IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 283 of 2011

LUIS GONZALEZ	**CLAIMANT**
AND	
DIRECTOR GENERAL OF STATISTICAL INSTITUTE OF BELIZE	**1st DEFENDANT**
STATISTICAL INSTITUTE OF BELIZE	**2nd DEFENDANT**
THE ATTORNEY GENERAL	**3rd DEFENDANT**

Hearings
2011
5th August
27th October
15th December
2012
26th January

Mr. Said Musa SC for the claimant.
Mr. Michael Peyrefitte for the 1st and 2nd defendants.
Mr. Nigel Hawke for the Attorney General.

LEGALL J.

JUDGMENT

The Facts

1. In September 2003, the Central Statistical Institute of Belize was a department in the Public Service of Belize and the claimant was

employed therein as a public officer. In December, 2006, the legislature enacted the Statistical Institute of Belize Act 2006, No. 9 of 2006 (the Act) which established, in replacement of the Central Statistical Institute, a new autonomous body known as the Statistical Institute of Belize (the Institute), a body corporate having perpetual succession and with power to acquire, hold and dispose of moveable and immovable property of any kind; and to enter into contracts; and may sue and be sued in its corporate name. The Act also gave the Institute the power to appoint officers and other persons to carry out its duties under the Act. The Director General of the Institute, subject to the Act and policy guidelines of the board of the Institute, has the authority to appoint such officers and employees of the Institute as may be necessary.

2. By letter dated the 15th March, 2007, the claimant was given, prior to the coming into force of the Institute, three options with respect to his employment. The first option was for him to accept terms of employment with the new body corporate, which included the carrying over of his years of service with the Central Statistical Institute, with full pension benefits accrued by the claimant due to his employment at the said Central Statistical Institute, and continuity of service. The other two options were to retire from the Public Service or to resign, in both instances with the payment of pension benefits. The claimant accepted option one and continued his employment with the Institute.

3. In March, 2011, the claimant held the post of Assistant Statistician II in the Institute and he was assigned to a branch of the Institute located in a building at Orange Walk Town. The building was not owned by the Institute, but by Mr. Alfredo Luna of Queen Victoria Street, Orange Walk Town who granted a lease for the premises to the government at a monthly rent of three hundred and fifty dollars. The government, on occasion, would be late in paying the rent; and in such instances, the Institute would pay the rent to Mr. Luna on the understanding that when the government paid the rent to Mr. Luna, he would refund the Institute. Rents for the months of December, 2010 and January, 2011 in the amount of $700 were paid by the Institute to Mr. Luna. The government subsequently and prior to 10th March paid the $700 rent to Mr. Luna, who claimed that he refunded before 1st March, 2010 the $700 to the claimant for the Institute in accordance with the arrangement. But by 10th March, 2010, the Institute did not receive the $700 repayment. An audit of the accounts of the branch of the Institute at Orange Walk, by the Finance and Administration Manager of the Institute, Mr. Harry Lui, revealed that the $700 were not refunded to the Institute, even though Mr. Luna on March 10, 2011 said he had paid the $700 refund to the claimant. The claimant was therefore called to the main office of the Institute at the town of Belmopan to meet Mr. Lui who enquired from the claimant about the $700 which Mr. Luna said he paid to him. The claimant told Mr. Lui he did not receive any money from Mr. Luna.

4. After some investigation of the matter, a meeting was held on 11th March, 2011 and attended by four persons – Mr. Lui, Mrs. Petillo-

Arzu, Human Resources Manager, Mrs. Requena, Administrative Officer and the claimant. A report of that meeting was tendered in evidence and signed by all the persons that were present at the meeting, including the claimant. But the claimant signed the report, with a condition that he did not agree with "point 2" of the report which stated as follows: "2. Mr. Luis Gonzalez had been asked several times by phone and face to face if Mr. Luna returned the $700 and the response was no." In another paragraph of the Report it states as follows:

> "Mr. Lui then asked "Are you admitting that Mr. Luna gave you the money?" Mr. Gonzalez nodded his head and said "Yes." Mrs. Lambey-Requena then asked Mr. Luis Gonzalez if he understood what Mr. Lui was asking him, to which he responded "Yes." Ms. Petillo-Arzu then said "Let me ask you point blank. Did you receive the $700 from Mr. Luna?" Mr. Gonzalez responded "Yes." Ms. Petillo-Arzu then said "You received the money from Mr. Luna and spent it?" Mr. Gonzalez said "Yes."

