COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

PUBLIC LAW DIVISION
2018/PUB/jrv/00716

BETWEEN

GREGORY ARCHER

Applicant

AND

THE MINISTRY OF NATIONAL SECURITY
(THE BAHAMAS DEPARTMENT OF CORRECTIONS)

First Respondent

THE ATTORNEY GENERAL

Second Respondent

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Ms. Tanya Wright for the Applicant**

Mr. Kenny Thompson for Respondents

Hearing Dates: **20th March, 21st March, 28th May, 17th July, 2019**

Judgment Date: **1st December, 2020**

Public Law – Judicial Review – Alternative Remedy - – General Orders Justiciable – Whether the application should be considered based on principles of Employment Law -Public Services Commission Regulations – Public Services Act – Grounds for Judicial Review – Irrationality – Illegality – Wednesbury Unreaonableness – Procedural Unfairness/Bias

JUDGMENT

1. The Applicant, Mr. Gregory Archer **(the "Applicant")** sought and was granted leave to apply for Judicial Review on 25th October, 2018.

2. On 25th January, 2019, the Applicant filed his Originating Notice of Motion seeking a review of The Bahamas Department of Correctional Services' **("BDOCS")** decision made on 15th January, 2018 **(the "Decision")** not to recommend the Applicant for a promotion to the next level of Principal Corrections Officer. The Applicant claimed that he was overlooked based on the

erroneous information that the Applicant lacked the requisite academic qualifications. As a result, the Applicant sought the following Orders:

2.1 A Declaration that the BDOCS' decision not to recommend the Applicant for promotion to the next level of Principal Corrections Officer, due to lack of academic qualifications was irrational and unfair.

2.2 An Order that the decision of BDOCS' not to recommend the Applicant for promotion to the next level of Principal Corrections Officer due to lack of academic qualifications be quashed.

2.3 An Order mandating the promotion of the Applicant to the position of Principal Corrections Officer.

2.4 Pecuniary and Non-Pecuniary Damages flowing from the unlawful decision.

2.5 An Order that the Respondent do pay the costs of and incidental to this application to be taxed unless otherwise agreed.

3. The grounds relied on by the Applicant were : -

3.1 Irrationality having regard to the admission by the Respondent on 28th December 2016 by letter of even date from Dawn E. Culmer on behalf of the Permanent Secretary for the Ministry of National Security, that the Applicant had in fact met the minimum academic requirement for the post of Principal Corrections Officer but merely lacked the minimum Five (5) year experience up to the 2014 promotion exercise having served only Three (3) years as Corrections Sargent since his promotion in 2011.

3.2 Unfairness having regard to the fact that since 2014, the Respondent's decision not be recommended the Applicant for promotion to the next level of Principal Corrections Officer due to lack of academic qualifications was predicated on One (1) of the Two (2) requirements for promotion to the post of Principal Corrections Officer.

3.3 Breach of natural justice in that:

3.3.1 It failed to take material facts and evidence that the Applicant had in fact met the requirement for the promotion based on the academic requirements for an officer serving Five (5) years in his previous post into account.

3.3.2 It took distorted or irrelevant facts into consideration by applying the post requirements for an officer possessing a minimum of seven years as opposed to Five years;

3.3.3 It failed to reasonably apply the facts to its decision.

(the "JR Application")

4. On day two of the hearing of the JR Application, Counsel for the Respondents **("Mr. Thompson")** made an application "in limine" for an Order that the JR Application be struck out for non-compliance with Order 53 rule 2 (5) of the Rules of the Supreme Court for not filing the application within the time limited by the rules. The Court ruled that the non-compliance was an irregularity and did not nullify the proceedings and dismissed the Respondents application to strike out the JR Application.

5. The Applicant relied on the following documents:

5.1 Affidavit of Gregory Archer filed 21st June 2018; **(1st Archer Affidavit)**
5.2 Witness Statement of Vanrea Lindsay Armaly filed 23rd January, 2019;
5.3 Witness Statement of Scott Macfarlin Williams filed 23rd January, 2019; and
5.4 Supplemental Affidavit of Gregory Archer filed 25th January, 2019. **("the 2nd Archer Affidavit")**

6. By Affidavit filed 21st June 2018, the Applicant swore that he was employed with BDOCs for over twenty eight years and that he was currently a Corrections Sergeant and had held that position since 1st August, 2013. He said that he had never been the subject of any investigation or charge and that his Annual Performance Appraisals were above average for over twelve years. In July 2016 in a previous promotion exercise, he had also advised that he would not be promoted to the post of Principal Corrections Officer, the decision being set out in a letter dated 26th December, 2016 from Ms. Culmer on behalf of the Permanent Secretary of the Ministry of National Security.

7. By that letter, he was informed that he could not be considered for a promotion to the post of Principal Corrections Officer because he had only met the minimum academic requirement of having five BJC subjects and did not meet the requirements of seven years relevant experience; the requirements for the post were either two BGCSE/GCE subjects and five years' experience or five BJC subjects and seven years' experience. The Applicant had one Pitman Certificate and 10 BJCs but not the seven years' experience.

8. The Applicant attested that by Circular No. 44, circulated on or around 18th October, 2016, the Ministry of Public Service informed all permanent secretaries, head of departments and human resources officers that for the Bahamas

Government's purposes the academic qualifications for appointment/reclassification were revised. Instead of five BJC's or equivalent passes, one BGCSE/GCE of grade C or above would be accepted. The applicant attested that by virtue of this, he not only met but exceeded the requirement of two BGCSE/GCE subjects of grade C or above and further one Pitman/RSA/City and Guilds Level I had the same value as one BJC and one Pitman/RSA/City and Guilds Level II or above had the same value as one BGCSE/GCE. **("Circular No. 44")**.

9. He further stated that by Circular No. 29, dated 5th October, 2017, Miss Elise Delancy, the Permanent Secretary for the Ministry of Public Services informed all permanent secretaries, heads of departments and human resources officers with responsibility for human resource matters that for the Bahamas Government's purposes one BGCSE of grade C or above or equivalent (Pitman/RSA/City and Guide Level II or GCE 'O' Level) including English would be accepted at the same monetary value as five BJC's or equivalent passes including English Language for appointment/reclassification.

10. The circular advised that one Pitman/RSA/City and Guilds Level I had the same value as one BJC and that one Pitman/RSA/City and Guilds Level II had the same value as one BGCSE. It was also stated that this Circular superseded Circular No. 44 **("Circular No. 29")**. The Applicant stated that he was advised by his Attorney that the revision had no effect on the acceptance of five BJC's or equivalent passes as one BGCSE and he therefore not only met but exceeded the requirement of two BGCSE subjects at the time of the 2017 promotion exercise as he had 10 BJC's.

11. In 2017, BDOCs conducted another promotion exercise however, on 15th January, 2018, he received a supersession letter signed by Mr. Patrick P. Wright, the then Commissioner of Corrections **("Commissioner Wright")** informing him that he would again not be recommended for a promotion. At the time, he had served over five years in his post as Corrections Sergeant and possessed the minimum academic qualifications.

12. The Applicant believing that the decision was irrational, unfair and a breach of the rules of natural justice, wrote to Commissioner Wright on 5th February, 2018, the Attorney General on 6th February, 2018 and the Chairman of the Public Service Commission on 17th April, 2018 and through his Attorney on the 28th May 2018 informing them that he had been overlooked for the promotion despite the fact that he met the requirements for the promotion.

13. By letter dated 11th June, 2018, Ms. Karen Turner, Secretary of the Public Service Commission informed him that their records indicated that he was the holder of ten BJC subject passes including English and also the holder of a

Pitman Certificate in English which qualified him to be previously promoted to Prison Sergeant in 2011 however, he did not meet the requirements for the promotion to Principal Corrections Officer as he lacked the seven years' experience.

