds for refusing public law relief?

114. The Respondent's Skeleton Argument did not advance any basis on which public law relief should be refused on discretionary grounds. I raised the question of alternative

remedies with Counsel, who suggested in reply that a complaint under the Employment Act ought to have been filed within three months of the termination.

115. It is however clear that the only relief the Applicant has established she is potentially entitled to in these proceedings is exclusively public law relief. Namely, a declaration that she had as a matter of public law a substantive legitimate expectation to be employed until the Foundation selected its own Director. An employment tribunal has no jurisdiction to grant equivalent relief.

116. Moreover, contrary to the Respondent's submissions to the contrary (a) the Applicant was a public officer under the Code, (b) the Code is not merely policy but subsidiary legislation forming part of the Regulations, and (c) on the Respondent's own interpretation of the Contract, termination was unlawful as a matter of public law for breach of the rule against sub-delegation. The breaches of public law complained of are not merely technicalities. They have been shown to have occurred in the context of imperfect contractual hiring practices in relation to the Applicant's status as a temporary employee of more than six months standing. Most importantly, the conduct complained of potentially impacted on her ability to discharge her duties as a public officer in an independent manner.

117. In these circumstances where the Court has found that it would be an abuse of the administrative process for the Respondent not to be required to honour the Applicant's legitimate expectation, it would be wrong in principle to decline to grant her appropriate relief.

Summary

118. The Applicant's private law rights under then Contract were infringed by an unauthorised purported premature termination on April 10, 2008. However her only private law remedy was to be paid in lieu of the contractually agreed notice of seven days prior to the expiration date of May 22, 2008.In other words, she was entitled to be employed and paid until May 22, 2008.

119. The Applicant as a temporary public officer was nevertheless a "public officer" for the purposes of section 102 of the Bermuda Constitution. The Applicant's public law rights were also infringed, because as a temporary officer she was entitled under the Public Service Regulations and the Code and/or pursuant to the Contract (which expressly incorporated this subsidiary legislation made under the Constitution into her terms and conditions of employment) to special public law protections against removal from office which are unavailable to ordinary private employees. These were, as far as is relevant to the present case, (a) the right to notice of termination on expiration of the Contract (Code, paragraph 4.6.2-4.6.3 as read with sections 82 and 105 of the Bermuda Constitution) and (b) to the extent that the Contract is to be properly construed as permitting premature termination, the right to have the termination decision made by the Head of the Civil Service (regulation 33). The

purported termination was unlawful either because it was improperly terminated before its expiration date in breach of the Code or because the Head of Department instead of the Head of Civil Service made the operative decision in breach of the Regulations.

120. The termination was, further and more significantly, in breach of the Applicant's substantive legitimate expectation that she would have been employed –but for the unlawful premature termination-until such time as the Foundation selected its own Director and put that person in office, eliminating the need for the temporary position the Applicant was filling. Her legitimate expectation was merely that this permanent job was one she would have been well-placed to at least apply for. On the evidence before the Court, the relevant selection was made on or before January 16, 2009 but the successful candidate did not take up the post until February 19, 2009. The Applicant's public law right was to have been employed until the latter date. This flows from the substantial unfairness which flowed from the Applicant's employment on rolling three-month contracts when it ought to have been clear from either (a) the outset, or (b) when the third contract was signed in February 2008, that a longer-term contract giving a more appropriate level of security of tenure was properly required, having regard to the letter and spirit of the Regulations and the Code.

121. The Applicant's claim for reinstatement is rejected primarily on the grounds that this remedy is not available post-expiration of her contract. The Applicant's suggestions that she was the victim of political interference by the Minister or terminated on covert but unjustified disciplinary or other punitive grounds because she was, in effect, a whistleblower are not made out on the affidavits in any event. Further enquiry is not in any event warranted in light of her success on other grounds.

122. I will hear the parties as to costs.

Dated this 25th day of April, 2009 _____
KAWALEY J