EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHMT2013/0003

BETWEEN:

[1] SIOBAHN NICOLA GILLESPIE
[2] CITCO BVI LIMITED

Claimants

And

THE MINISTER OF NATURAL RESOURCES AND LABOUR

Defendant

Appearances:

Mr. Syed Hussain QC and Mr. Robert Nader for the Claimants
Mrs. Jo Ann Williams-Roberts, Ms. Vareen Vanterpool, Mrs. Khadia Edwards-Allister and Ms. Maya Barry and for the Defendant

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2013: April 19
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JUDGMENT

[1] ELLIS, J.: By Fixed Date Claim Form filed on the 14th February 2013, the Claimants seek the following relief:

(i) An order of certiorari to quash the Respondent's refusal of 30th November 2012 to extend the First Claimant's work permit.

(ii) An order for costs and such further and other relief as the Court deems just.

[2] In summary, the Claimants contend that the decision of 30th November 2012 was flawed because of (a) a flagrant want of natural justice and (b) a failure to provide proper and adequate reasons.

[3] The Application is supported by (1) the second affidavit of Siobahn Nicola Gillespie sworn on 14th February 2013; (2) the third affidavit of Siobahn Nicola Gillespie sworn on 12th March 2012; and (3) the second affidavit of Glenroy Forbes sworn on 12th March 2012.

[4] The Defendant's evidence in response is contained in (1) the first affidavit of the Honourable Kedrick Pickering sworn on 8th March 2013; (2) the first affidavit of Ronald Smith-Berkeley sworn on 8th March, 2013.

[5] This application follows a protracted history between the parties which is critical to the determination of the matters in issue. For that reason, the background is set out below:

BACKGROUND

[6] The Second Claimant is the local office of a substantial international trust company that employs some 40 persons in the British Virgin Islands. The First Claimant is the managing director of the Second Claimant and has lived and worked in the Territory since July 2006.

[7] The First Claimant has been employed in the Territory on the basis of a work permit since July 2006. The First Claimant's work permit was consistently renewed from that date through to July 2012.

[8] On 18th June 2012, the Claimant's submitted an application for renewal for the First Claimant's work permit which was due to expire on 27th July 2012.

[9] On 12 July 2012 the Second Claimant was notified that the First Claimant's work permit was being processed. The Defendant contends that this information was communicated via telephone by an officer with the Labour Department who acted without authorization.

[10] The position was later clarified on 16th July 2012, when the Acting Labour Commissioner sent a letter to the Second Claimant in the following terms:

> *"Re: Work Permit Renewal – Siobahn N. Gillespie*
>
> *We regrettably wish to inform you that the application submitted for a work permit renewal on behalf of Ms. Gillespie for the position of General Managing Director has been denied.*
>
> *Section 171 (2) of the labour Code states, "the Minister shall in approving any work permit, have the discretion to impose any conditions he or she may consider appropriate to promote the national policy underlying the Code in section 2, the work permit policy, the employment of Virgin Islanders and Belongers and any manpower development plan of the Virgin Islands."*
>
> *Please be guided accordingly."*

[11] On 17th and 18th July 2012, lawyers acting for the Claimants met with the Defendant and other ministry officials to discuss the refusal. At that meeting it became apparent that in arriving at the decision, the Honourable Minister had considered a number of complaints that had been made against the Defendants. The identities of the complainants were not disclosed.

[12] The Defendant contends that at the meeting of 17th July 2012 he reiterated that his decision regarding the First Claimant's work permit renewal was final and would not be reconsidered. The Defendant further contends that at this meeting, Counsel for the Claimant sought extension of the First Claimant's work permit for a period of six (6) months to enable the Second Claimant to recruit and fill the position of General Managing Director. This request was granted.

[13] On 18 July 2012, the Second Claimant responded to the Labour Department's letter of 16th July 2012 expressing surprise at the decision to refuse the First Claimant's work permit and requesting (1) information as to exactly what has been

said and by whom, (2) the opportunity to respond to any such complaints and (3) the opportunity to meet with the Minister to discuss any concerns he may have.

[14] The letter also noted that the effect of the non-renewal was that the First Defendant would have 10 working days to depart the Territory, leaving the Second Claimant with no immediate replacement. The Second Claimant further requested an interim six month extension of the First Claimant's work permit to allow for further discussions and "*…if (however it should eventuate) Ms Gillespie then were to leave the BVI, Citco would have an opportunity to recruit and seek regulatory approval for a suitable replacement*."

[15] On 19th and 23 July 2012, the Claimants attorneys again met with officials from the Ministry. The Claimants contend that it was at that the meeting of 23rd July that the nature of the complaints were conveyed orally and in general terms. These included:

1. Racial and prejudicial sentiments against locals in the context of:
    i. Hiring practices for locals vs. expatriate
    ii. Travel opportunities
    iii. Blacks and locals in senior management/ advancement
    iv. Harassment and victimization
    v. Locals terminations vs. expatriate given verbal warning for same/ similar offences
2. High degree of micromanagement within the work environment
3. Reporting to management when going to the restroom
4. Shouting at staff
5. Invading staff personal space
6. Concerns of sick leave policies
7. Number of employees (at least 38) who were fired or forced to leave employment during Ms Gillespie's watch.

[16] By letter dated 26 July 2012, the Acting Labour Commissioner informed the Defendant that the First Claimant's work permit had been extended for further six month extension. In this letter the Claimant was also advised that the Minister would "*provide a more detailed response upon his return to the Territory*".