14. The Applicant maintained that he had been unfairly targeted and that the decision not to promote him was based on the Respondents' bias towards him because he was the past President of the BDOCS' Association from 2009 to 2014. While President he publicly challenged the policies of successive governments with respect to the operation and management of BDOCS. He also represented individual officers in hearings for their personal grievances or charges against them.

15. By his supplemental affidavit filed 25th January, 2019 the Applicant swore that during the 2017 promotion exercise, many correctional officers were promoted without the purported educational qualifications and that they had only enrolled with the Ministry of Education's Testing and Evaluation Section to sit the examinations and obtain the qualifications after the promotion. The Applicant exhibited excerpts from the Department of Correction's Education Criteria Roll and identified prison officers who held certain positions at BDOCS even though they did not meet the required academic qualifications.

16. Vanrea Lindsay Armaly, a Corrections Corporal Officer with BDOCs **("Ms. Armaly")**, averred that she was employed at BDOCS since 12th August 2001, and that she had entered as a recruit with two BJCs and two BGCSEs. She stated that she was superseded for three consecutive promotions because she did not have the required five BJCs. During her employ at BDOCS, she attended The College of The Bahamas earning a C in English at the college prep level and later a B in College English at Galilee Academy. She continued that she went on to earn an Associate's Degree in Public Administration from Southern College and that she had been studying for a Bachelor's Degree in Parole, Probation and Offender Rehabilitation along with being invited to participate in a six month international training course, which she had completed.

17. Ms. Armaly further stated that she had written to Commissioner Wright about her previous supersessions and in response, she was informed that she had been superseded because she did not meet the required educational qualifications. She too had been a member of the Correctional Officers Association and served as Secretary to the Applicant's Presidency from 2006 – 2008. She confirmed that the Applicant had vigorously agitated for the rights of Corrections Officers and she believed that the promotional exercises at BDOCS were prejudiced and often manipulated as there was a great amount of officers promoted without the required educational qualifications. Ms. Armaly also stated that it was her understanding that five BJCs would be the equivalent of one GCE.

18. Scott Mcfarlin Williams, a Correctional Sergeant with BDOCS since 1993 **("Sgt. Williams")** averred that when he commenced employment with BDOCS, he possessed four Pitman Certificates, one in English and four BJCs. In 1999 he was promoted to Corporal and in 2008 he was promoted to Correctional Sergeant. On 2nd December, 2015 he received a letter informing him that he had been superseded for promotion in the 2014 promotions because he did not have five BJCs. He was also advised by Commissioner Wright that the value of Pitman exams had been downgraded in 1990 which resulted in him lacking the necessary qualifications in 2014 and despite his having been promoted based on his receipt of four Pitman Certificates in 1999.

19. Sgt. Williams stated that he then applied to the Ministry of Education's Testing and Evaluation Section to sit three BJC exams in 2016. In January 2016 however, he was invited to participate in a six month training course which conflicted with the sitting of his exams. Mr. Williams testified that after he informed Commissioner Wright of the conflict, Commissioner Wright, in the presence of the Deputy Commissioner of Corrections and Mr. Carl Smith the Permanent Secretary of the Ministry of National Security told him that the course credits were greater than the BJCs. Despite this statement by Commissioner Wright, he was informed again on 9th August, 2017 that he had been superseded for promotion to Principal Corrections Officer because he lacked the required academic qualifications. Sgt. Williams reminded Commissioner Wright by letter of what he had previously stated but never received a response.

20. Sgt. Williams further averred that he had also served as a member of the Correctional Officers Association as Vice President during the Applicant's presidency. He too attested to the Applicant's vigorous agitation for the rights of Corrections Officers, against the abuse and poor and unsafe conditions that they were subjected to. Like the Applicant and Ms. Armaly, Sgt. Williams also believed that the promotional exercises were biased and prejudiced as an officer with his rank received a promotion in 2017 despite not having the required academic qualifications and that such occurrences had happened on a regular basis. Sgt. Williams stated that he also believed that five BJCs would be equivalent to one GCE.

21. At trial there was no cross examination of the Applicant or his witnesses.

22. In opposition to the JR Application, the Respondents relied on the evidence of Ms. Shonice Deveaux and Ms. Bridgette Hepburn.

23. Ms. Shonice Deveaux **("Ms. Deveaux")**, the Director of Human Resources at BDOCS since 11th December, 2017, averred that she was responsible for the

recruitment, promotion, training and development of staff at BDOCS. She alluded that the promotion exercise process was as follows:

- Review of post qualification to confirm number of years required and academic qualifications;
- Review of Pay Sheet to identify officers serving number of requisite years;
- Review of file to confirm officers serving number of years along with minimum academic qualifications;
- Drafting a supersession letter to officers lacking the number of requisite years, informing them of same along with option to respond within 14 days;
- If proof is provided that letter is incorrect, letter is rescinded and if correct then supersession letter and response is forwarded to Ministry of Public Service.

24. Ms. Deveaux further averred that the post qualifications for Principal Corrections Officer, Scale PR 7 within BDOCS was the possession of two BGCSEs and five years relevant experience or five BJCs and seven years' experience. After she reviewed the Applicant's file it was concluded that he had one Pitman in English and ten BJCs. Ms. Deveaux also said that the Applicant was promoted to Corrections Sergeant in 1st August, 2011 but was not eligible for promotion until 1st August, 2018 as he didn't have the requisite years.

25. She stated that he was invited to respond to the Decision within 14 days of receipt but he did not respond until 9th February, 2018. She also stated that he had been previously advised by the Ministry of National Security that his role as President of the Corrections Officers Association had no bearing on his supersession in 2014 and 2017 and it was noted that with effect from August 2018 he had attained seven years' experience and had maintained an above average level performance for a period of three years prior to the date of the next promotion exercise.

26. Under cross examination, Ms. Deveaux testified that the Director of Human Resources as the person in charge along with other members of the Human Resources Unit would participate in the promotion process. She stated that she would conduct the initial review which consisted of finding and reviewing the post qualifications, followed by the compiling of a spreadsheet of a list of persons applying and eligible and the recommendations made. This would be sent to the Commissioner of Corrections for his approval. After receiving the Commissioner's approval it would be sent to the Ministry of National Security and once approved it would be sent to the Public Service. The recommendations sent would include promotions and those not receiving promotions would be sent supersession letters which they would draft for the Commissioner to sign.

27. Ms. Deveaux confirmed that no application was necessary for promotion to be considered and that an officer would have a reasonable expectation to be

promoted once the criteria for the post was met. She further confirmed that the Commissioner of Corrections would intervene if he had information which had been omitted but he had to follow the criteria sent from the Public Service. If individuals brought to their attention that they were overlooked, they would investigate and reconsider the possible reasons for the same. She further testified that she knew of instances where the Permanent Secretary did not support the decisions made and that the Minister should not be involved in the process.

28. Ms. Bridgette Hepburn **("Ms. Hepburn")** swore that from April 2013 to 15th February 2019 she was the First Assistant Secretary at the Ministry of Public Service and National Insurance and was later appointed as the Deputy Permanent Secretary responsible for the management of the Policy, Planning and Development Unit. Ms. Hepburn stated that the Ministry took note of recommendations for appointments and re-classifications of officers to the posts of Filing Assistant/Office Assistant where the officers possessed one BGCCSE and possibly less than five BJCs which was the requirement for the post.

29. She further testified that in an effort to reclassify officers, it had been agreed that one BGCSE of C or above or the equivalent Pitman/RSA/City and Guilds Level II or GCE including English would be accepted at the same monetary value as five BJCs or equivalent passes for reclassification purposes which was the reason Circular No. 29 was issued. Ms. Hepburn continued that it was never the intent to advise that five BJCs were equivalent to one BGCSE because it is not possible for a lower level qualification to be equivalent to a higher level qualification and that Circular No. 29 did not address the promotion of officers but rather appointments and reclassifications.

