



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

**2025: No. 11**

**IN THE MATTER OF THE HUMAN RIGHTS ACT 1981**

**BETWEEN:**

**CORY AMIR BROWN**

**APPLICANT**

**-AND-**

**THE HUMAN RIGHTS COMMISSION**

**RESPONDENT**

## **JUDGMENT**

*Application for judicial review of the Executive Officer of the Human Rights Commission's decision not to make an investigation into a complaint and/or dismissal of a complaint as being without merit under section 15 (8) of the Human Rights Act 1981*

Date of hearing: 9 December 2025

Date of judgment: 15 December 2025

*Appearances*

Mr. Cory Brown in person

*Ms. Victoria Greening* of Resolution Chambers Ltd for the Human Rights Commission

## **JUDGMENT OF MARTIN J**

### **Introduction**

1. This is the court's decision in judicial review proceedings brought by Mr. Brown to set aside the decision of the Executive Officer (“the Executive Officer”) of the Human Rights Commission (“the HRC”) dated 15 July 2024 (“the Decision”) whereby the Executive Officer decided not to investigate and summarily dismissed Mr Brown's complaint of racial or ethnic discrimination in relation to his application for employment in the post of planner at the Department of Planning as lacking any merit.

### **Summary and disposition**

2. The Decision of the Executive Officer not to pursue an investigation and/or to dismiss Mr. Brown’s complaint as being without merit was within the range of reasonable decisions that were open to her. Consequently, the Decision to dismiss the complaint is not liable to be reviewed on a judicial review application as being ‘unlawful’ (as this term is understood in the present context).
3. In the context of the protection of human rights, the power provided in section 15 (8) of the HRA that enables the Executive Officer to dismiss a meritless claim is proportionate to the rights the HRA seeks to protect. The provision strikes an appropriate balance between the rights of individuals to bring forward complaints of discrimination and the interests of the HRC in administering complaints in a fair and efficient manner. The Executive Officer’s decision was also a proportionate use of the statutory power to dismiss a meritless claim.
4. The court has also found that the Executive Officer:
  - (i) did not give clear reasons for her decision; and
  - (ii) did not follow solicit representations from Mr. Brown concerning the lack of merit of the complaint before she made her Decision as required by section 15 (8) of the Human Rights Act 1981 (“the HRA”) properly construed.
5. For the reasons given in this judgment, the court is nonetheless satisfied that these procedural irregularities did not invalidate the Executive Officer’s Decision. The HRA does not expressly provide that a failure to comply with these requirements will invalidate a decision to dismiss a complaint for lack of merit. In the absence of a statutory provision that mandates the setting aside of a decision for failure to proceed in accordance with the steps set out in the HRA, the court must assess in the circumstances of each particular case whether the failure to comply with these requirements resulted in injustice or unfairness such that the court is required to set aside the decision.
6. In this case the court has concluded that the consequences of the non-compliance with these procedural requirements did not materially prejudice Mr. Brown. This is because (a) the Decision itself was one to which the Executive Officer was entitled to arrive on the basis of the materials presented to her by Mr Brown in support of the complaint (b) Mr Brown clearly understood the meaning of the Executive Officer’s Decision as a dismissal for lack of merit and (c) Mr. Brown did not advance any complaint that he was prevented from making representations that could have affected the outcome.

7. In addition, Mr. Brown has now had the opportunity to make the representations he would have made to her in these proceedings, and the court is satisfied that an opportunity to be heard on the question of dismissal before the Decision was made would not (in the circumstances of this case) have made any material difference to the outcome. It would therefore be pointless and wasteful for the court to remit the matter to the Executive Officer to reconsider the matter.
8. Accordingly, the court will not set aside Executive Officer's Decision or remit it to her for reconsideration because the court accepts that the Executive Officer was entitled to take the view that the materials presented by Mr. Brown in support of his complaint did not disclose evidence of any racial or ethnic discrimination in the selection process for the post of planner.
9. Alternatively, if the court were required to set aside the Decision because the Executive Officer failed to give clear reasons or to follow the correct procedure, the court would have nonetheless dismissed the application. The materials presented by Mr Brown in support of his application do not disclose any evidence of racial or ethnic discrimination on the part of the interview panel. The evidence does not disclose any act or omission or other conduct on the part of the interview panel from which it could be found or inferred that the decision not to interview Mr. Brown was activated by racial or ethnic discrimination within the meaning of section 2 (2) of the HRA nor by discrimination based on race or ethnic origin (or otherwise) in breach of section 6 (1) (a) or (b) of the HRA.
10. On the contrary, the evidence discloses that the reason that Mr Brown was not selected for interview for the post of planner was based on his unsuitability for the post for reasons that were entirely unrelated to his race or ethnic origin. As a result, the Decision not to open an investigation into Mr. Brown's complaint was not wrong in law.
11. It was, in the court's view, a proportionate and appropriate use of the power to dismiss the complaint as lacking any merit, because the power has been conferred upon the Executive Officer to screen out claims which are not genuine, or are baseless or for some other reason could not result in a finding that there was any breach of the HRA. This is a power given to the Executive Officer to manage the time, manpower and resources of the HRC in an effective way and strikes a proper balance between the rights of the individual to protect and enforce their rights and the prevention of abuse of the complaints process under the HRA.
12. If the court were required to consider the matter afresh, the court would also have dismissed the complaint as being without merit at a preliminary stage. Mr. Brown's application for judicial review of the Executive Officer's Decision of the 15 July 2024 is therefore dismissed with costs.

