

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1030 of 2015

**IN THE MATTER OF The Statutory
Boards (Pensions) Act Cap 384 of the
Laws of Barbados**

-AND-

**IN THE MATTER OF The Supreme
Court of Judicature Act Cap 117A of the
Laws of Barbados**

Between

**DAVID PARRIS
ELIZABETH MOSELEY
LOREEN TAYLOR
ROSALIND CUMBERBATCH
DIANNE JACK-WILTSHIRE
ANGELA HAYNES
MAHARLEY BABB**

**1ST CLAIMANT
2ND CLAIMANT
3RD CLAIMANT
4TH CLAIMANT
5TH CLAIMANT
6TH CLAIMANT
7TH CLAIMANT**

-AND-

**BARBADOS INVESTMENT DEVELOPMENT DEFENDANT
CORPORATION**

**Before the Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of
the High Court**

2015: August 31; December 17 and 18;

2016: January 12; March 07;

2017: December 20;

Mr. Gregory P.B Nicholls with Mr. Brian Weekes and Ms. Janice Browne for the Claimants

Mr. Michael R. Yearwood and Miss Nicole C. Roachford with Mr. Neil Marshall and Mrs. Monica Mason-Crichlow for the Defendants

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DECISION

Introduction and Summary

- [1] On 20th May 2015, the Board of Directors of the **Barbados Investment & Development Corporation ("BIDC")** determined that seven of their employees: three secretaries, two receptionists, a maid and a manager, would be required to retire from 30th September 2015 in accordance with the ***Statutory Boards (Pensions) Act Cap 384***. All of these employees had attained the age of 60 years on or before 31st August 2015.
- [2] These employees now apply for judicial review of the action of the Board and seek, among other things, an injunction and orders of *certiorari* to quash the decision of the Board, or in the alternative, damages.
- [3] After consideration of the evidence and the law, I hold that the actions of the Board were an abuse of discretion and award damages to the Claimants.

The Parties:

- [4] The claimants, Mr. Parris, Mss. Moseley, Taylor, Cumberbatch, Jack-Wiltshire, Haynes and Babb are employees of the defendant. The defendant is the **Barbados Investment & Development Corporation (BIDC)**, a corporate body established under section 3 of the ***Barbados Investment & Development Corporation Act Cap 340***. It operates from Pelican House, Princess Alice Highway in the parish of Saint Michael.

The Claim

[5] Prior to 2014, Sections 8 (1) and (2) of the *Statutory Boards (Pension) Act* provided as follows:

(1) A board may require an officer in its service to retire at any time after he attains the age of 60 years.

(2) Retirement shall be compulsory for every officer to whom this Act applies on attaining the age of 65 years.

[6] This section was amended by the *Pension (Miscellaneous Provisions) Act 2004-25* which provided *inter alia* that for the period 1st January 2014 to 31st December 2017 inclusive the compulsory retirement age for officers of statutory boards would be 66 ½ years. From 1st January 2018, and thereafter the age of compulsory retirement would be 67 years.

[7] Purporting to act under this section, the BIDC held a meeting on the 20th May, 2015 where the decision was taken to require the claimants to retire. The claimants refer to this as "compulsory" or "involuntary" retirement, insofar as they have, all of them, indicated that they would not have opted to retire at that time.

[8] This decision was communicated to them at a meeting on 27th May 2015 and later confirmed in writing by way of separate letters sent from the BIDC to each of the claimants respectively dated 17th June 2015.

- [9] It is undisputed that the Board of Directors gave no reason why it opted to exercise its discretion to require them to retire from its service before they had reached the compulsory age of retirement prescribed under the provisions of the *Statutory Boards (Pensions) Act Cap 384* (as amended) to the claimants, none of whom would have reached the compulsory age for retirement by 30th September 2015.
- [10] The claimants allege that the decision to require them from the service of the BDC as of 30th September 2015 would result either in some of them not being entitled to a full pension and gratuity or receive a gratuity at all from BDC on that retirement as opposed to if they had been allowed to work up to the prescribed compulsory retirement age.
- [11] BDC, through its CEO informed the claimants by letter of 17th June 2015, that their respective files would be forwarded to the Accountant General's Office and to the Auditor General for the processing and calculation of their respective gratuity and pension due as a result of service to the defendant. The claimants allege that the relevant public officers have begun to process and calculate the pension and gratuity due to each respective claimant at the request or insistence of the BDC.

[12] On the 20th July 2015, the claimants applied for judicial review of the decision of the Board of Directors of the BIDC to require them to retire under section 8(1), averring that the decision was: .

- a) Contrary to law;
- b) Unreasonable;
- c) Irregular;
- d) An improper exercise of discretion
- e) In conflict with the policy of Acts of Parliament namely: the *Pensions (Miscellaneous Provisions) Act 2004* and the *Statutory Boards (Pensions) Act Cap 384*

[13] With regard to (e) the claimants have accepted that a scheduled statutory board, like the BIDC may at any time retire an officer in its employ after the age of 60 years, and instead they concentrated on impugning the decision as procedurally flawed and therefore unlawful.

[14] Their argument was presented under seven heads, but in fact may be easily subsumed under two main claims.

[15] The first claim is that the exercise of the discretion was invalid and unlawful and the decision was made arbitrarily, capriciously, improperly and unreasonably. They identify, in particular, the failure of the BIDC to take into account the individual circumstances of the claimants and the policy

behind the relevant legislation and in particular the 2014 amendment, and say that the B IDC's exercise of its discretion is not untrammelled but bound on all sides by these factors.

[16] Secondly, although not specifically pleaded, the claimants urge the court to find that the claimants had a legitimate expectation that the B IDC would not exercise its statutory discretion under section 8 (1) of the *Statutory Boards (Pension) Act* except in certain circumstances. This argument is not as clear as the Court would have imagined that it could be framed. Counsel has variously stated that the legitimate expectation was substantive, that is, that the B IDC would not retire the claimants unless they, the claimants exercised an option to do so, and only if there were particular "extenuating" circumstances. In other argument, the claimants urge that there was an expectation that the discretion would not be exercised without consultation, which would give rise to a procedural legitimate expectation. Part of that argument must be that as well as consultation, the claimants also then had an expectation that they would be provided with reasons for the exercise of the discretion.

[17] Either way, they argue that the breach of the legitimate expectation adversely and materially affects their rights, particularly, in respect of quantum of pension and gratuity due to them as of 30th September 2015

compared to the quantum had they been allowed to work until the age of retirement as prescribed by law.

RELIEF SOUGHT

[18] The claimants therefore seek the following relief:

- (i) A declaration that, in the events which have happened, the said decision and/or administrative acts and/or omissions of the defendant to compulsorily retire the claimants from the service of the defendant is unlawful, null, void and of no legal effect.
- (ii) A declaration that, in the events which have happened, the said decision of the Accountant General, the officers of the Treasury Department, the Auditor General and other public functionaries and authorities of the Government of Barbados to process and calculate or purport to process and calculate the gratuity and pension due to the claimants is unlawful, null, void and of no legal effect;
- (iii) An order of *certiorari* to quash the decision of the Board of Directors of the defendant to effect the retirement of the claimants from service;

- (iv) Alternatively, an award of damages equivalent to the pecuniary loss occasioned by the unlawful administrative act and/or omissions on the part of the defendants;
- (v) An order for the claimants to have their costs of and occasioned by this action; and
- (vi) Any further Order that this Honourable Court may deem fit.