30. Under cross examination Ms. Hepburn testified that if a post qualification called for five BJCs for appointment/reclassification and an officer did not have the five BJCs but had one BGCSE in English, then the one BGCSE would have the same monetary value as the five BJCs. It was not equivalent to the other but would be accepted as a substitute. She added that the term monetary value in that instance was based on the pay scale an employee would be in.

31. Ms. Hepburn further explained that the monetary value was specifically for an appointment because where there was a reclassification the salary would probably not change as it was a lateral move. She further testified that when evaluating a certificate, it would be sent to the proper authority for evaluation in order for a decision to be made on whether or not the certificate could be accepted based on the post qualifications because that consideration was not in their purview.

SUBMISSIONS

32. The Applicant submits that the present application requires consideration of the criteria for promotions within BDOCS and a review of the manner in which determinations were made in order to determine whether they offended the law. Unless the process was transparent and clear, and all candidates are treated fairly and consistently, based on their experience and skills required for the rank without bias, the process would not comply with any policy, statutory framework or the rule of law and/or natural justice.

33. It was further submitted that as the promotion process is conducted pursuant to the Public Services Act and Regulations, it raises public law issues which are amenable to judicial review. The Applicant contended that as the Court had already granted the Applicant leave by Order dated 25th November, 2018, the Respondent could no longer contest the Court's jurisdiction with respect to:

    33.1 Compliance with the procedural requirements of Order 53 r.3 of the Rules of the Supreme Court;

    33.2 Whether the Applicant had a sufficient interest in the matter; or

    33.3 Whether the relationship between the Applicant and the Respondent was one of pure employment and could not be subject to judicial review.

34. The Applicant specifically seeks judicial review of the BDOCS decision not to recommend him for promotion to a Principal Corrections Officer due to lack of academic qualifications on the grounds of (a) irrationality (b) illegality and (c) procedural impropriety. The Applicant submitted that it was settled law that the Court, when exercising its discretion in Judicial Review proceedings, did not concern itself with determining whether the decision under review was good or bad but rather whether it was lawful or unlawful or whether the conclusion upon which the decision reached was legal as was held in **Reid v Secretary of State for Scotland (1999) 2 AC 512, 541F – 542a;** In Reid, Lord Clyde stated,

> **"Judicial review involves a challenge to the legal validity of the decision, it does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision**

may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."

35. As a result, the Applicant requests that the Court consider the criteria for promotions within BDOCS, in order to review the manner in which these criteria were applied and determine whether they offended the relevant statute which was the Public Services Act and Public Services Regulations, the rule of law or the rule of natural justice.

36. Since 2014, the Applicant submitted that the Respondent's decision not to recommend the Applicant for promotion to the post of Principal Corrections Officer was due to the alleged lack of academic qualifications based on one of two requirements for promotion to the post. Thereafter, in 2016, the Respondent acknowledged that the Applicant had met the academic requirement for the post but this time stating that he only possessed three years relevant experience.

37. As a result, the Applicant contended that the Respondents' either failed to apply the criteria contained in Circular No. 29 or that whatever other criteria they relied on was flawed. He also submitted that the criteria applied by the Respondents was unfair in failing to accept the equivalency between one BGCSE and five BJCs. The Applicant submitted that upon considering the words used in Circular No. 29 'AT EQUAL VALUE', by their natural meaning, it could be argued that it was the intention for one BGCSE to be equivalent to five BJCs. . Circular No. 29 is set out as follows:

Circular No. 29 of 2017

FILE NO. MPS/69/20 Vol. V

TO: ALL PERMANENT SECRETARIES, HEADS OF DEPARTMENT AND OFFICERS WITH RESPONSIBILITY FOR HUMAN RESOURCES MATTERS

ACCEPTANCE OF ONE (1) BAHAMAS GENERAL CERTIFICATE OF SECONDARY EDUCATION (BGCSE)/GENERAL CERTIFICATE OF EDUCATION (GCE) OR EQUIVALENT IN ENGLISH LANGUAGE AT EQUAL VALUE OF FIVE (5) BAHAMAS JUNIOR CERTIFICATES (BJCS) OR EQUIVALENT INCLUDING ENGLISH LANGUAGE

Please be advised that for The Bahamas Government's purpose, one (1) BGCSE (grade "C" or above) or equivalent (I,e, Pitman/RSA/City and Guild Level II or GCE 'O' Level) including English Language, will be accepted at the same monetary value (for appointment/reclassification) as five (5) BJC's or equivalent passes including English Language for appointment/reclassification,, e.g. Filing Assistant/Office Assistant, Scale M6.

Please also be advised that:

- **One (1) Pitman/RSA/City and Guilds Level I has the same value as one (1) BJC.**
- **One (1) Pitman/RSA/City and Guilds Level II and GCE 'O' Level or above has the same value as one (1) BGCSE.**

This supersedes Circular No. 44 of 2016 dated 18th October, 2016.
Grateful if the above is brought to the attention of all managers/supervisors and employees.

38. Based on his interpretation of Circular No. 29, the Applicant submitted that at the time of the 2017 promotion exercise he would have satisfied the first limb of the requirement for the promotion which was that an applicant must have possessed two BGCSEs and five years relevant experience. His interpretation was based on his understanding that five BCJs were equivalent to one BGCSE.

39. Further, the Applicant contended that the capped words **AT EQUAL VALUE** could not be misconstrued or misinterpreted as equal meant equal and not equal one way as suggested by the Respondents in their defence. He added that the Respondents suggestion that Circular No. 29 did not address promotions and also exposed the unfairness or impropriety in the decision process. The Applicant submitted that while the Public Service Rules provided a definition for appointment, it failed to give a definition for reclassification and in that regard submitted that applying the natural and ordinary meaning of the word would include promotion.

40. The Applicant submitted that the Respondents acted in breach of the Wednesbury Principles formulated in **Associated Provincial Picture Houses, Limited v. Wednesbury Corporation [1948] 1 K.B. 223** as they acted unreasonably by taking into account matters that they ought not to have. The Applicant claimed that he was only superseded as a result of his past post as President of the Correctional Officers' Association, a fact which should not have been taken into consideration but which he claims was.

41. He added that the Respondents failed to take material facts and evidence into account, such as, that the Applicant had in fact met the requirements for promotion based on the academic requirements for an officer serving five years in his previous post and one BGCSE or equivalent Pitman/RSA/City Guilds Level II or GCE O' Level would be accepted at the same monetary value as five BJC's or equivalent for appointment/classification.

42. The Applicant also relied on s. 18 of the **Public Service Commission Regulations**, which states,

> **"18. (1) In considering the claim of any officer in the public service for promotion, merit and ability shall be taken into account as well as seniority, experience and formal qualifications.**
> **(2) Any recommendation made to the Commission for promotion shall state whether the person recommended is the senior officer in the department or grade eligible for promotion and, where this is not the case, detailed reasons shall be given in respect of each person in that department or grade over whomever it is proposed that the person recommended should be promoted."**

43. The Applicant further submitted that the Respondents took distorted or irrelevant facts into consideration by applying the post requirements for an officer possessing a minimum of seven as opposed to five years' experience, that despite the passage of time the Applicant's academic qualifications remained the same and that the positions taken by the Applicant in execution of his duties as President of the Association informed on the minds of the Respondents.

44. The Applicant contended that the 28th December 2016 letter **(1st Supersession Letter)** was an admission that he had in fact met the minimum academic requirements for the post of Principal Corrections Officer without qualification, but merely lacked the minimum years' experience and therefore, the subsequent Decision was irrational.

