



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021 No. 200

BETWEEN:

TERRY LYNN THOMPSON

Applicant

And

THE PUBLIC SERVICE COMMISSION

1st Respondent

And

HIS EXCELLENCY THE GOVERNOR OF BERMUDA

2nd Respondent

And

THE ATTORNEY GENERAL

3rd Respondent

JUDGMENT

Application for Judicial Review against Decision not to appoint Applicant as the Director of Parks- Construction of Section 82 of the Bermuda Constitution Order 1968 –Whether the decision of the PSC to abort the recruitment process was ultra vires and void - Public Service Commission Regulations 2001- Delegation of powers vested in H.E. The Governor of Bermuda to the Public Service Commission- Legitimate Expectation

Dates of Hearings: 08 September 2021 and 24 September 2021
Date of Judgment: 17 November 2021

Counsel for the
Applicant: Mr. Mark Diel and Mr. Adam Richards
(Marshall Diel & Meyers Limited)

Counsel for the
Public Service Commission: Mr. Richard Horseman (Wakefield Quin Limited)

Counsel for H.E. The Governor
and the Attorney General: Mr. Brian Myrie (Crown Counsel)

JUDGMENT of Shade Subair Williams J

Introduction:

1. This is an application for judicial review which ultimately strikes out against the process employed and/or permitted by the Respondents in refusing to appoint the Applicant, Ms. Terry Lynn Thompson, to the post of Director of Parks (“Director”) for the Department of Parks (the “Department”) under the Government Ministry of Public Works (the “Ministry”). Ms. Thompson is otherwise employed in the Ministry as the Senior Plant Protection Officer.
2. On 8 and 24 September 2021 Counsel for each party appeared before me, having filed written submissions and affidavit evidence in support of their respective positions. At the close of the hearing, I reserved judgment which I now provide with the reasons below.

The Applicant’s Pleaded Case:

3. Having filed an application for leave to apply for judicial review dated 17 May 2019, the Applicant’s Counsel subsequently filed an amended notice (the “Amended Notice”) pursuant to Order 53/5 of the Rules of the Supreme Court (“RSC”) on 12 May 2021. The decisions in respect of which relief is sought are stated in the Amended Notice to be:

“The decision of the Public Service Commission to have the Applicant act in the position of Director of Parks before being substantively appointed to the post, and not to appoint the Applicant substantively to the post.”

The decision of the Public Service Commission on or about 26 November 2018 to withdraw its recommendation or decision in relation to the appointment of the Applicant as Director of Parks

The decision of the Permanent Secretary acting in the name of the name of the Minister of Public Works to withdraw the application for the post of Director of Parks to be filled.

The decision of the Public Service Commission to accept that decision.

The decision of the Head of the Civil Service acting in the name of the Minister responsible for the Cabinet Office to join in the above decision of the Permanent Secretary.”

4. By way of relief, the Applicant seeks the following orders of this Court:

“

- (i) *a declaration that the decisions referred to above are ultra vires, unlawful, void and ineffective;*
- (ii) *a declaration that the Public Service Commission had a duty to appoint the Applicant substantively to the post of Director of Parks on or about 10 September 2018 and were therefore required to do so;*
- (iii) *an order that the Applicant commence her appointment on or before a date set by this Honourable Court;*
- (iv) *an inquiry into damages*
- (v) *costs”*

5. The Applicant relied on paragraphs 3.5.1 and 3.5.2(a) of the Government of Bermuda Conditions of Employment and Code of Conduct (the “Government Conditions and Code”) in asserting that acting appointments are only made if the Permanent Secretary (“PS”) or the Head of Department (“HOD”) determines that it is “absolutely necessary” to do so and that the making of such appointments are regarded as a development opportunity for the officer appointed to the acting role.

The Evidence:

July 2017

6. The Applicant first acted in the vacant post of Director on 1 July 2017 when Mr. Francis Richardson was the substantive PS of the Ministry of Public Works. The Applicant's first acting appointment continued for a six month period¹ during which Mr. Richardson retired and Mr. Chris Farrow became the Acting PS to the Ministry of Public Works. In an affidavit sworn on 15 June 2021 Mr. Farrow (currently the PS to the Ministry of Social Development and Seniors) explained that during his acting appointment the Bermuda Industrial Union ("BIU") shop stewards met with him on a number of occasions to raise concerns about the Applicant's management style. He said [5]: *"Examples included her being disengaged during JCC meetings and spending the time on her phone."* He added [6]: *"I did not consider the reports from the BIU to be of such a nature that would lead me to believe that she was unable to manage the department."*

7. Mr. Farrow explained on his evidence that at the close of the six month period during which the Applicant was acting as the Director, he decided to place Mr. Steven Tucker in the position of Acting Director leaving the Applicant to return to occupy her substantive post. He said [7]:

“...
7. As Mr. Thompson's acting appointment was coming to an end, and she had been acting for 6 months, I decided to put Mr. Steven Tucker in as Acting Director and let Ms Thompson return to her substantive post. This achieved two goals: 1) I did not have to ask and wait on the PSC approving an extension (owing to the 6 month limit on acting appointments); and 2) it would alleviate the concerns expressed by the BIU. I had worked with Mr. Tucker and he had significant experience in managing BIU staff and had a very good working relationship with the BIU.

8. Ms Thompson was very upset about her acting appointment not being extended and appeared at my office unannounced with a colleague in tow to confront me about her not being extended in the acting role. She also at the time wrote to the Head of the Public Service demanding a meeting to find out why she was not being extended.

9. Dr. Binns declined to meet with her and I met with her and advised that her behavior was not appropriate. I offered personal advice to her stating that during your career you may be

¹ On a signed application form produced by Mr. Burt, it appears that Mr. Andrew Petit, Director of Environment, acted as the Director of Parks from 10-12 July 2017. On the remaining application forms exhibited to his evidence, it appears that Ms. Thompson was invited to act as DOP from 8-31 July 2017 (in the stead of DOP, Ms. Lisa D. Johnstone) and for the month of August 2017 in addition to the period commencing from 6 September – 31 October 2017 and again from 1 November 2017 to 31 December 2017. These successive acting appointments totals an approximate period of 6 months. (Mr. Burt also produced payroll printouts of payments made during the acting appointments.)

asked to step up to assist and you should do so without more and any expectations. It was an opportunity to show your abilities and be seen to be a reliable manager who would step up when needed. Once the acting was over, you should go back with grace and be known as a 'go to' person rather than becoming a problem to be avoided in the future. She appeared to take the advice well and that was the end of it..."