5. The claimant, in his evidence in court denied admitting at the meeting that he received the $700 and spent it. He said in evidence that having been repeatedly pressed and accused at the meeting that he had taken the $700, he signed the report admitting he received the money, in order to put the matter at rest and he would subsequently confront and deal with Mr. Luna. In other words, in order to settle the matter or to prevent difficulties including possible police action, he decided to

accept responsibility and agreed to repay the money, and he would deal with Mr. Luna afterwards. On 13th March, 2011 the claimant signed a document which stated as follows: "I Luis Gonzalez hereby authorize that the institute deducts $700 of my salary."

6. On 17th March, 2011, the claimant received a letter from the Director General of the Institute, Mr. Glenford Avilez as follows:

> "Dear Mr. Gonzalez,
> As you are well aware, on the 18th February 2011 the landlord of our Orange Walk office building, Mr. Alfredo Luna, gave you the sum of $700 to the accounts of the Statistical Institute of Belize (SIB) which you were required to send to our headquarters or deposit into the SIB's bank account.
> You failed to deposit the said amount into the SIB account and dishonestly misappropriated the said sum of $700 to your own use. Initially you denied receiving the amount from the landlord but later admitted to the theft of the said $700 belonging to the SIB.
> The above action on your part amounts to misconduct in the performance of your duties and also brings the SIB into disrepute.
> As stated in our Staff Operations Manual, Section 11.4, good and sufficient cause for dismissal included the following:
>
> - Misconduct whether in the course of or in relation to duties, inconsistent with the provision of the Manual
> - Fraudulent or deceptive behavior
> - For bringing the Institute into disrepute

> By reason of the foregoing, it is intended to dismiss you from the service of the Statistical Institute of Belize for misconduct in the performance of your duties, deceptive behavior and bringing the Institute into disrepute.
> You are hereby given an opportunity to show cause why you should not be dismissed from service. Any representation you wish to make must reach the undersigned no later than March ----, 2011 failing which it will be assumed that you have nothing to say."

7. Before he received the above letter, the claimant on 14th March, 2011 visited Mr. Luna at his home concerning the $700; and according to the claimant, Mr. Luna "continued to insist that he had made the payment to him." The claimant said that Mr. Luna suggested that the clamant checked his office, which he said he did, but without finding the $700. The claimant said he decided to search his vehicle, and according to him, in the "glove compartment, among my vehicle insurance papers, I discovered (14) $50.00 bills." The claimant continued at paragraph 8 of his affidavit as follows:

> "I immediately contacted Mr. Luna and informed him that I had found the money. I asked him if he had placed the money in the glove compartment of my vehicle. He did not recall doing so but was relieved that I had found the money. I then gave Mr. Luna a receipt for the payment leaving the date blank since neither of us could recall when the money was paid."

8. The receipt is for $700 but it has the date 28th January, 2011 which date the claimant said he did not insert. On the 18th March, 2011, the claimant replied to the letter above dated 17th March from the Director General. A part of his reply is as follows:

> "Dear Mr. Avilez,
>
> In reference to your letter, Ref: P/28/11(78) dated and received on the 18th of March of 2011. I want to state that I didn't personally receive the sum of $700 form Mr. Alfredo Luna. Therefore I couldn't have "dishonestly misappropriated" such money. I agree that I initially denied receiving the amount from the landlord but I didn't admit the theft of $700 belonging to the SIB. What I did agree was to pay the $700 and assume responsibility as if I had taken the money because there was surely a misunderstanding and I couldn't recall receiving the money but I knew once here I could clear the issue.
>
> I don't agree that my behaviour amounts to misconduct in the performance of my duties. About bringing the SIB into disrepute, I don't directly link my behaviour or actions to have caused this but rather the misunderstanding. I am also being accused of deceptive behavior, which may be linked to me accepting responsibility of receiving the money when I wasn't sure of how things happened, I did this to avoid further involvement of Mr. Luna in the event.
>
> I am confident that after you read letters prepared by Mr. Luna and Mr. Cunil you will have a clear picture of what had happened and that I wasn't denying receiving the money because I wanted to

> keep it, but rather because I actually didn't know about the money being in my procession.
> In my opinion I should not be dismissed from the service because although the money was in my procession all this time I didn't know about it."