45. Additionally, the Applicant maintained that the Respondents' actions were biased against him, and relied on **Sim Yong Teng and another v. Singapore Swimming Club – [2016] 3 LRC 371** which followed the test in **Porter v. Magill [2001] UKHL 67, [2002] 1 ALL ER 465, [2003] 2 AC 357, UK HL in addressing the test of apparent bias.**

46. At pg. 386 Chan Sek Keong SJ held,

> **[34].....the Judge held that the applicable test was that, without referring to *Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357 ('*Porter v Magill*'), set out in that decision. (Judgment at [71]):**
> **'[71] In sum, the test is whether a reasonable and fair minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion or apprehension that a fair trial is not possible ... It is an objective test from the perspective of a reasonable member of the public and not the court (*Shankar* at [82]) ...'**
> **[35] Applying this test, the Judge held that (Judgment at [71]–[72]):**
> **'[71] ... Here, the relevant facts that the reasonable person would be apprised of would be all the circumstances of the case (see [59] and**

[70] above) including the correspondence between [Sim] and [MC2] and even the context in which the 25/7/2013 Letters were made. The further gloss added to this is that "the test of apparent bias relating to predetermination is an extremely difficult test to satisfy" (see emphasis above in [63]). This, in addition to the fact that the rules of natural justice are not to be applied in their full rigour in the present case, would make the hurdle of establishing apparent bias in the form of apparent predetermination not so easily jumped over."

47. The Applicant submitted that there was clear evidence of bias against him as a result of his Presidency of the Association. He added that it was also clear that the process and criteria for promotions were applied arbitrarily and unfairly because of his Presidency.

48. The Applicant submitted that in order to determine that the decision was legal, one must determine that the maker carefully understood both the law and the process governing the making of its decisions and then complied and give effect to the law and process. Any failure to do so would make the decision illegal and subject to judicial review. He added that the Respondents' policy governing the Decision was confusing, poorly written and difficult to understand and justify.

49. The Applicant submitted that while the rules of natural justice were not codified, they were procedural in nature and that their aim was to ensure delivery of justice to the parties. It was well established that the authority must act in good faith and not arbitrarily. The Applicant further submitted that there were two basic tenets of the rule of law (1) that there should be equity before the law and (2) that the law must always be applied.

50. The Applicant submitted that the Respondents showed that the procedure which governed their decision was not applied equally and in some cases was not applied at all, which lead to injustice and deprivation of rights in breach of the rule of law and natural justice. He added that there was clear evidence that the Respondents failed to apply the policy for promotions and continued to fail to do so with respect to the Applicant and other officers.

51. The Respondents opposed the JR Application on the ground that the Applicant lacked the necessary academic qualifications for the position of Principal Corrections Officer, Scale PR7. The qualifications were two fold, namely possession of two BGCSE subjects **and** five years relevant experience or five BJC subjects **and** seven years' experience. The Applicant had ten BJC's and one Pitman at the time of the promotion exercise being challenged.

52. The Respondents submitted that there were two issues for the Court to determine;

52.1 Whether the Decision was amenable to judicial review which it submitted it was not; and

52.2 Whether the Applicant's interpretation of Circular No. 29, raised an entitlement of the Applicant to be promoted to the next level of Principal Corrections Officer, which it submitted it did not.

53. The Respondents submitted that the Decision was not amenable to judicial review, because it was the manner in which the Decision was made and not the Decision itself that is subject to review. They also relied on **Council of Civil Service Unions and Others v Minister for the Civil Service, Regina v Panel on Take-overs and Mergers, Ex Parte DATAFIN PLC, and Another, Regina v British Broadcasting Corporation, Ex parte Lavelle, and Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann** in support of their contention that the consequences or effect of the Decision must be public in nature and affect persons to which public law remedies would be available. They maintain that Commissioner Wright's refusal to promote the Applicant was an act of a purely private and domestic character based in employment law, arising out of a contractual relationship between employer and employee and not of a public nature. The decision only affected the Applicant.

54. They additionally submitted that the decision not to promote the Applicant was governed by employment law as it arose as a result of a contractual relationship between an employer and employee and as such, the decision not to promote did not evoke the court's supervisory jurisdiction even where the employer was a public authority.

55. The Respondents also added that the decision of an employer to refuse a promotion to his employee was personal to the employee and could not be examined by way of judicial review, unless the employer and employee agreed that the employee was entitled to such a promotion upon the satisfaction of conditions precedent. They added that even in those circumstances, an application for judicial review may not be the appropriate cause for redress.

56. Moreover, the Respondents relied on Article 111(1) of the Constitution of The Bahamas **(the "Constitution")** and Rule 4 (3) of The Correctional Officers (Code of Conduct) Rules, 2014 which vested the power of promotions within BDOCs in the Governor General.

57. Article 111 (1) which is part of the Chapter dealing with the Public Service Commission states::

"111. (1) Power to appoint persons to hold or act in the offices to which this Article applies (including power to make appointments on promotion and transfer and to confirm appointments) and to remove persons so appointed from any such office shall vest in the Governor-General, acting in accordance with the advice of the Prime Minister."

58. Rule 4 (3) states:

"4. Appointment and termination.
(3) Promotions shall be approved by the Governor-General."

59. The Respondents maintained that that the Applicant failed to exhaust the statutory remedy, namely the appellate process provided under Article 115 of the Constitution which provided the Applicant the right to appeal any decision made by the Governor General acting on advice of the Public Service Commission. Article 115 of the Constitution provides:

"115. (1) Subject to the provisions of this Article, an appeal shall lie to the Public Service Board of Appeal at the instance of the officer in respect of whom the decision is made from any decision of the Governor-General, acting in accordance with the advice of the Public Service Commission, that any public officer shall be removed from office or that any penalty should be imposed on him by way of disciplinary control.
(2) Upon an appeal under paragraph (1) of this Article the Board may affirm or set aside the decision appealed from or may make any other decision which the authority or person from whom the appeal lies could have made.
(3) Every decision of the Board shall require the concurrence of a majority of all its members.
(4) Subject to the provisions of paragraph (3) of this Article, the Board may by regulations make provision for —
(a) the procedure of the Board;
(b) the procedure in appeals under this Article;
(c) excepting from the provisions of paragraph (1) of this Article decisions in respect of public officers holding offices whose emoluments do not exceed such sum as may be prescribed or such decisions to exercise disciplinary control, other than decisions to remove from office, as may be prescribed.
(5) Regulations made under this Article may, with the consent of the Prime Minister, confer powers or impose duties on any public officer or any authority of the (6) The Board may, subject to the provisions of this Article and to its rules of procedure, act notwithstanding any vacancy in its membership or the absence of any member."

60. The Respondents also relied on **Bethell v Barnett and others [2011] 1 BS J. No. 30** in which Isaacs J (as he then was), asserted that the JLSC, in its role as the protector of the Constitution, afforded public servants and others in the employ of the Bahamian Government, protection from the depredations and arbitrary actions of those who wished them ill and acted as a bastion against those who may try to spoil the system.

61. The Respondents submitted that the Court should not grant the relief sought because the Applicant had an adequate alternative remedy which they did not pursue.

ISSUES

62. Having considered the submissions of the parties, the issues for consideration are:

    62.1 Whether the decision was based on employment law and accordingly a private act and as such not amenable to judicial review?

    62.2 Whether there is an alternative statutory remedy that the Applicant did not exhaust? and

    62.3 Whether the Decision is amenable to judicial review and if so did it infringe the principles governing judicial review?

DECISION

WHETHER THE DECISION NOT TO PROMOTE THE APPLICANT IS BASED ON EMPLOYMENT LAW

63. A court determining an application for judicial review does so in its supervisory jurisdiction and reviews the process by which a decision making public body makes a decision based on the relevant legislation and guiding policy. In **Regina v. British Broadcasting Corporation ex parte Lavelle [1983] AER241**, Wolf J held that;

    Under SC Ord 53, r1(1), as confirmed by s 31(1) of the Supreme Court Act 1981, certiorari and the other prerogative remedies were only available to impugn a decision of a tribunal which was performing a public duty, and were inappropriate to impugn a decision of a domestic tribunal such as an employer's disciplinary tribunal. Similarly, judicial review by way of an injunction or declaration under Ord 53, r 1(2), or s 31(2) of the 1981 Act, although wider in ambit than relief by prerogative order, was nevertheless confined to the review of activities of a public nature as opposed to those of a purely private or domestic character. Since the disciplinary procedure under which the applicant was dismissed arose out of her contract of employment and was purely private or domestic character, the applicant was not entitled to relief by way of certiorari under Ord 53, r1(1) or an injunction or declaration under Ord 53, r 1(2).