January 2018

8. Subsequently, an application for Ms. Thompson to act as Director from 1 January 2018 through to 31 March 2018 was submitted for approval. This application was signed by both the Head of the Civil Service and by a representative of the Director of Human Resources. It was not suggested by any party to these proceedings that Ms. Thompson did not act during this period.

April 2018

9. On Mr. Craig Burt's evidence, the Applicant again acted as the Director for the month of April 2018, during which period the office of Director was advertised. On 12 April the Applicant submitted her application for appointment. Amongst a total of twenty-two applications submitted, four Bermudian applicants were shortlisted to partake in a two-part recruitment process involving an assessment and an interview.

May 2018

10. On 16 May 2018 the Mr. Farrow wrote to Mrs. Carlita O'Brien in her capacity as the Secretary to the Public Service Commission (the "PSC") recommending the appointment of the Applicant. Mr. Farrow wrote, *inter alia*:

"Ms. Thompson meets the educational requirements of the posts as she possesses a MSc. In Plant Protection and Pest Management (1989); and a BSc. In Biology (1983). She also meets the experience requirement for the post as she has approximately twenty (20) years relevant senior management experience inclusive of various relevant acting appointments at the Head of the Department level. Her most recent acting appointment being in the Director of Parks post for nine (9) months from July 2017 to April 2018.

Ms Thompson delivered an excellent presentation and she scored the highest of the applicants. She clearly articulated her vision and strategic plan for ensuring that the mandate for the creation, implementation and maintenance of the National Parks Plan would be met.

Ms Thompson also had a very good interview. She provided in-depth responses to all of the interview questions and she was able to demonstrate her knowledge, experience and passion within the field. She also scored the highest for the interview.

...
...

The panel unanimously recommends Ms Thompson for appointment to the Director post.”

11. It is recorded in the minutes of a 21 May 2018 meeting that the PSC met and considered Mr. Farrow’s recommendation. An Interview Panel also convened and unanimously recommended the Applicant for appointment to the exclusion of any other candidate. Notably, Mr. Farrow was sat as a member of this interview panel in addition to his successor, Mr. Randy Rochester. However, the PSC’s recommendation on the Applicant’s application for appointment was deferred pending a 2 July meeting between the PSC and Mr. Farrow.
12. Mr. Farrow said in his affidavit evidence that he told the Applicant about his recommendation of support for the Applicant but warned her that the decision would ultimately be decided by the PSC with the Governor’s approval. He said [12]:

“12. Ms. Thompson was the unanimous choice by the panel and was recommended to the Public Service Commission (PSC). As I have done in the past with recruitments that I was leading, I called the recommended applicant and advised that the panel was recommending her for the post to the PSC, but ultimately it was the PSC’s decision and there was no guarantee that she would be offered the post and that they may interview her. It would also require the Governor’s approval.”

July 2018

13. On the minutes of the 2 July 2018 meeting it is said that the PSC questioned Mr. Farrow about the Applicant’s managerial style and her suitability. Mr. Farrow advised the PSC of his awareness of some challenges in this respect but expressed a view that this could be overcome. Mr. Farrow summarized this interaction with the PSC in his affidavit [13] as follows:

“13. ... At the meeting they questioned why Ms. Thompson was recommended and if I was aware of her history. I had not seen her personnel file and could only go on the experience I had with her and the interview. I did advise them of the issue I had with her acting appointment not being renewed but her response to my advice was well received and in my view the matter was closed. I personally was not aware of any issues with her that were insurmountable and advised the PSC as such. It appeared the PSC may have been aware of other matters but they did not share that with me.”

14. At the conclusion of the 2 July 2018 meeting between the PSC and Mr. Farrow, the PSC determined that the Applicant would serve as the Acting DOP for a six month period, subject to bi-monthly reviews. The minutes of that meeting provide, in its relevant parts, as follows:

“... ”

Based on the Commission having information on a previous matter between the recommended candidate and an employee, Mr. Farrow was asked to share feedback regarding Ms Thompson's managerial style and her suitability. Mr. Farrow indicated while he was the Acting Permanent Secretary, he was aware of some of the challenges Ms Thompson has faced, including employee feedback and union matters. Mr. Farrow, however, indicated he believed these were challenges Ms Thompson could overcome.

As a result of the discussion with Mr. Farrow, in conjunction with information shared previously, the Commission felt having Ms Thompson act for a period of six (6) months will allow adequate time for the Head of the Public Service to ensure the Acting Permanent Secretary assesses the challenges related to Ms Thompson's managerial style and whether they can be successfully assessed and remedied. During this period, the Commission requested two-month assessments, signed by the Head of the Public Service, the Acting Permanent Secretary, and Ms Thompson be provided to them for review.

...

The Commission agreed to defer a decision on the appointment to the post of Director until after Ms Thompson completes the six-month acting period, and the assessments have been reviewed."

15. Ms. Carlita O'Brien, as the Secretary to the Public Service Commission, provided affidavit evidence to this Court in which she deposed [5]:

"The PSC deferred the decision and requested the Acting Permanent Secretary Christopher (Chris) Farrow meet with the PSC on 2nd July 2018 to discuss the recommendation. Mr. Farrow attended the meeting on the 2nd July 2018. During the meeting, concerns were outlined regarding the Applicant's managerial style. The PSC decided the best way forward was to recommend that the Applicant act in the post for a six-month period during which time the challenges related to the Applicant's managerial style could be assessed and successfully remedied. The PSC's decision was therefore to defer a decision on the appointment with a view to reconsidering the matter further in six months' time."

16. At some point within this general timeframe, Mr. Yves Lortie took over from Mr. Farrow as the new Acting PS for the Ministry. Ms. O'Brien exhibited a letter dated 9 July 2018 from the PSC to Mr. Lortie stating, in its material portions:

"...Based on the Commission having information on a previous matter between the recommended candidate and an employee, Mr. Farrow was asked to share feedback regarding Ms Thompson's managerial style and her suitability. Mr. Farrow indicated while he was Acting Permanent Secretary he was aware of some of the challenges Ms Thompson has faced,

including employee feedback and union matters. Mr. Farrow, however, indicated he believed these were challenges Ms Thompson could overcome.

As a result of the discussion with Mr. Farrow, in conjunction with information shared previously, the Commission felt having Ms Thompson act for a period of six (6) months will allow adequate time for the Head of the Public Service to ensure the Acting Permanent, assesses the challenges related to Ms Thompson's managerial style and whether they can be successfully assessed and remedied.