### **Background facts**

13. The background facts can be shortly stated. Mr. Brown is a qualified planner and holds a master's degree in architecture. Mr. Brown is an American citizen and moved to Bermuda in 2005 to live with his wife, with whom he now has three children. Mr. Brown has worked for the planning department for about 10 years, namely between 2005 and 2006 and then between 2008 and 2016. He also spent time working in private practice and has considerable experience in matters relating to local planning regulation and forward development planning. Mr. Brown is a black man of Afro-American descent.

14. Mr. Brown applied for the post of planner with the Department of Planning when it was advertised in 2021, but he was not selected for interview. However, the post was not filled at that time. Mr Brown applied again for the post of planner in June 2023 when the post was re-advertised. Mr. Brown was again not shortlisted as a candidate and was not selected for interview for the job despite his qualifications and previous experience working for the planning department. A number of other candidates applied of whom four were shortlisted and selected for interview. One of those applicants, who is not a Bermudian or a spouse of a Bermudian, ultimately got the job.
15. Mr. Brown believed that his application was not entertained because he was discriminated against by reason of his race or ethnic origin contrary to Sections 2 (2) and 6 (1) (a) and (b) of the HRA. Mr. Brown made a complaint to the HRC on 7 August 2023. The material parts of his complaint state:
- “Specifically, I applied for the position in 2021 and 2023, on both occasions I was denied even an interview and informed that my application was not being further considered. I attempted to obtain clarification given my extensive local and cumulative experience as a planner as compared to any other applicants. It is my understanding that the department has been seeking planners and unable to find any suitable local candidates. I met with workforce development (Annette Eve), whom [sic] reached out to the director of the department on my behalf and I was advised that disparaging remarks were made regarding my professional career....*
- Unbeknownst to me, I have been subjected to an unparalleled level of discrimination despite fulfilling the responsibilities in an above satisfactory manner. The attached documents substantiate this and acknowledge the fact that I performed capably irregardless of the treatment I was being subjected to, I always carried myself in a professional manner. In an e-mail from the director, it states that our working relationship is fine notwithstanding what she termed as my futile attempts to seek justice and lack of understanding as to why I would not achieve it.”*
16. On 8 August 2023, the Executive Officer of the HRC instituted a preliminary investigation into this complaint under the powers given to her under section 14 I of the HRA. Clarification of the complaint was sought from Mr Brown on 6 October 2023 to which Mr. Brown replied on 13 October 2023, but his response did not add materially to the essential core parts of the complaint set out above.
17. On 4 January 2024 the Executive Officer’s team sent the material parts of the complaint to the Director of Planning for comment and response, to which the Director replied on 13 February 2024. The substance of her response was that Mr. Brown was not selected for interview for the post of planner because of “*significant performance challenges over a sustained period*” during the tenure of Mr Brown’s previous period of employment with the Department of Planning. The Director also confirmed that the decision not to recruit Mr Brown was based on his prior performance and had “*nothing to do with his race, colour, place of origin, and/or national origins.*”
18. The substance of this response was forwarded to Mr Brown by the Executive Officer’s team on 16 April 2024 and Mr Brown was invited to comment on it. Mr Brown replied by letter dated

26 April 2024. In that letter Mr Brown did not make a direct reply but asked a number of follow up questions about the Director's response that he felt would assist him in formulating his response. These questions were rhetoric in nature and mostly related to defending his employment record. He did not address the points that the Director had given as the reason why Mr Brown had not been selected for interview.

19. On 15 July 2024 the Executive Officer wrote to Mr Brown in the following terms:

*"A decision was made to conduct a preliminary inquiry into this matter in accordance with section 14 I of the Act. At this stage, we have broadly considered the core facts and issues set out within your complaint against the Act, however, the Executive Officer is of the view that your complaint does not appear to have contravened the provisions of the Act. Specifically, we considered the areas of discrimination identified by you and set out within Part II of the Act as read with the protected grounds within Section 2 (2) of the Act, where applicable. Following a review of your complaint, the Executive Officer determined that she is unable to proceed with your complaints alleging a contravention of section 6 (1) (a) and section 6 (1) (b) as read with section 2 (2) (a) (i) of the Act as required by section 15 (1) (a) or section 15 (1) (b) of the Act."*

20. The letter also addressed what the Executive Officer understood to be a complaint in relation to the failure to interview Mr Brown for the post of planner in 2021 and said that this complaint was outside the 6-month time limit allowed for complaints. At the hearing Mr. Brown confirmed that it was not his intention to complain about the failure to interview him in 2021, but he relied upon that fact as evidence of a "*pattern of behaviour*". Therefore, the points made by the Executive Officer about aspects of Mr. Brown's complaint being out of time are not relevant to this application and are not dealt with in this decision.