64. The Applicant submits that his JR Application would in fact affect the decision making process for promotions within BDOCS. The Respondent on the other

hand submits that it was the Commissioner of Corrections who governed the process leading up to the Decision and not a public body. Ironically, by its uncontroverted evidence, the Respondents set out the process for the promotion exercise.

65. The evidence of Ms. Deveaux explained that the Director of Human Resources of BDOCS and other members of the Human Resources Unit would participate in the promotion process. She added that as a part of the promotion process, they would research and review the post qualifications and prepare a spreadsheet of their findings. Ms. Deveaux went on to say that they would forward these findings to the Commissioner of Corrections for his approval and after the approval was received, it would be sent to the Public Service.

66. She further explained that all approved and non-approved recommendations were addressed as the latter would have to be sent supersession letters which they drafted for the Commissioner of Corrections to sign. Ms. Deveaux additionally stated that the Commissioner of Corrections could intervene if he had information that may have been omitted, however he had to follow the criteria established by the Public Service.

67. I have considered the evidence and I accept the evidence of the Respondents as to the promotions process. I find however, that the promotions process was not one which was conducted solely by the Commissioner of Corrections but by officers of a public body and as such the current application cannot be determined by the principles of employment law exclusively. The promotion process is in fact conducted by the Human Resources Unit of BDOCS, BDOCS is a statutory body established by the Correctional Services Act, 2014, whose powers are set out in the statute.

WHETHER THE APPLICANT HAS FAILED TO EXHAUST ANY ALTERNATIVE REMEDIES AVAILABLE TO HIM?

68. The Respondents submit that the Applicant's JR Application is incompetent as there is an alternative statutory remedy, pursuant to Article 115 of the Constitution and Regulation 15 of the JLSCR which the Applicant did not exhaust. Article 115 however, only gives a member of the public service the absolute right to launch an appeal with the Public Service Board of Appeal from a decision which has been made by the Governor General acting in accordance with the advice of the Public Service Commission to either remove a public officer from office or on whom a penalty has been imposed by way of disciplinary control.

69. The Applicant has not been removed from office nor has any penalty been imposed upon him, therefore Article 115 is not applicable. Similarly, Regulation 15 of the JLSCR addresses the appointment, promotion and transfer of a person

appointed to a public office which requires legal qualifications and accordingly this regulation is also not applicable.

70. The Public Service Commission and not the JLSC is the public body which oversees grievances presented to them by a correctional officer. Regulation 15 of the Public Service Commission Regulations **("PSCR")** provides:

> **15." (1) The Commission shall make recommendations to the Governor-General on the following —**
>
> **(a) appointments, (not being appointments delegated by the Governor-General under Article 110 of the Constitution), promotions and transfers of public officers in respect of whom powers of appointment are vested by Article 108 of the Constitution in the Governor-General acting in accordance with the recommendation of the Commission;**
>
> **(b) petitions by public officers to the Governor- General against decisions by him and by public officers in respect of appointments, promotions and transfers."**

71. The General Orders, which is the employment handbook for employees of the public sector also addresses how representations and petitions should be made **(the "General Orders")**. Order 946 speaks to representations..

> **"Representations 946**
>
> **(1) Any Government servant who has any representations to make on any matter relating to The Public Service must in the first instance address them to The Permanent Secretary of The Ministry in which he is employed, or; if there is no Permanent Secretary, to the Head of his Department. If the Head of Department or The Permanent Secretary is unable to settle the matter, he will submit a full report to The Permanent Secretary of The Public Service. If the matter is dealt with by the Head of Department, or; The Permanent Secretary but not to the satisfaction of The Government servant concerned, the latter may address himself to The Permanent Secretary of The Public Service. He may, however, do this only through the Head of Department or Permanent Secretary, but these senior officers are bound to forward the representation together with their comments to The Permanent Secretary of The Public Service. The Permanent Secretary of The Public Service will, as appropriate, submit the matter to The Governor General, to The Commission, or; to The Deputy Prime Minister, who is constitutionally responsible for terms and conditions of service. The Permanent Secretary of The Public Service will convey the decision to the officer through The Permanent Secretary or Head of Department.**
>
> **(2) Where the representations are made in writing, they should be addressed under flying seal to The Permanent Secretary and the officer through whom they are channeled must forward them to The Permanent Secretary, together with a covering memorandum in which shall be included any relevant observations."**

72. Chapter 18 of the General Orders **(the "General Orders")** speaks to the types of Representations, Appeals and Petitions that Government servants may make.

CHAPTER 18

REPRESENTATIONS, APPEALS AND PETITIONS

1800. The rules relating to representations by Government servants on matters connected with their conditions of service are given at General Order 946.

1801. An officer may appeal to The Governor General through The Public Service Commission against any decision in any disciplinary proceedings taken against him by an empowered officer. The procedure for appeal is laid down at Regulation 36 of The Public Service Commission Regulations and at Regulation 5 of the Public Service (Delegation of Powers) Order and is described in General Orders 1195 to 1198.

1802. A petition is a formal reference to ultimate authority for special consideration of a matter affecting a Government servant personally. If representations made in accordance with General Order 1800 are not successful and they are not concerned with a matter which is the proper subject of an appeal in accordance with General Order 1801 it is open to him to submit a formal petition to The Governor General in accordance with the rules set out at General Order 1803, or; in accordance with the procedure set out in any recognition agreement with a recognized Union.

73. The General Orders have been relied on by judges in the interpretation of acts performed by the Public Service Commission as seen in **Haughton v. The Governor General of the Commowealth of the Bahamas Government and another - [2011] 3 BHS J. No. 74** where Adderley J, acknowledged that the Orders governed public officers. In **Bahamas Customs Immigration & Allied Workers Union (A Trade Union) and others v. The Government of the Commonwealth of the Bahamas and others [2014] 1 BHS J. No. 72,** Winder J (Actg) (as he then was) stated **"It is also common ground that public servants are not ordinary workers but workers whose employment framework is established by no less an instrument than the Constitution of The Bahamas. General Orders is the manifestation of that framework which is managed by the Public Service Commission ("PSC")."**

74. In **Bahamas Air Traffic Controllers Union v. Government of the Commonwealth of the Bahamas - [2001] BHS J. No. 29,** Osadebay Sr. J referred to the General Orders as a set of rules and orders governing employment in the Public Service of the Bahamas, consequently they are justiciable but, of course, they do not supersede primary legislation or the Constitution. Additionally, **In the matter of the termination of the Contract of service of Malachi Dean v. The Public Service Commission - [2010] 4 BHS J. No. 167**, Allen J. sitting as the Chairman of the Public Service Board of Appeal considered the definition of misconduct as defined in the Orders when considering whether or not the Appellant was in fact guilty of the alleged misconduct that led to his interdiction.

75. I am satisfied that the General Orders would govern the framework for the employment of public servants like the Applicant.

76. Upon a review of the General Orders, the Applicant must first follow the procedure to make representations as set out in Order 946 (1) before he could submitted a petition pursuant to Regulation 15 of the PSCR and Order 1802.The Applicant should have first made a representation to the Permanent Secretary of the Ministry of National Security and if there was no Permanent Secretary then to the Head of the Bahamas Department of Corrections. If he received no satisfaction, then a full report should have been submitted to the Permanent Secretary of The Public Service.