[17] On 27th July, 2012 the Second Claimant submitted a copy of its grievance procedure to the Ministry and sought a meeting to "*discuss any improvements you think that could be made."*

[18] On 22nd August, 2012, attorneys for the Claimants in a detailed letter to the Permanent Secretary in the Ministry indicated *inter alia* that the Claimants denied such allegations as had been made against them. Although in this correspondence the Claimants lamented the fact that relevant particulars had not been communicated to them they reiterated a willingness to improve their operating procedures.

[19] Attached to this letter was a documents headed "RESPONSE TO EMPLOYEE COMPLAINTS – JULY 2012". This document purported to provide the Claimants' written response to the concerns which had been identified at the meetings between the parties. Throughout this document, the Claimants requested information on issues that had been raised that would adversely affect the further renewal of the First Claimant's work permit and noted in particular that they were prejudiced or otherwise unable to properly respond to the concerns.

[20] On 8 November 2012 the Second Claimant wrote to the Defendant, updating him as to the implementation of the new grievance procedures.

[21] On 30th November 2012, the Permanent Secretary wrote to the Claimant's attorney in the following terms:

> "The Acting Labour Commissioner wrote to Citco BVI on July 16th 2012, informing the organisation that the application submitted for work permit renewal on behalf of Ms Siobahn Gillespie was denied. On 26th July 2012 the Acting Labour Commissioner wrote to Citco BVI agreeing to the

> extension of Ms Gillespie's work permit for a interim period of six (6) months.
>
> By way of letter dated July 18th 2012 BVI Limited requested this interim six month period "*to allow these discussions to take place and, if (however it should eventuate) Ms Gillespie then were to leave the BVI, Citco would have an opportunity to recruit and seek regulatory approval for a suitable replacement*."
>
> I now hereby formally inform you that after further and extensive consideration of this matter the position regarding the [First Claimant's] work permit has not changed. It is therefore hoped that the period requested was sufficient to recruit a suitable replacement and to secure the necessary regulatory approval. The Ministry...stand ready to assist [the Second Claimant] in any way possible to ensure a relatively seamless transition."

[22] On 11th December 2012, the Claimants' attorneys wrote to the Ministry expressing disappointment with the decision and in particular with the fact that the Fist Claimant was given no opportunity to answer whatever allegations had been made. That letter also sought a renewal until the end of July 2013 to facilitate the recruitment of a replacement and an orderly transition.

[23] On 14th December 2012 the Ministry, by email indicated that it was prepared to grant to the First Claimant an additional month on her work permit to expire on 31st January 2013. This appears to have been an error as that work permit, if extended by one month would expire on 26 February 2013.

[24] The parties continued to communicate by email. However, in email correspondence on 8th January 2013, the Permanent Secretary indicated that the all further correspondence was to be directed to the Attorney General's Chambers.

[25] On 9th January 2012, the Claimant filed an application for leave to apply for judicial review of the Defendant's decision of 30th November 2012.

THE CLAIMANTS' CASE

[26] The Claimants contend that although they were apprised of the general nature of the complaints that the Defendant had received, they were not apprised of either the identity of the complainants or provided with any salient detail in respect of the complaints that would have enabled them to answer those complaints with any specificity or efficacy.

[27] Accordingly, they submitted that they were not afforded the opportunity to answer those complaints properly so that the First Claimant was, in effect, deprived of her right to a fair hearing. Although they attempted to answer the complaints as best they could, the Claimant further submitted that the Defendant was well aware of the fact that that the Claimants felt that greater detail was needed before they could properly answer the complaints.

[28] Counsel for the Claimants submitted that as later events revealed it was wholly unnecessary for the Defendant to limit his disclosure of the complaints to broad brush statement only. He noted that (a) the Defendant now feels it appropriate to disclose in his evidence before the Court, the un redacted name of a complainant currently employed by the Second Claimant, notwithstanding that the indication previously given was that names had to be withheld for fear of "reprisals" or "victimisation and (b) on the face of what is now disclosed, it is apparent that at least some of the complaints were made by former employees of the Second Claimant so that those complaints could have been disclosed in full without fear of adverse consequences.

[29] Counsel further submitted that based on the information disclosed in the affidavit evidence filed by the Defendant, the complaints made did not in several material ways conform with the general descriptions provided to the Claimants during the course of the meetings .

[30] Based on the information now disclosed by the Defendant, albeit still redacted and incomplete, Counsel for the Claimant contended that they would have been able to better or properly answer the complaints to a degree that might reasonably be expected to have impacted on the Defendant's decision-making had those complaints been disclosed in full or in redacted but original form.

[31] The Claimant also contend that on the information now disclosed, a significant proportion of the complaints made appeared to be baseless, misconceived or overblown. They submit that the clear inference from the chronology and the complaints is that the First Claimant was the victim of a concerted campaign by disgruntled employees and former employees of the Second Defendant. They allege that the Defendant was made aware of this and that this should have been taken into account when considering the complaints and before arriving at his decision.

[32] The Claimants also contend that they had been led to believe that a decision as to the extent of the First Claimant's work permit renewal would be made in or around January 2013 but that on 30th November 2012 they received communication to the effect that that decision had been reconsidered (after initial consideration in July 2012) and that extension was denied, and that no indication had been given as to the fact that that process was to be undertaken as early as November 2012.