### **The disqualification point**

21. It is important to address one point that was made in the evidence, but which did not feature in the Executive Officer's Decision.
22. The Director of Planning's response letter of 13 February 2024<sup>1</sup> referred to an email Mr Brown had sent to a parliamentarian on 21 February 2023 in connection with Mr. Brown's previous application for the post. The Director noted that section 20 of the Civil Service Regulations 2001 provides that any person who canvasses any member of the legislature in connection with appointment to any office shall be disqualified as a candidate. It appears from the Director of Planning's response letter that she considered that this was a supplemental justification for her recommendation not to select Mr. Brown for interview.
23. However, in the paperwork submitted by the interview panel to the Public Service Commission in relation to the recommendation to appoint the successful candidate, the reasons for not selecting Mr Brown for interview for the post were limited to Mr. Brown's prior performance. There was no mention of disqualification on the grounds of that Mr. Brown had canvassed for the post.

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<sup>1</sup> Letter from the director of Planning to the Executive Officer dated 13 February 2024: paragraph 5.

24. In addition, the Executive Officer's Decision does not refer to the disqualification of Mr. Brown as a candidate. Therefore, this point is not relevant to the court's consideration of the Executive Officer's Decision in these proceedings.
25. This point is recorded for the sake of completeness, but also to make it clear that even if this had been a matter which the Executive Officer had taken into account in reaching her decision (as to which she is silent in her affidavit) the disqualification on these grounds would have had nothing to do with Mr. Brown's race or ethnic origins. Mr. Brown could not therefore (for example) have asserted that there was a dispute over whether the canvassing occurred which ought to have been left to the Tribunal to decide, and that the Executive Officer's Decision was unlawful on that account. The Executive Officer's Decision is quite properly expressly limited to consideration of matters of unlawful discrimination under the HRA. Therefore, the court does not need to deal with the 'disqualification point' on this application.

### **The Judicial Review proceedings**

26. Mr. Brown issued his application for permission to commence judicial review proceedings on 15 January 2025, and leave was granted by Mrs Justice Subair Williams J on the papers on 20 January 2025. The judicial review proceedings followed a slightly unusual procedural course, partly as a result of Mr Brown's unfamiliarity with the formal legal process, but no point was taken as to the lack of a formal pleading.
27. The court entertained the application on the basis of the initial Form 86A and Mr Brown's affidavit and the materials he exhibited to it, as well as his skeleton argument and written submissions. The HRC relied upon the affidavit of Ms Lisa Reed, the Executive Officer.

### *The evidence*

28. Mr Brown's affidavit sets out his personal history and explains in detail the hardship that he has suffered as a result of not being able to find suitable employment, and says that this has had a profound and distressing effect upon him and his ability to maintain a relationship with his children, who are in the custody of his wife. Mr. Brown says that this has all been the result of being denied the opportunity to get the job as planner for which he says he was eminently qualified. There was no direct evidence or statement given by Mr. Brown in his affidavit as to why he alleged that he had been discriminated against by reason of his race or ethnic origin.
29. Although he did not say so in express terms, it is apparent that Mr Brown believes that he was entitled to priority over other candidates because (i) he is eminently qualified both academically and professionally and has performed the functions of the post of planner in the past and (ii) he is a spouse (or former spouse) of a Bermudian and the parent of Bermudian children, and that the policy of the immigration department requires employers to prioritise the employment of Bermudians, spouse of Bermudians and persons who have Bermudian children over those who do not possess any of those characteristics.
30. The Executive Officer put in an affidavit in response which set out (in large part) the statutory provisions which govern her role. In paragraph 17 of her affidavit, the Executive Officer said she did not consider that Mr Brown's complaint "*contravened the Act*", by which she must be

taken to mean that the matters set out in Mr. Brown's complaint did not allege matters which could amount to a breach of the HRA.

31. In the course of his presentation of his argument, the court asked Mr. Brown to link his allegation of discrimination on grounds on race or ethnic origin racial to the facts he relied on in his affidavit and the materials he produced in support of his case. Mr Brown referred to the fact that the selection and interview panel was composed of two white women and two white men (as set out at CA3 tab 1 of the exhibit to his affidavit). From this he suggested that the evidence of racial discrimination against him was "*obvious*".
32. There was no cross-examination of Mr Brown or the Executive Officer at the hearing, and the case was presented on the affidavit evidence alone.