77. If the Permanent Secretary of The Public Service was unable to satisfy his claim, the Applicant should have again addressed himself to The Permanent Secretary of the Public Service through the Head of Department or Permanent Secretary of the Ministry of National Security, who were then bound to forward the representation together with their comments to The Permanent Secretary of the Public Service. In turn, the Permanent Secretary of the Public Service would be tasked with submitting the matter to The Governor General, The Commission or to The Deputy Prime Minister.

78. Only after the above steps have been taken could a petition be submitted pursuant to Order 1802. The General Orders provided the Applicant with multiple opportunities to make his representations. The Appeals are restricted to disciplinary matters.

79. The Respondents' submit that the Applicant responded to the Decision after the fourteen days provided to him, however this contention was contradicted by Ms. Deveaux where she acknowledged that the Applicant had only received the Decision on 31st January, 2018 and consequently the first letter sent on 5th February, 2018 was within the fourteen days granted him to respond. The Respondents, in any event have not provided any law or legal requirement in support of their contention that the Applicant only had fourteen days to make the representation.

80. The Decision is set out as follows:

SUCCESSION – 2017 PROMOTION EXERCISE

Please be advised that this Department is conducting another promotional exercise and finds it necessary to inform you that you will not be recommended for promotion to the next level of Principal Corrections Officer.
Our records revealed that despite the passage of time your academic qualifications on record remain as:

- **1 PIT: English Language I**
- **10 BJCs: English Language, English Literature, Mathematics, History, General Science, Handicraft, Health Science, Arithmetic and Religious Knowledge**

Please know that the requirement for promotion to the position of Principal Corrections Officer is at least:

Two (2) GCE 'O' Level at (a), (b) or (c) passes including English Language, and five (5) years relevant experience in post or five (5) BJCs including English Language, and seven (7) years' experience in post.

In view of the above, regrettably I wish to also inform you that you will again be superseded by your peers in this exercise.

You are invited, however, to make any representation you desire regarding this decision, within fourteen (14) days of receipt of this letter and your timely response would be appreciated.

81. Neither the Applicant nor the Respondents complied precisely with the General Orders requirements for making a representation as set out in para. 71 above. The Applicant first wrote to the Commissioner of Corrections and copied the Human Resources Manager for the Department of Corrections on 5th February, 2018. The letter stated:-

5th February 2018

SUPERSESSION – 2017 PROMOTION

On the 31st January2018 at about 12:40 pm, I received your letter dated 15th January 2018.

Your letter stated that despite the passage of time my academic qualifications on record remain as

- **1 Pitman English Language**
- **10 BJC's English Language, English Literature, Mathematics, History, General Science, Arts, Handicraft, Health Science, Arithmetic and Religious Knowledge.**

Your letter then stated the requirement for promotion to the position of Principal Corrections Officer as it least:

"Two (2) GCSs 'O' level at (a), (b) or (c) passes including English Language, and five (5) years relevant experience in the post or five (5) BJC's including English Language and seven (7) years' experience in this post."

Your letter then stated that in view of the above, regrettably you wish to inform me that I will again be superseded by my peers in this exercise.

Sir tenaciously yet respectfully I disagree with this letter and I am asking you to do the lawful thing and rescind this letter and allow me to be promoted, to which I have earned and truly deserve.

The Ministry of the Public Service sent a Circular No. 17 file number MPS/69/20 dated 19th May 2016, which clearly qualifies me for promotion (see attachment).

In regards the upcoming Promotion, which is 2017 promotion, Circular No. 17 which came out on the 19th May 2016 should be what my academic qualifications should be based on, knowing that prior to the promotion date a three years annual appraisal must be given on every officer.

82. He then wrote to the Attorney General on the 6th February, 2018, the contents of which are set out as follows:

6th February 2018

SUPERSESSION – 2017 PROMOTIONS

I am tenaciously in the view that I am being victimized for my pass as President of the Corrections Officers Association for seven (7) years.
Sir, my Annual Performance Appraisal has always been Above Average for more than twelve (12) years,
I have the respect of all those work works around me.
I have worked as a proud Corrections Officer for more than twenty-eight (28) years, while I am only forty-seven (47) years of age with so much more to offer to this institution.
On July 4, 2016 a promotion list came out back dated for the year of 2014, being not promoted I wrote the Commissioner of Corrections and the Permanent Secretary of National Security. I received a letter from the Ministry signed by Ms. Dawn E. Culmer who explained clearly why I was not promoted.
The letter stated that I have meet the minimum academic required for the post but at the time I did not have the relevant years in the post (please see attached).
On the 31st January, 2018 I received another supersession letter dated the 15th January 2018, this letter ironically compare to the 2016 letter stated that I do not have the academic requirements for promotion.
The head of my Human Resources department then told me that that Circular has been rescinded and a new Circular has replaced it.
I then went and found the new Circular which I allowed several Attorneys to view it. This Circular is dated 5th October 2017 and upon reading it, still doesn't disqualifies my academic requirements.
I then again contacted the department Human Resource head by way of phone and explained to her that even if her interpretation was different from what I or others have read, I cannot be evaluated on a 2017 Circular when the promotion is a 2017 promotion so the Circular prior would be the one that I would be evaluated on, also be reminded that every Officer that is promoted must have an Above Average Appraisal for three (3) years leading up to his promotion.
The Human Resource department head in summary told me to put my concerns in writing (please see all attachments).
Sir, I humbly ask you help in correcting this wrong and allow me to be promoted for I have worked so hard over the years, I assure you I have sincerely, earn this.

83. On 17th April, 2018, the Applicant then wrote to the Chairman of the Public Service Commission as follows:

SUPERSESSION – 2017 PRISON PROMOTION

I have written to you on the 5th February 2018 and up to this date have yet to receive a response (see attachment).
Mr. Patrick Wright, Commissioner of the Department of Correctional Services had written me a letter of Supersession dated the 13th January 2018 concerning a promotion exercise of 2017 which I had received on 31st

January 2018 at about 12:40 pm by Chief Corrections Officer Mr. Dereck Noville.
I immediately read the letter which was clearly an error and anxiously I showed it to Chief Corrections Officer Dereck Noville who agreed. Mr. Novillle then send me to Human Resource Department, Mrs. Shonice Deveaux. Mrs. Deveaux then told me to put my concerns in writing.
Sir I asking you to please correct this wrong that was done to me.
I am well respected on the job but has always been victimized by the department administration because of my position in the past as President of the Correctional Officers Associations.
I have sent all of the documents to verify my claim (see attachments).
I await your response and also my well-earned promotion.

84. The Applicant is employed with the Bahamas Department of Corrections which falls under the purview of the Ministry of National Security. On 24th April, 2018, Ms. Culmer, on behalf of the Permanent Secretary of the Ministry of National Security responded to the Applicant's 6th February, 2018 Letter

RE: SUPERSESSION – 2017 PROMOTION

Your letter dated 6th February, 2018, addressed to the Ministry of National Security, refers.
Please be advised that your role as a past President of the Corrections Officers Association had no bearing on you being superseded in the 2014 and 2017 Promotion Exercises.
As you are aware, your next rank on promotion is Principal Corrections Officer, for which the following criteria must be satisfied:

"Applicants must possess two (2) BGCSE/GCE subjects and five (5) years relevant experience or five (5) BJC subjects and seven (7) years relevant experience"

According to our records, you possess the following academic qualifications:

- **1 Pitman Level I – English Language**
- **10 BJC subjects**

In view of your academic qualifications, you are required to possess seven (7) years relevant experience (i.e. experience in your current rank). Undoubtedly, as you were last promoted with effect from 1 August 2011, you would not have met the required years of experience at the time of the 2014 and 2017 promotion exercises and therefore could not be considered for promotion.
It should be noted that you would attain seven years' experience with effect from August, 2018 and once an above average level of performance was maintained for a period of three (3) years immediately prior to the date of the next promotion exercise you, would be eligible for promotion.
I trust you are now clear as to the reasons for your supersessions.