9. In his reply, the claimant attached letters of the same date as the reply, from Mr. Luna and a fellow worker of the claimant, Mr. Rigobertha Cunil. In the letter Mr. Luna now claimed that he did not give the money to the claimant directly, but gave it to Mr. Cunil who was at the time in the claimant's motor vehicle with the claimant. This is how Mr. Luna explained it: "I saw Mr. Luis (the claimant) was busy so I handed the money to Mr. Cunil and told him to hand it to Mr. Luis and to tell him that I would go back to his office for a receipt …. My mistake was that time passed by and I never went back for the receipt. Apparently Mr. Cunil inserted the money in Mr. Gonzalez documents and forgot to tell him about it." Mr. Cunil in his letter supports Mr. Luna and stated as follows:

> "Now on the morning of March 18th we went to Mr. Luna and I reminded Mr. Luna, that he had handed me the money and not Mr. Gonzalez personally as he had previously stated. Mr. Luna agreed to recall the incident now and apologized to Mr. Gonzalez for what he had caused. We both agreed to write a letter to you explaining the misunderstanding."

10. The letter from Mr. Cunil and Mr. Luna were addressed to the Director General of the Institute who received them. By letter dated 27th March, 2011 from the Director General, the claimant was dismissed from his employment. The letter reads:

> "Dear Mr. Gonzalez,
> Please refer to my letter referenced P/28/11978) and dated March 17, 2011, asking you to show cause why you should not be dismissed from the service of the Statistical Institute of Belize (SIB) for misappropriating the sum of seven hundred Belize dollars ($700)that Mr. Alfredo Luna paid through you to the account of the SIB.
> I have carefully considered your response and together with a copy of the receipt dated January 28, 2011 that you issued to Mr. Luna acknowledging receipt of the funds as well as the report of the meeting you had with the Human Resources and Finance & Administration managers on March 11, 2011, I have absolutely no doubt that you received and misappropriated seven hundred Belize dollars belonging to the SIB.
> This is therefore to inform you that you are being dismissed with immediate effect from the service of the SIB for misconduct in the performance of your duties, fraudulent behavior and bringing the Institute into disrepute. You are hereby ordered to ensure that all properties of the Institute in your care are duly handed over to the Finance and Administration Manager on Monday, March 28, 2011. Your salary and all other benefits that you have accrued to that date will be paid to you in due course.

> Let me thank you for your seven and a half years service to the Central Statistical Office and SIB. I wish you the very best in your future endeavors."

The Claim

11. By an application dated 5th May, 2011, the claimant applied for permission to apply for judicial review for declarations that the first respondent unlawfully and in breach of natural justice dismissed him and for an order of mandamus requiring the first respondent to reinstate the claimant. By consent, permission was granted on 29th June, 2011 to apply for judicial review. On 7th July, 2011 the claimant applied for judicial review by fixed date claim form as follows:

> "The claimant claims the following remedies and orders:
> (a) A declaration that the first defendant acted unlawfully unfairly and in breach of natural justice in dismissing without good and sufficient cause the claimant from the service of the Statistical Institute of Belize.
> (b) An order of mandamus requiring the first defendant to reinstate the claimant in his employment with full benefits.
> (c) An order of certiorari to quash the decision of the first defendant (contained in a letter to the claimant dated March 27, 2011) dismissing the claimant "with immediate effect from the service of the S.I.B."
> (d) Damages for wrongful dismissal.
> (e) Any other order which the court think just in the circumstances of this case

> including an order for costs to be paid
> by the defendants."

12. The claim makes no allegation against the Attorney General and therefore the claimant withdrew the claim against the Attorney General. It is to be noted too that no specific remedies are claimed in the claim form against the No. 2 respondent, except an order for costs.

The Manual

13. The Institute prepared a Statistical Institute of Belize Operations Manual (the Manual) which dealt with matters in relation to its staff, including matters such as appointment, probation, conduct of employees, leave of absence, disciplinary action, grievance resolution, retirement and dismissal. Among the reasons for dismissal, as stated in the Manual, are fraudulent and deceptive behaviour, substantial neglect of duties, and bringing the institute in disrepute. Paragraph 11.3 of the Manual states the procedure for investigation of complaints against employees of the Institute. Among the procedures, is the requirement that the complaint shall be brought to the attention of the employee who shall be afforded the opportunity to respond in writing. There are also provisions in the Manual for written warnings to be put in the file of an employee in relation to poor behaviour or performance, and if such persists, it is the responsibility of the head of the department to issue a first written warning to the employee. Paragraph 11.2(g) of the Manual states that in relation to complaints

against employees in the category of the claimant "a hearing shall be convened by a committee comprising the Director General, the manager responsible for human resources and another department head."