[19] Of course, as a preliminary issue the claimants invite the court to hold that the B IDC is, as a statutory authority exercising a statutory discretion, susceptible to judicial review, and that the existence of private law issues relating to their employment does not prevent the Court from exercising its supervisory jurisdiction

[20] The case for the B IDC is blunt and direct: they say that the discretion exercised by them under sections 8 (1) and (2) of the Act was exercised properly and within legal bounds, and that whilst the claimants are not entitled to reasons, having not asked for them under the *Administrative Justice Act Cap 109B* ("AJA"), the primary material consideration was the straightened financial situation in which the B IDC found itself. They argue that this a proper and reasonable consideration to be taken into account by the Board, and the Board having done so, had not acted arbitrarily or

unlawfully. They deny that there are any policy considerations arising under the 2014 amendment which they had to consider.

[21] Finally, they deny that any legitimate expectation, either substantive or procedural arises, permitting the employees to work until the age of compulsory retirement, or any practice requiring consultation before the discretion was exercised. In any event, even if the Court were to find the existence of a procedural legitimate expectation, they argue that this is a proper case for the court to find that the BIDC has established a justifiable departure from that practice on the grounds of public interest, that is, the imperative of the strictures of the national economy.

[22] With regard to the jurisdictional issues, the BIDC's argument is rather tangential, insofar as they do not strongly argue that the judicial review is inapplicable in this case, since it is based on employment law. Instead they point out that it is "arguable" that the true claim of the claimants in this case is for damages, namely the loss of their salary, and that in the circumstances, the basis of the claim resting on an employment contract, no order of *certiorari* should issue.

THE EVIDENCE

[23] The affidavit evidence of the claimants in this matter is similar and at this point it is convenient to note the similarities. All of the claimants are 60

years and older. They all depose that at no material time prior to the receipt of the letter dated 17th June 2015 did the B IDC inform them of any reason or basis for its decision other than that they were amongst a number of officers that had attained the age of 60 years old and the board had determined to exercise its statutory discretion to compulsorily retire them from its service. They each deposed that they had not reached the age of compulsory retirement as prescribed by the relevant provision of the *Statutory Boards (Pensions) Act* nor had they opted to retire from the service of the defendant when the said decision of the Board of Directors was taken.

[24] The claimants deposed further that it was within their knowledge that in order to receive their full pensionable benefits on retirement for service to a statutory board in Barbados one had to complete 40 years of service to the board. They stated that no input was sought from them nor were they consulted on the question of how they would maintain themselves after retirement. Based on the terms of their employment with the defendant, they did not expect that their contract of employment would be terminated prior to the age of compulsory retirement for any reason other than being dismissed fairly or being dismissed with good cause. They were aware that the policy of the B IDC previous to the impugned decision of the board was to allow officers to retire at the age of compulsory retirement in cases where

that officer did not previously opt or elect to retire having attained the age of 60 years.

[25] I turn now to the evidence for the Claimant. Of the 8 witnesses, seven of whom are claimants, I will deal with the evidence of Mr. Parris and the trade Unionist Ms. Delcia Burke in detail. The others vary only slightly in content.

Evidence of David Parris

[26] Mr. Parris was employed as the first defendant's Human Resources Officer, and is the only person in a supervisory position who was required to retire. He gave evidence on affidavit that he was 61 years old and that he began his employment with the B IDC in or about March 2000 having previously worked at another statutory board, The Barbados Vocational Training Board from 1988 until 2000, and the Barbados Development Bank, another statutory board.

[27] It was to his knowledge that his pensionable service relating to his previous employment had been effectively transferred and continued on his appointment to the B IDC.

[28] Mr. Parris stated that by letter dated 17th June 2015, the B IDC wrote to him informing that he would be required to retire from its service as of 30th September 2015. At no time prior to receipt of this letter was he informed of any reason or basis for the decision other than that he was amongst a number

of officers who had reached the age of 60 years and that the Board had determined to exercise its statutory discretion to compulsorily retire him from its service. As Human Resources Manager, he claimed that to his knowledge that the BIDC did not have a policy in existence to retire officers employed in its service prior to officers reaching the age of compulsory retirement as prescribed by law.

[29] The decision of the board, he stated, to unilaterally retire officers prior to the age of compulsory retirement without input from the said officers was a new policy that had been put in place by the Board of Directors. During his time as Manager, Human Resources, he stated that no officer had been compulsorily retired by the decision of the Board of Directors of the BIDC without any input from the officer retiring. In fact he stated, "The process of retirement of officers has always been a voluntary process usually instigated by an officer desirous of retiring prior to reaching the age of compulsory retirement." (Paragraph 9, Affidavit of 20th July, 2015).

[30] With regard to his prospects, he stated that was not entitled to a severance payment or any unemployment benefit from the National Insurance Scheme at the end of his employment given that officers of statutory boards were not entitled to such. To his knowledge, it had been the policy and practice prior to the decision of the board that employees were expected to work until

retirement unless such employee had been dismissed fairly or dismissed with cause, and he himself did not expect his contract of employment would be terminated for any reason other than his being dismissed fairly or with good cause since he did not reach the age of compulsory retirement.

[31] He went on to depone that prior to this decision of the Board, it had been the B IDC's policy to allow officers to retire at the age of compulsory retirement in cases where that officer did not previously opt or elect to retire having attained the age of 60 years. With effect from 1st January 2005, he understood as Human Resource Manager that the B IDC became bound by a 2004 amendment to the *Statutory Boards (Pensions) Act* which changed the compulsory age of retirement. It was his understanding that this new policy superseded the sole discretion of the statutory board to effect an officer's retirement after reaching age 60 and he received a circular to that effect from the Permanent Secretary, Ministry of the Civil Service dated 1st February 2005.

[32] Mr. Parris stated further that he advised many of the defendant's officers consistent with his understanding that the new policy in relation to the age of compulsory retirement superseded the sole discretion of the statutory board to effect an officer's retirement after reaching the age of 60 years. It appeared to him that the B IDC made a decision to retire him solely based on

him passing the age of 60 years without any other or other reasonable criteria being considered. He had discovered that as of 30th September 2015, his pension and gratuity position would significantly worsen since there would be a large difference felt in the quantum of his salary and the expected pension benefits if he accepted retirement on the current terms. In his view, the decision of the board of directors and senior management demonstrated that they had lost confidence in him.