85. On 28th May 2018, the Applicant's attorney again wrote to the Chairman of the Public Service Commission who had previously failed to respond to the Applicant, enclosing a letter by the Applicant. The attorney's letter did not

state the contents of the attached letter nor was it attached. As a result, it is uncertain which of the abovementioned letters was being referred to.

86. On 11th June, 2018, Miss. Karen P. Turner, Secretary to the Public Service Commission **("Ms. Turner")** responded to the 28th May 2018 Letter informing his Attorney that the Applicant did not meet the post requirements for promotion to Principal Corrections Officer as he had the five BJC subjects but lacked the seven years' experience required. She acknowledged that he had been previously promoted to the post of Prison Sergeant (now Corrections Sergeant) effective 1st August, 2011, hence at the time of the 2017 promotion he only had six years of experience at the level of Corrections Sergeant.

87. Ms. Turner made no mention of the Applicant's allegation of bias towards him as a result of his past post as the President of the BDOCS Association, therefore it is unclear whether this was brought to the Public Service Commission's attention for consideration.

88. The final step an applicant may take under Order 946 (1) of the General Orders is to again address himself to the Permanent Secretary of the Public Service through the Department Head or Permanent Secretary of his Ministry, who will in appropriate circumstances submit the matter to the Governor General or the Public Service Commission. If the Applicant still did not receive the response he thought he ought to have received, only then would he be able to submit his petition pursuant to Order 1802 and Regulation 15 (1) (b) of the PSCR, which stated that the Commission shall make recommendations to the Governor General on petitions by public officers to the Governor-General against decisions by him and by public officers in respect of appointments, promotions and transfer.

89. The final response that the Applicant and his attorney received was indeed from the Secretary of the Public Service Commission. However, as it has been previously stated, it is unknown what information the Public Service Commission possessed for consideration. Accordingly, the Applicant was able to make one more representation to the Permanent Secretary of the Public Service through his Head of Department or Permanent Secretary of the Ministry of National Security in addition to a formal petition. These steps were not taken.

90. As the General Orders are the rules and orders which govern employment in the Public Service of The Bahamas, I consider it necessary for its provisions to be followed. As with any workplace, rules are implemented to ensure the smooth running of the working environment. Additionally, rules in a workplace are implemented to protect its employees and ensure fairness throughout. During the hearing for leave, neither Counsel addressed the Court on the applicability of the General Orders.

91. In **Aarin Bain v Ayse Rengin Dengizer Johnson and The Attorney General 2-18/PUB/JRV/FP00001 (unreported)** Gray Evans Sr J discussed the Court's jurisdiction to consider an application for judicial review where there was an alternative statutory remedy that was not exhausted which is helpful and I set it out herein:-

"Judicial Review Proceedings

45. I remind myself that in its simplest terms, judicial review is intended to be a review by a superior court of the lawfulness of a decision by a lower court or tribunal. It is a focus, not on the merits, but, rather, on the legality, of such decision. It is not an appeal from that decision.

46. Further, it is accepted that judicial review is a discretionary relief and, therefore, it is not, as a general rule, available where there is another equally effective and convenient remedy, except in exceptional circumstances. See R v Peterborough Magistrate"s Court, ex parte Dowler (1997) 2 WLR 843 and Harley Development Inc and Another v Commissioner of Inland Revenue (1996) 1 WLR 727.

47. Further, it appears from a review of the authorities cited, and as pointed out by counsel for the applicant, that it is not mandatory that an applicant exhaust his right of appeal as a precondition for bringing judicial review proceedings.

48. In that regard, Georges CJ, in the case of R v Controller of Road Traffic, ex parte Storr, LRB [1988-1989] 119, in considering a similar submission made by counsel for the respondent in that case, as the one made by counsel for the respondent in this case, namely that the relief should not be granted because there was another alternative remedy available to the applicant in that case, said at page 123: "I think a far stronger case would have to be made out before a litigant is barred from coming to the court by way of certiorari. In De Smith"s Judicial Review of Administrative Action (4th edn) p 425 the statement appears— "An applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy or to have exercised any right of appeal to a court of laws." I think that expresses the basic approach ie a very strong case has to be made out that it is far more convenient to exhaust the administrative hierarchy. This does not mean, of course, that one wishes to have immediate recourse to the courts in all these matters..."

49. In ex parte Storr, the applicant, a public service driver, plying a taxi cab for hire outside a hotel, aggrieved by the decision of the Deputy Controller of Road Traffic, applied for an order of certiorari to quash the decision. It was argued on behalf of the Controller that since the Road Traffic Act provided an alternative remedy by way of appeal to the Road Traffic Authority, the court, in the exercise of its discretion, should refuse to grant the order. 9

50. In acceding to the application, Georges, CJ, held, inter alia, that since there was an issue of law which could conveniently be dealt with by the court and which offered the opportunity for laying down guidance in dealing with the powers under s38 of the Road Traffic Act, the court would exercise its discretion in favour of granting the remedy sought by the applicant.

51. Counsel for the applicant suggests that a similar situation exists in this case and this court in this case should do as Georges C.J. did in the Storr case.

52. As I understand the authorities cited, while, as a general rule, judicial review is only available where there is no other effective means of challenge, "the mere existence of a right of appeal does not preclude judicial review and an applicant may be permitted to proceed with judicial review if he shows there are exceptional circumstances which justify so proceeding rather than appealing".

53. As to what would constitute exceptional circumstances, it was held in the case of Harley Development case supra that where an abuse of power was alleged, may be considered an exceptional circumstance. Also, according to the learned authors of Judicial Review, Principles and Procedure, 2008 Oxford Press, at paragraph 26.104: the fact that a claim raises a point of law of general importance might constitute an exceptional circumstances for this purpose.

54. So, while I accept that the applicant has a statutory right, pursuant to section 8(1) of the Bail Act aforesaid, to appeal the decision of the learned magistrate, as I understand the authorities, the fact of an alternative remedy or the failure to exhaust any right of appeal or other means provided for challenging a decision are not necessarily bars to an application for judicial review, although those are factors for this court to take into consideration when deciding whether or not to grant the relief sought by the applicant. See Sargent v Knowles et al CL1334 of 1993 (unreported) in which Sawyer, J (as she then was) held that in exceptional circumstances the court could, in its discretion, entertain judicial review proceedings even where the applicants had neither exhausted nor pursued their alternative statutory right of appeal."

92. Also, in **Regina v. Bowe-Darville and others; Ex Parte Moxey - [2015] 1 BHS J. No. 38,** Winder J. discharged the order granting leave to apply for judicial review after the Respondent brought to his attention that the Applicant was not full and frank about the alternate remedy available pursuant to s. 54 of the Legal Profession Act. Winder J. helpfully considered and set out authorities on the point which I adopt. He stated:-

"35 I accept, as does Counsel for both parties that the writings of Messrs. Auburn, Moffett and Sharland, the learned editors of Judicial Review, Principles and Procedure, 2008, Oxford press, represent the

correct statements of the law on the question of alternative remedies. At paragraph 26.90, it is stated,

> Because judicial review is a remedy of last resort where an adequate alternative remedy is available the court will usually refuse permission to apply for judicial review unless there are exceptional circumstances justifying the claim proceeding. The availability of an adequate alternative remedy is a matter that is relevant to the exercise of the courts discretion to grant permission to apply for judicial review; it does not go to the court's jurisdiction to entertain a claim for judicial review.

At paragraph 26.97, it was stated,

> If an alternative remedy is not actually available to a claimant it is difficult to see how the mere existence of that remedy could justify the court refusing permission to apply for judicial review. However, if what would otherwise have been an adequate alternative remedy ceases to be available to a claimant because he or she have instead, choosing to bring a claim for judicial review the previous availability adequate alternative remedy may cause the court to refuse permission.