During this period, the Commission requested two-month assessments, signed by the Head of the Public Service, the Acting Permanent Secretary, and Ms Thompson be provided to [with] them for review.

Also, the Commission agreed to defer a decision on the appointment to the post of Director until after Ms Thompson completes the six-month acting period, and the assessments have been reviewed."

17. The Applicant met with both Mr. Lortie and Mr. Farrow on 16 July 2018. PS Farrow said in his evidence that this meeting was to discuss the offer of a period of development and that both he and Mr. Lortie offered to support her during her acting appointment. Ms. Thompson was told that during this acting period a Professional Development Plan would be implemented to address the perceived issues relating to her managerial style. It is the Applicant's pleaded case that it was also communicated to her that if she came to successfully complete the development plan during the prescribed acting period she would be appointed to fill the substantive post.

August 2018

18. On 17 August 2018 the Applicant emailed Mr. Lortie for clarification regarding the matter of her acting as the Director. By a same day email Mr. Lortie replied:

"...What I was told, is: that after the 6 month period, the PSC will determine if they are satisfied and if most of the issues have been addressed.

If it is positive and then appoint you to the post a Probationary Period will still follow.

Also, DHR were asked to prepare a developing plan, tailor made for you, to address these specific points and make sure objectives and goals are clear.

We should met them when the plan is ready and go over it point by point and make sure will all agree on the objectives.

I am expecting the document within the next two weeks.

To allow that to formalize, will push back the starting date October 1st, 2018.

Let me know if you have any question, and feel free to come and meet anytime next week to talk about it....”

19. On Monday 20 August 2018 the Applicant replied as follows:

“...Thank you for your response.

I welcome the invitation to meet with you and Chris [APS Farrow] tomorrow to discuss further. I would like to know the specific issues that have arisen, so that I can understand what is needed to adjust my management style.

Also, I would like to know if the development plan will include opportunities for further training and mentoring where it is felt that my management style requires attention.

With thanks...”

20. In a same-day reply, Mr. Lortie informed the Applicant that he had received a draft training plan on the day prior and that further training and mentoring would in fact be included in the plan which would be finalised later that same week. The Applicant by emails sent on 22 and 28 August 2018 followed up with Mr. Lortie asking for a meeting date to be confirmed. While Mr. Lortie advised the Applicant that he was off island on 28 August, he stated that he would follow up with her on the following day, 29 August, when he was due to return to office. However, without contacting the Applicant directly, Mr. Lortie wrote to the PSC via Ms. O’Brien by letter dated 29 August 2018 stating:

“..."

Dear Madam Secretary...

I write further to your letter dated 9th July 2018 regarding the recommendation for the appointment of a new Director in the Parks Department.

In this letter concerns were raised regarding the management style of the recommended applicant, Ms. Terry Lyn[n] Thompson:

“Based on the PSC having information on a previous matter between the recommended candidate and an employee, Mr. Farrow was asked to share feedback regarding Ms. Thompson’s managerial style and her suitability. Mr. Farrow indicated while he was

Acting Permanent Secretary, he was aware of some of the challenges Ms. Thompson has faced, including employee feedback and union matters. Mr. Farrow, however, indicated he believed these were challenges Ms. Thompson could overcome.

As a result of the discussion with Mr. Farrow, in conjunction with information shared previously, the PSC felt having Ms. Thompson act for a period of six (6) months will allow adequate time for the Head of the Public Service to ensure the Acting Permanent, assesses the challenges related to Ms. Thompson's managerial style and whether they can be successfully assessed and remedied."

After receiving this letter, both Chris Farrow and I met with Ms. Thompson, to advise her of the outcome of the recruitment process and the offer of an acting appointment. We discussed the concerns about her management style and attitude. She said she was not aware of any major issue and requested more details. We were very transparent with her and the concerns.

We then put the start date to 4th September to get some time to complete a training programme for her.

The Department of Human Resources provided a good training plan. This plan will be finalized by the end of August 2018. I contacted Ms. Thompson to let her know that we will meet with her to discuss the training plan, and her start date would be pushed back to the 1st October 2018.

After our first meeting with her, it was apparent that it was becoming common knowledge that Ms. Thompson was to be the new Director of Parks. It was reported to me that she subsequently had discussions with workers at the roundabout at Trimmingham Hill about the botanical plant layout. She apparently directed them in work matters, giving them orders as she will be the next Director.

Over the following weeks I received many complaints from staff, BIU workers and one official letter from the BPSU that was received by Dr. Binns. I met with the BPSU, BIU as well as staff of the Parks Department to identify more precisely the problems with her management skills which would assist in developing the training plan.

After all those meetings, I have not received any positive comments on her past management practices. Comments received, were:

- Exhibits an unprofessional behavior towards staff in a manner which is disrespectful, aggressive, condescending and vindictive.*
- Talks down to staff.*

- Exhibiting bullying, discriminating and victimizing behavior towards employees.*
- Unwilling to listen to staff.*
- Talks derogatorily about staff in the presence of other staff.*
- Not a team player.*
- Has leadership and management style which is autocratic and dictatorial.*
- No team spirit at all.*
- Working environment is unpleasant as a result of the mistrust, and confrontational atmosphere which is not conducive to the productive professional operation of Parks*

After listening to the comments, I asked the Union and staff to give her another chance and be open to a new start, as everyone deserves a second change [sic] [chance]. I was told that: she had many chances in the past, and she has no qualities to be in this position.

They told me that they are now in a healing process and are moving forward slowly, and are going in the right direction, It is apparent from these meetings that this is not the time to bring her back. If we do that, the staff will fight against this decision.

From what I can see now, if we appoint Ms. Thompson as Director of Parks, it will be an intense uphill battle. She will have no support from inside the department or the Unions.

My conclusion following the meetings and conversations regarding the appointment of the new Director, is that we cannot move forward with the appointment of Ms. Terry-Lynn Thompson as the new Director. The issues are severe, and 100% of the comments that I collected were negative, very strongly negative.

I think that Ms. Thompson, after completing a successful training programme, has the potential to be the Director of Parks, but the present timing is not good. She cannot succeed, in the present environment. She really needs to get an appropriate training plan and be mentored. It will not take a month. It will take some time, and I think that the proposed training plan to her, if she subscribes to it, can be beneficial for her career.

My recommendations are:

- i. Abort the current recruitment process*
- ii. Continue with Mr. Stephen Tucker as Acting Director for a minimum period of six to 12 months*

I am available with Chris Farrow to meet the Public Service Commission to discuss in further details.