14. The Manual seems to have been administratively made by the management of the Institute. From the contents of the Manual as shown above, the Manual contains rules governing the employment and discipline of staff; and forms part of the terms of employment of employees of the Institute. Clause 1.2 of the Manual states that the purpose of the Manual is to set out the terms and conditions for the management and administration of the Institute; and Clause 1.4 states that the conditions of the Manual "shall apply uniformly to all staff members of the Institute." Under section 23(1)(a) of the Act, the Board of the Institute may make regulations relating to, among other things, the appointment, dismissal and discipline of employees of the Institute. I have no evidence that Regulations were made under this section. But such regulations under section 23(1)(a) of the Act dealing with terms and conditions of employment of staff, would have amounted to a statutory provision bearing directly on the right of the Institute to dismiss the claimant, the existence of which would inject the element of Public Law necessary to attract the remedies of administrative law including the right to be heard: see ***Malloch v. Aberdeen Corp 1971 2 All ER 1278***. But the Manual, on which the claimant relies in support of his claim, incorporates its provisions, including a right to a hearing, into the terms of the claimant's employment.

Challenge to the Dismissal

15. The claimant submits that his dismissal was "irrational, arbitrary, ultra vires in breach of natural justice, unreasonable, grossly unfair and illegal." I will consider the above under two general heads: One, was the dismissal unreasonable; and two, was it done in breach of natural justice and unfair? The claimant further submitted that the decision of the first respondent to dismiss him was in violation of the Manual, in particular the Rules 11.2(g)(h) which deals with taking disciplinary action including dismissal against employees.

Unreasonableness

16. In the celebrated and well known ***Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation 1948 1 K.B. 223***, Lord Greene expounded at page 229 on the public law principle of unreasonableness: "It has," he said, "frequently been used and is frequently used as a general description of things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he had to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the power of the authority."

17. Applying the above principles to the facts and circumstances of this case, did the first respondent act unreasonably when he dismissed the

claimant under Clause 11.4 of the Manual for misappropriation of seven hundred dollars, belonging to the Institute? There is evidence, as we saw above, that Mr. Luna had initially reported to the Institute that he had paid the $700 to the claimant, though he changed and later said he gave the money to Mr. Cunil who it is alleged forgot to tell the claimant about the money. Cunil also testified of receiving the money and placing it in the glove compartment of the car and forgot to tell the claimant. But the claimant admitted, that unknown to him, the money was in his vehicle; and he found it in his car on 14th March, 2011. What has happened to the money that he said he found in his vehicle? He has given no evidence of this and has given no evidence as to why he did not immediately report to his superiors that he had found the money.

18. There is evidence that at the date of the claimant's reply, 18th March, 2011, to the Director's letter of the 17th, he had already allegedly found the $700 in his car, but he did not mention in his reply that he would deliver the money to the Institute. It would reasonably be expected that when the money was allegedly found in his car on 14th March, 2011, the claimant would have immediately by phone informed his superior and exclaimed "look I've just found the $700 in my car. I'll bring it right away!" But there is no evidence that this was done. He was dismissed on the 27th March, 2011 and up to that time there is no evidence that he paid the $700 which he said he found in his vehicle to the Institute. It is true on the 12th March, 2011 he signed a document authorizing the Institute to deduct $700 from his salary.

19. When the claimant, as he testified, found the $700 in his vehicle, he said he immediately contacted Mr. Luna and informed him of finding the money and he gave Mr. Luna a receipt. But he said he left the part of the receipt for dates, blank, "since," according to him, "neither of us could recall when the money was paid." The receipt was tendered in evidence, but there is a date on it – 28th January, 2011 – which the claimant states he did not insert. But assuming that the claimant and Mr. Luna could not recall the date when the $700 were paid, what prevented the claimant from stating on the receipt that the money was paid on a previous unrecalled date, and inserting on the receipt the date when the receipt was in fact written, rather than leaving the date blank, as he claimed. The question whether on the evidence as a whole the dismissal was unreasonable would be further considered below.