### **The legal grounds for setting aside administrative decisions in judicial review proceedings**

33. There are three well-established grounds for review of an administrative decision of a public body or a tribunal or person in the exercise of their statutory functions or powers. These are usually referred to as 'illegality', 'irrationality' and 'procedural impropriety'. In summary, a challenge to the lawfulness of an administrative decision may be made on the grounds that (i) the decision-maker acted outside the powers given by the statute, or misapplied the law in exercising the relevant power, or failed to take into account relevant matters or took into account irrelevant matters in arriving at the decision (illegality) (ii) the decision-maker arrived at a decision that was irrational in the sense that no reasonable decision-maker properly directing his or her mind to the facts and the law could have arrived at the decision that was made (irrationality) (iii) the decision-maker failed to follow fair procedures or comply with relevant statutory requirements (procedural impropriety)<sup>2</sup>.
34. In cases involving limitations human rights protected by the European Convention on Human Rights and the HRA, the courts also apply a 'proportionality' test. This requires the court to be satisfied that the measure or power pursues a legitimate aim, is necessary, is rationally connected to that aim and strikes a fair balance<sup>3</sup>. The proportionality test may require heightened scrutiny of the balance the decision-maker has struck, the weight accorded to the relevant interests at stake, and whether the limitation of a human right by statute is necessary in a democratic society and whether the limitation was proportionate to the legitimate aim being pursued<sup>4</sup>.
35. In this case, the court is not concerned with any limitations on human rights, so the consideration of proportionality in this case only relates to the exercise of the Executive Officer's power to dismiss the complaint as lacking in merit. This means considering whether the appropriate balance in the competing interests was struck in addition to determining whether the Decision was within the range of rational or reasonable decisions that lay open to her.
36. The question in this case boils down to whether the Executive Officer was justified in reaching the conclusion that Mr. Brown's complaint had no merit. Put another way, if the facts relied on by Mr. Brown in support of his complaint *could not* amount in law to a breach of the HRA, then

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<sup>2</sup> **Council of Civil Service Unions v Minister of the Civil Service** [1985] AC 374 ("the GCHQ case").

<sup>3</sup> **R (Daly) v Secretary of State for the Home Department** [2001] 2 AC 532; **Bank Mellat v HM Treasury (No 2)** [2013] UKSC 39.

<sup>4</sup> **Daly** (supra) at paragraphs 27-8 per Lord Steyn.

the Executive Officer would be entitled to take the view that it had no merit and her decision to dismiss the complaint summarily will stand. If the facts alleged *could* amount to a breach of the HRA, then the Executive Officer would not have been justified in dismissing the complaint summarily, and the Executive Officer should have allowed the complaint to proceed to a Tribunal hearing for determination.

### **The legal framework of the HRA**

37. The legal framework of the HRA is well known and understood. Unlawful discrimination is defined in section 2 (2) which provides (so far as material in this case):

*“For the purposes of this Act a person shall be deemed to discriminate against another person—*

- (a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because –*
  - (i) of his race, place of origin, colour, or ethnic or national origins;*

[The remaining provisions setting out other grounds of unlawful discrimination are omitted because they are not relevant to the facts of this case.]

- (b) If he applies to that other person a condition which he applies or would apply equally to other persons generally but—*
  - (i) which is such that the proportion of persons of the same race, place of origin, colour, ethnic or national origins...as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and*
  - (ii) which he cannot show to be justifiable irrespective of the race, place of origin, colour, ethnic or national origins...of the person to whom it is applied; and*
  - (iii) which operates to the detriment of that other person because he cannot comply with it.*

38. Section 6 (1) of the HRA provides:

*“Subject to subsection (6), no person shall discriminate against a person in any of the ways set out in section 2 (2) by—*

- (a) refusing to refer to or recruit any person or class of persons (as defined in section 2) for employment;*
- (b) dismissing, demoting or refusing to employ or continue to employ any person;*

[The remaining provisions setting out other grounds of unlawful discrimination are omitted because they are not relevant to this case. The exceptions set out in subsection (6) that relate to discrimination based on sex, marital status or domestic partnership



status, family status, religion, beliefs or political opinions are also not relevant to this case.]

## Analysis

39. It is apparent from Section 2 (2) that in order to amount to unlawful discrimination under the HRA there must be (a) less favourable treatment of one person compared to others or (b) a refusal or a deliberate omission to enter into a contract on like terms or like circumstances as other persons or (c) a deliberate different treatment of a person, by reason of (in this case) race, place of origin, colour of ethnic or national origin.
40. The court has summarised the evidence that Mr. Brown gave. He says that he did not get the job because, although he was qualified and had shown his ability and qualification for the job in his previous employment, he was not interviewed for the job. He relied upon the composition of the selection panel of two white women and two white men to substantiate his claim that the reason he was not interviewed was because of his race or ethnic origin<sup>5</sup>.
41. It is clear that those facts do not of themselves contain any relevant material which could amount to evidence of unlawful racial discrimination. Taking each ground in turn:
- (a) There is no evidence that Mr. Brown was treated less favourably than any other person by reason of his race or origin: for example, it is not a case where another person got better or different treatment than Mr Brown because of his race or ethnic origin (e.g. he was offered less favourable terms of employment than someone else who was similarly qualified but who was of a different race or ethnic origin from Mr. Brown).
  - (b) There is no evidence that Mr. Brown was not employed (or to give the provision a wider meaning, was not interviewed for the post) by reason of his race or ethnic origin. The evidence is clear (and undisputed) that the reason that he was not interviewed (or employed) was because of his poor performance as an employee of the Department of Planning in the past. Although Mr. Brown disputed the claim that his previous performance as an employee was less than ideal, he did not suggest that the reason given by the Director for not interviewing him was not true, nor did he say that the real reason he was not asked to interview (and therefore not offered the job) was because of his race or ethnic origin. There is no other evidence.
  - (c) There is no evidence that Mr. Brown was treated any differently as the other candidates for the post by reason of his race or ethnic origin.
42. Of course, the court recognises that racial or ethnic discrimination is insidious and it does not usually take an open and clearly identifiable form that can easily be presented as a “fact”, so the court will often (and probably usually) have to infer from other facts and circumstances which are apparently ‘innocent’ that the true reason for a refusal to employ someone (to use the