[33] In his second affidavit, filed in response to the affidavit of the CEO of the B IDC, Ms. Sonja Trotman, he reiterated and expended upon some of the contentions. First of all he stated unequivocally that the decision to retire officers from the employment of the B IDC was “unprecedented” and “contrary to the formal policies and practices adopted by it when dealing with the retirement of officers, and that the change was due to the impact of recent policy of the Government of Barbados to cut public expenditure in order to reduce the national fiscal deficit and to reduce transfers from the consolidated fund to statutory corporations” (Paragraph 5, second affidavit of David Parris). In addition, the decision to exercise the discretion under section 8 (1), he said, went against the established human resource practises and settled industrial relations customs which require that any major shift in policy affecting officers of the B IDC should first be discussed with the

representative trade union of the said officers. He said he had been advised by Ms. Delcia Burke that there was a long established custom and practice that officers would not be forcibly required to retire and he was aware that the B IDC had not previously ever exercised its discretion otherwise.

[34] He also gave evidence that he was aware that the Board had sought clarification on a matter relating to the statutory provisions for pensions payable to staff under a Private Pension Plan in 2000 from attorney at law (now deceased) Theodore Walcott. He stated that the matters on which Mr. Walcott was required to advise were:

- (i) whether employees who have attained the age of sixty years and are in receipt of a pension under the private pension scheme can continue employment with B IDC until they reach the age of 65;
- (ii) if the answer to (i) is yes can the B IDC require such employees to retire at anytime after reaching 60 and before reaching age 65; and
- (iii) if the answer to (i) is yes, to what extent, if at all, is the B IDC liable to pay severance or other payments in the event of 'dismissal' without 'good cause' to such employees.

[35] He stated that it was to his certain knowledge that that the B IDC was advised by Mr. Walcott that section 8 (1) of the Act should not be arbitrarily applied by the Board unless it wished to invite litigation, and that the

opinion was discussed at the level of the Board and senior management and shared with certain other stakeholders. (This opinion was not exhibited, nor was it disclosed by the BIDC). He went onto say that the discretion was not exercised in the way it had been in relation to himself and the other claimants at any other time, and that the change in policy “now being enacted by the Board” was never contemplated or understood to be applicable unless being used in disciplinary action. His position was that he never sought to give legal advice, but followed the legal advice sought and obtained by the Board which was accepted as policy to guide him in the exercise of his duties, and that he advised other employees accordingly.

[36] Under cross-examination, Mr. Parris confirmed that he considered himself the in-house expert on matters relating to employees and their contracts. (That is as it may be, but he is a mere claimant here and not accepted as any expert for the purposes of this case).

[37] Under questioning he said that he was present at meetings where contracts and the continued employment of persons had been discussed and further that he was present at such a meeting on 27th May 2015. He was asked if whether, at the meeting, Ms. Trotman (the CEO of the BIDC) raised the fiscal and budgetary constraints of the corporation as the reason the board was exercising their statutory action, and he denied any such recollection.

[38] He confirmed that he was aware of persons leaving the corporation, that their posts were not being filled and that he was told by Ms. Trotman that posts were not being filled because of budgetary cut backs. He stated that he did not consider financial constraints to be a good reason for the retirement as it took place with respect to himself and the other claimants. He agreed that several matters had to be taken into account when a company wanted to reduce its expenditure and that finances were a relevant consideration. He was not aware however that the board took any other considerations into account but he went on to state that he was not present at board meetings and could not comment on that aspect.

[39] Mr. Parris was asked whether he would accept that there was a discretion to retire officers under section 8(1) of the *Statutory Boards Act*. He stated that the discretion was circumscribed and not unilateral and he maintained that to his knowledge, the board had never before used the section in circumstances like these.

[40] Interestingly, counsel took no issue with the witness about the legal opinion which he referred to.

ELIZABETH MOSELEY

[41] Ms. Moseley was employed as a Secretary with the BIDC. She was 60 years old at the time the affidavit was sworn and had been employed with the

BIDC in or about December 2011. She stated that at no material time prior to the receipt of her letter dated 17th June 2015 informing her of her compulsory retirement did the BIDC inform her of any reason or basis for its decision other than that she had attained the age of 60 years and the Board of Directors had determined to exercise its statutory discretion and retire her from its service. She had been advised by other officers, but particularly Mr. Parris that the BIDC did not have a policy in existence to retire officers in its service in the manner purported and that the decision was new policy.

[42] Ms. Moseley stated that she did not expect that her contract of employment would be terminated prior to the age of compulsory retirement for any reason other than being dismissed fairly or being dismissed with good cause. She was aggrieved and saddened that a decision to retire staff on the basis of age only could be taken in a unilateral and arbitrary fashion.

[43] She confirmed, under cross-examination by Ms. Roachford, that she and the other claimants were informed of a decision made by the board of directors on 27th May 2015. It was possible, she stated, that Ms. Trotman did inform her of the financial problems being experienced by the BIDC but she could not remember what she said word for word.

[44] Ms. Moseley confirmed that no other officers informed her of the policy of working to the compulsory retirement age. She confirmed that apart from the

Union (NUPW) no one from the BIDC 'promised' that she would be working until the compulsory retirement age. She stated that she "figured on her own that that should be". Ms. Moseley stated that she was employed from December 2011 and even if she worked to her compulsory retirement age, she still would not make 40 years of service at the statutory board.

[45] In re-examination, she stated that she was not singled out in terms of her circumstances but that her circumstances were different from the other claimants in that she had not been employed long enough to be granted a gratuity or to be eligible for pension.

LORENE TAYLOR

[46] Ms. Taylor was employed as a Secretary at the BIDC. At the time of swearing the affidavit she was 62 years old. Her evidence was in like manner and content to Ms. Mosely except that she had been employed by the BIDC from 2007.

[47] Ms. Taylor stated in cross-examination, that she was not at the meeting on 25th May 2015. She was informed of the board's decision when she was met in the foyer of the BIDC by the Legal Officer, Monica Mason, and the Director of Finance, Dwayne Stuart. She did not ask either officer for a reason. She stated that it was not to her knowledge that she would be

required or allowed to work until 67 or 66, or that the BIDC had a discretion to retire her at 60.

[48] She confirmed that the other claimants are the ones who told her that there was no such policy of retiring officers in the public service in the manner complained of.

ANGELA HAYNES

[49] Ms. Haynes was employed as a secretary for the BIDC. She was 61 years old at the time of swearing the affidavit and had been employed with the Barbados Export Promotion Company in August 1981 before it subsequently merged with the BIDC. There was no material change in her evidence from the previous claimants.

[50] In cross-examination she confirmed, that the other claimants particularly the first claimant told her that no policy existed to retire them in the manner complained of.

DIANA JACK-WILTSHIRE

[51] Mrs. Wiltshire was employed as a receptionist with the BIDC. She was 60 years old on the date of swearing the affidavit and had been employed with the BIDC from around August 1994.

[52] In cross-examination, Mrs. Wiltshire stated that her employment began in 1994 but she left the post to go overseas with her husband to do national

service. In 2000, she was appointed to her post and verified that there was no policy in place 'prior to the decision complained of in these proceedings'. Apart from the first defendant, she could not recall exactly who told her about the policy or lack thereof and she was not promised that she could work until the age of 67.

- [53] In re-examination, she stated that she did not take notes during the meeting, that it was not good news which she received and further that on hearing the news, she was devastated.