Natural Justice and fairness

20. The fundamental question is whether the claimant is entitled to judicial review and public law rights, including fairness and the right to be heard which would usually depend on whether his employment had some statutory, or legislative status or protection. Where there is such status or protection, it is not difficult, in the absence of express provisions, to imply public law rights and the right to be heard. The authorities have accepted that if there are employment relationships in which all the requirements of the observance of rules of natural justice are excluded, these must be confined to pure master and servant cases: see ***Malloch v. Aberdeen Corp. 1971 2 A.E.R. 1278*** per Lord Wilberforce at p. 1294; and ***Ridge v. Baldwin 1963 2 A.E.R. 66, per***

Lord Reid at p. 71. Lord Wilberforce in ***Malloch*** gave a definition of pure master and servant cases as "cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or status which is capable of protection." If any one of these elements exists, regardless of the terminology used, "there may be essential procedural requirements to be observed and failure to observe them may result in a dismissal being declared void": per Lord Wilberforce at p. 1294 above.

21. The rationale for the difference in the treatment of these two classes employees or workers would seem to be, in the case of pure master and servant cases, the absence of statutory status or protection of the employment and the pure private nature of the employment contract in which the public has no interest; whereas in the case of public officers, it is the statutory underpinning or status of their employment which restricts the freedom to dismiss, and gives them public law rights making them eligible for public law remedies and the right to be heard and to be treated fairly. According to Lord Wilberforce above, it is the existence of the statutory provisions in the latter category of employees which inject the element of public law to attract public law rights and remedies. It must however be noted that employment by a public authority does not per se inject an element of public law, for the simple reason that a public authority can enter into a private employment contract, which could confer on such employees, private law rights under the terms of the contract of employment.

22. In one of the first cases reaching the Caribbean Court of Justice (CCJ), the court enforced the distinction, between a pure case of master and servant, and public officers whose employment had a statutory status or underpinning, in relation to the right to be heard. The CCJ held that the applicant in the case before it "failed to bring himself within any exception to the rule that in a pure case of master and servant there is no right to a hearing prior to dismissal": see ***Brent Griffith v. Guyana Revenue Authority CCJ No. 1 of 2006***, per Nelson J at paragraph 54. The CCJ pointed out that the exception would be employment protected by statutory status, or dismissal contrary to statutory procedures. This aspect of the decision in ***Brent Griffith*** was criticized on the ground that the difference between these two classes of workers – master and servant and public officers – is unfair, because all workers, whether private or public, should have a right to be treated fairly before being dismissed, and that the court ought to imply in the contract of all workers, public or private, a right to be treated fairly before dismissal: see ***Brent Griffith and the right to be heard***: ***New Guyana Bar Review Volume 2 May 2008 page 111***. Prof Wade in his book ***Administrative Law, 8th Edition at p. 534*** writes as follows:

> "There is a tendency to extend the ambit of natural justice in the field of employment as fairness undoubtedly demands. In some sense it may already be said, as in New Zealand, that the requirements of fairness apply virtually to all employment relationship, whether private or public."

That only one class of workers has a right to be treated fairly and a right to be heard before dismissal, while another class, master and servants, generally does not, is in my view, with the greatest respect, inherently unfair and ought to be revisited.

23. In this matter before me, though, there is no dispute that the defendants are a public authority. There is also no dispute that section 19 of the Act gives the first defendant the right to appoint officers and employees of the Institute, and section 22(1) of the Act states that the post of employees and officers of the Institute shall be pensionable under the Pensions Act Chapter 30. There is also section 23(1)(a) of the Act authorizing the making of regulations in relation to appointment and dismissal of staff of the Institute. These provisions seem to give the employment of members of staff of the Institute including the claimant, a statutory status or underpinning entitling them to public law rights and remedies. Moreover, the Manual governs and contains terms of the claimant's employment, which confer on the claimant a right to be heard. The defendants are required to comply with the provisions of the Manual. I hold that the claimant is entitled to public law rights, including the right to be heard and fairness before dismissal.