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<sup>5</sup> These are the two grounds mentioned in the complaint.

situation in this case) was based on discrimination on the grounds of race or ethnic origin. The court will not try to imagine all the various types of circumstance where such an inference might be drawn. But there must be *some* fact or facts from which the court can draw such an inference. A mere suspicion or a lack of trust on the part of the person who did not (for example) get the job is not, by itself, enough. An accusation of unlawful discrimination is easy to make. Although the burden of proof of the allegation lies on the accuser, once an allegation of racial discrimination is made, the very fact of the accusation itself may have damaging consequences for the person accused: it is therefore particularly important that there is some objective factual evidence which supports the allegation.

43. The only fact that Mr. Brown relied upon from which such an inference could be drawn was that the interview panel was made up of two white women and two white men.
44. It seems to the court that it is impossible to draw an inference of discrimination on grounds of race or ethnic origin from that fact alone, even though Mr. Brown said it was “obvious” to him. Moreover, the uncontroverted evidence shows that the selection of candidates for interview was a joint undertaking between the Department of Planning and the Department of Employee and Organisational Development<sup>6</sup>. It was not a function of the interview panel to select the candidates, although the Director of Planning had input into the selection. The composition of the interview panel cannot therefore be relied upon as evidence of any alleged bias in the selection: the interview panel did not select the candidates.
45. The Director of Planning’s view was that Mr. Brown was not a suitable candidate because of his prior employment record with the Department. It was for this reason that Mr. Brown was not selected for interview. A decision not to interview someone for a post because of previous poor performance as an employee is plainly not a decision which related to the candidate’s race or ethnic origin.
46. A prospective employer is entitled to consider a prior employee’s record in assessing whether to offer employment to that person again, and there was nothing unlawful about making a selection of candidates on those grounds, and any complaint as to a decision not to rehire an employee on the basis of poor performance in the past is not one which falls under the remit of the HRC.
47. As a result, in my judgment, the Executive Officer was entitled to come to the decision that after her preliminary investigation, she was not going to take the matter any further and to dismiss the complaint under section 15 (8) of the HRA, which provides:

*“If in the opinion of the Executive Director, a complaint is without merit, the Executive Officer may dismiss the complaint at any stage of the proceedings after [she] has given the complainant an opportunity to be heard.”*

#### **The substance of the Executive Officer’s decision**

48. The court is therefore satisfied that the Executive Officer was entitled to arrive at the conclusion that the evidence and the materials provided by Mr. Brown in support of his complaint could

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<sup>6</sup> Letter from Director of Planning to the Executive Officer dated 13 February 2024: paragraph 1.

not result in a finding of a breach of the HRA and was also entitled to exercise the power to dismiss the complaint summarily as being without merit.

49. The Executive Officer exercised her power for a proper purpose, took into account relevant matters and did not take into account irrelevant matters, and the decision was obviously within the range or reasonable decisions that lay open to her. It is therefore a decision which cannot be challenged on the grounds of illegality or irrationality.

#### *Proportionality*

50. As explained above, in cases involving an allegation that human rights have been infringed, the court must also consider whether the decision to dismiss the complaint was ‘proportionate’.
51. In this context this means assessing proportionality in two distinct ways. The first question is whether the existence of the power in section 15 (8) to dismiss the complaint without a hearing strikes a proper balance between the interests of the individual to bring forward claims of unlawful discrimination on the one hand and the need to protect against overwhelming the HRC with baseless complaints that will waste the time, manpower and resources of the HRC on the other. The second question is whether the exercise of that power by the Executive Officer on the facts of this case was proportionate to the management of this particular complaint.
52. In my judgment it is plainly proportionate to include such a power in the HRA to prevent the resources of the HRC from being wasted in hearing meritless claims (or claims that are not genuine). It is also plainly proportionate to use that power in cases where there is no merit to the complaint, namely when the material in support of the complaint is viewed objectively, the complaint does not amount to a breach of the HRA. This is such a case. The dismissal of the complaint was therefore in my judgment proportionate in this case.

