

[2013–14 Gib LR 677]

**R. (on the application of MONTIEL) v. GIBRALTAR
DEVELOPMENT CORPORATION, MINISTER FOR
EMPLOYMENT and CHIEF SECRETARY OF THE
GOVERNMENT OF GIBRALTAR**

SUPREME COURT (Dudley, C.J.): September 18th, 2014

Administrative Law—judicial review—alternative remedies—claimant to pursue available alternatives to judicial review before making public law claim—only appropriate to bring review claim first in exceptional circumstances, including if review more effective and convenient than private law claim—more effective if involves multiple claims with interlinked facts

Administrative Law—judicial review—legitimate expectation—requires clear and unambiguous representation, without reasonable qualification, made by person with actual or ostensible authority—substantive legitimate expectation requires specific undertaking to particular individual or group that particular policy will continue—Government entitled to ignore expectation if can show necessary to further overriding public policy

The claimant sought judicial review of a number of decisions made by the first defendant (“the GDC”) in relation to his employment.

The claimant was permanently employed by the GDC on the sixth point of a seven-point pay scale. His terms and conditions of employment stated that if he were elected as a Member of Parliament, he had to resign his position with the GDC but that he could be reinstated at his former grade after he ceased to be an MP. The claimant was subsequently elected as an MP and appointed Minister for Employment. Whilst he was serving, the Government declared that it would integrate all of the GDC’s employees into the civil service, although the Opposition objected to this policy. As any appointment to the civil service could only be made by the Governor, the following procedure was followed: once an opening had been confirmed, a Public Services Commission (“PSC”) paper would be circulated to the PSC. If no member objected to the paper within 48 hours, a recommendation would be made to the Governor, who would be asked to act upon it. If the Governor accepted the recommendation, he would issue a letter of appointment. This process was followed and letters of appointment were issued to the majority of the GDC’s employees.

Shortly before Parliament was dissolved, the claimant wrote to the GDC’s human resources manager, S, requesting reinstatement. After Parliament had been dissolved, but before the general election, the

claimant met with C, the Government's acting human resources manager, and G, the director of education and training, who each informed him that he would be reinstated shortly after he left Government. A PSC paper proposing his hiring was circulated, but the 48-hour deadline did not expire until after the general election. The Government lost the election and the Opposition entered power. The recommendation was therefore sent to the new Governor, who returned the note stating that the claimant should be reinstated to the GDC instead of the civil service.

Shortly afterwards, S informed the claimant that there was a meeting for all former employees and that this included him. At that meeting, B, a Government minister, stated that the letters of appointment sent out under the previous Government would be honoured and that each employee could choose whether to work for the GDC or the civil service. The claimant, however, had not received a letter of appointment and was later offered re-engagement with the GDC with no option to join the civil service. This offer stated that he would be paid on the third point of a eight-point pay scale, which was the closest level on the new scale to his old salary; that his employment was effective from the date of the letter; and that the re-engagement must be in final settlement of any legal claims which he purported to have against the GDC or the Government.

The claimant sought judicial review of the decision, alleging that he had had a legitimate expectation that his employment would begin from the day after he had ceased to be a Minister; that, as he had previously been on the penultimate point on the pay scale, he should be re-engaged at that point; and that he should be employed as part of the civil service rather than the GDC. He further claimed that the condition that he cease any legal action was unfair. Shortly after he brought the present proceedings, the GDC dropped the condition that he cease legal proceedings and the claimant began work. On his first day, however, he was informed that he would be working as a receptionist until a suitable position was found. He refused to do so and claimed that he was entitled to a position commensurate with his grade.

The claimant submitted that he had fully complied with the requirements of the terms and conditions and that his legitimate expectation arose from (a) the previous administration's policy that all GDC employees would be transferred to the civil service; (b) the PSC paper and letters of appointment transferring most of the GDC's employees to the civil service; (c) promises and representations made by C and G that the letter of appointment was merely a formality, and that the policy of transferring employees from the GDC to the civil service was still in place and that he would be able to take advantage of it; (d) representations by S that he would be treated in the same way as those employees who had been issued letters of appointment; and (e) representations by B that the GDC's previous employees could elect to be employed by either the GDC or the civil service.

The defendants submitted in reply that the claimant could not rely on any legitimate expectation because (a) the Government could not be

bound by the previous Government's policies; (b) as the Governor was the only party capable of hiring the claimant, neither the PSC papers, C, G nor S had actual or ostensive authority sufficient to create a legitimate expectation; and (c) it was clear that the representations made to the previous employees did not extend to the claimant. They further submitted that the claim should have been brought under employment law, rather than as an application for judicial review, and that, as the letter complained of was written by the GDC and not by the Government, there was no decision which could be subject to judicial review.

Held, quashing the decision in part:

(1) The claimant did not have a legitimate expectation that he would be hired by the civil service. A legitimate expectation required a clear and unambiguous representation, devoid of any relevant qualification, made by a person with actual or ostensible authority. Further, a substantive legitimate expectation required a specific undertaking to a particular individual or group that a particular policy would continue. The Government, however, had to be entitled to discontinue old policies and determine the rate at which they changed. A legitimate expectation could therefore be ignored if there were evidence that it was necessary to do so to further an overriding public objective—particularly if, when properly understood, the promise was only for a limited period. Moreover, the claimant could not rely on an expectation which arose from a representation made by a civil servant in respect of a commitment from the Government of which he had been a member. This fell outside the principle of legitimate expectation as the representation was, in part, self-generated by the claimant. Accordingly, he could not rely on the representation that all GDC employees would be transferred to the civil service (paras. 40–41; para. 45).

(2) Even if the claimant had not been a member of the Government, it must have been apparent to him that the policy would not survive the dissolution of Parliament. The Opposition had clearly stated that it opposed the policy, and neither the Government's policy nor the PSC paper which recommended that the claimant be appointed to the civil service could therefore have amounted to a clear and unambiguous promise that would continue after the general election. As a Minister, the complainant must have known that neither C, G nor S had the actual or ostensible authority to implement his employment with the civil service. Moreover, the representations from S, particularly the email informing him to go to the meeting for former GDC employees, could not have amounted to a clear and unambiguous promise that he would be employed by the civil service. Although the policy would still have been in effect if the PSC paper had been forwarded to the acting Governor before the general election, it was not unfair or irrational for the PSC to wait for the new Governor to be appointed before it made any recommendations. Additionally, whilst, at the meeting for former GDC employees, B had

claimed that previous employees could choose whether to resume employment with the GDC or to continue with the civil service, this was clearly aimed at those employees who had received a letter of appointment and could not have been a representation to the claimant (paras. 42–48).