[33] Finally, the Claimant's contend that the Defendant failed to give any reasons (or any adequate reasons) for the decision that was made, either in July 2012, on 30th November 2012 or otherwise, notwithstanding the intimation (Labour Commissioners' letter of 26th July 2012) that reasons would be forthcoming.

THE DEFENDANT'S CASE

[34] The Defendant submitted that he has the absolute and sole discretion to refuse to renew work permits in the Territory. He contended that in exercising his discretion in this case, he acted appropriately and that his decisions were valid and lawful.

[35] The Defendant's contention is that complaints had been made to the Labour Department by employees of the Second Applicant, either through letters or in person.

[36] The nature of all complaints received in respect of the Claimants pertained to poor employer/employee relations at the workplace of the Second Applicant, under the management of the Claimant. The Defendant contends that as a result of the volume and nature of these complaints, he directed that the complaints be investigated.

[37] Pursuant to this direction, a meeting was convened on 27th January, 2012, at the offices of the Labour Department. Present were the First Claimant, the Human Resources Manager of the Second Claimant, Ms. Edna Williams, the Permanent Secretary for the Ministry of Natural Resources and Labour, Mr. Rymer, and the former Dispute Officer of the Department, Mrs. Myrna Samuels. The purpose of the meeting was to present to the Claimants the nature of the many complaints received by the Department, and to enable the Claimants to respond directly to same.

[38] During the meeting, the Applicants were orally presented with and were given the opportunity to address the specific concerns and issues, which were compiled by the Labour Department from the myriad of complaints made.

[39] The Defendant alleges that the Claimants denied knowing of or being involved in the issues which were highlighted. On the basis of this Counsel for the Defendant contended that the Claimant would have been fully aware since January 2012, of the general nature of the complaints made against them and the concerns which were generated as a result.

[40] It is the Defendant's contention that the complaints were thoroughly investigated and Claimants were given an opportunity to be heard. The Defendant submitted the degree of information provided to the Claimants was sufficient to enable them to obtain a "fair hearing".

[41] The Defendant evidence is that he felt obliged to withhold the identities of the complainants in order to protect them from "possible harassment or victimization." He contended however that this could not have in any way prejudiced or hindered the Claimants' ability to make adequate representations because in any event the evidence discloses that the Claimant were aware of the identity of the complainants

[42] Counsel for the Defendant submitted that the evidence in this matter shows that the Claimants knew the adverse factors which weighed on the Defendant's mind and which were considered when the renewal of the work permit was refused. She further submitted that the Claimants made representations to the Minster on all of these factors prior to the 30th November 2012 decision. In particular, she referred the Court to the Claimants Response of 22nd August 2012 and concluded that natural justice was in fact afforded to the Claimants.

[43] Finally, although Counsel for the Defendant argued that the Defendant was under not duty to give reasons for his decision whether under statute or under common law, she contended that the Defendant's reasons for refusing to extend the First Claimant's work were conveyed orally in the meetings between the parties subsequent to 16th July 2012 or were later communicated in the evidence which had been filed in these proceedings.

[44] Counsel for the Defendant therefore concluded that having regard to all of the circumstances of this case, there was no procedural impropriety and that Defendant's decision cannot be vitiated on the basis of breach of natural justice, fairness or failure to give reasons.

COURT'S ANALYSIS AND FINDINGS

The Legal Framework

[45] Part X of the British Virgin Islands Labour Code 2010 (The Code) vests the Minister of Labour with the power to grant, renew or extend work permits within the Territory. The relevant sections in this Part provide as follows:

"171. (1) An application for a work permit shall be made by the intended employer on behalf of the person for whom the permit is sought, by filing with the Labour Department an application in triplicate, in the prescribed form and, unless the applicant is a self-employed person, that application shall be accompanied by a statement in the prescribed form, completed by the intended employer.

(2) The Minister shall, in approving any work permit, have the discretion to impose any conditions he or she may consider appropriate to promote the national policy underlying the Code in section 2, the work permit policy, the employment of Virgin Islanders and Belongers and any man power development plan of the Virgin Islands.

(3) An application for renewal or extension of a work permit shall be made by, or on behalf of the person for whom the work permit is sought, by filing with the Labour Department an application in the prescribed form and, unless the applicant intends to be self-employed, the application shall be accompanied by a statement in the prescribed form completed by the intended employer.

(4) The Minister shall, in considering an application under subsection (3) taken into account the extent to which the employer has complied with a condition imposed under subsection (2).

"173. (1) The Minister may, by Order, delegate any of his or her functions under section 171 or this section to the Commissioner.

(2) The Minister shall subject to section 171(2) decide whether or not, and under what conditions, the work permit should be granted, renewed or extended.

(3) A statement in a work permit stating the conditions upon which the permit is granted, renewed or extended shall be conclusive evidence of those conditions.

(4) Where a work permit is granted, renewed or extended, it shall be in the prescribed form and its validity shall be dependent upon compliance with section 178.'

[46] The Code does not prescribe the procedure which is to be followed when considering the revocation of or the refusal to renew a work permit. However it is clear that this power is not unfettered. As the renowned author Professor H.W.R Wade noted in his text Administrative Law; *"Statutory power conferred for public purposes is conferred as it were on trust, not absolutely – that is to say, it can validly be used only in the right and proper way in which parliament when conferring it is presumed o have intended*."