Non attendance at hearing

24. The question now is whether or not the claimant was heard. The evidence is clear that the claimant attended a hearing on 11th March, 2011, and was heard. He also admitted that the letter from the Director General dated 17th March, 2011 gave him an opportunity to

be heard in this matter which opportunity he took as shown by his letter dated 18th March, 2011. But it was submitted on behalf of the claimant that the alleged hearing was a nullity because it was held contrary to the provisions of the Manual. Clause 11.2(g) of the Manual states:

> "(g) For employees at senior management level, a hearing shall be convened by a committee comprising three representatives of the Board, excluding the Director-General. For all other employees, a hearing shall be convened by a committee comprising the Director-General, the manager responsible for human resources, and another department head. In both cases, the decision of the Committee shall be final."

25. The claimant fell under the term "other employees" as used in the clause. The Director General, who testified in this case, said he was not present at the hearing, nor was he represented by anyone, nor did he participate in the hearing. The committee that heard the complaint against the claimant was not constituted in accordance with the Clause 11.2(g) above. It was therefore submitted on behalf of the claimant that the committee was improperly constituted and therefore there was no proper hearing under the clause and that the committee therefore had "no power to determine the case and accordingly the decision must be void and a nullity," to use the words of senior counsel for the claimant.

26. The Director General acted contrary to 11.2(g) of the Manual when he did not attend the hearing, nor did he delegate anyone to represent him. The purpose of requiring the Director General at the hearing of a disciplinary matter is that he would have, as well as the other members of the committee, first hand information of matters that are denied, admitted or said at the hearing for the purpose of deciding on the nature of disciplinary action, if any, to be taken. Instead the Director General, in relation to what was said at the meeting, relied on the report of the meeting prepared by others, one of whom, as we shall see below, was not authorized by the Manual to be present at the meeting. It is true that the claimant signed the report, but in his evidence in court he denied that he said he received the money and spent it, and gave a reason why he signed the report as shown at paragraph 5 above. The other persons present at the hearing representing the Institute were not called, and did not give evidence. And the Director who gave evidence was not present at the hearing and could not, for the truth of what was said there, properly testify of what others told him the claimant admitted or denied at the hearing. It must be remembered that it is the Director in consultation with two other officers who shall decide on the disciplinary action to be taken, and that is why I think it is mandatory, when one considers the language of clause 11.2(g), that the Director is bound to attend such a hearing.

Wrongful attendance at hearing

27. There is a further violation of clause 11.2(g) of the Manual in that one person who attended the hearing, attended it in violation of the clause. At the hearing, the Human Resources Manager and the other department head, Mr. Lui, attended, and Mrs. Requena administrative officer attended who, even if she is a department head, clause 11.2(g) makes provision for only two department heads and the Director General to attend the meeting. One person therefore attended the hearing who ought not to have attended, and be a member of the committee. This person participated and played an active role in the committee. It has long been held that in general no person ought to participate in the deliberation of a judicial or quasi-judicial body unless he is a member of it: ***Lane v. Norman 1891 66LT83***. Nor should he retire with them for their discussions lest it gives the impression that he is taking part in their deliberations when he is not entitled to do so, for then justice would not be seen to be done: see ***Ward v. Bradford Corporation 1971 70 LGR 27***. In ***Leary v. National Union of Vehicle Building 1971 Ch. 34***, Megarry J said at page 53:

> "Participation in the deliberations and the decisions of the committee is another matter: if one or more of those who do this are not members of the committee then in my judgment, this would invalidate the proceedings."

Not only did the person who had no authority to attend the hearing, attended; but the person took part in the hearing, by asking the claimant questions, which he answered, and the person assisted in preparing the report, parts of which were disputed by the claimant. This person along with the others at the meeting took notes of the meeting, and after the meeting they met and from their notes they compiled the above report.

No Warnings

28. Where the behavior or performance of an employee of the Institute is not in accordance with his employment, the head of his department has, according to clause 11.2 of the Manual, the responsibility to bring the unacceptable behaviour to the employee and to record a warning in the personal file of the employee. If the behavior or unacceptable performance continues, a further written warning is to be given to the employee who has to respond within five working days, indicating why disciplinary action should not be taken against him. The clear purpose and intention of clause 11.2 of the Manual is that an employee of the Institute whose behaviour is in contravention of good work practices, or the provisions of the Manual, is entitled to verbal and written warnings by the head of his department about his behaviour before further disciplinary action, such as dismissal, is taken against him. I have no evidence before me that any verbal or written warning was given to the claimant in relation to this matter. In fact the Director swore that he did not give the claimant any warning prior to the investigation of this matter.