ROSALIND CUMBERBATCH

- [54] Ms. Cumberbatch was employed as a maid at the BIDC. She began her employment with the BIDC around July 1995 and at the time she swore this affidavit, was 61 years of age. There was no departure in her evidence from that of the other claimants.
- [55] In cross-examination, she stated that Ms. Trotman told her the board had agreed to send home people who were 60 and over by 30th September. She could neither talk about the specific terms of her employment or the basis of her expectation that she would not be retired prior to the age of compulsory retirement.

MAHARLEY BABB

[56] Ms. Babb was employed as a Secretary for the BIDC. She began her employment in or about September 2005 and stated that she had not yet made the requisite ten years of pensionable service. At the time of swearing the affidavit she was 60 years old. There was no material departure from the evidence of other parties.

[57] In cross-examination, Ms. Babb could not state specifically, the terms of her employment she relied on that would have allowed her to expect that she would not be terminated prior to the age of compulsory retirement. When asked whether she was promised that she would be able to work until that age she stated "this is an expectation". She confirmed that it was the other claimants, in particular the first claimant, who told her that the BIDC had no policy in existence with respect to retiring officers early.

DELICIA BURKE

[58] Ms. Burke is the acting Deputy General Secretary of the National Union of Public Workers (NUPW). Her evidence was most instructive. She stated that she had been a trade-unionist for more than 41 years and had intimate and practical knowledge of all the industrial relations practices and policies that governed the operation of the public sector including but not limited to the BIDC as a Government statutory body. She was one of the principal officers

who consulted with Mr. Parris and legal counsel in preparing his response. Much of her affidavit evidence was mere opinion (however experienced) and the court must separate the wheat from the chaff.

[59] Shorn of opinion, her evidence revealed the following:

[60] First of all she stated that it was the customary practice among statutory corporations, including the BIDC, to allow its officers to voluntarily retire, despite the provisions of section 8 (1), and that the “decision to involuntarily retire the claimants was unprecedented in so much as the officers were offered no reason or basis for the decision of the board to terminate their employment, other than that the board had a statutory discretion to exercise and so exercised it in the circumstances.” (Paragraph 5, affidavit of Delcia Burke filed on the 16 November 2016).

[61] She stated also that the involuntary retirement was in breach of the longstanding custom that a public officer in the civil service could not be retired involuntarily without any reason being given for the basis of the exercise of discretion.

[62] Further she stated that there was a policy of Government that employees of statutory bodies should not be employed on terms and conditions any less favourable than those which exist in the central government service.

[63] Thirdly, Ms. Burke stated further that the effect of the 2004 amendment was to increase the age of compulsory retirement for officers of statutory boards and notwithstanding the discretion by a statutory board to retire an officer after having reached the age of 60 years, it was the view of the Union that there could be no involuntary retirement of any officer since the increase in the mandatory retirement age and the expectation of an officer to take the benefit of the said increase were now relevant and material considerations to be taken into account by a statutory board when exercising its discretion. It was to her certain knowledge that the BIRC had never invoked the power to involuntarily retire an officer pursuant to section (8) 1 of the *Statutory Boards (Pensions) Act* without having a proper and justifiable basis for doing so and without providing the affected officer and the NUPW with the basis under which such discretion had been advised. She stated that generally amongst statutory boards, section 8 (1) had only been invoked as a form of discipline where an officer had been found guilty of misconduct but it had been determined that based on their service, the officer should not lose his/her accrued pensionable benefits and would be retired under the board's discretion.

[64] Ms. Burke deposed that it was the Union's view that to involuntarily retire the claimants when they had reached the age of compulsory retirement was

unreasonable in so much as it caused them to lose a significant portion of pensionable benefits as prescribed under the *Statutory Boards (Pensions) Act*.

[65] The NUPW as a representative trade union, she stated, was not consulted prior to the decision of the board in breach of the established industrial relations practice existing in Barbados between the public sector trade unions and public sector agencies. The first time they received notice of the board's decision was by letter dated 26th May 2015 from Ms. Trotman, the CEO to Ms. Roslyn Smith, General Secretary (Ag.).

[66] By letter dated 29th May 2015, Ms. Burke, stated that the NUPW drew to the attention of the first defendant that the process it embarked upon to involuntarily retire the claimants was unlawful. The BDC responded by letter dated 2nd June 2015 stating *inter alia* that it stood by its decision and that the involuntary retirement was based on the mere exercise of discretion and no more. The NUPW had engaged in extensive consultation since the board's decision and no reason was ever advanced as to why there had been a sudden change of policy as it related to the claimants in respect of the unprecedented exercise of the board's discretion to effect the involuntary retirement.

[67] The NUPW, she stated, remained concerned that the BIDC had arrogated unto itself the power to adversely affect the livelihood and economic circumstances of its officers without giving reasons therefor in the circumstances, where the power to act to the detriment of those officers was not the intent to the statutory scheme behind the powers of the *Statutory Boards (Pensions) Act*. This act demonstrated Parliament's intent to make provision for officers employed by statutory boards to receive pensionable benefits where those officers so qualified but the Act did not provide for the arbitrary and unreasonable exercise of a power of discretion.

[68] Ms. Burke, under cross-examination admitted that the policy which she referred to, that is, that officers in statutory corporations should not be employed on terms and conditions any less favourable than that which exists in central government services was a written one, which came in existence because the statutory boards kept referring to the Public Service Rules and Regulations and the Establishments Division asked that all Statutory Boards devise their own terms and conditions of service and that they be no less favourable than the terms and conditions of service which exist in Central Government. She accepted that the BIDC was a statutory corporation governed by a Board and the *Barbados Investment & Development and Corporation Act Cap 340*. She went on, under questioning to say that she

was not aware of any circumstance in which any statutory corporation exercised its discretion under s 8 (1), except in disciplinary matters.

[69] However, she agreed that she was not aware of any policy of the B IDC, written or oral, that it would only apply section 8 (1) in disciplinary matters.

DEFENDANT'S CASE

Evidence of Sonja Trotman

[70] Mrs. Trotman is the Chief Executive Officer of the B IDC. Her affidavit evidence was essentially a reply to the claimants' affidavits largely encompassed in the evidence of the first claimant, Mr. Parris. She denied that the decision of the Board of Directors was unlawful as alleged by the claimants. The decision of the Board of Directors made on 20th May 2015, she maintained, retired officers pursuant to section 8 (1) of the *Statutory Boards (Pensions) Act Cap 384* and not as Mr. Parris stated in his affidavit. The board acted at all times pursuant to section 8 (1).

[71] In respect of the board having no policy in existence to retire officers prior to reaching the age of compulsory retirement, Mrs. Trotman stated that under paragraph 4.1 of Part IX of its terms and conditions, the B IDC was not required to state the reasons when requiring staff to retire from its service. Mr. Parris was aware that his employment with the B IDC was subject to the terms and conditions of his offer letter dated 24th December 1999. A revision

of these same terms and conditions was presented by Mr. Parris to the BIDC's senior executive team on 13th April 2015 and to the Board of Directors on 21st April 2015. The Terms and Conditions, *inter alia*, were forwarded to all employees by electronic mail dated 17th July 2014 and 29th July 2014 requesting that any amendments be submitted. The revised draft terms and conditions were shared with Mr. Parris by electronic mail dated 19th May 2015.