[47] It is now well settled at common law that where character of the power has the potential to adversely affect legal rights and interests, it must be exercised fairly.[1]This principle is so fundamental that the courts have demonstrated that they are generally prepared to read it into statute on the basis that parliament is presumed to have *"intended that a failure to observe it should render null and void any decision reached in breach of this requirement."*[2]

[48] Where a decision maker purports to take make an administrative decision which is capable of affecting the rights and interests of an individual, the duty to act fairly demands that he apply the principles of natural justice. The concept of natural justice is said to comprise two fundamental rules of fair procedure (1) that a man may not be a judge in his own cause and (2) that a man's defence must always be fairly heard. In the context of administrative action, these rules have such universal application that they have almost achieved the status of a fundamental right.

[49] However it is clear that these principles have to be applied flexibly. Courts have repeatedly cautioned that the rules of natural justice are not carved in stone and that it is "not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything will depend on the

[1]Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180 approved in Ridge v Baldwin [1964] AC 40; Durayappah v Fernando [1967] 2 AC 337; Wiseman v Bourneman [1971] AC 297
[2] O'Reilly v Mackman [1983] 2AC 237 at 276

subject matter of the case[3] including the relevant legislative scheme the nature of the status, right or interest of the person affected and the entire factual context.

[50] It is common ground between the parties that the principles of natural justice are applicable in the particular context of this case. The point of distinction centres on the way in which these principles are to be applied. It is the Defendant's contention that where the relevant statute prescribes no statutory procedure, the decision maker has the discretion to determine what is an appropriate and fair procedure. Counsel for the Defendant submitted that having of regard to all of the circumstances of this case, the Claimant were afforded natural justice and were treated fairly.

[51] This was trenchantly opposed by the Claimants who contended that the procedures followed by the Defendant did not afford them an opportunity to effectively answer the allegations or concerns which were raised.

[52] Despite the purported opposition during the trial the Court is of the view that both sides are for the most part *ad idem* as regards the general legal principles. Much was made of the judicial authority of McInnes v Onslow – Fane [1978] 3 All ER 211. The Court is satisfied that while it remains good law, it was by no means the last word on the subject. This is not surprising given the age of the judgment and the dynamic nature of public law. Since that decision, it has become clear that "renewal cases" are indeed closer to "revocation cases" – so that absent a contrary indication, a person applying to continue a licence or privilege which has expired is entitled to a hearing before he or she is refused. This position reflected in R v Assistant Commissioner of Police of the Metropolis Ex P Howell [1986] R.T.R 52 which was applied in Naidike v Attorney General of Trinidad and Tobago [2004] UKPC 49. In the latter case, the Judicial Committee held that the Claimant who had been granted work permits for a number of years previously had a legitimate expectation that a further permit had been granted. The Committee held that while he had no substantive right to be granted a work permit,

[3]R v Gaming Board of G.B ex parte Benaim and Khaida [1970] 2 QB 417 at 439

the Claimant had a right to have his application fairly decided. Having concluded that the Claimant had been given no opportunity to address the refusal, they held that the decision to refuse him the work permit was unlawful.

[53] Indeed even in the so called "application cases" the courts have signalled a willingness to imply a limited right to a fair hearing in cases where a person can be badly affected by being rejected in a first time application. R v Huntingdon District Council v Ex Parte Cowan [1984] 1 WLR 501.

PROCEDURAL IMPROPRIETY – WANT OF NATURAL JUSTICE

[54] There can be no doubt even on the basis of the authorities relied on by the Defendant[4] that the facts and circumstances of this case warranted the application of the principles of natural justice. In satisfying those principles, the Defendant was obliged to give the Claimants an opportunity to make representations against the intended or possible refusal to renew the First Claimant's work permit. Indeed, this has been readily conceded by the Defendant.

[55] The scope of this obligation has now been well established at common law. In Kanda v Government of Malaya [1962] AC 322[5] Lord Denning prescribed what is now the classic and authoritative statement in that regard, where he stated that:

> *"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statement have been made affecting him; and then he must be given a fair opportunity to correct or contradict them."*

[4]Marks v Minister of Home Affairs (1984) 35 WIR cited in Naidike v Attorney general of Trinidad and Tobago [2004] UKPC 49

[5] See also: Chief Constable of North Wales v Evans [1982] 1 WLR 1115; Murungaru v Secretary of State for the Home Department [2006] EWHC 2416 (Admin)

[56] It is at this point that the Parties diverge. The Claimants contend that they were not provided with sufficient detail to enable them to make adequate representations. In particular they complain that they were not provided with the specific details of the complaints. They submitted that it was not sufficient for the Defendant to simply provide the headline statements of the broad categories of complaint. They submitted that in this case, the gist of the concerns was not enough and that the Defendant was also obliged to reveal the identities of the complainants.

[57] On the other hand, the Defendant contends that the Claimants were well aware prior to the decision of the nature and substance of the matters which weighed on his mind. In those circumstances he contends that the failure to reveal the specific complaints and the identity of the complainants was not tantamount to a breach of natural justice.

[58] Where, as in the case at bar, an individual has a right to be heard before a decision is taken, he will almost inevitably also have the right to disclosure of the case to be met or the basis upon which the decision maker proposes to act. However, this broad principle is not without its limitations or exceptions. Certianly there are some administrative situations in which the right to disclosure should properly be limited and where an individual would have to make do with less than full disclosure. Substantial fairness may in some circumstances be satisfied by disclosing the substance of the case without disclosing the precise evidence or the sources of information.[6]

[59] A court must always consider the statutory framework and the particular context within which natural justice is to operate. The extent of disclosure required by natural justice can only properly be discerned following a balancing exercise between the interests which non-disclosure seeks to protect and the need to be procedurally fair.