Bias

29. In the letter dated 17th March, 2011 above, the Director General gave the claimant "an opportunity to show cause why you should not be dismissed from the service," to use the words of the letter. The said letter states that "it is intended to dismiss you from the service of the Statistical Institute of Belize for misconduct in the performance of your duties …." The letter also states that the claimant "dishonestly misappropriated the said sum of $700 to your own use." The Director General states in the letter that it is intended to dismiss the claimant, before giving the claimant an opportunity as the letter states, "to show cause why you should not be dismissed." The Director General seems to have prejudged the matter and intended to dismiss the claimant prior to giving the claimant the opportunity to show why he should not be dismissed. ***In R v. Romney Justices exp. Gale,*** The Times 24 January 1992 a magistrate was disqualified from continuing a case where he prepared a statement of the sentence half way through the trial. In ***R v. Maryleborne Magistrates Courts exparte Joseph*** The Times 7th May 1993 a magistrate was at fault who read a newspaper (Law Report) during the defendant's evidence; as was a judge who in the absence of the prosecutor, took over the prosecution: see ***R v. Wood Green Crown Court exp Taylor*** The Times 7th May 1993. Where there is evidence that the tribunal or public authority in carrying out its duties prejudged or pre-determined the case or matter before it, then its decision in the case or matter should not stand, not only because it would be unfair and unjust to the person concerned, but also because it is evidence of prejudice or bias on the part of the tribunal or public authority.

30. The question to ask in relation to bias is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased: ***Porter v. Magill 2002 2 AC 357***; and ***Belize Bank Limited v. A.G. of Belize 2011 UK PC 36 at paragraph 34***. This test is grounded on the hallowed principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done; and that no person should adjudicate on any matter if it might reasonably be thought that he ought not to act. To inform the claimant, as the Director General did, that he intended to dismiss the claimant and that the claimant had misappropriated the money, before giving the claimant the opportunity to show cause why he should not be dismissed, would seem to amount to bias on his part and in breach of the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

31. In ***Cooper v. Wilson 1937 2 K.B. 309*** charges were preferred against a sergeant of police who had more than thirteen years service in the Police Force, for offences against discipline, including discreditable conduct in that he acted in a manner likely to bring discredit to the reputation of the Force, because he failed to subscribe to the maintenance of his wife and two children. The charges were heard by the Chief Constable who found the sergeant guilty and dismissed him. On an appeal to the Watch Committee, at which the Chief Constable was present during the deliberations, the Committee dismissed the sergeant's appeal from the Chief Constable's sentence of dismissal. The Court of Appeal ruled that the proceedings before the Watch

Committee were contrary to natural justice, because of the presence of the Chief Constable during the committee's deliberations on the appellant's appeal. Greer LJ says that he thinks that the sergeant was fairly entitled to complain that the presence of the Chief Constable at the committee's hearing when they were deliberating as to whether they would or would not affirm his sentence, was contrary to natural justice, and that it thereby invalidated the decision of the Watch Committee and entitled him to have a declaration to that effect. The authorities seem to establish the principle that if the conduct of the adjudicating body is such as to give rise to a real possibility of bias then justice would not seem to have been done, and the decision of the body ought to be set aside.

Consequences of breaches

32. As shown above, there were several procedural breaches of the Manual. There was no warning to the claimant; the Committee that heard the complaint was not properly constituted in that the Director General who should have been present at the hearing was absent; an unauthorized person was present at the hearing and took part in it, and the letter of 17th March to the claimant prejudged the issue and was biased. Considering all the evidence could it be now said that the first defendant acted unreasonably in the ***Wednesbury*** sense? Should the decision to dismiss the claimant stand? The claimant may not have been frank with the court with respect to his involvement in the disappearance of the $700; but the procedure used to determine his involvement was seriously flawed and in breach of natural justice and the terms of his employment. The claimant's employment had a

statutory underpinning, and his procedural rights under the Manual and terms of his employment were violated. Could the decision of dismissal arrived at by the process of the aforesaid breaches, stand, and be said to be reasonable?