(3) The claimant was entitled to be restored to a position of employment with the GDC from the day after the general election. The terms of employment were intended to ensure that employees who wished to become politicians could do so securely and it would not have been unduly burdensome for the GDC to offer employment after the new Government was formed—particularly as the claimant had applied for reinstatement several weeks before that time. The claimant was not entitled, however, to be placed on the penultimate point in the salary scale as it was not *Wednesbury* unreasonable to determine that the equivalent level was determined by the amount paid rather than the position in the scale (paras. 53–54).

(4) The claim was properly brought as a public law claim. The claim against the GDC had a contractual background, but the claim that the claimant’s employment should be transferred to the civil service was a public law claim, particularly as it relied on a contention that the application of the employment policy had been irrational and in violation of the claimant’s legitimate expectation. Further, whilst the letter had been written by the GDC’s Human Resources Department, the condition requiring that the claimant treat the employment as settlement of any claim he may have against the Government made it clear that a decision had been made not to employ him within the civil service. Although a claimant should normally exercise any alternatives to judicial review available before attempting to bring a public law claim, it was appropriate to apply for judicial review in exceptional circumstances. This included a situation in which judicial review was more effective and convenient than a private law claim. As the claim involved an interlinked set of facts, it was more cost and time efficient for the claim to be brought by judicial review rather than as a number of separate claims. The claimant had therefore been entitled to apply for a single judicial review hearing, rather than bringing the claims against the GDC under employment law (paras. 38–39; paras. 51–52).

Cases cited:

- (1) *Kay v. Lambeth L.B.C.*, [2006] 2 A.C. 465; [2006] 2 W.L.R. 570; [2006] 4 All E.R. 128; [2006] 2 F.C.R. 20; [2006] H.R.L.R. 17; [2006] UKHRR 640; (2006), 20 BHRC 33; [2006] 2 P. & C.R. 25, applied.
- (2) *Paponette v. Att. Gen. (Trinidad & Tobago)*, [2012] 1 A.C. 1; [2011] 3 W.L.R. 219; [2010] UKPC 32, applied.
- (3) *R. v. Inland Rev. Commrs., ex p. MFK Underwriting Agents Ltd.*, [1990] 1 W.L.R. 1545; [1990] 1 All E.R. 91; [1990] STC 873, referred to.

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- (4) *R. (Bancoult) v. Foreign & Commonwealth Secy. (No. 2)*, [2009] 1 A.C. 453; [2008] 3 W.L.R. 955; [2008] 4 All E.R. 1055; [2008] UKHL 61, applied.
- (5) *R. (Niazi) v. Home Secy.*, [2008] EWCA Civ 755, applied.
- (6) *R. (Patel) v. General Medical Council*, [2013] 1 W.L.R. 2801; (2013), 133 BMLR 14; [2013] EWCA Civ 327, referred to.
- (7) *R. (Shoosmith) v. Ofsted*, [2011] P.T.S.R. 1459; [2011] I.C.R. 1195; [2011] IRLR 679; [2011] B.L.G.R. 649, applied.

D. Feetham, Q.C. and *C. Allan* for the claimant;
K. Azopardi, Q.C. and *Ms. K. Power* for the defendants.

1 **DUDLEY, C.J.:** This is the judgment of a rolled-up permission and substantive hearing of a claim for judicial review of various decisions said to be contained in a letter dated March 15th, 2012.

Background

2 The claimant (“LM”) was the former Minister for Employment in the GSD administration and it is averred served in that capacity from October 8th, 2007 to December 8th, 2011. Although nothing turns on it, the cogent submission advanced for the defendants, which is not materially challenged, is that, by virtue of s.45(9) of the Constitution, LM in fact remained a Minister until about midday on December 9th, 2011 when the Hon. Fabian Picardo was appointed Chief Minister and consequently there was a new government. LM was also a member of Parliament from October 8th, 2007 to November 8th, 2011 when Parliament was dissolved.

3 Before becoming an MP and Government Minister, LM was permanently employed by the Gibraltar Development Corporation (“the GDC”) as a Training Monitor within the Department of Education and Training. LM took up employment with the GDC on February 14th, 2007.

4 The first defendant, the Gibraltar Development Corporation was established as a corporation under s.3(1) of the Gibraltar Development Corporation Act 1990 and, under s.3(5), can sue or be sued in its corporate name. On December 17th, 2009, the then Government appointed the then Chief Minister, Peter Caruana, Q.C., as Chairman of the Board of the GDC and three other then Government Ministers (but not LM) were also appointed members of the board. On January 20th, 2012, those appointments were revoked and the second defendant, the present Minister for Employment, Hon. Joe Bossano (“Minister Bossano”), was appointed Chairman of the Board.

5 The GDC terms and conditions of employment, at the Second Schedule, deals with general principles of conduct at cl. 6 and provides as follows:

“Gibraltar Parliament Candidature

6.1 Any employee of the Corporation who is granted unpaid leave for the purpose of standing for election and is elected as a member of the Gibraltar Parliament shall be required to relinquish and cease to act in any office under the Corporation before taking up his seat in the House.

6.2 Employees who are elected to the Gibraltar Parliament will be entitled to be reinstated in their former grade as employees of the Corporation if:

(a) they cease to be elected members after an absence from the Corporation not exceeding two terms of office as members of the Gibraltar Parliament;

(b) they apply for reinstatement within 3 months of ceasing to be members.”

6 By letter dated October 17th, 2011 sent on behalf of LM to Ms. Eleri Surrey, the human resources officer of the GDC, LM informed her that he would not be standing as a candidate at the next general election and sought confirmation of his entitlement to be reinstated to his former grade as a GDC employee. On the same day, Ms. Surrey replied, enclosing the relevant provision in the GDC terms and conditions.

7 On November 8th, 2011, LM ceased to be a Member of the Gibraltar Parliament and, by letter dated November 10th, 2011, he wrote to the acting Human Resources Manager of the Government of Gibraltar, Ms. Brenda Cumbo, copied to Ms. Surrey, confirming his intention to be reinstated to his former GDC grade after the General Elections. Although it was somewhat unattractive that LM chose to write on Ministry of Employment letterhead and that he signed *qua* Minister, it is not in dispute that the letter constituted an application for reinstatement for the purposes of cl. 6.2.

8 Following the institution of a new pension scheme applicable to new civil service entrants which was in line with the pension scheme of GDC employees, the policy of the previous administration, as outlined by the then Chief Minister in his budget speech of July 2011, had been to appoint GDC employees to the civil service “with those grades being ring-fenced such that it would not affect the present or future interests or promotion prospects of existing civil servants.” In reply, during the same budget debate, Minister Bossano, who was then Leader of the Opposition, made it clear that the Opposition does “not support the position of the Government to proceed with the integration of GDC employees into the civil service thereby changing the status of this group of employees.”