[6] R v Gaming Board ex parte Benaim and Khaaida at pages 430 - 431

[60] Ultimately, however a decision maker must consider whether the individual has sufficient information and material as to the case against him, so that he was able to make informed submissions. Otherwise an individual would not be able to properly defend himself and could not effectively persuade the decision maker that his information is inaccurate or exaggerated or at any rate does not justify an adverse decision.

[61] The evidence in this case reveals that the Defendant did not disclose the actual text of the complaints received whether in summary or in redacted form. Rather the Claimants were orally advised of a number of general concerns which were presented in point form and which flowed from various complaints which were recorded on the relevant files of the Labour Department.

[62] Further the Defendant avers that he deemed it appropriate to withhold the identities of the complainants *"to protect them from the possibility of victimisation and or harassment."* The Defendant does not submit that these complaints were confidential or sensitive in nature. He does not contend that the complainants demanded anonymity. Further, he does not advance any basis for his concern. More importantly, he has not provided any reason why the excerpts or in the case of the letter from Celine R. Alphonso, the entire text which were set out and exhibited in his affidavit evidence filed in these proceedings, could not have been revealed to the Claimants when they had clearly demanded more fulsome disclosure.

[63] It is also apparent that no national security or other public interest considerations would have operated to militate against disclosure in this case. Indeed even where national security considerations do operate, it is clear that the courts will still demand that an individual be given sufficient information about the allegation against him to enable him to make effective representations. In that regard the dicta in Secretary for the Home Department v AF (No. 3) [2012] 2 AC 269 is instructive. The Court is guided by the following:

"…while it might be appropriate, in the interests of national security in the context of combating terrorism, not to disclose sources of evidence on which the grounds for suspecting a person's involvement in terrorism-related activity were based, a controlee had to be given sufficient information about the allegations against him to enable him to give effective instructions to his special advocate in relation to them; that so long as that requirement was satisfied there could be a fair hearing without the need for detailed disclosure of the sources of evidence on which the allegations were based; but that where the disclosed material consisted of only general assertions and the case against the controlee was based solely or to a decisive extent on undisclosed materials the requirements of a fair trial under article 6 would not be satisfied;"

[64] During the trial, Counsel for the Defendant repeatedly asserted that the Claimants had been fully apprised of the matters of concern from as far back as January 2012. She further contended that they also appeared to be aware of the identity of at least some of the complainants. She referred the Court to the Claimant's document of the 22nd August 2012, titled – RESPONSE TO EMPLOYEE COMPLAINTS – JULY 2012 and contended that it demonstrates that the Claimants had sufficient disclosure to enable them to make detailed, thorough and comprehensive representation on all of the factors which weighed on his mind prior to his decision.

[65] The Defendant's evidence reveals that his decision on 16th July 2012 was made after giving consideration to the various complaints received by the Labour Department and the Ministry in January 2012. At that time the Defendant submits that he directed that an investigation be carried out into these claims and that pursuant to this, the relevant concerns would have been communicated to the Claimant in January 2012.

[66] The evidence confirms that meetings were convened between the parties and that an investigation was in fact conducted. What is also evident is that by letter dated 15th February 2012, the Labour Commissioner communicated the extent of the investigation and the conclusions which were drawn. This correspondence also identified a list of two recommendations. It is apparent that those recommendations were implemented and that other ameliorative measures were taken by the Claimant. Although this letter intimated that the Minister would continue to monitor the situation, the Court is persuaded that there would be no reason for the Claimants to infer that the issues involved in this investigation would have without more impacted her work permit when it came due for renewal in July 2012.

[67] Further, the Court cannot overlook the full text of the Claimants' Response of 22nd August 2012. That correspondence though lengthy, clearly demonstrates that the Claimants were struggling in their response. The document begins with the following preface:

> "*At the outset, the difficulty that Citco faces in responding to anonymous allegations cannot be overstated. These responses are provided to the best of its ability, based on the summary of information relayed to Citco by its legal counsel.*
>
> *The complaints are in general difficult to address because no examples have been provided to illustrate or support the allegations made."*

Thereafter the document repeatedly refers to the difficulties experienced because of the lack of specificity and concrete examples.

[68] The Claimants contend that they have been prejudiced. First, they contend that the general assertions were conveyed orally during meetings where the First Claimant (though represented by Counsel) was not personally present. Additionally, at paragraphs 26 (b) 27 (b) of her affidavit, the First Claimant details a plethora of representations which she could and would have advanced had she

been provided with the information which belatedly found its way into the Defendant's evidence.

[69] They further submitted that in this case, natural justice demanded that the Defendant condescend to particulars. In order to effectively address the highlighted concerns, the Claimant needed to be aware of the examples of the specific breaches which were alleged. Given the nature allegations, they submitted that the identity or (at the very least) the profiles or characteristics of the affected persons would have been critical in assessing the reliability, legitimacy and relevance of the claims.