33. The remedy of certiorari and mandamus are discretionary and the court may refuse these reliefs even though there was a clear violation of natural justice: see ***Chief Constable of North Wales Police v. Evans 1982 3 A.E.R. 141***. But this discretionary power must be exercised with the greatest care: see ***Scott v. Scott 1973 A.C. 417***. In the exercise of that discretion the court is entitled to look at the conduct of the applicant and defendant as shown above. The discretion has to be exercised reasonably. Up to the date of the incident, the claimant's work, according to the Director General, was more than satisfactory. He was never given a warning and this was the first disciplinary proceeding against the claimant during the course of seven years of service. He called two witnesses who testified supporting his story that he did not know the money was in his vehicle. The members who attended the Committee meeting, representing the defendants, were not called nor testified at the trial. No reason was given for not calling them. Instead of putting the best evidence, the Director General was called, and gave evidence, though he was not present at the Committee hearing, and did not have first hand knowledge of what was admitted or denied at the meeting. The unexplained absence of these persons' evidence and the evidence of a non attendee at the hearing, caused some judicial uneasiness in the

court and a suspicion that perhaps something occurred at that hearing which was not to be brought to the attention of the court.

34. In exercise of the discretion the court must also take into consideration a prior incident where Mr. Luna had paid two thousand one hundred dollars to the claimant who did not pay over the money immediately to the Institute. The claimant did pay this money over to the Institute, but as the Director testified, it was not paid immediately by the claimant. How much time elapsed between the receipt of the money by the claimant and the payment to the Institute was not given in evidence. Was it paid over the same day of its receipt or hours after receipt? What exactly is meant by saying that the money was not paid immediately? The answers of these questions are unknown by the court. There is evidence that this prior incident occurred around 2009 and the Director, testifying in this matter, said that up until this present incident in 2011 he found the claimant's work more than satisfactory. Clearly, the Director General did not attach much significance to the prior incident in arriving at his conclusion that the claimant's work was more than satisfactory. Prior to this present incident during his years of service no disciplinary proceedings were ever taken against the claimant, nor is there any evidence that he was previously warned for any misbehaviour or misconduct. Taking into consideration the facts and circumstances of the case, I am of the view that the first defendant, taking the evidence as a whole, acted unreasonably; in breach of natural justice and in breach of the claimant's terms of employment, and the dismissal of the claimant therefore cannot stand.

Reinstatement

35. The claimant applied for reinstatement in his position Assistant Statistical Officer II. In ***Evans*** above the House of Lords held that an order for re-instatement may be impractical, as it might border on a usurpation of the court by the powers of the disciplinary body and there would be an obvious danger that ill feelings would affect the officers future relations with his superiors in the department. In ***Brent Griffith*** above the applicant had applied for the following reliefs:

> "(a) an order declaring the applicant's removal from the service of the Authority as illegal, unconstitutional, null and void;
> (b) an order for the applicant's reinstatement;
> (c) an order for the payment of salary and superannuation;
> (d) costs."

The CCJ held that:

> "As the application is drafted, a declaration of nullity, if granted, will result in the dismissal being treated as if it never occurred and in the applicant's reinstatement. However, in that event the applicant would not be entitled to payment of superannuation benefits."

36. In this claim before me, the claimant states that his dismissal was illegal, null, void, and he requested among other things damages and reinstatement. In relation to damages there is no evidence given in this case of salary, emoluments of the claimant, his age or whether

there were terms of his employment regarding notice from his employer with respect to termination of the employment, matters which are generally considered by the court in awarding damages for wrongful dismissal. As regards reinstatement the views in ***Evans*** are persuasive; but I am bound by ***Brent Griffith***. And on the facts, reinstatement seems to satisfy the justice of the case. The special facts of this case, including breaches of the claimant express terms of his employment, distinguish this case from some others, where reinstatement was denied. I think on the evidence as a whole it was not fair to impose immediate dismissal of the claimant instead of a warning which is provided for in the Manual. For the above reasons and on the facts and circumstances of this case, I declare that the claimant's dismissal is a nullity and the claimant is entitled to reinstatement.

Conclusion

37. The court has a discretion as to costs and in the exercise of that discretion the court considers the conduct of the parties. Taking these matters into consideration there will be no order as to costs.

38. I therefore make the following orders:
    (1) A declaration is granted that the first defendant acted unlawfully and in breach of natural justice when he dismissed the claimant.
    (2) An order of Certiorari is granted quashing the decision to dismiss the claimant.
    (3) The applicant is reinstated in his position of Assistant Statistician II with effect from 1st March, 2012.

(4) The claim for damages is dismissed.

(5) There is no order as to costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
26th January, 2012

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