9 In the summer of 2011, the GSLP/Liberals issued a discussion document entitled *The Gibraltar Civil Service & The GDC* and, although it is accepted by Mr. Azopardi that the document was not explicit about future detailed plans for the GDC, he properly submits that it was implicit in the document that the GSLP/Liberals envisaged a continuing role for the GDC should they be elected into government. That much is apparent from a passage which reads: “We are committed to the principle of equal pay for equal work, which is why we remain committed to the principle of harmonization of terms and conditions of GDC members with the civil service.” As Mr. Azopardi contends, there would be no need to harmonize if integration were envisaged.

10 It is LM’s case that on October 6th, 2011, all GDC employees were sent a letter of appointment by the Human Resources Department of the Government of Gibraltar appointing (or, from another view, purporting to appoint) the recipients to the civil service. The evidence of Ms. Cumbo is more nuanced. Dealing in her witness statement with the relevant Public Service Commission (“PSC”) papers circulated on September 27th, 2011 to its members, she states (at para. 15):

“This first paper covered the majority but not all of the GDC employees, namely it excluded the seven Gibraltar Car Parks employees and the six Kijy Ltd. employees. My understanding is that the latter were excluded deliberately. I know this because when HR officials asked No. 6 whether the Kijy GDC employees should be offered a transfer to the civil service like the other GDC employees, we were instructed by No. 6 Convent Place at the time that these employees were to be excluded from the proposed transfer. The Car Parks employees had however been inadvertently excluded and this was subsequently rectified.”

Although in that passage she refers to the six employees who were excluded as “Kijy Ltd. employees,” it is evident from the passage when read as a whole that they were GDC employees seconded to work with Kijy Ltd.

11 According to Ms. Cumbo, in relation to LM, an offer of employment with the civil service was not issued as he was still a Minister and “the issue of a letter of offer of appointment to the civil service to him had not been proposed or approved.” On November 18th, 2011, a second PSC paper was produced requesting sanction to make offers of employment into the civil service of the seven GDC employees working with Gibraltar Car Parks who were then sent a letter of appointment dated December 7th, 2011.

12 It is not in dispute that although the Government could seek to transfer GDC employees to the civil service, in accordance with the Constitution, it is the Governor (on behalf of the Crown) acting in

accordance with the advice of the PSC who appoints public officers. In her witness statement, Ms. Cumbo explains the stages of the process and it is useful to set out the relevant passage to properly understand the process which (in part) was followed in respect of LM:

“(a) First a policy decision by the Government resulting in the opening of, for example, vacancies would need to be taken. In this case the policy decision entailed the integration of most GDC employees within the civil service;

(b) Once a policy view/position is taken by the Government, a paper is prepared by either the staff of the Government’s Human Resources Department or Government officials at No. 6 Convent Place (‘No. 6’) for circulation to the PSC recommending a certain course of action [in this case the appointment of certain individuals to the civil service];

(c) The paper is then circulated to the PSC members by HR, on the basis that unless an objection is raised by any individual member within two working days, it is deemed that the PSC accepts the course of action recommended and would wish to tender such advice to the Governor/Crown. Accordingly, provided the 48 hour period elapses without comment or objection, the Secretary of the PSC will send a PSC Minute to the Chief Secretary addressed to the Governor confirming the advice of the PSC;

(d) At that stage the Chief Secretary tenders the recommendations to the Governor who is asked to act on the advice of the PSC;

(e) It is only once the Governor, on behalf of the Crown, has accepted the recommendations and made the appointments that the requisite action of issuing letters of appointment to those individuals into the civil service will be taken. Neither of the defendants, therefore, has the power to appoint any individual into the civil service nor to direct the issue of a letter of appointment into the civil service to particular individuals.”

In respect of the Chief Secretary, it is properly submitted by Mr. Azopardi that his role in the appointments process is multi-faceted in that he provides administrative support; appoints the Secretary of the PSC; is an ordinary member of the PSC; and acts as a communication conduit between the Government, the PSC and the Governor.

13 Various telephone communications between LM and Ms. Cumbo, leading up to a meeting held on November 29th, 2011, took place. According to LM, at that meeting he was told unequivocally that he would be issued with both a letter of appointment to the civil service effective December 9th, 2011 and with written instructions to return to work. According to LM, he was also told that he was going to be reinstated to

his old job as a Training Monitor. LM told Ms. Cumbo that he believed that Minister Bossano felt genuine hostility and animosity towards him and that, if elected into office, it was likely that he would be appointed Minister for Employment and might try to prevent his reinstatement.

14 It is also LM's case that, following the conversation with Ms. Cumbo, in the first week of December, he spoke to Mr. Ernest Gomez. Mr. Gomez is the Chief Secretary, and the third defendant, but at the time was Director of Education and Training. According to LM, Mr. Gomez told him that he had received instructions from Ms. Cumbo that arrangements had been put in place for him to return to his old job and that, during the conversation, Mr. Gomez had said that it was better to postpone his return until Monday, December 12th, 2011 (December 9th being a Friday). According to LM, he said that he could delay going back to work to allow for the necessary arrangements to be made, provided that he was on the pay roll as from December 12th. Moreover, it is said by LM that the impression created by Mr. Gomez was that the issue of the letter of appointment was merely a formality and that his reinstatement to his former job, albeit within the civil service, had been agreed with Ms. Cumbo. Had this not been his understanding, he would have raised the matter with the Board of the GDC and/or the then caretaker Chief Minister.

15 Ms. Cumbo recollects the reference made by LM to the difficult relationship between LM and Minister Bossano. She is, however, unable to recall whether LM explicitly told her that he wished to be transferred to the civil service, although as she puts it, "given Government's policy at the time . . . it must have been assumed by both of us that he wished to do so." Similarly, she cannot recall whether, when discussing the letter of appointment, they were referring to a letter of appointment to the civil service or a letter of reinstatement to the GDC, but accepts that it may have been the former given what was then government policy. This was, however, subject to the caveat that "of course . . . I do not have the power to agree to issue letters of appointment to the civil service and was waiting for instructions from No. 6 in this regard as these could only be issued by the Crown." In relation to the reinstatement date, Ms. Cumbo's evidence is that, as far as she can recall, although she had telephone conversations with Mr. Gomez, no agreement was reached as to whether LM would be reinstated either as from the December 9th or 12th, 2011, but that, aware of LM's concern as to being placed within the Employment Ministry, they wanted to explore the possibilities of not placing him within that Ministry if that were at all possible. However, she accepts that it was assumed that reinstatement would take place at the earliest possible opportunity after the General Election.