[70] In light of the Claimants' Response of 22nd August 2012 and having heard the parties' submissions and in circumstances where the Defendant felt able to later provide the details sought (albeit in evidence before the Court) the Court has no difficulty in concluding that more fulsome disclosure was not only possible but appropriate in the circumstances. Further, the Court is persuaded on the Counsel for the Claimants' submissions that in the absence of such disclosure, their ability to provide effective representations would have been hindered.

[71] During the course of her submissions, Counsel for the Defendant posited that it was not necessary for the Claimants to specifically respond to each and every allegation complained in the complaints because the Defendant's concerns were more holistic in nature. She contended that the Defendant was looking at the overall work environment within company from a policy perspective. The specific allegations were therefore not inimical to the general issue and in this context it was unnecessary for the Defendant to make definitive findings in respect of any specific allegation.

[72] She submitted that the Defendants concerns stemmed rather from the general history, the nature and volume of the complaints which required him to make a high policy decision in respect of the First Claimant's work permit. She submitted that the general representations made by the Claimants in their letter of 22nd

August were sufficient in the circumstances and she concluded that any further representations would not have advanced the Claimants' case in the circumstances (the Defendant would not been interested in the truth or falsity of the specific instances of complaint) as they would not have assisted the Defendant in arriving at his decision.

[73] Given the very serious nature of the issues raised, this was, in the Court's view, an extraordinary submission. The Court has some difficulty in discerning how a "high policy decision" in this case could properly be divorced from the relevant factual underpinning. This is particularly so where the Claimants were prepared to challenge the allegations of fact as being palpably untrue, misconceived or exaggerated.

[74] But even if this position was accepted, it is clear that this should have been conveyed to the Claimants as the true basis of concern militating against the renewal of the First Claimant's work permit. The correspondence and the interaction between the Parties clearly demonstrate that Claimants did not appreciate that this was the approach adopted by the Defendant. As a result the parties would have been operating at cross purposes, with the Claimants seeking to make representations which would apparently have been irrelevant and thus ineffective.

[75] No doubt this confusion would have been exacerbated by the fact that the Defendant chose to communicate his concerns orally during the course of meetings. It appears that there were no minutes or other contemporaneous notes taken of these meetings with the result that the parties are forced to rely on their own recollections. Given the potential for legal challenge, the Court finds this approach to be surprising.

[76] The Claimants were clearly entitled to a fair hearing before the adverse decision was taken in regard to the renewal of the work permit. The Court finds that a fair hearing was not afforded to the Claimant's prior to the decision of 16th July 2012. The Court is not persuaded that the investigation of the complaints in January 2012 can be relied upon to justify the contention that the Defendant's concerns relevant to the renewal of the work permit had in fact been conveyed to the Claimants. Notwithstanding the intimation that the matter would be kept under review, the letter of 15th February 2012 concluded this investigation and raised no lingering concerns about the workplace environment or employee turnover. The Claimants could not be faulted for thinking that the complaints had been put to rest. They certainly could not be expected to assume that they had the potential to impact the renewal of the First Claimant's work permit.

[77] While the extent of disclosure in January 2012 may have been sufficient for the purposes of that investigation, in circumstances where he was contemplating the non-renewal of the work permit, the Defendant was obliged in take into account the nature and potential impact of this decision in determining what procedural fairness demanded in those circumstances.

[78] In regard to the decision of 30th November 2012, the Court finds that the Claimants were unable to make effective representations based on the extent of the disclosure. The case against the Claimants was to a decisive extent based on materials which were only disclosed after the decision had been taken. Having reviewed the evidence there can be no doubt that the complaints in question were considered by the Defendant. To the extent that they were taken into account, the Defendant was obliged to disclose them in sufficient detail to permit the Claimants to make effective representations. Having regard to all the circumstances of this case, the Court finds that the itemised outlines were not enough.

[79] Alternatively, the Court finds the Defendant did not sufficiently or accurately communicate to the Claimants the case which they were to meet. For the reasons indicated, the Court is satisfied that the Defendant's decision of 30th November 2012 was determined in a procedurally unfair manner.

FAILURE TO GIVE PROPER OR ADEQUATE REASONS

[80] Counsel for the Counsel argued strongly that neither the Labour Code nor the common law imposes a duty on the Defendant to give reasons for his decision.

[81] There can be no doubt that the traditional approach at common law has been that there is no general rule of law that reasons should be given for public law decisions. This view appears to have been crystallised in the case of R v Secretary of State of Home Department ex parte Doody.[7]

[82] However recent cases have emphasised that this is only a general principle. So that if fairness requires it in any particular situation, courts have now begun to insist that decision makers provide reasons for their decisions. Admittedly, this has not evolved in any structured way but emerging from the case law is a decided inclination to more often than not infer a duty to give reasons where (1) the decision affects an individual's fundamental rights, (2) the decision is one for which the person affected needs reasons in order to know whether he should appeal or seek judicial review, (3) a formal decision is required following a hearing or inquiry and (4) it would not be administratively impracticable for the decisions maker to give reasons for a decision.

[83] The duty to give reasons has become a fundamental hallmark of good administration. During the course if his submissions, Counsel for the Claimant noted that there a number of advantages and benefits to this duty which from the individual's perspective includes, (1) the ability to satisfy the expectation of just

[7] [1994] 1 AC 531

and fair treatment by the decision maker (2) the ability to properly discern and decide whether the decision is open to challenge by way of further representations, appeal or judicial review. From the decision maker's standpoint, there are also obvious advantages. Where a decision maker is obliged to give reasons for his decision, there can be no doubt that this will ultimately improve the quality of decision making. If one is aware that they are obliged to justify their decision in writing, that fact alone would reduce the likelihood of capricious or arbitrary decisions. Reasons therefore promote transparency and rational and lawful decision making.