Respectfully,

*Yves 'Bob' Lortie
Acting Permanent Secretary/Chief Engineer"*

21. Neither a copy of the above letter nor the fact of the letter was disclosed to the Applicant. Having heard nothing further from Mr. Lortie since he advised that he would be off island on 28 August, Ms. Thompson sent a chaser email to Mr. Lortie on 31 August 2018 reiterating her request for a meeting date. Moments thereafter Mr. Lortie replied, proposing to meet on Wednesday 5 September or Thursday 6 September.

September 2018

22. On Tuesday 4 September the Applicant emailed Mr. Lortie asking for confirmation of the meeting time. However, the Applicant was not afforded the courtesy of a reply. Against this background, the Applicant wrote to the Human Resource Manager, Mrs. Toni Fox, seeking her assistance. On Wednesday 5 September 2018 the Applicant wrote:

"Good morning Ms. Fox,

I attempted to reach you by phone and understand that you are in training this morning.

Having reached out to Acting PS Lortie to advance this meeting with very little success, I write seeking advice. I refer to the email of August 31st below proposing a meeting Wednesday/Thursday of this week to discuss a development plan. I was originally told by Acting PS Farrow and Acting PS Lortie that the start date would be the first week of September, and further to that, the first week of October. I am concerned that pattern will continue and there will be no progression.

I would appreciate any advice you can offer.

With thanks..."

23. A response from Ms. Fox came over a week later stating:

"Good day Ms Thompson:

Your email is noted and hereby acknowledged. Given the changes in Permanent Secretary assignments please contact the new Permanent Secretary for the Ministry of Public Works.

Kind regards,"

24. Mr. Rochester, having previously been appointed as a PS to the Ministry of Public Works in March 2013, returned to the Ministry as the new PS on 10 September 2018. In his affidavit evidence of 28 June 2021, Mr. Rochester deposed [5-7]:

“5. During handover briefings with the outgoing A/Permanent Secretary, Mr. Christopher Farrow, and A/Permanent Secretary Yves Lortie I was advised there were some issues with the possible appointment of Ms. Terry-Lynn Thompson, as Director of Parks relating to her leadership style, which was perceived by employees to be very autocratic. I was advised that Ms. Thompson’s attitude towards staff was perceived by them to be demeaning and unsupportive such that there was a lack of trust amongst the rank and file that was cause for concern.

6. On September 13th 2018 I received an email from Ms. Thompson who requested an update on the status regarding her acting appointment to the Director of Parks position. I responded advising it was my understanding that the matter was with the Public Service Commission.

7. Over the ensuing weeks I was approached by many staff from the Department of Parks who had expressed concerns consistent with the concerns mentioned above that if Ms. Thompson were to be appointed to the post, there would be a walkout of the employees...”

November 2018

25. In November 2018 Mr. Rochester met with the Applicant about the concerns raised by members of the Department. He also met with various union representatives regarding these staff complaints. In his evidence, Mr. Rochester said:

“8. Sometime around the first week in November 2018, I reached out to Ms. Thompson to schedule a meeting to provide her an update. At that meeting, I recall advising Ms. Thompson of the concerns raised by the staff but at that time I believed I could manage the staff by working with her during the six (6) month period which was to be a development period. However, I did not advise Ms. Thompson that she would be appointed to the post as this is simply not my decision to make but I advised her that I would make a recommendation to the PSC after the acting period had concluded.

9. At this meeting, I also advised Ms. Thompson not to share the details of this meeting as it would only make it more difficult for me as the new Permanent Secretary since the rank and file had not progressed these concerns to their respective Trade Unions.

10. During the month of November 2018 I met with union member including shop stewards of the respective trade unions on two occasions to discuss the possible appointment of Ms. Thompson to the post. At both meetings I was vehemently reminded of the concerns about Ms.

Thompson's leadership style and how staff felt intimidated by her. I was reminded that there would be some consequences if she was appointed to the post which in no uncertain terms meant a walk out of the staff of the Department, which could escalate beyond.

11. It was a result of these concerns expressed by staff regarding Ms. Thompson being appointed to the post that I determined this was an obstacle I could not overcome. I was not about to expose the Government of Bermuda to potential labour withdrawal..."

26. Ms. O'Brien's sworn evidence was that on 23 November 2018 the PSC was informed by letter that the Mr. Rochester would be withdrawing the application for the post of Director to be filled and that this was supported by the Head of the Public Service. (Notably, the fact of this letter was not mentioned in Mr. Rochester's affidavit evidence.) Ms. O'Brien said that PS Rochester's withdrawal letter brought the application process to an end and the withdrawal by the Commission of its recommendation for the Application to be confirmed as the Acting Director for the 6 month development period. The 23 November letter from PS Rochester provided:

"...You may recall at the December [sic] [November] 5th 2018 meeting with the Public Service Commission, I committed to meeting with the respective trade unions (BPSU/BIU) regarding the possibility of having Ms. Terry Lynn Thompson act as the Director of the Department of Parks for a six (6) month period while on a development plan.

It was my view from these discussions that my approach was acceptable and that I would have the support of unions based on the plan to work with Ms. Thompson through the challenges that were raised prior to my coming in the Ministry. Somehow, this information has found its way into the rank and file.

To that end, it has become increasingly apparent over the last week that bringing her on board in any capacity will be very contentious- and I have been made to understand that there is even a petition circulating among the Parks Department that has raised some 80 signatures in protest of Ms. Thompson acting.

Therefore, I would like to withdraw the application for the post of Director of the Department of Parks at this time until further notice. I have conferred with the Head of the Public Service who has no objection to this course of action.

Should the Commission wish to discuss further, feel free to let me know."

27. Ms. O'Brien produced the PSC's written response to PS Rochester. The body of that letter states:

“At its meeting held on Monday, 26th November 2018, the Public Service Commission noted your correspondence dated 23rd November 2018, regarding the matter of the recruitment to the post of Director, Department of Parks.

The Commission wishes to thank you for attending the meeting to discuss the matter.

In addition, the Commission agreed the recommendation from the former Acting Permanent Secretary should be withdrawn.

It was also agreed its recommendation to have Ms. Thompson act for six (6) months to develop her for consideration for appointment to the post be withdrawn.”

28. PS Rochester stated in his evidence that he informed the Applicant of the Union’s concerns and that her offer for an acting appointment would be withdrawn. He said [12]:

“12. I recall communicating with Ms. Thompson to advise her of the concerns with the union and that, as a result, the acting appointment would have to be withdrawn as this was uphill battle that I simply was not going to be able to overcome. She was never in the Acting post when I came on board at PS. My meetings with her were in her office at DENR.”