16 Mr. Gomez's evidence as regards the conversations with Ms. Cumbo is in consonance with her evidence. As regards his conversation with LM, Mr. Gomez's evidence is on the following terms:

“As discussions were already under way, my understanding was that his reinstatement to the GDC would be a mere formality, and I advised him as such during our conversation. Further, although a start date had not been agreed, for practical reasons we also discussed delaying this until he had received the necessary confirmation in writing. I cannot recall whether the claimant explicitly mentioned his desire to be transferred to the civil service during this conversation or whether we were referring to a letter of appointment to the civil service or to the GDC. However, we could well have been referring to a letter of appointment to the civil service given Government’s policy at the time.

17 Unbeknown to LM (until disclosed for the purposes of these proceedings), on December 5th, 2011, No. 6 officials were instructed to prepare a third PSC paper to deal solely with LM’s proposed transfer to the civil service. Although dated December 5th, 2011, the paper was circulated by Human Resources on December 7th, 2011 and the 48-hour “no comment” deadline described above expired on December 9th, which was the day after the General Election. In tandem with that process, on December 8th, 2011, a draft letter of appointment to the civil service addressed to LM (but to be sent through the Director of Education and Training) was prepared by Human Resources and drawn up to offer LM appointment as from December 9th, 2011, albeit the rate at which salary was payable was left blank. According to Ms. Cumbo the draft letter was not issued on December 8th, 2011, because—

(a) the PSC had not delivered its advice to the Chief Secretary and therefore the Chief Secretary had, in turn, not tendered advice to the Governor;

(b) LM’s appointment could not have been approved or made until he ceased to be a Minister on December 9th, 2011;

(c) it was unclear what salary was to be offered; and

(d) advice was being sought as to whether, for pension purposes, LM was to be covered by Provident Fund No. 2.

Again according to Ms. Cumbo, a minute by the secretary to the PSC, tendering the advice of the PSC, was not prepared until December 9th, 2011 and, in line with the usual process, Ms. Cumbo prepared a note to the Governor which was sent through the acting Chief Secretary, Mr. Richard Armstrong.

18 It is Ms. Cumbo’s evidence that by then a new Government was being sworn in and it is her understanding (albeit she does not give the basis for such understanding) that Mr. Armstrong held the paper back for further consideration and did not tender the advice to the Governor on this

issue. Her understanding is also that Mr. Armstrong did not tender the advice because—

(a) no PSC minute had been received prior to the election;

(b) it was known that the new administration had a completely different policy in relation to the GDC; and

(c) LM was still a Minister on Friday, December 9th, 2011 and therefore it was not feasible to offer him employment.

19 On December 15th, 2011, LM wrote to Ms. Cumbo chasing her for his letter of appointment and stating that he had agreed with Mr. Gomez to postpone his start date for a few days until he had received his letter of appointment to the civil service. There then followed internal communications between the Assistant Chief Secretary and Ms. Cumbo and, by letter dated January 3rd, 2012, the Assistant Chief Secretary informed Ms. Cumbo that LM was to be offered reinstatement by the GDC at the same level of salary he had when he left to stand for election, albeit subject to cost of living increments. On January 5th, 2012, Mr. Armstrong returned Ms. Cumbo's note, which he had endorsed as received on December 12th, 2011, with the following note:

“As you are aware the Government has decided that Mr. Montiel be reinstated with the GDC and you are finalizing arrangements. Consequently there is no need to proceed with the transfer to GOG [the Government of Gibraltar] and I am therefore returning the file. For the sake of good order the secretary of the PSC should be informed accordingly.”

There then followed communications between the government officials as to whether a more appropriate location could be found in which to place LM rather than within the Employment Ministry. According to Ms. Cumbo, at about this time she contacted LM to update him on recent events and although by then aware that the offer of reinstatement was to the GDC, she does not recall discussing the issue with him. In some contrast, according to LM, early in the New Year Ms. Cumbo contacted him by telephone to inform him that the letter of appointment into the civil service had been drafted and once approved by No. 6 Convent Place would be posted to him within the next few days.

20 On January 11th, 2012, Ms. Surrey emailed LM informing him of a meeting for former GDC employees which was to be held on January 13th, 2011. Ms. Surrey's choice of language, described by Ms. Cumbo as “loose,” was on the following terms: “Minister Bossano has called a meeting of all former GDC employees at 16:00 on Friday, January 13th at the John Mackintosh Hall, this obviously includes you as well.” According to Ms. Cumbo, following the meeting those individuals who had the letters of appointment/offers of appointment to the civil service of October

6th and December 7th, 2011 were sent a letter dated January 19th, 2012, which was then superseded by a letter dated January 24th, 2012, which confirmed what had been said at the meeting and essentially gave recipients the option either to return as employees of the GDC or to take up employment in the civil service as provided for in the letters which had been sent to them on October 6th and December 7th, 2011. Ms. Cumbo makes the point that the GDC employees working at Kijy Ltd. and new recruits to the GDC were not sent the January 19th and 24th, 2012 letters. LM was not sent either letter.

21 Minister Bossano was appointed Chairman of the Board of the GDC on January 20th, 2012 and, in that capacity, at about that time wrote to the GDC employees offered appointment to the civil service. In that undated letter he said, *inter alia*:

“As an employee of the GDC you received a letter offering appointment to the civil service dated October 6th, 2011 to take effect from October 1st, 2011. You will retain that right and be able to exercise it in the event that at some future date a Government decides that the Gibraltar Development Corporation will be abolished. Therefore, you will not loose [*sic*] the security of employment you would have enjoyed had you accepted the offer to join the civil service on the October 1st, 2011.

This undertaking applies to those persons who, having decided not to transfer by January 2012 to the civil service, continue as GDC employees. Clearly, this undertaking is not required by those who will have already chosen to accept to join the civil service as they will have then ceased to be GDC employees.

...

For the avoidance of doubt then, I confirm that the pay and conditions introduced on October 1st, 2011 analogued to the civil service grades will remain linked and will move in line in the future.”

Of those that received the January 19th and 24th, 2012 letters, 69 opted to stay in the civil service and 87 within the GDC.

22 On January 31st 2012, LM wrote to Ms. Cumbo expressing his concern that the Financial Secretary was unaware of his wish to be reinstated, had no knowledge that his salary was to be paid from December 9th, 2011 and had also been inquiring as to whether his pension and social insurance contributions had been made.

23 In February 2012, LM instructed Messrs. Hassans and, on February 14th, 2012, Mr. Feetham sent an email to Mr. Gomez, who by that stage was Chief Secretary. In that email, reinstatement to the GDC was sought but no reference was made to LM’s wish to be transferred to the civil

service. Mr. Gomez's reply directed Mr. Feetham to the GDC Board. In his subsequent communication, Mr. Feetham raised the question of appointment to the civil service.