[84] The legislators within the Territory have clearly recognised the utility of this duty in the context of labour regulation. At Part I, section 7 (c) of the Labour Code 2010, the Legislature has specified that one of the principles governing the administration of the Code is the following:

> *"to the extent practicable, all actions taken by administrators of the Code shall be recorded in writing and, except where they are self-evident, reasons for the actions shall be set forth in writing;"*

[85] In the Court's view there can be no clearer indication that the intention of the Legislature in the Territory is to adhere to and advance the principles of good administration in a way which is consistent with the highest standards of public law and natural justice.

[86] During the course of her submission Counsel for the Defendant argued unconvincingly that this statutory provision does nothing to advance the Claimants' case. She urged the Court to deny that this section provided a mandate to give reasons. She contended that the section is ultra-flexible in nature as it does not prescribe a time within which reasons are to be rendered; it does not oblige the decision maker to disclose these reasons to the person affected neither does it mandate the reasons are to be given in every case.

[87] She submitted that the circumstances of each case would need to be examined in order to determine whether reasons were necessary in the particular case and in this particular case she contended that written reasons were not necessary because the Defendant's reasons were self-evident. She pointed again to the several meetings which had been convened between the relevant parties in January and again in July of 2012, in which the factors or matters which were of concern and which arose out of the several complaints received had been identified to the Claimants.

[88] These concerns she submitted had been orally distilled on repeated occasions and were fully understood by the Claimants who responded thoroughly with written representations on 22nd August 2012. In those circumstances she submitted that the Claimants cannot justifiably say that they were given no reasons for the Defendant's decision.

[89] It is clear that the non-renewal of the First Claimant's work permit was a departure from the previous course adopted in relation to the work permit. It appears that to all intents and purposes, her work permits had been renewed without demur since 2006. It is also clear that the non-renewal of her work permit had the potential to significantly impact the First Claimant. Her livelihood would clearly be affected and there are also implications for her continued residence within the Territory. The decision would no doubt also have a significant impact on the Second Claimant who stood to lose not just an employee but its managing director.

[90] A decision to refuse to renew the work permit taken in the context of the type of concerns which were raised would clearly have significant implications for the reputations of both Defendants. In the Court's view, the facts of this case and the developments between January and November demanded that the Claimants be made aware of the reasons which ultimately informed the Defendant's decision.

[91] Taking into account the legislative intention of section 7 (c) of the Labour Code, the Courts concludes that in the circumstances of this case, fairness required that the Defendant provide reasons for his decision. The Court considered that the peculiar circumstances of this case, the general background; the complainants; the investigation; the several meetings between the parties and the Claimant's request for reasons and the Defendant's intimation on 26th July 2012 that he would "*provide a detailed response upon his return to the Territory*" all lead to the conclusion that reasons were warranted in this case.

[92] The Court is not persuaded by Counsel for the Defendant's submissions that in this case the reasons were self-evident. It appears that in grounding her arguments, Counsel for the Defendant has made the fundamental error of failing to distinguish the right to reasons for a decision from the right to be informed of the case which an individual is required to meet. In the case of the latter, this is a basic requirement of natural justice and is quite different from the duty to give reasons. Natural justice requires that an individual be provided with sufficient information to enable him to make useful representations before a decision is taken which is adverse to him. Whereas, reasons are important so that the individual would know how and why the decision was made.

[93] Such reasons must be sufficient enough to enable the person affected to judge whether a legal challenge can or should be instituted. Proper and adequate reasons must generally set out the authority's findings of fact. It should show that all relevant matters have been considered and that no irrelevant ones have been taken into account. It should cite and apply any relevant policy statements or guidance and it should note any representations or consultation responses as having been considered and taken into account and perhaps most importantly, it should show by what process of reasoning the issues were resolved and how the various factors were weighed against each other. And where there is a conflict of evidence, it ought to state its findings.

[94] The approach to be adopted to the adequacy of reasons has been summarised by the House of Lords in South Bucks District Council v Porter (No 2)[8] as follows:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such an adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration..."

[95] In the case at bar, it is clear that the Defendant has not indicated what if any weight it attached to any of the individual complaints received, the ameliorative measures implemented or the representations made by the Claimants in arriving at its decision. In the absence of this, there is no way for the Claimant's to know what was the basis of the decision, whether their representations (such as they were) carried any weight and if they did what were the lingering areas of concern which underpinned the decision to refuse the renewal of the work permit.

[96] Indeed, Counsel for the Claimants contended that even as at the date of trial, his clients are unaware of the reasons for the Defendant's decision on 30th September 2012. In light of the contents of the letter of 30th November 2012, this is not surprising. The Court also finds that vague reference in the Defendant's letter of 16th July to the policy of the Code does not meet the standard of adequate reasons.

[97] During the course of the trial, Counsel for Defendant sought to advance the alternative argument that the reasons which have been communicated subsequent to the decision – in his evidence filed in these proceedings - ought to be considered by the Court. At paragraph 19 and 31 and 34 of his affidavit, the

[8] [2004] 1 WLR 1953, HL, para 36 *per* Lord Brown

Defendant indicates that the reasons for the decision of 30th November 2012 "carried over from the 16th July decision" and that these encompassed his general concern at the volume and nature of the complaints and in particular the high rate of turnover among Virgin Islander and Belonger employees which "*seemed to have resulted from some of the concerns if not all in the complaints made*."