[72] Mrs. Trotman stated that she was not aware of any precedent or procedure for the BIDC exercising its discretion under paragraph 4.1 of its terms and conditions or under section 8 (1) of the Act.

[73] Mrs. Trotman stated that she did not agree with Mr. Parris' assertion that the board's decision was based moreso on Government's economic strategy to reduce transfers from central government to statutory corporations. BIDC's decision was not a convenient way to make a certain class of officers in its service redundant from their employment with the knowledge that there was no requirement in law to make provision for the redundancy.

[74] Contrary to Mr. Parris' assertion, Mrs. Trotman expressed the view that there was no established policy or practice that an officer could expect to work until retirement unless that officer had been dismissed fairly or dismissed with good cause. She stated that she did not agree that there was a

policy prior to the board's decision to allow officers to retire at the age of compulsory retirement in cases where the officer did not previously opt or elect to retire having attained the age of 60 years. The terms and conditions of service and the Act both spoke to retirement of B IDC's officers in three ways, namely: voluntary, retirement by the board and retirement at the compulsory age. The Circular from the Permanent Secretary spoke to the change in the compulsory retirement age from 65 upwards to 67 and did not affect the board's powers under section 8 (1).

[75] Mrs. Trotman denied that the effect of the 2004 amendment was to give rise to a legitimate expectation that a statutory board would not arbitrarily exercise its discretion to compulsorily retire an officer in its service. She further denied that the decision of the board was arbitrary, unauthorized or contrary to law or that there was a failure to satisfy or observe the conditions and procedures required by law. She was not of the view that the input or opinion of the claimants was necessary for the exercise of the board's discretion.

[76] Under cross-examination, Mrs. Trotman stated that she was appointed as Chief Executive Officer on 19th January 2015 but had been in the corporation for 30 years. She confirmed that discussion about the use of section 8 (1) took place at the level of senior management prior to the

board's decision and that the board introduced the matter in December 2014. She confirmed that their legal officer was requested to provide an opinion on the use of section 8 (1) and that the board took into account Human Resource considerations despite not asking Mr. Parris for an opinion on same.

[77] Mrs. Trotman confirmed that the reason for the board's decision was based on the financial constraints of the corporation. She was asked whether the financial information that led the board to its determination was relevant to the proceedings before the court and she replied that she did not "think the details of that information were relevant". In her view, based on the provisions of the terms and conditions of service, the officers were not entitled to reasons for the exercise of the board's discretion. She confirmed that the reason for the board's decision was not written in the letters sent to the claimant but she stated that it was communicated to Mr. Parris not in his retirement letter but in other correspondence sent to him that was not exhibited.

[78] Mrs. Trotman was shown the affidavit of Delcia Burke which had attached to it as an exhibit a letter she wrote to the NUPW the day before the meeting of 27th May 2015. She confirmed that in this letter she did not mention anything about the corporations straightened financial circumstances. She

confirmed that she was communicating in that letter to the Union that the B IDC had a discretion and it had exercised it.

[79] Mrs. Trotman confirmed that retirement of the claimants was seen as a viable option to assist in the reduction of expenditure. She hastened to point out however that this was just one of the actions, the organization having assessed itself in 2014 and deciding that changes had to be made if it was to continue as an organisation. She confirmed that the decision to retire the claimants was not her decision.

[80] In 2014, the B IDC was asked to reduce its budget by 5%. Mrs. Trotman stated that they were also charged with the responsibility of collecting more of its rent. There was a reduction in the subsidy received from Central Government from \$16 million to \$12 million and this was one of the reasons why the board determined to exercise its discretion to retire the workers. As a result of the retirement, the corporation saved \$350,000.00 annually.

[81] Mrs. Trotman testified that there was nothing in writing which showed the origins of the redundancy prior to the decision of the board. The board made a decision that the claimants and the IT department would be closed down as a result of ongoing discussions.

ISSUES:

[82] The following issues arise:

- a) First, whether the actions of the BIDC are susceptible to judicial review.
- b) Secondly, the proper interpretation of section 8 (1) and (2) of the Statutory Board (Pensions) Act.
- c) The proper exercise of the discretion under Section 8(1).
- d) Whether any legitimate expectation arises in respect of the exercise of the discretion of Section 8 (1) and the nature thereof.

JURISDICTIONAL ISSUES:

[83] I turn first to the susceptibility of the decision of the board of BIDC to judicial review. Under the provisions of the *Administrative Justice Act Cap 109B* (s.3) of the laws of Barbados review of an administrative act or omission must be made by way of judicial review. An “administrative act or omission” is defined, *inter alia*, as an act or omission of a board exercising, purporting to exercise, or failing to exercise any power or duty conferred or imposed by an enactment or the Constitution. It is trite law that when statutory authorities such as statutory boards purport to exercise a statutory discretion, then that decision is an administrative act within the meaning of the AJA and is amenable, or susceptible to judicial review. The BIDC does not seriously challenge this view.

- [84] However, the B IDC invites the Court to interrogate the nature of the relationship between the parties, which they correctly point out is also based on a contract of employment, and hint that this matter would more properly be brought as a wrongful dismissal case.
- [85] The court rejects this, and accepts the argument of counsel for the claimants that there is no jurisdictional bar either in the AJA or other law which prevents the denial of relief to the claimants. The issues in this case are such that they should be examined through the lens of judicial review.
- [86] If the view is being posited by the B IDC that there is an alternative remedy in this case which the claimants must exhaust before seeking judicial review, the court rejects that as well. The facts of this case do not easily or at all lend themselves to determination within the realm of a wrongful or unfair dismissal suit. In addition, the strong public interest aspect of the case strengthens my view that judicial review is the correct procedure. In any event, contrary to the argument of counsel for the B IDC, the claimants are entitled to seek both orders of *certiorari* which would have the effect of reinstating their employment, as well as damages occasioned by any loss suffered.
- [87] The court finds then that the decision of the Board of the B IDC is amenable to judicial review.

THE STATUTORY POSITION

[88] I turn now to the second issue, the interpretation of section 8 (1) and (2) of the *Statutory Boards (Pension) Act*. Sections 8 (1) and (2) are the relevant provisions for my consideration. Prior to the 2014 amendment, these sections provided as follows:

(1) A board may require an officer in its service to retire at any time after he attains the age of 60 years.

(2) Retirement shall be compulsory for every officer to whom this Act applies on attaining the age of 65 years.

[89] This section was amended by the *Pension (Miscellaneous Provisions) Act 2004-25* which provided *inter alia* that for the period 1st January 2014 to 31st December 2017 inclusive the compulsory retirement age for officers of statutory boards would be 66 ½ years. From 1st January 2018, and thereafter the age of compulsory retirement would be 67 years.