24 On March 1st, 2012, Hassans sent a pre-action letter to both the Chief Secretary and Minister Bossano *qua* Chairman of the GDC. By letter also dated March 1st, 2012, but received by LM on March 2nd, LM was offered re-engagement with effect from March 1st, 2012 in the post of training monitor within the GDC at an annual salary of £33,554, being the third in an eight-point salary scale.

25 There then followed further communications culminating in the letter of March 15th, 2012, which is identified in the claim form as containing the decisions challenged. In it, Mr. Reyes, on Government of Gibraltar Human Resources letterhead, but signing for the GDC, said:

“Dear Sirs

Luis Montiel

We write on behalf of the Gibraltar Development Corporation (‘the GDC’) further to your letters of March 2nd, 2012 and March 13th, 2012. Neither the Chief Secretary, Mr. Gomez, nor the Chairman of the GDC, the Hon. Mr. Bossano, will be replying separately to your letter. Please note that we have been unable to reply sooner as the GDC does not yet have its own Human Resources Department and we are under great pressure of work.

In answering your letter of March 2nd, we will follow the numbering of the questions posed for ease of reference, as follows, namely that:

(1) the offer of re-engagement is from March 1st, 2012. The salary will therefore be paid from that date or the date from which your client reports to work, whichever is the later. Kindly set out why you consider there is any right for your client to be reinstated as at December 9th for the consideration of the Board of the GDC;

(2) the contributions in respect of social insurance will be made as from the date on which your client takes up the offer of employment set out in our earlier letter of March 1st, as per para. (1) above. Please note that ‘national insurance contributions’ are not payable in Gibraltar;

(3) the position in respect of occupational pension payments is the same as in respect of social insurance contributions as set out at (2) above; and

(4) the re-engagement is to the GDC, which was your client's original employer.

As to the issue of the salary scale raised in the final, unnumbered paragraph of your letter of March 2nd, the re-engagement is proposed on the salary scale that is closest to the salary which your client was on before he became a Minister. Please set out in detail why you consider this is not the appropriate salary for re-engagement.

Finally, although the Board of the GDC agrees that your client should be free to continue to argue issues relating to the effective date of his re-engagement and his salary scale, the re-engagement by the GDC must be in full and final settlement of all and any other legal claims he may purport to have against the GDC and/or the Government or any officer thereof in respect of any aspect of this matter. This will clearly not prevent your client from pursuing whatever entitlements he may believe he has via his union once his re-engagement has taken effect.

We shall look forward to hearing from you.

Yours faithfully,

John B. Reyes

for Gibraltar Development Corporation”

26 By letter dated March 19th, 2012, Hassans sought confirmation as to whether Mr. Reyes had authority from the Chief Secretary to reject LM’s contention that he was entitled to be appointed to the civil service and whether the offer of re-engagement was in fact conditional upon LM not instituting proceedings.

27 By letter dated April 26th, 2012, Mr. Reyes confirmed on behalf of the Chief Secretary that Government did not consider that LM was entitled to be appointed to the civil service. And, although not dealing with the issue of whether or not the offer was conditional, his paragraph numbered 5 is telling: “I note that you write that you have been instructed to issue proceedings. Can I therefore take it that the offer of re-engagement in the GDC is being turned down by your client?” The present claim for judicial review was subsequently issued on April 27th, 2012. Thereafter, through the defendants’ solicitors, it was said that the GDC offer of reinstatement was unconditional and, by agreement, LM reported for work at 8.00 a.m. on July 16th, 2012 at the Ministry of Employment offices at New Harbours. According to LM, when he reported for work he was told that he was being offered the post of receptionist until something suitable was found. It is LM’s view that Minister Bossano had given those instructions so as to humiliate him. As a consequence, LM left the Ministry of Employment offices and has not returned to work. LM accepts that he is not entitled to the same job he had

prior to taking ministerial office but says that he is entitled to reinstatement anywhere within the GDC to a post commensurate with his grade.

The claim

28 By his amended claim for judicial review, LM seeks to challenge the following decisions:

(a) the making of the offer of reinstatement as from March 1st, 2012 conditional;

(b) the refusal to reinstate LM to the GDC from December 12th, 2011;

(c) the refusal to offer LM the opportunity to be appointed to the civil service;

(d) the refusal to procure payment to LM of his social insurance and occupational pension contributions from December 12th, 2011; and

(e) the refusal to reinstate LM on the same point on the salary scale as his initial appointment on May 29th, 2007, namely on the penultimate salary scale of the Grade IV Scale with an unconsolidated bonus additional to pay of £648 per annum.

The opportunity to be appointed to the civil service

29 Central to the action is the claim that LM was denied the opportunity to be appointed to the civil service. Both in his written and oral submissions Mr. Feetham advanced the argument in great detail, I endeavour to summarize it without doing it too great a disservice.

30 It is not in dispute that, upon ceasing to be a Minister, LM was entitled to reinstatement to his previous grade within the GDC. It is LM's case, however, that he was entitled to immediate reinstatement on December 9th, 2011 when he ceased to be a caretaker Minister and that he had a legitimate expectation that having elected to do so he would be afforded the opportunity to be transferred to the civil service. It is said that that legitimate expectation arose consequent upon the following policies, representations and/or promises, individually and cumulatively:

(a) the policy of the previous administration ("the GSD policy");

(b) the first PSC paper and the letters of appointment transferring most GDC employees to the civil service;

(c) promises and/or representations by Ms. Cumbo and Mr. Gomez in November and December 2011;

(d) the announcement by Minister Bossano on or about December 12th, 2011;

- (e) the email of Ms. Surrey of January 11th, 2012; and
- (f) further representations by Ms. Cumbo in 2012.

The GSD policy

31 It is submitted for LM that the GSD policy had been to offer all GDC employees who wished to transfer to the civil service the opportunity to do so; that the policy was well known and applied to all GDC employees and that LM elected to take advantage of the same opportunity in a timely manner; that the fact that there may have been a small number of GDC employees who were not included within the scope of the policy does not affect LM's entitlement to have the option to come within its scope; that although, at the time, LM was not in employment with the GDC, by virtue of the right to reinstatement, he remained under a contract of employment; that the policy was in force on November 10th, 2011 when LM wrote exercising his right to be reinstated to the GDC and it was one of the reasons why he decided to return; that on a fair reading of the policy, LM reasonably understood it to mean that he would have the opportunity of appointment to the civil service (see *R. (Patel) v. General Medical Council* (6)); and that consequently the policy gave rise to a legitimate expectation that it would be applied to him.