In respect of statutory appeals it continued at paragraph 26.104 as follows,

> A court is extremely unlikely to grant permission to apply for judicial review in any case where there is a statutory right of appeal against the decision under challenge unless there are wholly exceptional circumstances. The fact that a claim raises a point of law of general importance might constitute an exceptional circumstances for this purpose, but when considering this issue the court will be likely to have regard to whether the relevant appellate body can itself definitively determine the relevant point and if not, whether there are subsequent avenues of appeal to other bodies (or to the court) which could provide the requisite determination.

36 In R .v. IRC ex parte Preston, 1985 AC 835 at 852, Lord Scarman had this to say:

> [A] remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts

will allow the collateral process of judicial review to be used to attack an appealable decision.

37 In R. v. Chief Constable of the Merseyside Police ex parte Calveley and others [1986] 1 All E.R. 251 it was held that the jurisdiction [of judicial review] would not be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances. By definition, exceptional circumstances defy definition, but where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.

38 Likewise, in Sargent v. Knowles et al CL1334 of 1993, Sawyer J. (as she then was), relying on R. v. Chief Constable of the Merseyside Police ex parte Calveley and others confirmed that in exceptional circumstances the Court could, in its discretion, entertain judicial review proceedings even where the Applicants had neither exhausted nor pursued their alternative statutory right of appeal.

39 Sawyer J. went on to identify circumstances where to the Courts have asserted the existence of this discretion:

a) In R v. Paddington Valuation Officer, ex p Peachey Property Corp Ltd [1965] 2 All E.R. 836 at 840, [1966] 1 QB 380 at 400, Lord Denning MR, with the agreement of Danckwerts and Salmon LJJ, held that certiorari and mandamus were available where the alternative statutory remedy was 'nowhere near so convenient, beneficial and effectual.'

b) In R v. Hillingdon London Borough, ex p Royco Homes Ltd [1974] 2 All E.R. 643 at 648, [1974] 1 QB 720 at 728 Widgery CJ said: "...It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy."

c) In R v. Hallstrom, ex p W [1958] 3 All E.R. 775 at 789 790, C19851 3 WLR 1090 at 1108 per Glidewell LJ,: "Whether the alternative statutory procedure would be quicker, or slower, than procedure by way of judicial review, whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body, these are amongst the matters which a Court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available."

d) In Preston v. IRC [1985] 2 All E.R. 237 at 337 338, [1985] AC 835 at 862, per Lord Templeman: "Judicial review process should not be allowed to supplant the normal statutory appeal procedure [but] present circumstances are exceptional in that the appeal procedure provided by

s 462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under s 460 was unlawful."

40 In light of the foregoing and the burden of the Applicant to demonstrate, prior to the grant of leave, that exceptional circumstances exist which would militate against the pursuit of an alternate remedy (in the nature of a statutory appeal) in favor of judicial review, this failure to disclose the existence of a statutory appeal was a material non disclosure."

93. In cases where there is an alternative remedy, I am satisfied that the Court should only exercise its supervisory authority in exceptional circumstances. In the Applicant's case it would not be detrimental to order that he make properly his representations and that the Respondents properly respond to the same as provided by Order 946 (1) of the General Orders and Regulation 15 of the PSCR which would provide due process for the Applicant as the Decision and the objections to it will be considered by more than one person.

94. Moreover, the Applicant is still employed with BDOCS and he would still have the remedy to apply for judicial review if after exhausting the representation and the petition process there is no clear decision provided to him with respect of his allegations.

WHETHER THE DECISION NOT TO PROMOTE THE APPLICANT TO THE POST OF PRINCIPAL CORRECTIONS OFFICER IS AMENABLE TO JUDICIAL REVIEW?

95. Judicial review is the exercise of the Court's supervisory jurisdiction over public-decision making bodies and their application of the public law. This jurisdiction also serves to ensure that the public-decision making bodies do not exceed or abuse their powers during the performance of their duties. It is imperative that the Court does not exceed its supervisory jurisdiction by interfering with the decision made by a public body as judicial review is not an appellate process.

96. The grounds of judicial review, illegality, irrationality or "Wednesbury unreasonableness" and procedural improprierty, have been succinctly discussed by Lord Diplock in the well-known case of **Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374**. At pgs. 410 – 411 Lord Diplock posited,

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by

judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" *(Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

97. The decision not to promote the Applicant was relayed to him by The Bahamas Department of Correctional Services, by letter dated 15th January, 2018. The Applicant was given an opportunity to make representations which

he attempted to do but not completely. The letter explained the reason for the Supersession. There was no failure to observe the rules of natural justice. The Respondents have submitted and maintained that the reason he was not promoted was because he did not meet the requirements of two GCE 'O' Level at (a), (b) or (c) passes inclusive of English Language **and** five years' relevant experience in post **or** five BJCs including English Language **and** seven years' experience in post.

98. At the time of the promotion exercise, the Applicant had one Pitman in English Language I and 10 BJCs. Further, the Applicant had only been in the post since 2011 and did not satisfy the seven years' experience required.

99. The Applicant claimed that the Decision was procedurally unfair, unreasonable and illegal because the decision makers failed to apply the criteria contained in Circular No. 29. In turn, the Respondents stated that Circular No. 29 was never to advise that five BJCs could be equivalent to one BGCSE as it was virtually impossible for a qualification at a lower level to be equivalent to a higher level and additionally that it did not address the promotion of officers but rather appointments and reclassifications only.

100. The Applicant relied on the letter that he had received dated 28th December, 2016, by which he was informed that while he met the minimum requirements for the post, as his promotion to Corrections Sergeant was only effective from 1st August, 2011, he only possessed three years' experience. Upon a review of this letter however, the promotion exercise referred to was the 2014 promotion exercise. He was being considered based on the requirements that he had to have five BJC subjects and seven years relevant experience, which he did not have.

101. The first paragraph of Circular No. 29 clearly states that it is in relation to appointments and reclassifications within the Public Service. The second paragraph has no such specifications. Even if the second paragraph were to refer to and be applied to promotions, based on the Respondents' evidence, the Applicant still would not have been eligible for promotion as he would only have six years' experience as he was last promoted on 1st August, 2011. The circular does not provide nor do I find that there was an automatic abridgment of time even if there was an equivalency between 1 BGCSE and 5 BJCs which I do not accept. Further, I do not accept that a lesser qualification can be replaced by a higher qualification and thus shorten the years of experience required.

102. Although, the Applicant's allegation that the Respondents wrongly considered his post as the past president of the Correctional Officers' Association was not heavily contested, the evidence before me clearly shows that he was superseded as a result of his inability to meet the requirements of the post qualifications at the time. There was no evidence that the claim of

weight in the decision making process. The Applicant simply did not meet the requirements for promotion.

103. I am satisfied that the process leading up to the Decision was not flawed for any of the principles that the Court is bound to consider when reviewing a decision of a public body. There was nothing irrational, unreasonable, illegal or procedurally improper in the process leading to the decision.

104. In view of the foregoing and in considering the evidence in its totality, I find that:

104.1 The JR Application was not governed exclusively by the principles of employment law;
104.2 There is an alternative remedy available to the Applicant which had not been exhausted and which would allow a review of the Decision.
104.3 The process followed leading up to the Decision was not illegal, irrational, improper or biased. It simply was a fact that the Applicant did not meet the requirements for promotion at the time.

105. The Applicant's originating notice of motion filed 25th January 2019 is dismissed.

COSTS

106. It was initially ordered that the Applicant would pay to the Respondents, the costs associated with the action, in line with the principle that the unsuccessful party bears the burden of costs. However, after handing down the decision to make such order and prior to the publishing of the judgment, the Applicant requested and the Court acceded to hear the application with respect to costs.

107. Upon hearing the submissions of both the Applicant and the Respondent, the Court is satisfied that neither party fully complied with the alternative remedy and that the Respondents were in control of the process. Consequently, this is a proper case for each party to bear their own costs and I so order.

Dated this 1st day of December 2020

The Hon. Madam Justice G. Diane Stewart