[90] What was the intent of this amendment? On 1st February 2005 the Permanent Secretary, Ministry of the Civil Service issued the following memorandum:

“The Pensions (Miscellaneous Provisions) Act 2004-25, which was published in the Official Gazette dated December 23, 2004 makes provision for all persons in the public service at January 1, 2005 to retire compulsorily at the age stipulated under the National Insurance Scheme. That age is presently sixty-five (65) but will move to sixty seven (67) by 2018.

“2. The main provisions of this Act are outlined below

- (1) The compulsory retirement age in the public service has been harmonised with the retirement age under the National Insurance Scheme. That retirement age will gradually move to 67 years by 2018. Among other things, the amendment means that officers listed in the Schedule to the Pensions Act Cap 25 under section 13C (2) will have the same retirement age as other public officers.
- (2) The effective date for the commencement of the provisions contained in this Act was January 1, 2005.
- (3) The new provisions with respect to the compulsory retirement age are also applicable to Statutory Boards which fall under Cap. 384...

“3. It is important to note that the amendment supersedes the option which might have been exercised by officers at the time of the 1984 amendment to the Pensions Act to retire at sixty (60). Therefore without taking any action, officers who opted to retire at sixty (60) can now continue to work beyond that age ...

“4. It must be emphasised that officers do not have to exercise an option in relation to the new retirement age since the voluntary age of retirement remains unchanged. That is, officers who joined the service after June 1984 can continue to retire voluntarily at age sixty (60) if they so wish, and those who were in the service before that date have also retained their voluntary retirement age. In addition, persons joining the service on or after January 1, 2005 will also be able to retire voluntarily at sixty (60).

...”

[91] The claimants maintain that the effect of the amendment was such that the sole discretion of the board to effect an officer’s retirement after reaching age 60 had been superseded. The Court disagrees. On a review of the amendment, it did no more than to change the age of compulsory retirement

upwards gradually to 67. Indeed, the Permanent Secretary in his memorandum quite rightly made it clear that there had been no change to the age of voluntary retirement. There was no mention either in the amendment or the circular to changes in respect of the power of a statutory board to retire personnel involuntarily after the age of voluntary retirement.

[92] It is the view of the court that this section provides a statutory board with the option or the discretion to retire its officers prior to the age of compulsory retirement but after the age for voluntary retirement. In other words, for a statutory board to exercise this option, an employee would have to be between the ages of 60 and until the end of 2017, the age of 66 ½.

[93] In this matter therefore, the statutory provisions applicable provide that the BDC was well within its legal authority to exercise its discretion under section 8(1) to compulsorily retire officers after the age of voluntary retirement. This finding however does not mean that the process employed by the BDC was a correct one. It is clear that the Board had to exercise its discretion correctly in order for the provisions of the Act to be properly enforced.

INVOKING SECTION 8 (1): The proper exercise of the discretion.

[94] How should the discretion in section 8(1) be exercised? What factors are relevant?

[95] It is the argument for the defendants that that the B IDC did not have to give reasons for compulsorily retiring the claimants. Indeed , the evidence of the CEO, Ms. Trotman was that the Board relied on section 4.1 of Part XI of the B IDC’s terms and conditions 1995 (section 3 in the revised draft version dated 14th May 2015) which provides as follows:

“Retirement by the Corporation

4.1 The corporation may require a staff member to retire from its service at any time after attaining the age allowed by these terms and conditions for voluntary retirement. The corporation shall not be required to state reasons, and shall give the staff member the same notice of its intention to retire him as the staff member is required to give the corporation of his intention to retire.”

[96] However it is the claim for the Claimants that the evidence revealed that the decision was (1) arbitrary (2) unreasonable and (3) unfair.

[97] The law prescribes that decision makers are held to specific standards in the exercise of their discretion. I do not propose to rehearse all the grounds on which such an exercise of discretion may amount to abuse, but to concentrate on those preyed on in aid by the claimants. First, a public body may be endowed with a discretion to act but the courts will seldom interpret such a discretion as being unfettered and immune from judicial scrutiny. They are allowed to make policies that guide them in making decisions but those policies may not be applied so rigidly as to prevent them from exercising their discretion to consider each individual case on the merits.

[98] Secondly, public decision makers must not act for an improper purpose, and must act in accordance with the stated purpose of the legislation which imbues them with power.

[99] Thirdly, a decision maker must not be guided by improper motives in arriving at his decision. Such decisions will be impugned by the court as having been made in bad faith.

[100] Fourthly, where a statute is silent on the considerations to be taken into account in making a decision, the decision maker must not take into account considerations which are irrelevant, and must take into account considerations which are relevant. As the learned text book writer **Eddie Ventose** states in his treatise "*Commonwealth Caribbean Administrative Law*"

“The courts have made it clear that they would construe the legislation to determine what matters the public authority may properly take into account, or examine the the proper considerations to determine whether they were proper considerations given the context and purpose of the legislation.” (page 189)

[101] Finally, the court may also refer to the broad ground of review established in *Wednesbury (Associated Provincial Picture Houses v Wednesbury Corp.)* [1948] 1KB 223). Where a public authority exercises a discretion in making

a decision it must do so according to law and must not act unreasonably. It is settled law that *Wednesbury* unreasonableness can include all the previously stated grounds.

[102] Has the B IDC abused its discretion under any of these heads and therefore fallen into error?

[103] The claimants maintain that the evidence did not reveal that the B IDC had given consideration to either their particular or individual circumstances, and that the decision was therefore arbitrary.

[104] Despite Mrs. Trotman's testimony that a spread sheet had been provided to the board outlining the salaries and payments due to the retired workers, this spreadsheet was not presented in evidence. It was fundamental, they argue, to the exercise of discretion that each matter had to be considered on its own merits and decided as the public interest required. By rigidly applying its decision, they submitted, the B IDC disabled itself from exercising its discretion and failed to exercise the said discretion lawfully (refer *Southwell v Attorney General et al* [2001] 1 LRC 53).

[105] The defendants maintained that a negative change in the economy was a good and proper reason, for not only a reduction in wages but also the dismissal and/or retirement of employees. They maintained that the court was entitled to take judicial notice of an economic downturn being

experienced by the whole island where workers from other statutory bodies have been dismissed and that that public policy considerations were a relevant consideration in exercising the discretion.

[106] The Court agrees that the public policy considerations are relevant considerations, but is not satisfied on the evidence that the Board took these into account in any serious, considered way.

[107] In her cross-examination, Mrs. Trotman referred to discussions at the level of the board where the cases of the claimants were dealt with. At no point however in these proceedings has any proof of such been disclosed. No board papers, no minutes of the relevant meetings, not one iota of evidence has been provided to substantiate her claim to this court that the Board exercised its discretion properly by taking the relevant considerations or into account any considerations at all. No Board members or any member of the executive team that did presentations were called to give evidence in this matter. It is not for the court to assume that witnesses and proof are available when they have not been presented with it.