The first PSC paper and letters of appointment

32 The argument advanced in this regard is one which, in my view, is essentially ancillary to that advanced in respect of the GSD policy. Mr. Feetham submits that the PSC paper seeking the appointment of 151 GDC employees to the civil service, and the subsequent issuance of the letters of appointment, shows that it was intended for the policy to be applied to all GDC employees; that this amounted to an implied representation to the remaining members of the GDC, including LM who was temporarily absent by virtue of being a Member of Parliament; that the policy remained in force and it would in due course afford him the opportunity to transfer to the civil service; and that these representations, in combination with the GSD policy, gave rise to LM having the legitimate expectation that upon reinstatement he would be given the opportunity to transfer to the civil service.

Promises and/or representations by Ms. Cumbo and Mr. Gomez in November and December 2011

33 At the start of the hearing, Mr. Feetham made an application to have LM, Ms. Cumbo and Mr. Gomez examined on oath in relation to the alleged representations. For reasons I gave at the time, I dismissed that application. Although Ms. Cumbo and Mr. Gomez do not recall explicit

representations being made by either of them that, following reinstatement, LM would be transferred to the civil service, I do not ignore that as Mr. Gomez puts it in his witness statement “[W]e could well have been referring to a letter of appointment to the civil service given Government’s policy at the time” and similarly, according to Ms. Cumbo: “[W]e may have assumed that it was [a letter of appointment into the civil service] given it was Government policy at the time to transfer most GDC employees to the civil service.” Those assumptions, particularly given the production of the third PSC paper, on balance leads me to accept that LM was given to understand that he was to be reinstated and transferred into the civil service. LM relies upon what are categorized on his behalf as promises and/or representations as follows:

(a) they amounted to further representations and/or entrenchment of previous representations that the macro-policy was in place and would be applied to him;

(b) they amounted in their own right to representations that LM would be afforded the opportunity to transfer to the civil service, that the Government and its administration had agreed to such transfer and that they would take all necessary steps to ensure that LM was afforded that opportunity; and

(c) that it amounted to a representation that the issuance of the letter of appointment was a mere formality and that the Government and or the administration would not frustrate the process of appointment to the civil service.

To the extent that, strictly, the issuance of a letter of appointment was not within Ms. Cumbo’s powers, it is submitted that the representation was as set out at (iii) and further said that that is how the representation would have been reasonably understood by LM. Mr. Feetham relies upon *R. v. Inland Rev. Commrs., ex p. MFK Underwriting Agents Ltd.* (3) in support of the proposition that representations made must be looked at in context and by reference to the positions, knowledge and understanding of the parties to the conversations. On that premise, Mr. Feetham submits that though both LM and Ms. Cumbo knew that she did not have the power to appoint to the civil service, neither thought that that was what she meant by her representations, but that what she meant was clear: that the Government had committed to seeing that it would be done.

The announcement by Minister Bossano on December 12th, 2011

34 In respect of the announcement by Minister Bossano, the case is advanced by relying upon the *Hansard* of the meeting of Parliament of February 15th, 2012. On that occasion, Minister Bossano said: “I came in on December 9th, and I gave them two months to think about it,” namely, the option to either remain in the civil service or return to the GDC. On

that premise, Mr. Feetham submits that, on or about December 12th, 2011, Minister Bossano announced to all those employees who had been issued with a letter of appointment by the previous administration, that they could—

- (a) accept the offer made and transfer to the civil service;
- (b) remain in the civil service if they had already accepted the offer and been transferred;
- (c) remain in the GDC if they had not accepted the offer; or
- (d) move back to the GDC from the civil service if they had previously accepted the offer and transferred.

It is said that the Government's approach amounted to a representation that it would accord respect to the expectations of persons who had, prior to the change in government, been given assurances that they could transfer to the civil service. It is further said that this representation, taken individually or together with other representations, created or further entrenched LM's reasonable and legitimate expectation that he would be treated in accordance with the macro-policy and thereby be allowed to transfer to the civil service.

The email of Ms. Surrey of January 11th, 2012

35 It is said for LM that the email from Ms. Surrey amounted to a representation that LM was being treated as one of the GDC employees who had been transferred to the civil service and that this representation was consistent with the earlier representations made. It is further said that, as a senior civil servant working in the Human Resources Department, Ms. Surrey had actual or apparent authority to make the representation.

Further representations by Ms. Cumbo in the beginning of 2012

36 Given the terms of the endorsement by Mr. Armstrong, dated January 5th, 2012, to Ms. Cumbo's earlier note, I am on balance of the view that whilst it may have been said that reinstatement was imminent, no statements would have been made suggesting that it would have been by way of appointment to the civil service.

Irrationality and unfairness

37 Mr. Feetham further submits that, irrespective of the representations and legitimate expectation, the claim is also capable of being framed in terms of irrationality. He submits that the third PSC paper in respect of LM's proposed appointment had gone before the PSC and that, by operation of the negative resolution procedure, the PSC had recommended LM's appointment to the civil service; that at that stage all that remained

was for that advice to be tendered to H.E. the Governor and acceptance by H.E. the Governor of the recommendation for appointment and that, therefore, all stages of the process requiring the exercise of evaluative judgment or discretion had been completed; that the only difference between LM and those other persons to whom the new Government's policy applied was that the latter had been given letters of appointment and LM had not and that this is a materially irrelevant distinction and the policy on its true construction applied to LM; and that it is irrational and unfair to exclude him from the application of the policy merely because, by pure chance, the PSC advice had not been passed to H.E. the Governor by December 8th, 2011, and but for the general election would have gone to him the next day or very shortly thereafter.

The civil service claim—discussion

Private law/public law claim

38 The claim is opposed on a number of grounds. The submission advanced on behalf of the defendants is that they are private law rather than public law claims. Nonetheless, the defendants adopt a neutral stance on the procedural avenue chosen by LM (although not conceding that remedies are available to LM that would not otherwise be available). I shall return to consider the issue in some detail when dealing with the GDC claims. However, in so far as the action relates to the opportunity to be appointed to the civil service, I am of the view that it is properly a public law claim. Evidently there is a contractual backdrop to the civil service claim in that, but for the contract of employment, the issue of the opportunity to be transferred to the civil service could not arise. However, the contention that the application of an employment policy has been applied in an irrational manner and/or that conduct on the part of public officials has created a legitimate expectation raises pure public law issues and that claim is therefore properly brought by way of judicial review.

Does the March 15th, 2012 letter contain a decision?

39 In respect of the civil service claim, the decision which LM seeks to review is set out in the claim form as:

“The refusal to offer the claimant the opportunity to be appointed to the civil service as all other GDC employees had been offered or to issue him with a letter of appointment issued to all other GDC employees who wanted to be appointed civil servants.”