29. However, by email sent on 30 November 2018 the Applicant wrote to PS Rochester requesting a detailed explanation for the withdrawing of the offer for the acting appointment. Her email stated:

“Good morning PS Rochester,

On the heels of successive meetings with you in discussion of my placement at the Director of Parks as the Acting Director (scheduled for December 10th), with the following probationary period for the Director of Parks post as per the PSC recommendation, I would like to request for the reason for the withdrawal of this offer.

When we met this Monday, November 26, 2018 you informed me that you had ‘bad news’ and that I would have to “stand down.” You proceeded to talk about how the situation had escalated, however, the exchange was obscure, the particulars of the matter were not disclosed and from the bits and pieces shared I recall responding to you that, “It sounds there’s a lot of drama”, and you agreed. I was not given any specifics as to what had transpired and it was not clear how this outcome was any fault of mine.

It remains unclear to me why the offer to act as the Director of Parks was withdrawn, and again I seek your response for clarity.

We met at my substantive department and amongst other things, discussed;

- 1. My six month acting at Parks, commencing December 10th; prior to the beginning of the six month probation period in the Director post;*
- 2. The professional development plan (discussed, reviewed and signed off by both of us on November 20th);*
- 3. Some of the issues at the department and how we would collectively address them;*
- 4. Me sharing with the staff my approach to developing the Bermuda National Parks Plan as presented at my interview for the Director post;*
- 5. Your detailed plan for transitioning the Acting Director out and placing me at the Department of Parks; (including you informing the respective Unions of this plan Friday, November 23; you informing the Acting Director on Monday, November 26, and the staff 30 minutes later; your plan to have Craig Burt act as the Director the first week of December; and to have me commence at Parks on December 10th).*

On Tuesday November 27th I received a generic response from the Department of HR thanking me for attending the interview in May for the Director post and informing me that I was unsuccessful in securing this post.

I appreciate your attention to this request.

*Regards,
Terry Lynn Thompson”*

30. PS Rochester responded to this request at the close of business on the same day with the following few lines:

“Good afternoon Ms. Thompson,

Thanks for your detailed email below. The short answer is- the issues raised prior regarding you approach, lack of confidence, trust, abrasiveness, talking down to staff etc. where [sic] something I thought could be worked through hence my efforts.

However, as these issues appear insurmountable, the Acting opportunity was withdrawn.

*Regards,
RR”*

The Relevant Constitutional and Statutory Framework

The Constitutional and Delegable Powers of the Governor

31. Section 17(1) (Schedule 2, Chapter II) of the Bermuda Constitution Order 1968 (“the Constitution”) establishes the legal existence of the Governor of Bermuda. It is prescribed under section 17(2) that the Governor shall have any powers as may be conferred on him (or her) under the provisions of the Constitution or any other existing law.
32. The general exercise of the Governor’s functions are set out under section 21 of the Constitution. Under section 21(4) the Governor is not obliged to accept the advice of any person or authority (other than the Cabinet) with whom he is obliged to consult and section 21(6), on its face, is an interdiction against the Court’s adjudication over any question as to whether the Governor has exercised his or her function after the consultation required by the Constitution or any other law. Those provisions read as follows:

“21(4) Where the Governor is by this Constitution or any other law directed to exercise any function after consultation with any person or authority other than the Cabinet he shall not be obliged to exercise that function in accordance with the advice of that person or authority.

21(6) Where the Governor is by this Constitution or any other law directed to exercise any function in accordance with the recommendation or advice of, or after consultation with, any person or authority, the question whether he has so exercised that function shall not be inquired into in any court.”

33. The Governor is given a general power to constitute offices and make appointments in addition to a power to remove appointed persons or to take disciplinary action pursuant to section 25 of the Constitution which provides:

“Powers to constitute offices and make appointments, etc.

25 Subject to the provisions of this Constitution and of any other law, the Governor, in Her Majesty’s name and on Her Majesty’s behalf, may— constitute offices for Bermuda and make appointments, to be held during Her Majesty’s pleasure, thereto; and remove any person so appointed or take such other disciplinary action in relation to him as the Governor may think fit.”

34. Section 83(1) of the Constitution:

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. 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.*

35. The offices referred to in section 82(2) apply to the posts assigned to permanent secretaries and heads of government departments where the Governor's consultation with the Premier is required. Section 82(4)(c) (the office of Secretary to the Government) is not relevant for present purposes. Section 82(1)-(2) provides:

82 Appointment etc., of public officers

(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.

(2) Before the Public Service Commission recommends to the Governor the appointment of a person to the office of a permanent secretary or head of a department of government the Commission shall consult the Premier.

The Constitutional and Statutory Role of the Public Service Commission

36. Section 81 of the Bermuda Constitution establishes the Public Service Commission which may in accordance with section 84(6) regulate its own procedures. Further to the provisions ensuring the independence of the members appointed to the PSC, section 84(7) of the Constitution reinforces the overall independence of the PSC: "... *the Public Service Commission shall not be subject to the direction or control of any other person or authority.*"

Substantive Appointments

37. Subject to exceptions which need not be expounded in this Judgment, Regulation 10 generally requires the PSC to advertise all vacant posts in accordance with the advertising procedure prescribed under Regulation 11. Once the applications have been submitted, the HOD is then required to review those applications and make a report to the PSC stating whether or not he is recommending an applicant for appointment, and if so, identifying the recommended applicant.

38. In keeping with its autonomous model, section 84(6) of the Constitution entitles the PSC to regulate its own procedure. Regulation 5A of the Public Service Commission Regulations 2001 (“PSC Regulations”) affirms that the PSC’s general powers shall be those which are “*reasonably necessary or expedient to enable the Commission to carry out the functions and duties imposed upon the Commission under the Constitution*”. Regulation 6 grants the PSC further powers to require any officer to appear before it to give sworn evidence on any matter with which the PSC is properly seized. This may also entail the production of any relevant documents or other information which the PSC may require. Additionally, under regulation 14 the PSC is empowered to require an applicant to attend for an interview, examination and/or tests where the PSC considers it necessary to establish that the applicant is so qualified and capable of performing the functions of the office to which the application relates.
39. The PSC has a statutory duty to consider all applications received within a reasonable timeframe. In respect of appointments of persons to the office of PS and HOD, the PSC’s role is advisory in that it is duty-bound to consult with the Premier and to make its recommendation to the Governor who will be the sole guardian of the decision on whether to appoint any particular candidate to the post.