[108] The court is of the view that that the particular and individual circumstances of the Claimants was also a relevant consideration. Counsel for the BIDC made the startling submission that in fact taking those individual circumstances into account would itself, be an abuse of discretion. The Court

cannot adhere to this line of argument. The Act is stated to be “an act to provide for the grant of pensions and gratuities to persons employed in the service of Statutory boards”. The whole structure of the Act requires the Board to inquire into the circumstances of an officer and exercise a discretion in relation to that officer’s pensionable benefits. The seven claimants had different circumstances and the decision affected them differently. David Parris spent 27 years in the service of scheduled statutory boards, and would have qualified for a higher pension and gratuity payment under the Act, had he not been required to retire. Elizabeth Mosely had spent 3 years 9 months with the BIDC, and does not qualify for a pension or gratuity payment as of right, but would have been so qualified if she had been allowed to work to the age of compulsory retirement. Loreen Taylor was employed for 7 years and 5 months, and was in a similar position. Rosalind Cumberbatch spent 20 years and 2 months in the service of the BIDC and would also have qualified for a higher pension and gratuity payments under the Act. Diane Jack-Wiltshire spent 14 years with the BIDC and would have also received a higher pension and gratuity payment, as would Maharley Babb, with 10 years service. Angela Haynes would have, after 34 years with the BIDC, qualified for the full maximum pension if she had not been required to retire by the Board. I agree with counsel for the

claimant that relevant considerations would include, but not be limited to the particular circumstances of each claimant, the relevant law in relation to the conditions under which officers of statutory boards are required to retire, the terms implied by law into the claimant's contract of employment and the policy adopted by the B IDC relative to its use of the statutory discretion. The straightened financial circumstances of the B IDC and how the Board could best manage this was also a consideration to be weighed in the balance.

[109] The court finds that there is no evidence upon which the court can conclude that the B IDC exercised its discretion properly, as there is no evidence that they took any considerations in mind at all, including the consideration of the straightened financial state of the B IDC. In fact, this factor was raised by Mrs. Sonja Trotman quite late in the day, certainly it was not admitted by the B IDC that this was a factor at the beginning of this matter.

[110] A failure to properly consider the matter at hand fetters the exercise of that discretion and is an abuse of discretion. Further, such a failure makes the decision arbitrary, capricious and unreasonable. In the words of **Simmons CJ**, sitting at first instance in *Pearson Leacock v. The Attorney-General* decided 27th October 2005:

“The categories of unreasonableness are not closed and an unfair action can seldom be a reasonable one. Nor is there a universal rule as to the principles on which the exercise of the discretion may be reviewed. And while claiming no authority to dictate the decision that ought to have been made in the exercise of the discretion in this case a court is yet duty bound to declare invalid a purported exercise of a discretion where the proper limits have not been observed. A discretion must be exercised according to reason, justice and the law. It must never be exercised whimsically or capriciously but within these limits which a reasonable person performing a public duty ought to confine himself.”

Were the claimants entitled to reasons for decisions?

[111] The defendants argue that the claimants have failed to avail themselves of the provisions of the *Administrative Justice Act Cap 109B* which provides at section 13 that they could request reasons for decision. This is undoubtedly true, the BIDC had no duty to give reasons and the claimants did not exercise their statutory rights to request them.

[112] However, the failure to give reasons further strengthens the claimant’s case that the discretion was exercised arbitrarily and unreasonably.

[113] It is by now settled law in our jurisdiction that there is no general duty on a decision maker to give reasons. **Lord Mustill** put it quite succinctly when he said “the law does not at present recognise a general duty to give reasons for an administrative decision” (*R v Home Secretary ex P Doody* [1994] 1 AC 531b). If those reasons are required by statute then they must be provided but where the statute is silent, then the giving of reasons is a matter of discretion (refer **Ramlogan** ‘*Judicial Review in the Commonwealth Caribbean*’ Routledge 2007 at page 143). It must be noted that the absence of reasons where there is no duty to give them will not of itself provide any support for the contention that the decision is unreasonable (refer *R v Secretary of State for Trade & Industry ex P Lonrho PLC* [1989] 1 WLR 525 quoted in section 8.19 **Supperstone Goudie & Walker** *Judicial Review* 3rd Edition (2005) Lexis Nexis Butterworths at page 187). There are times however, in the appropriate circumstances when a duty to give reasons can be implied in accordance with the principles of natural justice. By no means is it the role of the court to seek to interfere with the decision making authority of the BIDC’s board, but the court however is concerned with ensuring the board’s findings are arrived at by reasonable and fair means.

[114] Mrs. Trotman stated in her evidence that members of staff of the BIDC were aware of the financial constraints of the corporation. The financial constraints of the BIDC was not evidenced in any of the correspondence issued in this matter. There was no mention of it in the retirement letters issued to the claimants, no mention of it in the correspondence to the union the day before the May meeting, no minutes of any of these meetings, no board papers and no evidence from any other member of the board. Indeed not even in these proceedings were any financial statements presented and Mrs. Trotman's evidence, quite alarmingly, was that such detail was not necessary. There must be a basis on which the claimants might know why they were being required to retire and upon which an adjudicating body can be sure that the decision maker took into account relevant considerations and ignored irrelevant ones.

[115] The decision of the Board was a very important one. It had financial implications for the board and it critically affected the claimants' lives. In the particular circumstances of this case, fairness and openness should have guided the BIDC to provide reasons to the applicants at the earliest possible stage, not obdurately insist that no reasons need be given. This would have negated the appearance of the decision being arbitrary, aberrant or irrational. Decisions which affect the livelihood of persons are generally those where

fairness could prompt a decision maker to give reasons for decision. The absence of reasons is not without repercussions.

[116] **Lord Keith of Kinkel** elucidated the effect of a failure to give reasons in *R v Trade and Industry Secretary ex P Lonrho* thus:

“The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision”.

[117] Indeed, this Court has drawn exactly such an inference.

LEGITIMATE EXPECTATION

[118] The claimants argue that they are beneficiaries of a substantive legitimate expectation that the defendants would not use its statutory discretion under section 8 (1) of the Act to require them to retire, and that this expectation arose from the representations made to the Claimants by both the Board and by representations made through the process of collective bargaining with their Union. The defendants deny that any such representations were made or that any such policy existed.

[119] Legitimate expectation is concerned with the exercise of “non-rights”, that is, an applicant may argue that he is entitled to a benefit which he is

otherwise not entitled to by law because a public authority is bound by a clear promise or cannot change a policy. It may be procedural or substantive.

[120] A procedural legitimate expectation is one in which in which the applicant argues that “he would be allowed a right to be heard before any changes in policy are made or before a public authority reneges on a promise previously made. The expectation here is procedural in that the applicant simply wants an opportunity to make representations to the public authority before it changes its mind. This expectation does not risk fettering the discretion of the public authority to decide when to change its policies to suit new circumstances or to change its mind in respect of a promise previously made as long as it allows the affected applicant the right to make representations.”
(Ventose *Commonwealth Caribbean Administrative Law* 2013 Routledge).