It is LM's case that that decision is contained in the letter dated March 15th, 2012 from John Reyes to Hassans. By letter dated April 17th, 2012, Hassans wrote to Mr. Reyes on the following terms:

“The decision communicated to us in your letter of March 15th, 2012 would not have been taken by you . . . Please come back to us as to who took the decision to refuse to offer our client the opportunity to be appointed to the civil service, or indeed to issue a letter of appointment to that service, failing which we will assume that the decision was taken by Minister Bossano as he is the Minister responsible for the GDC and dealt with this issue throughout the relevant period. We hope that the Government will not start taking technical points in any proceedings as to [the] proper person who took the decision communicated to us in your letter of March 15th, when we are giving you ample opportunity to put this issue beyond doubt.”

Thereafter, by letter dated April 26th, 2012, Mr. Reyes, albeit replying to a matter raised in another letter stated: “I am able to confirm, on behalf of the Chief Secretary, that the Government does not consider that Mr. Montiel is entitled to be appointed to the civil service.” For the defendants, it is said that the March 15th letter, which was expressly written on behalf of the GDC, does not contain a decision in relation to the offer of appointment to the civil service given that this was not a matter for the GDC. Therefore there is nothing to review and that the claim fails at the permission stage. It is a submission that I do not accept. It is right to say that the letter was expressly written on behalf of the GDC and that it did not deal with the issue of appointment. However, the final paragraph which makes the re-engagement by the GDC conditional upon LM foregoing all and any legal claim not only against the GDC but also against “the Government” made it clear beyond peradventure that a decision not to afford LM the opportunity to be appointed to the civil service had been taken.

Legitimate expectation

40 For a legitimate expectation to arise there must be a clear and unambiguous representation devoid of relevant qualification made by a person with actual or ostensible authority. A policy statement by an authority can give rise to a legitimate expectation that a decision will be reached in that way. Detrimental reliance is not essential but, as Lord Hoffmann put it in *R. (Bancoult) v. Foreign & Commonwealth Secy. (No. 2)* (4) ([2009] 1 A.C. 453, at para. 60): “It is not essential that an applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power.” Dealing with substantive expectation, Laws, L.J. in *R. (Niazi) v. Home Secy.* (5) said ([2008] EWCA Civ 755, at para. 43).

“Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of

the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured. Lord Templeman in *Preston* referred . . . to 'conduct [in that case, of the Commissioners of Inland Revenue] equivalent to a breach of contract or breach of representations.'"

Whilst earlier, while dealing with the ability of public authorities to change the direction of policy, he said (*ibid.*, at para. 41):

"There is first an overall point to be made. It is that both these types of legitimate expectation are concerned with exceptional situations (see Lord Templeman in *Preston* at 864; compare *ABCIFER* [2003] Q.B. 1397 *per* Dyson, L.J. at paragraph 72). It is because their vindication is a long way distant from the archetype of public decision-making. Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley, L.J. described (*BAPIO* [2007] EWCA Civ 1139 at paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement—in truth, a duty—is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult."

41 The court must give due weight to the role of public authorities, particularly the Government, for the discontinuance or implementation of policies which its Ministers, as elected representatives, consider to be in the public interest. However, the court cannot simply infer that a legitimate expectation has been breached to further some overriding public objective; such a determination has to be founded on evidence which is accepted (*Paponette v. Att. Gen. (Trinidad & Tobago)* (2) ([2012] 1 A.C. 1, at paras. 42–43)). However, in the context of the present case, of

particular relevance is part of the judgment of a majority of the Board delivered by Lord Dyson, JSC in *Paponette* (*ibid.*, at para. 44):

“The position is different where, properly understood, a promise is only for a limited period. If it is for a specified limited period, then once that period has expired, the promise ceases to bind. The promise may also be subject to an implication that it is for no more than a reasonable period. In that event, once a reasonable period of time has elapsed, the promise ceases to bind.”

42 In my view, once Parliament was dissolved on November 3rd, 2011, no reliance could properly be placed upon the GSD policy of incorporating GDC staff into the civil service. As Mr. Azopardi cogently submits, as a parliamentarian and Minister for Employment it must have been apparent to LM from the 2011 budget debate, and from the discussion document produced by the GSLP/Liberals in the summer of 2011, that if the GSLP/Liberals were elected into Government the policy of integration of the GDC into the civil service would not be continued. Essentially, that policy ceased to bind the administration when Parliament was dissolved. The same analysis applies in relation to the first PSC paper and the letters of appointment. Moreover, I am of the view that the PSC papers and letters of appointment generated in respect of other GDC employees cannot be said to amount to clear and unambiguous representations devoid of relevant qualification given that, albeit small in number, some GDC employees were excluded from the transfer to the civil service.

43 As regards the representations by Mr. Gomez and Ms. Cumbo before the general election, these need to be considered separately. It is of some significance that at that time Mr. Gomez was the Director of Education and Training and as a Crown Minister and it must have been clear to LM that Mr. Gomez had no actual or ostensible authority to make any representation in respect of employment within the civil service.

44 For the reasons I gave before, I accept that Ms. Cumbo gave LM to understand that he was to be reinstated into the GDC and transferred to the civil service. However, LM, as a Crown Minister, must have been aware that the appointment was not in the gift of the then Government but that, in accordance with s.54(2) of the 2006 Constitution, appointments to public office are made by the Governor “acting in accordance with the advice of the Public Service Commission,” from which it must follow that Ms. Cumbo did not have actual or ostensible authority. Ms. Cumbo would have been doing no more than act in accordance with what was the policy of the then caretaker Government and consider LM’s position in that context.

45 To the extent that the submission is advanced in terms of the representation being that the Government had committed to seeing that LM would be transferred to the civil service, it is a wholly unattractive

proposition that a minister in a government should be able to rely upon a representation by a Civil Servant in respect of a commitment by that government in which he is a minister. In the absence of any authority suggesting otherwise, I am of the view that an expectation, which is partly self-generated, falls outside the scope of the principle of legitimate expectation. Given that no legitimate expectation arises, it does not matter whether the appointment process was not consummated because of timing or because the Acting Chief Secretary was seeking to comply with s.45(9) of the 2006 Constitution or any possible applicable conventions guiding the conduct of caretaker governments. It follows that I find it unnecessary to consider whether or not the appointment of LM to the civil service would have breached the restrictions imposed upon caretaker Governments by s.45(9) of the 2006 Constitution and/or the possible applicability of English conventions.

46 The submissions advanced in respect of representations said to have been made following the general election do not materially advance LM's claim either. Ms. Surrey's email inviting LM to attend a GDC employees meeting is simply not capable of being described as a clear and unambiguous representation. Moreover, because of his ministerial background, it must have been clear to LM that Ms. Surrey did not have any actual or ostensible authority to provide any assurance that he would be transferred to the civil service. As regards the alleged further representations made by Ms. Cumbo after the general election, for the reasons previously given I am of the view that Ms. Cumbo did not make any representation suggesting that LM would be appointed to the civil service.