Analysis and Findings

The Decision of the PSC to have the Applicant act as the Director of the Department

40. The Applicant seeks a declaration that the PSC’s decision for her to act as the Director before (or in lieu of) a substantive appointment is *ultra vires*, unlawful, void and ineffective. In part the Applicant’s case is that an acting appointment can only be made by the Governor on the recommendation of the PSC after consultation with the Premier.
41. In these proceedings, the construction of section 82(1) and section 82(2) of the Constitution is pivotal as the Applicant invites this Court to find, as a matter of law, that the decision to appoint, discipline or remove an acting HOD is vested solely in the Governor and that the Governor is prohibited from delegating that power to the PSC or any other authority or person.
42. As a starting point, I should first determine whether the Governor’s power to make appointments to public offices under section 82(1) includes the power to make acting appointments to public office. Clearly the Governor has the power to exercise disciplinary control over a person acting or holding the substantive post of a public officer in addition to the power of removal, so long as the Governor has received the recommendation of the PSC. However, the wording of section 82(1) does not plainly state that the Governor also has the power to make acting appointments.

43. Be that as it may, it would, of course, be a real oddity for the Governor, having the power to make substantive appointments and the power to remove and exercise disciplinary control over acting appointments under section 82(1), to be absent of the power to appoint persons to act in a public office. It seems to me that if the intended construction of section 82(1) was to exclude from the Governor the power to make acting appointments, it would plainly say so. It does not. To my mind, the only reasonable interpretation which can be made of the Governor's powers under section 82(1) is that there is also a power to make acting appointments. Indeed the Governor's powers to make acting appointments under section 82(1) is recognized by Regulation 3 of the Public Service (Delegation of Powers) Regulations 2001 ("Delegation Regulations") as read with paragraph 8 under the Schedule where the Governor's power under section 82 of the Constitution to make acting appointments is expressly delegated. I am thus satisfied that the Governor is so empowered.
44. Having determined that the Governor does in fact possess the power to make acting appointments under section 82(1), I must now decide whether an appointment of a person to the office of an HOD under section 82(2) also applies to the Governor's power to appoint an acting HOD. For context, the appointment process referred to in section 82(2) requires the PSC to consult with the Premier before the PSC makes its recommendation to the Governor on the appointment of the relevant person to the office of HOD or PS. In my judgment, this makes it sufficiently clear that subsection (2) is reserved only for the Governor's powers of appointment to the person who is to be the substantive post-holder of HOD or PS. It is evident that subsection (2) is not concerned with all of the powers referred to in subsection (1). For example, subsection (2) makes no mention of the Governor's powers of disciplinary control or removal. So, if subsection (2) was intended to extend to the Governor's power to make acting appointments, or to exercise disciplinary control or remove a post-holder, it would say so. It does not so say. More so, any presumption of the inclusion in subsection (2) of these additional powers conferred by subsection (1) would operate to produce an absurd result. The absurdity would be the immovable requirement for the Premier to be consulted by the PSC on each and every occasion that it is proposed that a person acts in the office of HOD or PS, whether it be for a day, a month, or a year. To my mind, any such burden on the process of making acting appointments would be expressly and clearly drafted on the wording of subsection (2). This is not the case.
45. As already noted, the Governor's delegable powers to make acting appointments under section 82(1) of the Constitution are conferred on the PSC via the Delegation Regulations (which were made by the Governor in accordance with the recommendation of the PSC). Under paragraph 8 of the Delegation Regulations, the Head of the Public Service is given the power to make acting appointments in respect of any public office within the Civil Service to the extent that the post is vacant or if the post-holder is on leave and there is a legal requirement for the post-

holder to perform certain functions. However, where the acting appointment exceeds a period of six months, the approval of the PSC is required.

46. For these reasons, I find that the PSC's decision for the Applicant to be appointed to act as the Director was neither *ultra vires*, unlawful, void nor ineffective because the PSC had the delegated power to approve acting appointments exceeding a six month period.

Whether the Applicant had a Legitimate Expectation to be appointed as the Director

47. Ms. Thompson's Counsel argued that she had a legitimate expectation to be appointed in the post of Director principally because (i) at the close of the recruitment process APS Farrow and the Interview Panel unanimously recommended her for appointment to the exclusion of any other candidate; (ii) she had been given successive acting appointments in the office of Director for an approximate 9 month period between July 2017 and April 2018 and had impressive performance appraisal reports evidencing her overall competency and (iii) she was again offered a 6 month acting appointment in July 2018 as a preparatory step towards substantive appointment.
48. Mr. Myrie on behalf of the Second and Third Respondents, correctly submitted that any statement or representation giving rise to a legitimate expectation must be "clear, unambiguous and devoid of relevant qualification", citing Hellman J's judgment in *Edwards v Ministry of Finance et al* [2013] Bda LR 24².
49. The first two parts of the Applicant's claim that she had a legitimate expectation for appointment is built on the notion that the Applicant was proven and confirmed to be fit and qualified for the post. As thoroughly argued by Mr. Diel, there is no evidence of any wrongful or negligent conduct from the Applicant between May 2018 when she was unanimously recommended for the post and 23 November 2018 when her offer to act for 6 months was withdrawn.
50. Mr. Horseman for the PSC, however, pointed out that the PSC communicated to the Applicant via, PS Rochester, that in November 2018 it had become increasingly apparent that her appointment to the post would be 'very contentious'. Mr. Horseman turned to PS Rochester's evidence of his November 2018 meetings with various union members and trade union shop stewards by which PS Rochester was 'vehemently reminded' that the staff members of the Department felt intimidated by Ms. Thompson and had concerns about her leadership style to the point that they would stage a walk-out if she was to be appointed. According to PS

² The decision in *Edwards v Ministry of Finance et al* [2013] Bda LR 24 was overturned in part by the Court of Appeal in *Edwards v Ministry of Finance et al* [2014] Bda LR 29. However, Hellman J's statement of legal principle on the subject of legitimate expectation was not the subject of any criticism from the Court of Appeal.

Rochester's evidence, he advised the Applicant of these concerns raised. The Applicant however complains that she was not provided with any particulars of these staff complaints and was not afforded a fair opportunity to address any of these allegations made.

51. Effectively, on this portion of the Applicant's case for legitimate expectation this Court is invited to assess the Applicant's suitability for the post on the strength of her previous acting appointments and her reports of performance appraisal. The Applicant argues that little or no regard should be given to the anonymous and bare complaints made by staff which are undermined by the affidavit evidence of Ms. Dawn Santucci-Smith. However, in my judgment, this Court ought not to usurp the function of the PSC or the Governor only to impose its own view as to how an application for an acting or substantive appointment for public office should be determined. In any such instance, the Court will only intervene as necessary and appropriate where there has been a perverse and obvious error of law.