[121] In ***Trinidad and Tobago Civil Rights Association v Manning* TT 2007 HC 253**, the court held that the law relating to a legitimate expectation could be summed up as follows

“a claimant’s right to legitimate expectation will only be found to be established where there is a clear and unambiguous representation made by a public authority or body upon which it is reasonable for him to rely”

[122] In contrast, with substantive legitimate expectation the applicant argues that he is entitled to the actual benefit and the public authority cannot change it or resile from it. The standard is exacting.

[123] The doctrine of legitimate expectation arises not only where there is a settled practice or promise but also “where the very circumstances would entitle a person to expect to be treated in a particular way notwithstanding the absence of a promise or settled practice” (**Ramlogan at pg 48 para 2.1**)

[124] Three questions must be answered. In *R (on the application of Bibi) v Newham LBC* [2002] 1 WLR 237 their Lordships stated that 3 practical questions arise in these matters

- “1) To what has the public authority committed itself?
- 2) has the authority acted ... unlawfully in relation to its commitment?
- 3) What should the court do...”

[125] What legitimate expectation can the claimants pray in aid? To what has the public authority committed itself?

[126] The evidence of Delcia Burke is of the utmost importance since she gave clear evidence of the policy which the court accepts that the BIDC followed in all other circumstances except the case of these officers. Her evidence sets the context in which the provisions of section 8 have operated, and qualifies any expectation that the workers legitimately had. Paragraph 20 of her affidavit is in the following terms

“The NUPW remains concerned that the First Defendant, as a statutory board, believes that it has an unfettered and unassailable discretion to retire any officer who has reached the age of 60 years *without providing that officer with a reason for the exercise of the discretion or with an opportunity to discuss the same given the right to a pension and such like benefits*, provided that officer has met the qualifying terms and conditions and the increase in the age of compulsory retirement affected by the 2004 amendment to the law.”

[127] It is extremely important to note that the expectation as she and the union saw it was that despite the BDC having a discretion to retire officers, or as she put it “notwithstanding the discretion enjoyed by a statutory board to retire an officer after having reached the age of 60 years”, “there could be no voluntary retirement of any officer since the increase in the mandatory retirement age and the expectation of an officer to take the benefit of the said increase were now relevant and material considerations to be taken into account by a statutory board when exercising its discretion”.

[128] Of greater note is the context within which she placed the above statements. Specifically at paragraph 11 of her affidavit she states as follows:

“It is to my certain knowledge that the first defendant has never invoked the power to voluntarily retire an officer pursuant to Section

8 (1) of the Statutory Boards (Pension) Act *without having a proper and justifiable basis for so doing and without providing the affected officer and the NUPW with the basis under which such discretion had been exercised*". (**my emphasis**)

[129] Miss Burke accepts then, that the representation made by the Board was not that it would not exercise its discretion under section 8, but that such power has always been exercised within the context of consultation and explanation and not in the shadows, with the relevant considerations including the pension and gratuity positions of the employees.

[130] The Court accepts that the representation that was made by the BIDC or the policy that they followed, arising out of the negotiations with the Union and the buttressed by the legal opinion obtained by them (the existence of which they do not now or any time have denied) was not to exercise their discretion under section 8 (1) to require officers to retire without consultation with that officer, and that would imply with his union representative. It is a procedural, not substantive legitimate expectation.

[131] Based on all the evidence, and the considerations highlighted above, this court holds that the legitimate expectation held by the claimants, on the basis of custom and practice in the public sector is that whilst involuntary

retirement remained an option, the discretion to invoke it would not be exercised in the absence of consultation with them or their representatives.

[132] Much was made of the fact during cross examination by the defendant's counsel that, with the exception of Mr. Parris, the individual claimants could not pinpoint the person who communicated this representation to them or when it was so communicated. The court gives this trend of thought short shrift. The representation was communicated to their representatives, the union, and evidence of the long standing policy was given by Miss Burke. Mr. Parris himself gave evidence that because of his management position he was aware of the legal opinion which was discussed by the Board, and aware too that no one else had ever been required to retire in the circumstances similar these claimants. That he misconstrued the legal effect of the representations is not the issue, the evidence that he has given establishes a procedural legitimate expectation to the satisfaction of the court.

FINDINGS

[133] Having considered all of the evidence and submissions before this court, the court makes the following findings

- 1) The BIDC has a discretion in law to require employees to retire after the age of voluntary retirement has been attained, that is on attaining the age

of 60 years. The 2004 amendment made no change to the power to involuntarily retire employees.

- 2) The Claimants have a procedural legitimate expectation that the exercise of such discretion will be subject to consultation with them or their representatives.
- 3) The exercise of the discretion under section 8 (1) by the Board of Directors of the B IDC and the decision to require the claimants to retire was arbitrary and unreasonable.
- 4) The consequence of the failure to exercise the discretion properly and the frustration of the claimants' procedural legitimate expectation by the B IDC is that the claimants would otherwise have been entitled to work to the compulsory age of retirement, and be paid the full amount of the salary and pension benefits accruing at that time.

[135] The claimants also seek an order of *certiorari*. An ineluctable consequence of such an order would be that the claimants would remain in the employ of the B IDC, and would be free to return to work tomorrow. The B IDC would then be free to exercise the discretion under section 8(1) if it so chose, but this time exercising the discretion according to law. Essentially, when there has been a finding of an abuse of power or a frustration of a procedural legitimate expectation, the Court may refer the matter back to the decision

maker to make the decision properly. The Court cannot substitute its decision for that of the Board, and the Board may, after consultation come to exactly the same conclusion. This is the nature of judicial review.

[136] However, the court does not consider that a grant of *certiorari* is in the interests of good administration, or that it would meet the justice of this case. The claimants have now been out of the workplace from the 30th September 2015, the date on which the impugned decision took effect. It cannot seriously be contemplated that they return to the BIDC, a relatively small organisation, as employees. Mr. Parris in any event gave evidence that the Board had lost confidence in him. So the third question must be answered: what should a court do?

[137] I consider that in all the circumstances, that the appropriate relief for the wrongful exercise of the discretion and the frustration of the legitimate expectation is an award of damages under the AJA.

CONCLUSION & RELIEF SOUGHT

[138] In the circumstances, the court makes the following orders:

- (i) A declaration that, in the events which have happened, the said decision and/or administrative acts and/or omissions of the defendant to compulsorily retire the claimants from the service of the defendant is unlawful, null, void and of no legal effect.

- (ii) A declaration that, in the events which have happened, the said decision of the Accountant General, the officers of the Treasury Department, the Auditor General and other public functionaries and authorities of the Government of Barbados to process and calculate or purport to process and calculate the gratuity and pension due to the claimants is unlawful, null, void and of no legal effect;
- (iii) An award of damages equivalent to the pecuniary loss occasioned by the unlawful administrative act and/or omissions on the part of the defendants;
- (iv) There being no submissions on damages, the parties are to file their written submissions and affidavits within 28 days of the date of this decision.
- (v) An order for the claimants to have their costs of and occasioned by this action;

[139] I will hear submissions as to the quantum of costs in the substantive case, and submissions on costs on the application of the Attorney General who was struck out as a party during the proceedings.



Jacqueline A.R. Cornelius
Judge of the High Court