47 In so far as the claim is premised upon representations made by Minister Bossano, it also fails. *Hansard* does not assist in identifying the precise terms of the statements said to amount to representations said to have been made by Minister Bossano on or about December 12th, 2011. Representations may have been made at the meeting of "all former" employees on January 13th, 2012 (of which there is no detailed evidence before me), which was followed by the January 19th and 24th letters from human resources and the letter from Minister Bossano of about January 20th, 2012. The first self-evident point is that LM was not sent any such letter and therefore no written representation was made to him. Also noteworthy is that the GDC employees working at Kijy Ltd. and new recruits to the GDC did not receive the letter. To the extent that there was a representation, it was directed to those who had been in employment with the GDC before the general election and had been transferred to the civil service, giving them the option to remain within the civil service or return to the GDC. LM had not been in employment at the time and had not been transferred to the civil service, so those representations do not avail him.

48 I also disagree with the submission that the claim can be made out in terms of irrationality or unfairness. By the time that the third PSC paper had been circulated and the 48-hour “no comment” period had expired, the election results were known and there was a new government with a distinct policy in relation to the GDC. It was perfectly reasonable for the advice which would otherwise have been tendered to HE the Governor to have been held back by the Acting Chief Secretary.

49 Although the civil service claims fails, given that this is a rolled up hearing I need to consider whether the permission threshold is met. For the purposes of permission, all that is required of a claimant is that he establish an arguable case. The purpose of the permission hurdle is as put in the commentary to the *White Book (1 Civil Procedure 2014*, at para. 54.4.2), “to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration.” I am of the view that the case advanced was sufficiently arguable to overcome the permission threshold. Therefore permission is granted but that claim is dismissed.

The GDC claims

50 As aforesaid, the defendants, without making a concession as to the remedies which might be available, adopt a neutral stance on the procedural avenue chosen by LM. However, they submit generally (albeit in my view more cogently in relation to the GDC claims) that this is a private law employment claim. It is, I think, evident that the GDC claims are essentially private law in nature, turning on contractual interpretation and in particular how cl. 6 of the Second Schedule of the GDC terms and conditions is to be construed. However, the imposition of the condition in the March 15th, 2012 letter that LM forego claims against the Government or any officer thereof as a condition precedent to being re-engaged by the GDC brings it into the public law arena. Although the imposition of the condition precedent was subsequently denied and abandoned by the defendants, this happened after proceedings were issued. The imposition of that condition in the context of reinstatement to the GDC lacked logic or justification and was therefore an irrational act by a public body which went beyond the purely contractual relationship between GDC and LM and brought into the public law arena what was essentially a private contractual employment claim.

51 Lord Bingham of Cornhill referred in *Kay v. Lambeth L.B.C.* (1) ([2006] 2 A.C. 465, at para. 30) to “the principle that if other means of redress are conveniently and effectively available to a party they ought ordinarily to be used before resort to judicial review.” However, provided a case is amenable to judicial review, and notwithstanding that a claimant in an employment claim would be expected to

pursue his remedies through a Part 7 claim, there may be exceptional circumstances justifying the court to exercise its discretion to allow judicial review. *R. (Shoemith) v. Ofsted* (7) is authority for the proposition that such exceptional circumstances include a judicial review being more effective and convenient because it allows claims against several public authorities to be dealt with at the same time and reduces legal costs. Essentially, Ms. Shoemith appealed against a decision dismissing her application for judicial review of a decision surrounding her summary dismissal as Director of Children's Services of the third respondent local authority, Haringey Borough Council. A mother and others had been convicted of causing or allowing the death of a child who had been known to the local authority because of concerns about neglect and abuse. Following the criminal trial, the second respondent, the Secretary of State, requested the first respondent, Ofsted, to produce an urgent report into child safeguarding arrangements within the local authority. The report was very critical. Following the report, the Secretary of State made a direction appointing another person to Ms. Shoemith's post. The local authority dismissed Ms. Shoemith on the grounds of the direction and a fundamental breach of confidence.

52 The facts of *Shoemith* were undoubtedly more extreme. However, in my view, the principle can properly be applied in this case because at the time the proceedings were instituted, the GDC claims were amenable to judicial review, the factual matrix of the claims is interlinked and there being only one set of proceedings should result in the reduction of costs to all parties. For these reasons, and notwithstanding that the GDC claims could have been brought as a Part 7 claim, in the exercise of my discretion I shall determine them in these proceedings.

53 The reinstatement claim can be dealt with shortly. LM worked in the GDC from February 2007 to September 2007 and the claim for reinstatement therefore came after a very short period of actual employment. He was appointed Minister in October 2007 and, by letter dated October 17th, 2011, he asked to be reinstated. He ceased being a Minister on December 9th, 2011. I am of the view that the period of actual employment is of no relevance. The purpose of cl. 6 is to provide comfort to those in the public service who wish to embark upon a career in politics. Undoubtedly, GDC, as employer, must be afforded some flexibility in respect of the timing of the reinstatement and location of placement of the employee. But that flexibility ought not to defeat the purpose of the contractual provision which is to allow for the return to employment and receipt of a salary following the end of a career in politics. In an organization the size of the GDC, which services with its employees Government departments and agencies, the reinstatement of an individual should not prove unduly burdensome. From the date LM requested reinstatement to his ceasing to be a Minister some seven weeks elapsed. That was a reasonable period for

the GDC to find a post for LM. In my judgment there was an obligation upon the GDC to have offered reinstatement with effect from Monday, December 12th, 2011.

54 The submissions in relation to the salary point at which LM was to be reinstated are very short. At the time that LM left the GDC and became Minister he was on the penultimate point of the GDC Grade IV salary scale which consisted of seven points. His annual gross salary was of £25,517, plus an unconsolidated bonus of £648. Reinstatement was offered at a salary of £33,544, being the third point in an eight-point salary scale. It is submitted for LM that he should be reinstated in the penultimate point of that salary scale which amounts to a salary of £37,040. As I understand it, there was an assimilation by the GDC of Government of Gibraltar salary scales. Had LM been reinstated on his GDC salary scale, he would have received a salary of £30,976, whilst the salary offered was the nearest highest point in the new scale. No substantive submission is advanced to found an argument that this is in breach of contract. And, from a public law perspective, the GDC, in offering that level of salary, have cannot be said to have acted in a manner which is *Wednesbury* unreasonable.

55 For these reasons, as against the GDC I shall grant a declaration that LM was entitled to be reinstated as an employee of the GDC as from December 12th, 2011 and paid his salary, social insurance contributions and occupational pension contributions until July 16th, 2012, being the date of actual reinstatement. Whether or not LM was entitled immediately upon reinstatement to a post commensurate with his grade is not a matter which falls for determination in this action.

56 Orders are made accordingly and I shall hear the parties as to costs.

Orders accordingly.