52. In *Police Constable GA v The DPP et al* [2021] SC (Bda) 1 Civ (5 January 2021), per Hargun CJ, the Court was concerned with the constitutional role of the Director of Public Prosecutions under section 71A. In *Commissioner of Police v Public Service Commission; Oswin Perriera (Interested Party)* [2021] Bda LR 11 I compared the constitutional independence of the Director of Public Prosecutions ("DPP") to that of the PSC in considering the role of the Court when reviewing a decision made by the PSC. In that case I cited *Police Constable GA v The DPP* where Hargun CJ explained the narrow circumstances under which the Court would interfere with any decision made by the DPP in carrying out a constitutionally independent remit. He said [18]:

"18. This Court has no jurisdiction to intervene simply because it disagrees with the decision of the DPP in the sense that if the Court itself was exercising the discretion, it would have made a different decision. In order for the Court to intervene, leaving aside cases of obvious errors of law, the decision has to be categorized as perverse in the sense that no prosecutor would have made the decision that is sought to be impugned in the judicial review proceedings."

53. Mr. Diel would invite this Court to find that there has indeed been a real error of law. This, the Applicant says, occurred when the Applicant's application, which had been unanimously supported by the Interview Panel as the sole suitable candidate, was not the subject of any consultation with the Premier or a recommendation to the Governor.

54. On the minutes of the PSC's 2 July 2018 meeting, it is evident that the PSC had information in their possession relating to a previous matter which caused them to seek further feedback from Mr. Farrow about the Applicant's managerial style and suitability. Having made enquiries

of Mr. Farrow, the PSC clearly considered their concerns to be grounded. I shall pause here to consider the lawfulness of the role played by Mr. Farrow in the role of the Acting PS.

55. In this case, controversy has arisen on the question of who the HOD is for the Department. In support of the Applicant's pleaded case, Mr. Diel pointed to a 1 April 2015 PATI Information Statement for the Ministry of Public Works [Section H, p.7] where a former Director of Parks is described as the "Head". This, on the Applicant's submissions, is reinforced by a 'Department of Parks Organization and Staffing' hierarchical chart where the Director of Parks holds the top position.
56. In the affidavit evidence of PS Rochester [2] he described the remit of the PS as the officer responsible for "*...the overall administration of the Ministry, which includes the coordination of Ministry human resources and labour relations (about 700 staff), Capital and Operational Budgets among many departments, quangos and the municipalities.*" Nowhere in PS Rochester's evidence or in any other evidence before me is there a clear statement asserting that the PS or any person, other than the Director, is the HOD of the Department.
57. Chapter IV of the Constitution governs the executive branch of the government. Section 61(5) of the Constitution provides that a person holding the office of a PS shall have supervisory control of each department of government which is generally directed and controlled by a Government Minister. However, it is implicit from section 82(2) of the Constitution that the office of HOD is distinct from the office of PS. I would also take notice that most, if not all, government departments have a director or other similar-type post which is recognized and operates as the HOD in addition to a PS who has supervisory control over the Ministry to which various government departments belong. It thus follows that if it is to be taken that any PS has supervisory control over one or more departments in a ministry in addition to the operational control as an HOD, there should be clear evidence affirming that anomaly, supported by statute or other authoritative documentation. Absent any such evidence to the contrary, it seems to me that the legal presumption must be that the Director of the Department is in fact the HOD.
58. That being said, in this case the procedural steps required of the HOD under regulation 10(2) of the PSC Regulations could not have been carried out by the Director of the Department as that post was vacant. Therefore, the requirement for a report to be made to the PSC stating whether or not any particular applicant would be recommended for appointment had to be carried out by another officer. In these circumstances, I see no cause for criticism that the function of HOD in this narrow respect was carried out by the PS. This is consistent with the policy outlined in the Department of Human Resources Recruitment Code [7.0 Step 1 – Recruitment Request].

59. So, the information from APS Farrow was treated as part of the report the PSC was entitled to receive from an HOD under regulation 10(2) of the PSC Regulations. The PSC's acceptance of APS Farrow's evaluation was not, in my judgment, unfair or tantamount to an error of law. I make the same finding of the PSC's decision to appoint the Applicant to act in the office of DOP as a preparatory opportunity for substantive appointment. This obviously had the effect of prolonging this portion of the recruitment process by six months. This delay was preparatory to the PSC forming an ultimate view of the Applicant's suitability prior to any consultation with the Premier and recommendation to the Governor. In my judgment, given the controversy lurking over the subject of Ms. Thompson's suitability, the PSC's decision for the Applicant to be offered a six month acting period to showcase her suitability was not unfair nor did it amount to any mistake of law or miscarriage of justice.
60. The next issue is whether the PSC, had a duty to allow Ms. Thompson to act during the 6 month period once it had made her the offer of an appointment to act as Director. This is tied in to the question as to whether the PSC were wrong in law to have brought the application and recruitment process to an end upon receipt of Mr. Rochester's November 2018 request for a withdrawal of the application for the post of Director to be filled.
61. To take a few steps backwards, I ask myself whether the PSC would have been entitled to reject Ms. Thompson as a suitable candidate had the concerns raised by Mr. Rochester in November 2018 been made known to the PSC prior to 2 July in the form of the report made under Regulation 10(2). So, had the PS (acting as the HOD in this respect) initially stated in his report to the PSC that he was not recommending the Applicant, would the PSC have been wrong to side with the PS and refuse its recommendation of support of the Applicant? Before considering this question, I must acknowledge that both Mr. Farrow and Mr. Rochester formed part of the Interview Panel. This means that it is a near certainty that any position taken by the Interview Panel would have aligned with the views expressed in the HOD's regulation 10(2) report. (This Court has not been invited to opine on the fusion between the Interview Panel and the HOD, so I make no criticism of the vinculum between the two bodies.) The point is that if the HOD's original Regulation 10(2) report opposed Ms. Thompson's candidacy, the Interview Panel would have also likely denied her suitability and the PSC would have been well within its remit to accept those objections in forming its own decision as to the recommendation to be made in respect of Ms. Thompson's application for appointment.
62. Effectively, the criticism made of the PSC is that it was unfair for them to permit the HOD (Mr. Rochester in this respect) to revisit the position originally reported by Mr. Farrow under Regulation 10(2), particularly because an offer of a preparatory acting appointment had been made and communicated to Ms. Thompson in July 2018. However, in my judgment the PSC was not procedurally bound to follow the advisory conclusions of the PS or the Interview Panel

no more than it was bound to confirm its support of Ms. Thompson's application merely because an offer of an acting appointment had been made.