#### **Procedural irregularity**

53. The material parts of the Executive Officer’s decision are set out above. In my judgment, there are some troublesome aspects regarding its content and the procedure that the Executive Officer followed.
54. The letter of 15 July 2024 is not a model of clarity. It says that Mr. Brown’s “*complaint does not appear to have contravened the provisions of the Act*”, by which it must be understood that the Executive Officer meant that the facts set out in Mr. Brown’s complaint did not show that the Act had been contravened. Mr. Brown certainly understood that was the intended meaning.
55. The letter goes on to say “*Following a review of your complaint, the Executive Officer determined that she is unable to proceed with your complaints alleging a contravention of section 6 (1) (a) and section 6 (1) (b) as read with section 2 (2) (a) (i) of the Act as required by section 15 (1) (a) or section 15 (1) (b) of the Act.*”
56. The meaning of this part of the letter is not entirely clear, but it seems to mean simply that the Executive Director has decided not to proceed with the complaint. The problem is that the letter does not say expressly that the Executive Director has decided to dismiss the complaint because it has no merit, as she is required to under section 15 (8). Furthermore, there are no reasons

given for the decision to dismiss the complaint. In addition, it is unclear whether the requirement to afford Mr. Brown an opportunity to be heard arises after the decision not to proceed was made or whether that requirement that Mr. Brown be given an opportunity to be heard was satisfied by the steps taken in the preliminary investigation which canvassed Mr. Brown's reaction to the Director of Planning's response.

57. These may seem like small defects that ought not to warrant any concern as to the substance of what was being done. However, this is not merely a pedantic linguistic criticism. The statutory rights that are protected by the HRA are vitally important and hard-won civil rights that apply to all citizens in Bermuda. The HRA sets out a statutory regime which only allows the Executive Director to dismiss a complaint for lack of merit, and not otherwise.

58. The court raised these points in argument because they had not been raised by Mr. Brown himself. The court considered that these points needed to be addressed by the HRC's counsel to ensure that any substantive points which could be taken on Mr. Brown's part were fully and properly canvassed.

#### *Dismissal of complaint*

59. As to the first point, the letter does not actually say that the complaint has been dismissed for lack of merit in the exercise of the Executive Officer's power under section 15 (8). In my view, in light of the fact that it is a step that prevents a complainant from having his or her case heard by the Tribunal, the Executive Officer ought to have made it clear by express language that she was exercising that power.

#### *Short reasons for the decision*

60. As to the second point, in my view the complainant is entitled to have a short explanation for the reason(s) why the complaint was being dismissed for lack of merit.

61. The general position is that administrative decision-makers do not have to give reasons for their decisions. However, the courts have consistently held that an implied duty to do give reasons arises where fairness demands it<sup>7</sup>. In the field of civil rights and fundamental freedoms, the law has recognised that the law requires reasons to be given as a matter of fairness and to enable the party affected to be able to exercise their right to seek judicial review of the decision<sup>8</sup>. Those reasons must be adequate to enable the person affected to understand the decision and to articulate any grounds of challenge<sup>9</sup>.

62. In a case where the Executive Officer has determined on a summary basis, after a preliminary enquiry, that the complaint lacks sufficient merit or is otherwise not genuine, then in my judgment a duty arises to give a reasoned explanation for her decision to dismiss the complaint. This is because the effect of the decision is to shut out further investigation and the opportunity

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<sup>7</sup> See **R v Secretary of State for the Home Department, ex parte Doody** [1994] 1 AC 531, 565 "*I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognize a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied ...*" per Lord Mustill.

<sup>8</sup> **R (JW) v Dr G Feggetter and Mental health Act Commission; R (Wooder) v Feggetter** [2002] EWCA Civ 554

<sup>9</sup> **R (on the application of Help Refugees Ltd) v Secretary of State for the Home Department** [2018] EWCA Civ 2098.

for the complainant to present the complaint to the Tribunal for determination after hearing evidence, examining any documents and hearing argument. The rights protected by the HRA are fundamental to modern life and a complaint that those rights have been infringed should only be summarily rejected if the complaint plainly lacks any merit. In my judgment, fairness gives rise to a duty to say why.

63. The reasons for the decision to reject a meritless claim do not have to be detailed. The basis of the Executive Officer's decision to dismiss a complaint as being wholly without merit should (in most cases) be easy to state. The reasons need only go as far as stating the basis for the rejection so that it can be understood by the complainant and so that he or she can seek judicial review of the decision if dissatisfied. One sentence might in many cases be enough. For example, in this case, it would have been enough for the Executive Officer to say something to the following effect (in one or two sentences). Without intending to provide a 'template' that is suitable for all cases, and purely for the purposes of illustration, the principal ingredients of the decision could have been summarised along the following lines:

"After a preliminary investigation of the facts set out in the intake form, and having given you an opportunity to be heard upon the question of dismissal<sup>10</sup>, in the exercise of my powers under section 15 (8) of the Human Rights Act 1981, I have decided to dismiss your complaint because the complaint does not disclose any arguable grounds for alleging that there has been a breach of section 2 (2) when read with section 6 (1) (a) or (b) of the Act."

#### *Opportunity to be heard*

64. As to the third point, section 15 (8) says that the Executive Officer may dismiss the complaint "*after [she] has given the complainant an opportunity to be heard*". This phrase is capable of being interpreted in two ways. It could be interpreted to mean either that, as long as the Executive Officer has given the complainant *an* opportunity to be heard *in the process*, the Executive Officer may dismiss the complaint if she thinks it lacks merit at any stage. Or, it could be construed as meaning that *before* making a decision to dismiss the complaint, the Executive Officer must offer the complainant the opportunity to be heard on the question of summary dismissal.
65. Given the importance to be afforded to the protection of human rights in Bermuda<sup>11</sup>, in the context of a summary dismissal of a complaint lacks any merit (or is not genuine<sup>12</sup>), in my judgment the court should give section 15 (8) the more generous interpretation, namely one that favours a complainant's right to be heard. Therefore, it seems to me that the better interpretation of the phrase "*after she has given the complainant an opportunity to be heard*" is that the complainant must be given the opportunity to be heard in relation to a potential dismissal of the complaint **before** a decision to dismiss the complaint is actually made. It would be illogical to construe the phrase to mean that the Executive Officer can decide to dismiss the complaint and then give the complainant an opportunity to be heard on the decision after the decision has been taken.

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<sup>10</sup> See the discussion about the 'opportunity to be heard' below.

<sup>11</sup> **Attorney General for Bermuda v Roderick Ferguson & Others** [2022] UKPC 2 at paragraphs [12-17].

<sup>12</sup> One requirement for a valid complaint is that it must be a 'genuine' complaint: see section 2(2) HRA.

66. That would (in effect) mean that the decision to dismiss the complaint might be reversed afterwards if the complainant put forward reasons to persuade the Executive Office that her decision to dismiss the complaint was wrong. Such an interpretation would be contrary to legal principle. First, the language of section 15 (8) does not contemplate a power of reversal of the Executive Officer's decision. Second, once the decision has been made, legally the Executive Officer is '*functus officio*'—i.e. the power has been exercised, and the Executive Officer cannot re-exercise, revoke or modify her decision<sup>13</sup>.
67. In this case the Executive Officer said at the end of her letter of 15 July 2024:
- “In the event that you wish for anything further to be taken into consideration or if the Commission can assist you further, we ask that you contact us.”*
68. For the reasons just explained, this does not meet the requirements of the section 15 (8) to give the complainant an opportunity to be heard on the dismissal *before* the Executive Officer made her decision.
69. In this case, it might be possible to construe the letter of 15 July 2024 as meaning that the Executive Officer was minded to dismiss the complaint and was offering Mr. Brown the opportunity to be heard before doing so. It might be said that the Executive Officer did, after all, offer Mr. Brown the opportunity to contact her if Mr. Brown wanted anything further to be taken into consideration but, in her affidavit evidence, said that she heard nothing further from him.
70. However, that interpretation of the letter's meaning is self-evidently contrary to the way the parties in fact understood it. The Executive Officer has never suggested that she did not make the decision to dismiss the complaint. She used different language, namely that she had decided "*not to proceed with the complaint*"<sup>14</sup> but has not suggested that this was not in effect a decision to dismiss it. For his part, Mr. Brown understood it to be a dismissal of his complaint because he proceeded to issue his application for leave to commence judicial review proceedings. Furthermore, such an interpretation would result in the very odd situation that the complaint has not yet been dismissed. That is completely contrary to the way all the parties understood what the letter meant and how they have acted since 15 July 2024.
71. The result of the court's analysis on this point is that the 15 July 2024 letter was in fact a dismissal of Mr. Brown's complaint for lack of merit, and that he did not get an opportunity to address the question of potential dismissal before the decision was made, which was in breach of section 15 (8) of HRA.
72. For the reasons already given, it is clear that on the evidence that was provided to the Executive Officer (which is the only relevant material for these purposes) that she was entitled to come to the view that Mr. Brown's complaint did not allege facts that could amount to a breach of the provisions of the HRA. The court is satisfied that the Executive Officer's decision to dismiss the complaint for lack of merit was one to which she was plainly entitled to arrive.

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<sup>13</sup> See **R (the Commissioner of Police of the Metropolis v The Independent Police Complaints Commission** [2015] EWCA Civ 1248.

<sup>14</sup> Paragraph 17 of Ms Reed's affidavit.

73. For the avoidance of any doubt, even taking into account what Mr. Brown says in his evidence in these proceedings and the materials he has presented in support of the application for judicial review (which includes material which he did not present to the HRC), the court finds that there is no evidence on which Mr. Brown's complaint would justify a finding that he had been discriminated against by reason of race, colour, or national or ethnic origin. Furthermore, the court finds that there is no inference that can properly be drawn from Mr. Brown's evidence that the decision not to interview him for the post or to offer him the job was as a result of discrimination against him by reason of his race, colour, or national or ethnic origin.
74. The court therefore concludes that there is no basis upon which to impeach the decision of the Executive Officer's decision to dismiss the complaint for lack of merit as a matter of substantive legal principle either on the material advanced by Mr. Brown to the Executive Officer or on the material advanced by Mr. Brown in these proceedings.

### **The court's approach to procedural irregularities**

75. The court has also considered whether the opaque language which was used in the letter of 15 July 2024 gives rise to any concern as to what is commonly referred to as a breach of "due process" in the American legal idiom.
76. Under English law, an administrative decision is not automatically invalidated by any procedural irregularity unless there is an express provision in the relevant legislation that makes it clear that the failure to follow a particular procedure will have the effect of rendering the decision invalid or unlawful. There is no such provision under the HRA. In the absence of such a provision, it is a matter for the court to determine whether the procedural irregularity is of such a character or has such an effect that the whole decision is rendered invalid or unlawful<sup>15</sup>.
77. In this case, it therefore falls to the court to assess whether the failure to give Mr. Brown an opportunity to be heard before a decision was made to dismiss the complaint, and the failure to say expressly that the complaint was dismissed for lack of merit and to say why gives rise to a fatal irregularity to the Executive Officer's exercise of her power.
78. The irregularity must, in my judgment, go to the fundamental requirements of fairness or justice. The English courts have taken the view that the emphasis ought to be on the consequences of non-compliance and whether Parliament can fairly be taken to have unintended that total invalidity will flow from a failure to comply with the procedural requirements.

### *Dismissal and lack of clear reasons*

79. In this case, the failure to state expressly that the Executive Officer was dismissing the complaint and the failure to give clear reasons did not materially affect Mr. Brown in a way which undermined the fairness of the decision. It seems to me that the letter was clearly understood by Mr Brown to be a dismissal of his complaint as lacking in merit. He said as much.

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<sup>15</sup> **R v Soneji** [2005] UKHL 49 at paragraph 23 per Lord Steyn.

*Lack of opportunity to make representations prior to the dismissal*

80. The denial of his right to be heard before the complaint was dismissed is regrettable and represents a breach of his rights under section 15 (8). But the court does not consider that this materially affected the fairness of the decision or the procedure that was followed.
81. In the first place, it is difficult to imagine what Mr. Brown could have said that would have changed the position. Either the complaint had arguable merit, or it did not. In this case, it is clear that it did not. In the second place, Mr. Brown did not in fact present anything new in his subsequent challenge to the Decision, which shows that there was nothing that would have been said that would have persuaded the Executive Officer that there might be an arguable point. In the third place, Mr Brown has now had the opportunity to ventilate his complaint fully, so that it would be pointless and wasteful to remit the matter to the Executive Officer for reconsideration on the basis of these irregularities. The result would inevitably be the same.

**Alternative finding**

82. If the court were to be held wrong to uphold the Executive Officer's decision because of the procedural irregularities that have been discussed, the court has briefly considered the alternatives. For the reasons just stated, it would not be appropriate to remit the Decision to the Executive Officer to reconsider after having asked Mr. Brown for his input. The court could in the alternative review the materials and take the decision for itself, and the court confirms that it would have reached the same conclusion as the Executive Officer.
83. There is no evidence in the complaint (or the materials submitted by Mr. Brown on the judicial review application) on which a breach of the provisions of the HRA could be established or from which a breach could be inferred, and that the court would have dismissed the application for judicial review in any event. It is clear from the evidence that the reason that Mr. Brown was not interviewed for the post of planner in 2023 was as a result of the Department of Planning's assessment of his suitability based upon Mr. Brown's prior performance as an employee over an extended period of time.
84. This court has not set out in this judgment a summary of the evidence as to the concerns over Mr. Brown's performance record because they are not relevant to the issue that the Executive Officer was called upon to consider, and which Mr Brown has sought to challenge in these proceedings. The court makes no findings as to whether the Department of Planning's concerns were justified because that issue is not before this court on this application. However, for the purposes of clarity, the court does confirm that the issues as to Mr Brown's prior performance as an employee were not based on any matter which could be the subject of a complaint under the HRA.

**Conclusions**

85. The court has therefore concluded as follows:
- (i) The Decision of the Executive Officer is not liable to be set aside on the grounds that the Executive Officer erred in her assessment of the evidence presented to her.



- (ii) In reaching her Decision the Executive Officer did not take into account matters which were irrelevant nor did she fail to take into account any matters which would have been relevant to her decision.
- (iii) The Decision of the Executive Officer to dismiss the complaint because it lacked any arguable merit was within the range of reasonable decisions open to her.
- (iv) Although the Executive Officer ought (a) to have given Mr. Brown the opportunity to be heard on the question of dismissal before she made her Decision and (b) to have given sufficient reasons in support of her Decision to enable Mr. Brown to understand the decision and to challenge it, those deficiencies have not resulted in an injustice that would require the matter to be remitted for reconsideration because that would be pointless and wasteful of time, costs and court resources.

Alternatively,

- (v) If the court is wrong on its approach in not setting aside the Executive Officer's Decision for the reasons explained, the court would itself have reached the same conclusion, namely that there is no evidence that would justify a potential finding of a breach of the HRA in relation to Mr. Brown's complaint, either directly or by inference from other facts.

86. Accordingly, the court dismisses the application for judicial review. The court will hear the parties on costs.

Dated this 15<sup>th</sup> day of December 2025



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**THE HON. MR. JUSTICE ANDREW MARTIN**  
**PUISNE JUDGE OF THE SUPREME COURT**