[98] The Court accepts that in certain circumstances it has the jurisdiction to accept late reasons. [9] However it is clear that some level of caution is required. The position in R (Nash) v Chelsea College of Art Design can be summarised thusly;

> "Where there was a statutory duty to provide reasons, a court should accept late reasons only in the most exceptional of circumstances. However where, as in the instant case, there existed no such express duty, the court had to be cautious in accepting subsequent evidence of reasons, and had to consider whether the additional reasons were consistent with the original reasons provided and were the reasons of the entire committee, the delay in providing the later reasons, the circumstances surrounding the provision of late reasons, and the risk of ex post fact reasoning, R. v Westminster City Council Ex p. Ermakov [1996] 2 All E.R. 302, R. v Northamptonshire CC Ex p. D [1998] Ed. C.R. 14 considered. Moreover, the level of scrutiny required was dependent upon the seriousness of the subject matter of the decision in question. The court had to also take into consideration the qualifications and experience of the administrative tribunal when considering the clarity of the reasons provided."

[99] None of these factors were addressed by Counsel for the Defendant. Further, the Court is guided by the dicta of Simon Brown J in R v Legal Aid Area No. 8 Appeal Committee ex parte Angel[10]

> "Naturally the Courts will look circumspectly at additional reasons; these clearly cannot carry quite the same authority as reasons properly given as part of the actual decision, and of course, anything suggestive of ex post facto reasoning, let alone anything in the way of inconsistency with previous reasons, would be particularly scrutinized. Certain bodies, moreover, will clearly be held to the reasons expressed with their decision

[9] R (Nash) v Chelsea College of Art and Design [2001] EWHC 538 (Admin)
[10] (1990) 3 Admin LR 189

> — for instance, the Secretary of State on planning appeals and tribunals of the kind in question in f Machinery and ex parte Khan. Furthermore, whenever as here a public body files evidence, it is desirable that each member should approve the supplementary reasoning disclosed in the individual deponent's affidavit as the actual basis for the decision earlier taken. But given these sorts of qualification, there seems to me much to be said in favour of allowing affidavits to supplement reasons, and little against either in the way of legal or practical objection. Of course, the supplementary reasons go only to the question whether the decision reached was erroneous in point of law; they cannot repair the breach of duty involved in having provided inadequate reasons in the first place…" (Emphasis added)

[100] In any event, the Court is not satisfied that the affidavit evidence proffered by the Defendant in response to this Claim sufficiently advances his contention that adequate reasons have been provided. In providing reasons, a decision maker must be careful to provide the person affected with sufficient materials which will enable them to verify whether he has made an error of law in reaching its decision.[11] The late reasons which are alleged to be set out in the Defendant's evidence in any event do not meet the standard of adequate reasons.

[101] From affidavit evidence, one may be drawn the conclusion that the Defendant's position did not advance past that which had been adopted in January /July 2012. So that the decision of 30th November 2012 would have been informed by all of the original concerns and he would not have been persuaded by any of the Claimant's representations. However this conclusion cannot be drawn with any degree of certitude.

[102] In the Court's view it is not consistent with the principles of good administration for persons adversely affected by decisions to be expected extrapolate or infer from the circumstances, what are the true reasons for a decision.

[11] Alexander Machinery (Dudley) ltd. v Crabtree [1974] ICR 120 at 122

Consequence of failure to give reasons

[103] If no collateral unlawfulness is established, in the case where no or inadequate reasons are provided the Court has a discretion as whether it should simply quash the substantive decision as procedurally flawed or should only afford relief in the form of an order of mandamus to give reasons. One the one hand it may be argued (as the Claimants do in this case) that the failure to give reasons infects the legitimacy of the entire decision making process such that the decision should be retaken; on the other hand, it will often be the case that the decision maker does possess reasons (or fuller reasons) and need merely be required to produce them.

[104] In this case however, the Court has already concluded that procedural impropriety has been established. CPR 56.14(2) provides as follows:

> "If the claim is for an order or writ of certiorari, the judge may if satisfied that there are reasons for quashing the decision to which the claim relates-
>
> a) direct that the proceedings be quashed on their removal to the High Court; and
>
> b) may in addition remit the matter to the court, tribunal or authority with a direction to reconsider it in accordance with the findings of the High Court.

[105] In the circumstances, the Court is satisfied that there is a good reason for quashing the Decision. The Court will remit the matter to the decision-maker and direct him to reconsider the matter and reach a decision in accordance with the judgment of this Court. The Defendant must make full disclosure of the factors, issues, features or elements of concern which are adverse to the Claimants. Before arriving at his decision he must afford the Claimant reasonable time to provide written representations in response thereto. He is also directed to provide in writing the reasons for his decision.

[106] The Court's order is therefore as follows:

1. Judgment for the Claimants on the Fixed Date Claim Form filed herein on the 14th February 2013.

2. The Defendant's decision of 30th November 2012 refusing to extend the First Claimant's work permit is quashed.

3. The matter is remitted to the Defendant for reconsideration in accordance with the judgment of this Court.

4. The Claimants will have their costs to be assessed in accordance with Part 65.12 unless otherwise agreed.

Vicki Ann Ellis
High Court Judge