63. That being said, I do find that the withdrawal of Ms. Thompson's confirmed offer to act as the HOD was unfairly renounced as she was not afforded a proper opportunity to address the grounds relied on in the recanting of the offer. While the PSC have a constitutional right to regulate its own procedure, it is nevertheless bound by a common law duty to act fairly and this Court, in the exercise of its inherent jurisdictional powers, will construe any statutory duty that procedurally governs the PSC to contain a duty to act fairly and in accordance with the principles of natural justice. Fairness is a tenet of natural justice upon which constitutional law was built and there can be no dispute that a duty to conform to those principles are etched on the PSC in its execution of duty. As put by the Court of Appeal of Jamaica in *Kissoon v Manning and Public Service Commission* Civil Appeal No 22 of 2006 [41]:

"41. The Court may read into a statute the necessary procedural safeguards to ensure the attainment of justice. This is so even if the act sets out a procedure to be followed. In that case the Court will require that procedure to be followed but will import additional safeguards if necessary in the interest of justice. In Lloyd v. Mc Mahon [1987] 1All E.R. 1118, 1161 Lord Bridge of Harwich said:

"...it is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the Court will not only require the procedure prescribed by the statute to be followed, but will readily import so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of justice."

64. The PSC were well aware of the reported concerns lurking over the Applicant's ability to manage the Department when they settled on its decision for her to act for a 6 month testing period. So any sudden escalation of its concerns which fed into the decision to withdraw the acting appointment ought to have been outlined to Ms. Thompson to allow her to formally address and / or defend the intended withdrawal.
65. I now go on to consider the effect of Ms. Thompson's retracted acting appointment. It is clear to me that the acting appointment was an opportunity for Ms. Thompson to prove herself suitable for a substantive appointment as Director. It was implicit in the PSC's offer, if not expressed, that had she successfully performed in the role of acting Director for the 6 month period, the PSC would have supported her application for appointment and consulted with the Premier in recommending her appointment by the Governor.
66. The converse is equally so. Had Ms. Thompson not been shown to be an effective acting HOD during that 6 month period from July 2018, she would not have been recommended by the PSC for appointment. However, in such a case, the PSC would have still been under a duty to consult with the Premier to make it known that it would not be supporting any of the applicants for the post. This should have then been followed by a communication to the Governor recommending

against the appointment of the applicants considered. Ultimately, the decision on appointment would have then fallen to be made or not to be made by the Governor. For these reasons, it cannot be said that the Applicant had a legitimate expectation to be appointed to the post of Director.

Whether this Court has the jurisdiction to direct the Appointment of the Applicant

67. The Applicant's Counsel invited this Court to order that the Applicant be appointed to the office of Director on or before a fixed date. I am not troubled in refusing this part of the application as it is plain to me that this Court has no power to usurp the constitutional powers of the Governor to make the ultimate decision as to whether the Applicant or any other person is to be appointed to the post of Director. After all, this is the very thesis of the Applicant's submissions to this Court.

Whether Damages are available in Judicial Review Applications

68. RSC Order 53/7 provides:

"53/7 Claim for damages

On an application for judicial review the Court may, subject to paragraph (2) award damages to the applicant if—

(a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and

(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages."

69. RSC O. 53/7(b) is merely a procedural provision which does not give rise to any special cause of action for damages in cases of judicial review. A claim for damages will only succeed if damages would be recoverable on the same facts in a private civil law action. This, as Mr. Horseman pointed out, is reinforced by the writings of Halsbury's Laws of England (Volume 61A (2018)) ("Halsbury's") in its reference to the provision on damages for judicial review under CPR 54.3(2). Halsbury's [141] provides (footnotes not included):

"On an application for judicial review, the court may award damages providing that a claim for damages was included in the application and, if the matter had been brought by an ordinary claim, damages would be available. This provision is procedural in effect and does not create any new substantive right to damages. Rather, it enables a claim for damages to be sought in an application for judicial review where a private law cause of action, such as negligence or

false imprisonment, is made out against the public body. A claim for damages cannot be sought alone on an action for judicial review but must combined with a claim for another remedy such as one of the prerogative remedies or an injunction or declaration. To recover damages a recognized cause of action must be pleaded and proved. It will often be appropriate for the court, having determined the public law issues, to transfer the issues relevant to private law liability to proceed as if begun under the rules governing commencement of proceedings generally..."

70. In this case, the facts do not give rise to any civil law cause of action which would entitle the Applicant to damages. In its simplest form, the Applicant's pleaded case is that her application for employment in a particular role was unfairly and wrongly refused on the basis that the PSC's decisions were *ultra vires*. Had the Applicant's grounds of complaint alleged that the refusal amounted to a tortious breach of duty or breach of contract, then it would have been open to the Applicant to seek damages in the same way that it would otherwise be open to her to do so in a private law civil action. However, in this case, no such causes of action were pleaded. For these reasons, I find that this Court has no jurisdiction to award damages.

Conclusion

71. I find, as a Declaration of this Court, that the Applicant did not have a legitimate expectation to be appointed to the post of Director.

72. However, by a Declaration of this Court, I find that the PSC acted unfairly in withdrawing the offer made to the Applicant in July 2018 to act as the Director for a 6 month period without first informing her of the grounds on which it proposed to do so and without allowing her the opportunity to make representations on those grounds.

73. The PSC shall inform the Applicant within 21 days of this judgment, the reasons for the withdrawal of its offer for her to act in the post of Director for a 6 month period.

74. The Applicant shall then be afforded a 14 day period within which to respond to the information received.

75. Thereafter, the PSC shall form a recommendation (for or against the Applicant) in consultation with the Premier. For the avoidance of any doubt, it may be open for the PSC to recommend

against the appointment of any and all of candidates for the post, so long as the final decision whether or not to make an appointment is vested solely in the Governor.

76. Given the passage of time since the recruitment process was aborted in November 2018, the post of Director should be promptly re-advertised if the Governor declines to appoint any candidate from the 2018 recruitment.
77. Unless either party files a Form 31D to be heard on the issue of costs within 14 days of the date of this judgment, I award the Applicant 70% of her costs in this action on a standard basis to be taxed by the Registrar if not agreed.

Wednesday 17 November 2021

**HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT**