THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV 2019-02182

Between

Central Broadcasting Services Limited

Claimant

And

Telecommunications Authority of Trinidad and Tobago

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on: 26 November 2020

Appearances

Messrs. Jagdeo Singh, Dinesh Rambally, Keil Taklalsingh and Stefan Ramkissoon, Attorneys-at-Law for the Claimant

Mr Douglas Mendes SC and Ms Gabrielle Gellineau, Attorneys-at-Law for the Defendant

JUDGEMENT

A. Introduction

1. This Judicial Review Claim involves a challenge by a Company licensed to operate a radio and television broadcasting station known as Jaagriti. The challenge is against a decision made by the grantor of the said licence, the Telecommunications Authority of Trinidad and Tobago ["TATT"], to find the Claimant in breach of Clause D9 of its Concession to operate free-to-air radio broadcasting services ["the Concession"]. Clause D9 mandates the concessionaire not to transmit programming that degrades or portrays in a negative manner or discriminates against or encourages discrimination based on factors such as race.

2. The challenged finding concerns statements made by Mr. Satnarayan Maharaj about Tobagonians during live programming emanating from the Claimant's TV and radio station. The statements were as follows:

> "*Nothing going correct in Tobago. They lazy six out of ten of them working for the Tobago House of Assembly getting money from Port of Spain. They don't want to work. And when they get a job they go half past nine and ten o'clock they go for breakfast. The rest of them able bodied men they don't want to wuk at all. Run crab race, run goat race, and go on the beach hunting for white meat. Yuh see a white girl there yuh rape she, yuh take away all she camera everything, this is record yuh know. This is what Tobago is all about, but anything they want they gonna get. So now...We have a lot of ferries already, our prime minister is renting a ferry. To take Tobagonians from Scarborough, bring them to Port of Spain so they could buy market in Port of Spain market, dey aint going nothing dere. They coming to make market you know from Tobago. We paying for them to come and make market, here yuh know, and you know how much our Prime Minister paying our money? Every day $263,580.00 a day. For this boat to bring them lazy people from Scarborough to come and make market in Port of Spain and take them back. They wouldn't grow nothing there, they wouldn't grow nothing. When they catch they crab is*

to run race and when they mind they goat is to run race. They come to Port of Spain growing nothing. We paying. We the taxpayers in Trinidad we paying. Whatever Tobago wants Tobago gets and I am saying we should change the name of this country, we are no longer Trinidad and Tobago, we are Tobago and Trinidad, we are subservient to them." [***These words are to be redacted from publication save for the Court's record and distribution to the parties***]

3. The comments disparaged persons identified as Tobagonians as lazy and criminally minded by nature. A group identified as Tobagonians is not entirely homogeneous as the population of Tobago and its diaspora includes persons of diverse ethnic backgrounds. However, the population is primarily of African descent[1].

4. Tobagonians have contributed to nation building and enhanced the image of Trinidad and Tobago at the highest levels in the fields of politics, sport, entertainment, religion, tourism, academia, agriculture, medicine, the arts, the legal profession, business and public administration among others. Many, originally from Tobago, have contributed to the economy/society while resident in Trinidad.[2]

5. Mr Satnarayan Maharaj was a pundit, an educator and the Secretary-General of the Sanatan Dharma Maha Sabha, a major Hindu organisation in Trinidad and Tobago, which operates more than 100 mandirs and over 50 schools. He died a few months after the Claimant commenced these proceedings. Many in Trinidad and Tobago respected and revered Mr Maharaj ["the Deceased"] because of the leadership role

[1] See pages 49-51 - Rhoda Reddock, 'Split me in Two: Gender Identity and "Race Mixing" in the Trinidad and Tobago Nation' in Rebecca C. King-O'Riain and others (eds), *Global Mixed Race* (New York University Press 2014)

[2] On Tobago and Tobagonians see:

- Susan Craig-James, *The changing Society of Tobago, 1838-1938 – A Fractured Whole*, vol 2 (Cornerstone Press 2008)
- Professor Rita Pemberton's review of Learie B. Luke, 'Identity and Secession in the Caribbean: Tobago versus Trinidad, 1889-1980' (Jamaica, University of the West Indies Press, 2007) in (2009) 83 (3-4) New West Indian Guide, 294, 346 <https://brill.com/view/journals/nwig/83/3-4/article-p294_6.xml> accessed 2 November 2020

he played in education, religion and in litigating to uphold the rights of Hindus against discrimination.[3] His achievements included school building, cultural initiatives and landmark litigation; for example, the case[4] that allowed for establishment of the Jaagriti TV and radio station run by the Claimant.

6. The Claimant no longer disputes that the deceased made the above-mentioned statements during one of its broadcasts in April 2019 ["the Broadcast"]. TATT's finding is challenged primarily, on the basis that it was made in breach of the Claimant's right to be heard.

7. On 23 May 2019, the Claimant filed its Application for Leave to Apply for Judicial Review supported by the Affidavit of Lokesh Maharaj. On 16 October 2019, the Claimant filed the Supplemental Affidavit of Lokesh Maharaj supporting its Application for Leave to Apply for Judicial Review.

8. The Defendant indicated opposition to the grant of leave to apply for Judicial Review and parties were given directions for the filing of submissions. However, this was not achieved and at a hearing of the Leave Application on 16 December 2019, the parties jointly moved the Court that the decision whether to grant leave be addressed in a "rolled up" determination with the substantive issues for Judicial Review. The Court granted this request and gave directions for the filing of a Fixed Date Claim, Affidavits in Response by the Defendant and submissions by the parties on leave and the substantive issues.

---

[3] On Satnarayan Maharaj see:

- Dr Selwyn Cudjoe's review of "Dr. Kumar Mahabir "Sat Maharaj: Hindu Civil Rights Leader of Trinidad and Tobago" in Dr Selwyn Cudjoe, 'The Responsibility of Intellectuals' (*Trinicenter*, 16 October 2014) <http://www.trinicenter.com/Cudjoe/2014/1610.htm> accessed 2 November 2020
- Report on Eulogy by Dr Selwyn Cudjoe in Julien Neaves, 'Sat was like Martin Luther King Jr' *Trinidad and Tobago Newsday* (Port of Spain, 19 November 2019) <https://newsday.co.tt/2019/11/19/cudjoe-sat-was-like-martin-luther-king-jr/> accessed 2 November 2020

[4] Central Broadcasting Services Ltd and another (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago) [2006] UKPC 35; [2006] 1 WLR 2891

9. On 31 January 2020, the Claimant filed its Fixed Date Claim Form, relying on the Affidavits of Lokesh Maharaj filed on 23 May 2019 and 16 October 2019. An Affidavit was also filed by Mr. Stefan Ramkissoon on 24 May 2019. The Fixed Date Claim Form sought the following reliefs:

    i. A Declaration that the Defendant's decision to find the Claimant guilty and/or in breach of Concession Clause D9 is unlawful, null and void and of no effect;
    ii. A Declaration that the Defendant has acted in a conspicuously unfair manner and/or abused its power in arriving at its decision to find the Claimant guilty and/or in breach of Concession Clause D9 towards the Claimant;
    iii. An Order of Certiorari to bring into the High Court of Justice and quash the said decision of the Defendant to find the Claimant guilty and/or in breach of Concession Clause D9;
    iv. Any other order which the Honourable Court may deem fit in the circumstances;
    v. Damages inclusive of aggravated and/or exemplary damages;
    vi. Legal Costs.

10. On 8 July 2020, the Defendant filed the Affidavits of Cynthia Reddock-Downes and Shonda Moore in opposition to the Claimant's Application for Leave and the Fixed Date Claim Form.

11. The parties filed submissions based on an agreed extended schedule ending on 3 November 2020.

B. <u>Factual Background</u>

12. The Defendant is a regulatory authority established by Section 4 of the **Telecommunications Act, Chap 47:31** ("the Act") and empowered by Section 18(1)(m) of Act to "investigate complaints by users, operators of telecommunications networks, providers of telecommunications and broadcasting services or other persons arising

out of the operation of a public telecommunications network, or the provision of a telecommunications service or broadcasting service, in respect of rates, billings and services provided generally and to facilitate relief where necessary".

13. The Claimant, as the holder of a radio and television broadcasting license, is a party to a Concession with the Defendant to operate "free-to-air" radio broadcasting services. By Clause D9 of the Concession, parties agreed the following:

> *"Without prejudice to Condition D8, and until such time as a Broadcasting Code is promulgated in accordance with the Act, the concessionaire shall not:*
>
> *(a) transmit any programme, information or other material which degrades or portrays in a negative manner or discriminates against or encourages discrimination against any person or group by reason of race, origin, class, religion or sex;*
>
> *(b) transmit any programme, information or other material which is hostile to any country; or,*
>
> *(c) broadcast programme, information or other material which endangers the security of the Republic of Trinidad and Tobago, violates any law, is of a defamatory nature, is subversive to peace or public order or is otherwise contrary to the laws of Trinidad and Tobago."*

14. The Defendant alleges that its Chief Executive Officer was shown a video by its Compliance Officer II, Ms. Shonda Moore ["the Compliance Officer"] on 16 April 2019 which showed Mr. Satnarayan Maharaj on a programme called "Maha Sabha Strikes Back" broadcast on the Claimant's radio and TV station. The Defendant also alleges that on the next day it received, through Ms. Moore, an email complaint about an offensive broadcast, which the Chief Executive Officer, Mrs. Cynthia Reddock-Downes ["the CEO"] interpreted as referring to the video she was shown the day before. The CEO also alleges that around the same time she read an article in the Trinidad Guardian dated 15 April 2019 entitled "Sat's nasty attack on Tobagonian denied" in which Mr. Maharaj was reported as standing by his statement.

15. On 17 April 2019 at about 3:30 pm, the Claimant received a letter of even date by facsimile from the Defendant. It was signed by the Compliance Officer, and addressed to the Programme/ Brand Manager Radio & TV Jaagriti. The said letter was captioned "Request for recording of Programme Broadcast on TV Jaagriti on April 15 2019" and it advised as follows:

> *"Please be advised that we have received a complaint about a programme broadcast on your station and therefore pursuant to Section 18(1)(m) of the Telecommunications Act Chap. 47:31 and Clause D34 of the Concession granted to Central Broadcasting Services Limited, the Authority hereby requests DVD-R recordings of all programmes hosted by Mr Satnarayan Maharaj and broadcast on TV Jaagriti on April 15, 2019.*
>
> *Please provide us with the said recording within seven days from the date of this correspondence."*

16. Despite the 7-day period indicated in the Compliance Officer's letter, for production of the recording, the Claimant received another letter at around 5:33 pm on the same date signed by the Defendant's CEO. By this second letter the Defendant advised inter alia as follows:

> *"It has recently come to our attention that on the 'Maha Sabha Strikes Back' programme broadcast on TV Jaagriti on April 15, 2019 there were disturbing statements made by the host, Mr. Satnarayan Maharaj, during that programme. The Authority has reviewed an extract of the programme and finds that the comments made can be seen as divisive and inciteful.*
>
> *The Authority notes that the comments attributed to Mr. Satnarayan Maharaj have not been refuted as stated in the Trinidad Guardian article entitled "Sat's nasty attack on Tobagonians slammed" dated April 16, 2019.*
>
> *We take this opportunity to remind you of Clause D9 of the Concession granted……*

The Authority is of the view that the statements are inappropriate and derogatory to Tobagonians as equal citizens of this country and therefore a breach of Concession Clause D9.

The Draft Broadcasting Code recognises that the broadcaster has a duty to ensure that standards are applied to provide adequate protection of audiences against harmful, abusive or discriminatory material. Discriminatory material is defined as any material, either by speech or visual representations, which targets an identifiable group in a manner that endorses or incites hostility, violence or anti-social divisions against such group.

We are therefore urging you, in the interest of ethical and moral standards; that you pay due regard to the obligations of your Concession and the conditions within the Draft Broadcasting Code.

Please note that the Authority reserves the right to take further action should there be any further breaches of Clause D9."

17. The Defendant, in its Affidavit in Response to the Fixed Date Claim, states that in the period between issuing the first and second letters, a meeting of TATT's Broadcasting Content Complaints Committee ["the Committee"] was convened. In this meeting the following conclusions were said to have been drawn:
    - That the person appearing on the video was plainly recognisable as Mr. Maharaj;
    - That the words uttered by the person appearing on the video were correctly represented by the author of the email complaint;
    - That the words uttered by the person appearing on the video were correctly represented in the Guardian article;
    - That the Guardian article confirmed that a video of the broadcast had been circulated on social media;
    - That the Guardian article represented that Mr. Maharaj did not deny that he did in fact utter the words complained of; and
    - That there was no need to wait for the recordings from the Claimant.

18. The Defendant's CEO avers that TATT's second letter sent on 17 April 2019 to the Claimant did not formally charge the Claimant under the Draft Broadcast Code and that there was, therefore, no need to provide an opportunity to be heard. She insists that the letter was meant simply to encourage the Claimant to have due regard to ethical and moral standards and carried no penalty.

19. On 18 April 2019, the Claimant responded to what it considered to be the Defendant's adverse decision and/or finding and/or conclusion. An extract of the letter is as follows::

> *".....From the aforementioned sequence of events it is our respectful view that TATT arrived at an adverse finding against our client in breach of the principles of natural justice and/or common law fairness. It is our view that TATT had a duty to properly particularize the complaint against our Clients and further afford them an opportunity to be heard in relation to same. These are basic tenets of fairness which should be observed by any responsible public authority acting in a bona fides manner.*
>
> *Apart from jettisoning these trite principles of procedural fairness, we note that TATT has deliberately breached its own policy in its haste to condemn our Clients. It is noteworthy that while your decision letter refers and places reliance on the said draft broadcast code it has, perhaps conspicuously in the case of our Clients, refused to abide by the procedural safeguards contained therein. As you are aware, section 4.3 of the said code, which seems to be a written expression of TATT policy, prescribes that the following matters should be provided:*
>
> *a. Particulars of the alleged breach;*
>
> *b. Particulars of the Code which is alleged to have been breached;*
>
> *c. Particulars of possible sanctions which the breach may attract;*
>
> *d. Particulars of the concession which may have been infringed;*
>
> *Respectfully, the failure of TATT to abide by its own policy is undisputable evidence of bad faith and an abuse of power. There is simply no good reason*

why TATT would not only fail to afford our Clients with basic fairness but further deliberately refuse to follow its own policy on a seemingly predetermined path to embarrass, humiliate and condemn our Clients in the eyes of the public …

Given the actions of TATT, the only logical inference which can be derived from same is that the authority has allowed itself to become an instrument of oppression orchestrated to suppress freedom of speech, political dissent and freedom of expression. Indeed, while TATT or any other organization may disagree with the views expressed by our Clients, what is not disagreeable is that our Constitution and the Rule of Law protects their rights to express those views."

20. The said correspondence went on to inform the Defendant that Judicial Review proceedings would be commenced. It requested that the Defendant undertake in writing not to take any further action whatsoever against the Claimant whether concerning the alleged breach of Clause D9 and/or any other alleged breaches of the Act pending the decision of the High Court.

21. The letter made a further request as follows:

"*Prior to our Client's institution of Judicial Review action we call upon you within the time frame herein after given to* ***immediately reconsider your decision and rescind the findings*** *made in your letter of April 17th, 2019. Should we not receive a written undertaking from you by 1:00pm on the 18th April, 2019 we have instructions to approach the Court for injunctive relief*"

22. On 18 April 2019, the Defendant responded to the Claimant's letter of even date and reiterated its urging that the Claimant pay due regard to the obligations under its Concession and the Draft Broadcasting Code. The Defendant's letter did not include a retraction of the finding that the Claimant had breached Concession Clause D9. However, the Defendant stated, *inter alia*, that it had no intention to apply any further sanction regarding the breach than that which was contained in their letter dated 17 April 2019 but reserved the right to further sanction should the said breach recur.

23. On 7 May 2019, the Claimant's Attorneys at Law wrote to the Defendant requesting that the Intended Defendant rescind its adverse finding(s) and/or sanction(s) made against the Claimant. In summary, it expressed the Claimant's view that the Defendant's response dated 18 April 2019 amounted to an admission of adverse findings being made against them without affording them an opportunity to be heard. The Claimant suggested that its right to be heard was supported by the procedural requirements for fairness and representation outlined in the Draft Broadcasting Code relied upon by the Defendant as well as the Judicial Review Act. The letter also alleges that the Defendant acted in a high-handed, oppressive and conspicuously unfair manner in bypassing these procedural requirements.

24. By letters dated 9 May and 15 May 2019, the Defendant requested an extension of time until 20 May 2019 to respond to the Claimant's letter of 7 May 2019. By letter dated 15 May 2019, the Claimant's Attorneys at Law responded to both letters acceding to the Defendant's request.

25. By letter dated 17 May 2019 (emailed on 19 May 2019), Attorneys at Law for the Defendant responded to the Claimant's letter of 7 May 2019. The letter referred to the decision that had been made to send the warning letter to the Claimant as a decision made by "Management" after the "Management Team" viewed the video of the broadcast. In the letter Counsel for the Defendant set out the wording of the broadcast and some of the events preceding the issuance of TATTs letters on 17 April 2019. No mention was made of the Committee. The letter stated as follows:

> *"While it may be appropriate in most cases for a Concessionaire to be given an opportunity to explain their actions before a warning letter is dispatched, in this instance, it appeared to Management that the words broadcast by Mr. Maharaj were clearly attributable to him and were unequivocally in breach of Clause 9D of the Concession.* ***Allowing your client an opportunity to make representations in the face of such an obvious breach would have served no material purpose****, particularly since Management intended only to issue a warning." [Emphasis Added]*

26. This letter further indicated that TATT "*is sensitive to your Client's complaint that he has not been heard and Management has accordingly decided to refer this matter to the Board of the Telecommunications Authority in order that the Board may decide whether your Client has committed any breach of the Concession*." The letter concluded with an invitation to the Claimant to make representations to the Board as to whether they uttered and broadcast the words that had been found to be offensive, which were set out in the letter and if so, whether they acted in breach of Concession Clause D9.

27. By letter dated 19 May 2019, the Claimant's Attorneys at Law responded that it would be an unfair procedure for the Defendant to maintain its already concluded adverse findings against the Claimant and requested that the finding be rescinded. The Claimant further suggested that it was procedurally unfair, belatedly, to invite representations from the Claimant while maintaining its procedurally flawed finding and/or sanction and/or conclusion.

28. The Defendant states in its Affidavit in Response to the Fixed Date Claim that, since the Claimant declined the invitation to make representations, the matter was not brought before the Board for consideration, however, the Board will be engaged when the Claimant is prepared to make representations.

29. The Defendant also confirms in this response that the broadcast deemed offensive was later clarified to have been a live programme hosted on 9 April 2019 and not 15 April 2019 as set out in its initial letters to the Claimant.

C. Issues

30. The issues to be determined, as identified by the parties are:

- Whether the Claimant is entitled to be granted Leave to Apply for Judicial Review in light of the following:
    i. Is there an arguable ground for Judicial Review with a realistic prospect of success?

ii. Was there an alternative form of redress and if so, are there exceptional circumstances based on which the Court's discretion should be exercised to grant leave for Judicial Review?

- Whether the Defendant's decision to find the Claimant to have breached Clause D9 of the Concession was irrational, procedurally unfair and in breach of the legitimate expectations of the Claimant or whether the invitation to the Claimant to make representations to the Board "cured" any procedural unfairness?
- Alternatively, whether the relief sought should be refused to the Claimant given that, in spite of a procedural breach by the Defendant, the Defendant declared itself ready to put the matter before the Board and hear the Claimant's representations?
- Alternatively, whether relief ought to be refused because the opportunity to be heard by the Committee would have made no difference to the finding?

D. Law and Analysis

Leave to Apply for Judicial Review

31. The Claimant considered in its submissions the threshold test for the grant of leave to apply for Judicial Review. Citing **Sharma v Brown-Antoine (2006) 1 UKPC 57** and **Maharaj v Petroleum Company of Trinidad and Tobago (2019) UKPC 21** they submit that this threshold is low.

32. In **Sharma v Brown-Antoine [2007] 1 WLR 780** it was explained that:

> "The *ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to* ***a discretionary bar*** *such as delay or an alternative remedy." [Emphasis added by the Claimant]*

33. Based on these authorities, the Claimant contends that the Court must examine whether the Claimant has an arguable ground for Judicial Review which has a realistic prospect of success. In the circumstances of this case, where the Claimant has

demonstrated that an opportunity to be heard was precluded by a finding of TATT which the Defendant says was made by the Committee, it is my finding that the Claimant has an arguable case that the decision made was procedurally unfair.

34. The Defendant in their submissions did not challenge whether the case is arguable. Rather, the Defendant submitted that leave to apply for Judicial Review should be denied due to the availability of an adequate alternative remedy. The alternative remedy referred to by the Defendant was the offer made in the letter dated 17 May 2019 to have the Board consider the matter and inviting the Claimant to make representations. In the Defendant's submissions, it was explained that the said offer was made pursuant to Section 83 of the Telecommunications Act Chap. 47:31 ["the Act"] which provides:

> *"Any person aggrieved by a decision of the … Authority may request that such decision be reconsidered based upon information not previously considered, and the … Authority … shall consider the new information submitted and decide accordingly."*

35. The Defendant cites Section 9 of the **Judicial Review Act, Chap. 7:08**, which states:

> *"The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in* ***exceptional circumstances****." [Emphasis added]*

36. The **Civil Proceedings Rules, 1998, as amended** also provides at 56.3(e) that Judicial Review applications for leave should contain a statement as to "whether an alternative form of redress exists and, if so, why Judicial Review is more appropriate or why the alternative has not been pursued". In the instant case, the Claimant stated, at page 18 of its Application for Leave, that Judicial Review is the most appropriate form of redress given the complaints of breaches of natural justice and legitimate expectations and the declaratory relief being sought. They contended that there is no other appropriate form of redress available and that Judicial Review would provide speedy resolution.

37. The Defendant also cites the decisions of **Sharma** and **Ex parte Preston [1985] AC 835** in which the Courts expressed the principle that leave for Judicial Review should not be granted where there is an adequate alternative remedy available.

38. The Claimant, in its Application and initial submissions, does not expressly state that any consideration was given as to whether the opportunity to make representations to the Board was an alternative remedy that ought to have been exhausted before seeking Judicial Review. Instead, the Claimant, in its letter of 19 May 2019, made clear that in the absence of a rescission or withdrawal of the finding by the Defendant, the Claimant rejects the opportunity to be heard by the Board, considering it "repugnant to long standing principles of public law and natural justice as well as an affront to common sense".

39. It was only in the written submissions filed by the Claimant in Reply to the Defendant's written closing submissions that the Claimant frontally addressed the issue of alternative remedy. In so doing, the Claimant made two main points. Firstly, they underscored the statement made in **Sharma** that availability of an alternative remedy is merely "a discretionary bar" to the grant of leave to apply for Judicial Review. This discretionary element arises from the fact that the Judicial Review Act provides for "exceptional circumstances" when leave will be granted despite the existence of an alternative remedy. Secondly, they contend that Section 83 did not present an alternative remedy because on a literal interpretation it is of limited scope, applicable only to cases where TATT needs to consider new information.

40. Looking at the first of these points made by the Claimant, it is noted that the factors to be considered by the Court in deciding whether exceptional circumstances for discounting an alternative remedy are well established. In Judicial Review in the Commonwealth Caribbean[5], a number of relevant authorities on the point are cited including **HCA No 1361 of 1998 (TT) In the Application of the Director of Public Presecutions** where Ventour J as he then was, at P.16 highlighted that the critical

[5] Rajendra Ramlogan, *Judicial Review in the Commonwealth Caribbean* (Routledge-Cavendish 2007)

question is whether the alternative remedy was effective and convenient. In **HCA No CV 1347 of 1993 (TT) In the Application of Saga Trading Ltd** Archie J as he then was, explained at P.33 that:

> "*There is now a substantial body of judicial authority which supports the proposition that where there is an effective alternative remedy available, the discretion to grant judicial review will only be exercised in 'exceptional circumstances'…(PP34-35). The criteria which Courts adopt in the exercise of this discretion are further illustrated by the decided cases, e.g. in Ex Parte Waldron (1986) QB 824 at 852 G. Glidwell LJ considered: 'Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker or slower than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body'. The element of public interest is also a relevant factor as the same judge observed in R v Huntingdon DC, Ex Parte Cowan (1984) 1 WLR 501 at 507: …The nature of the central issue to be resolved and the appropriateness of the remedies available are also factors*"

41. More recently in **CV 2018-03600 Dhelia Gabriel v Ministry of Health,** Mohammed J in concluding that the case before him was not suitable for Judicial Review as there was an appropriate alternate private law remedy, considered submissions as follows:

> "*the question as to whether there is an alternative remedy is not one which is determined by simply pointing to an existing alternative remedy: consideration of that question goes much deeper and must include an inquiry as to the suitability of such an alternative remedy, if one is determined to exist. In securing further support for this contention, counsel cited* ***Halsbury's Laws Volume 61A 2018 Edition which cited R (C) v Financial Services Authority*** *(2012) EWHC 1417 Admin which states:*
>
> > *"The Courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal* ***or internal complaints procedure*** *or where some other body has exclusive jurisdiction in respect of the dispute. However, judicial review may be granted*

in exceptional circumstances such as where the alternative statutory remedy is "nowhere near so convenient, beneficial and effectual" or "where there is no other equally effective and convenient remedy"." [Emphasis Added]

42. In **R (C) v Financial Services Authority** at [89] Silber J stated:

"*These cases show (a) that judicial review will not be granted where there is an alternative remedy available as long as it is in Lord Widgery's words in the Royco case "equally effective and convenient" or in Taylor LJ's words in Ferrero "suitable to determine" the issue and (b)* ***judicial review can be brought where the alternative remedy is in Lord Denning's words in the Peachey case "nowhere near so convenient, beneficial and effectual".*** **[**Emphasis Added**]**

43. In **Judicial Review Principles and Procedure**, the authors at paragraphs 26.89 to 28.91 discussed the rationale for Judicial Review being a last resort:

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

There is a twofold rationale for the requirement that a claimant should usually exhaust any adequate alternative remedy before, or instead of, making a claim for Judicial Review. First, it is not for the Courts to usurp another body that is charged with resolving challenges to or complaints about decisions of public bodies, particularly where that other body has specialist expertise in the relevant field. Secondly, Judicial Review is intended to be a speedy procedure and, given the limited judicial resources available, this necessarily requires limiting the number of claims considered by the Courts. This second element of the rationale should, however, be treated with caution: claimants should not

be denied access to the Courts simply because the Court's resources are inadequate, particularly if Convention rights are in issue."

44. The Defendant cited the case of **King v. University of Saskatchewan [1969] S.C.R. 678, 6 D.L.R. (3d) 120** in support of its submissions that the procedure provided must be looked at as a whole to determine whether fairness was afforded. It is instructive as well on the considerations to be taken into account in determining whether there was an adequate alternative remedy available to the Claimant:

> *"In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which* ***the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal*** *and was not bound to act exactly as one nor likely to do so. Other relevant factors included* ***the burden of a previous finding, expeditiousness and costs****. A consideration of all the factors led to the conclusion that appellant's right of appeal to the senate committee did provide him with an adequate alternative remedy. In addition, this remedy was a more convenient remedy for the appellant as well as for the university in terms of costs and expeditiousness. Also, the council committee's refusal to grant a rehearing to appellant was not a sufficient reason for issuing certiorari and mandamus.*
>
> *Nor should he have assumed that, since the governing bodies of the university had erroneously failed to comply with the principles of natural justice, another governing body of superior jurisdiction would do the same. He should on the contrary have assumed that the body of superior jurisdiction would give him justice, as was held by the Judicial Committee in White v. Kuzych at p. 601:*
>
> > *Their Lordships are therefore constrained to hold that the conclusion reached by the general committee was subject to appeal. And they must respectfully repudiate both the correctness and the relevance of*

the view that it would have been useless for the respondent to appeal because the federation would be sure to decide against him. They see no reason why the federation, if called on to deal with the appeal, should be assumed to be incapable of giving its honest attention to a complaint of unfairness or of undue severity, and of endeavouring to arrive at the right final decision." [Emphasis Added]

45. In the present case, the factors of expeditiousness and costs are relevant considerations in deciding whether exceptional circumstances exist such that despite the alternative remedy leave ought to be granted. An attempted recourse to the Board for re-consideration could not have taken more than a few weeks to saving costs and time is not an exceptional reason for which Judicial Review is to be preferred. In the Claimant's refusal to access the opportunity to make representations to the Board to achieve a reconsideration of the finding, the Claimant has faced more than one year thus far of costs and delay in litigating the matter.

46. As to the likely effectiveness of accessing this alternative remedy, the Defendant has also submitted that it is the Board and not the Committee that made the initial finding that would have been rehearing the matter. Accordingly, there was no likelihood that the decision taken by the Board would be tainted or prejudiced by that of the Committee. The Claimant has presented no evidence as to the composition of the Board such that, on a balance of probabilities, the Court can hold that a hearing by the Board would not be effective.

47. On the other hand, there is evidence before the Court of the questions in response to which the Board was prepared to receive representations from the Claimant. These, as stated in the letter offering the re-consideration, were quite broadly stated as follows:

    - Whether the "Clients" of Counsel for the Claimant uttered the words in the Broadcast;
    - Whether they acted in breach of Clause 9D of the Concession.

48. In my opinion, there is indeed no basis to find that the Board would be ineffective and/or prejudiced by the Committee's decision and therefore unable to give a fair hearing to the Claimant. As in the **White** decision cited in **King**, there is no reason to assume that the Board should be assumed incapable of giving its honest attention to a complaint of unfairness or of undue severity, and of endeavouring to arrive at the right final decision.

49. In these circumstances, recourse to the consideration of the matter by the Board and participation by making representations was an adequate alternative remedy to Judicial Review. The Claimant ought to have exhausted the alternative remedy by accepting the offered consideration by the Board and by making representations to the Board. Such an approach may have taken no more than a few weeks of the Claimant's time and would have been less costly. If it turned out that there was any unfairness, irrationality, breach of legitimate expectations or delay in the Board's deliberations, the Claimant could then have been in better stead to seek remedies from the Court by applying for Judicial Review.

50. Looking at the second point made by the Claimant, it is my further finding that there is no merit to the contention that recourse to a Section 83 re-consideration was not an applicable alternative remedy. Counsel for the Claimant contends that Section 83 allows the Authority to undertake a review "upon new information only."

51. However, it is clear from the correspondence sent by TATT's Attorney inviting representations from the Claimant that new information was to be taken into account in the Board's consideration of the matter. The new information was the information from the Claimant that had not been heard and, more specifically, the Claimant's responses to the two questions posed. Thus, it was immaterial that Section 83 was not cited. On a literal interpretation, a re-consideration was what TATT was offering and the jurisdiction to do so was pursuant to Section 83.

52. The submission filed in reply to the Defendant's submissions on alternative remedy also addresses in detail the legislative structure of the Defendant. The Claimant contends that the Defendant has, by way of submissions, created an "artificial distinction between its management and board, which is not contemplated by statute,

to belatedly cure a procedurally flawed approach". However, the factual existence of the Committee and its role with the CEO and other members of "Management" in coming to the hurried decision to issue the 17 April 2019 warning letter is set out in sworn testimony from the CEO. That testimony remains un-contradicted and there is no basis for the Court to find that it is untrue that the Board was not involved in the 17 April 2019 decision. It is not correct to say that this stance by TATT was only raised belatedly in submissions as the letter offering the opportunity to make representations had made clear that the matter had not been put before the Board.

53. In all the circumstances, the Claimant had access to an alternative remedy in the form of internal re-consideration proceedings. It was not exhausted before seeking leave for Judicial Review. There are no exceptional circumstances justifying an exercise of the Court's discretion to grant leave despite the existence of the alternative remedy.

Substantive Considerations

54. Having determined that there was an alternative remedy with no exceptional circumstances justifying forgoing recourse to same, it follows that the Application for Leave to apply for Judicial Review must be dismissed. However, as the matter has proceeded as a "rolled up" hearing, the substantive issues raised for review are also considered in this Judgement.

55. It is my determination that, even if leave had been granted, the Claimant's case would not succeed. This is so because the procedural unfairness in the flawed approach taken by the Committee was remedied by the offer made to have the matter considered by the Board. This offer was made in response to the Claimant's request for re-consideration but when the offer to do so was made, it was rejected.

56. Similarly, if the first letter sent by the Compliance Officer on 17 April 2019 gave rise to a legitimate expectation by the Claimant that there would be a proper investigation of at least a seven-day duration before a finding was made or sanction imposed, the failure by Management to honour this could have been remedied by a Board re-

consideration. The Claimant has failed to prove breach of legitimate expectation such that any relief from the Court would be required.

57. It is my finding, however, that there is no merit to the submissions of the Defendant that relief ought to be refused because the opportunity to be heard by the Committee would have made no difference to the finding. These considerations will be addressed separately below in more detail.

Legitimate Expectation

58. The Claimant submits that the representation by the Defendant in the letter sent by the Compliance Officer on 17 April 2019 that TATT was acting pursuant to Section 18(1) (m) of the Act amounted to a clear and unambiguous undertaking to act in accordance with the provisions of Section 18(4).

59. The Claimant submits that the provisions of the Act constitute unambiguous, clear and express provisions as it relates to the Defendant's power to investigate and ultimately determine findings arising from investigations. In particular, the Claimant cites Sections 18(4) and 18(5) of the Act:

> *"18(4). In the performance of its functions under subsection (1)(c), (d, (e)(m) and (p), Sections 28, 78 and 79 and any other provision of this Act as the Authority deems appropriate, the Authority shall adopt procedures by which it will:*
>
> *a. Afford interested parties and the public opportunities for consultation;*
>
> *b. Permit the affected persons and the public to make appropriate submissions to the Authority*
>
> *18(5). At all times the Authority shall, in the performance of its functions and exercise of its powers, act in an objective, transparent and non-discriminatory manner."*

60. The Defendant's submissions on this point are, in essence, that there was no unambiguous, express undertaking or promise made to comply with Section 18(4) of the Act to give rise to a legitimate expectation on the part of the Claimant. Further, the Defendant argues that even if the Compliance Officer's letter did implicitly include such an undertaking, the Defendant's invitation to the Claimant to make representations to the Board represented active steps to honour such an expectation.

61. Section 18(4) applies to several sections of the Act and provides that consultations and "appropriate submissions" be permitted in various instances. The sections it refers to speak to various functions of the Authority from establishment of industry standards to investigation of complaints to determination of the services to which universal service shall apply. Given the broad ambit of the section, the statement of the Defendant in its letter of 17 April 2019 that it acted in compliance with 18(1) (m) cannot be considered a clear and unambiguous representation that it would allow for representations by the Claimant in relation to the subject matter of the 17 April 2019 warning letter.

62. Similarly, Section 18(5) contains a very broad obligation of the Authority to act objectively and transparently. This is insufficient to support a claim of legitimate expectation in the present case to make representations before the initial finding, though it does support a general obligation of fairness in the exercise of the Defendant's functions.

63. There was, therefore, no basis for the Claimant's claim of breach of legitimate expectation. There is also merit to the Defendant's contention that, even if there had been a promise made by the Committee to apply the said provisions of the Act in conducting an investigation, the offer of consideration by the Board remedied any breach. This offer was made in direct response to the Claimant's complaint about procedural flaws but it was not accepted. Accordingly, the Claimant has neither proven breach of legitimate expectation nor shown that any relief was required in relation to it.

Procedural Unfairness

64. The Claimant submits, firstly, that the Defendant's decision to find the Claimant guilty and/or in breach of Concession Clause D9 was contrary to the principles of natural justice (right to be heard) and procedural fairness. The Claimant also submits that the decision and the manner in which the decision was taken is rooted in bad faith.

65. **Section 20 of the Judicial Review Act** provides:

> *"An inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner"*

66. The Claimant submits that this duty to act fairly and in accordance with the principles of natural justice is implied in the exercise of the discretionary power of the Defendant. The Court's decisions in **Permanent Secretary, Ministry of Foreign Affairs & Prime Minister Patrick Manning v Feroza Ramjohn [2011] UKPC 20**; and **R v Secretary of State for the Home Department, ex p. Doody [1994] 1 AC 531** are cited in support.

67. The Defendant accepts unreservedly the authorities cited by the Claimant and the principles of law derived therefrom as to the breach of the right to be heard and the rationale for treating with due fairness a person affected by any decision made by a public authority. The Defendant makes no challenge to the common law principles governing the right to be heard. They accept that the principles are enshrined in the constitutional rights to the protection of the law (s. 4(b)) and the due process of law (s. 4(a)), and more particularly "the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" (s. 5(2)((e)).

68. The Defendant's submission under this head is simply that the Defendant's agreement to the Claimant's request for a reconsideration of the decision made by the Committee and/or undertaking to place the matter before the Board for its consideration,

demonstrates that the Claimant was not treated unfairly and was not deprived of its right to be heard.

69. The Defendant suggests that the procedure/system of justice has to be looked at as a whole to determine whether the right to be heard has been infringed. They submit that the existence of an avenue of appeal or review is a crucial factor, drawing comparison to the cases of **Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago and another [2005] 1 AC 190** and **Forbes v Attorney General of Trinidad and Tobago [2002] UKPC 12**.

70. In **Judicial Review Principles and Procedures**, the authors Auburn, Moffett and Sharland state at p. 124:

> *"In assessing whether there has been a breach of the requirements of fairness, the proper approach is to assess the decision-making procedure as a whole, including any process of appeal or review. If the procedure adopted by an initial decision-maker is unfair but, by reason of the procedure adopted on any appeal or review of that initial decision, the decision-making procedure as a whole is fair, the court will not intervene. This is sometimes described as 'cure by appeal', even though it is inaccurate to describe the situation as one where unfairness has been 'cured'. The correct analysis is that, because of the appeal or review process, the procedure as a whole is fair and therefore there is no unfairness requiring a cure."*

71. **De Smith's Judicial Review**, 8th Ed. at p. 492, para, also supports this analysis. 8-043:

> *"The common law and the ECHR both permit a public authority to make decisions which do not comply fully with procedural fairness if the person affected has recourse to a further hearing or appeal which itself provides fairness."*

72. **De Smith** explains further at p. 494, para. 8-046:

> *"…it is the case that the courts will not intervene on grounds of procedural unfairness where the procedurally unfair decision is subject to correction by a procedure which has proper procedural safeguards."*

73. The Defendant also cites several Commonwealth decisions in support of this argument. In **Pillai v City Council of Singapore [1968] 1 WLR 1278**, the Court considered that a rehearing *de novo* could be capable of curing an alleged defect in earlier proceedings. Although the case was dismissed on the basis that the rules of natural justice did not apply to the employer employee relationship in question, the dicta of Lord Upjohn at p. 1286 provides some support for the Defendant's contention:

> *"But the complaint here was that certain evidence was wrongly received by the tribunal at first instance, in the absence of the employee, a serious complaint. But when on appeal there is a rehearing by way of evidence* de novo *from the witnesses it seems to their Lordships that different considerations apply. The establishments committee heard evidence* de novo *in the presence of the appellants or their representatives. Upon that evidence only the committee held that the appellants were rightly dismissed. That cured the alleged defect at an earlier stage and is in itself conclusive against the appellants as the proceedings before the establishments committee are not attacked."*

74. The case of **King v University of Saskatchewan [1969] S.C.R. 678, 6 D.L.R. (3d) 120** involved a challenge by a student on the basis of unfairness, against a law school's decision not to award him a degree. The Court considered that although the student was only given an opportunity to be heard and represented by counsel upon an appeal of the initial decision, the process provided to the student applicant was fair overall:

> *"Any possible failure of natural justice before the special appeal committee, the executive committee, or the full faculty council, is quite unimportant when the senate, the appeal body under the provisions of The University Act, and also the body in control of the granting of degrees, has exercised its function with no failure to accord natural justice. If there were any absence of natural justice*

in the inferior tribunals, it was cured by the presence of such natural justice before the senate appeal committee."

75. Notably, in this case the decision-making process was determined to be fair due to the presence of natural justice in the appeal *after the claimant had accessed it*. In the present case, the Claimant refused to make representations to the Board and demanded a rescission of the decision.

76. However, a similar circumstance is assessed in **Harelkin v. University of Regina [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14** where a student claimant failed to access a right to appeal of the decision of the decision-making body, instead bringing Court proceedings to set aside the decision. The Supreme Court of Canada held that the failure of the decision-making body to observe the rules of natural justice did not render its decision void and that the decision could have been appealed by the claimant and a *de novo* hearing conducted.

77. The principle, the Defendant submits, has also been applied in cases where the body, which was alleged to have denied the claimant natural justice later, reviewed or reconsidered its decision. They cite the decision in **R (on the application of E) v Oxfordshire County Council and another [2001] EWHC 816 (Admin)** in which the claimant argued that a review of a decision after her representations were accepted, did not remedy the original unfairness relating to the original determination. The Court considered at para. 31:

"I think it highly desirable if a matter can be put right quickly and expeditiously by a specialist tribunal that it should be. That is far more desirable than having the original determination brought before a court where even if the appeal is successful, the matter will in any event, in all probability, be sent back to the Tribunal. In this case I am wholly satisfied that the procedure was fair overall. The complaint was a procedural complaint limited to a concern that the Appellant had not had a proper opportunity to deal with a specific matter. I accept it was an important matter because it related to the very recommendation of the Tribunal. This Tribunal heard representations on that

point, they did so relatively quickly after the initial decision and when all the relevant facts and arguments were in their minds. I consider it would be very detrimental to the proper functioning of these Tribunals if the power to review were to be limited so as not to enable it to put right its decision in that kind of way."

78. This is particularly relevant in the present case where the Defendant expressed in their letter dated 17 May 2019, a decision to i) "refer this matter to the Board" to decide whether the Claimant did commit any breach of the Concession and ii) to invite representations from the Claimant.

79. The Defendant submits that this referral of the matter to the Board was done in accordance with the requirements of Section 18(4) of the Act to permit affected persons to make appropriate submissions. They further submit that a person aggrieved by a decision of the Defendant such as the Claimant, has recourse under Section 83 of the Act to request that the decision be reconsidered based upon information not previously considered. The Defendant contends that the request by the Claimant's attorneys for the Defendant to reconsider its decision and rescind the findings automatically triggered the provisions of Section 83.

80. It is notable that the Court in the **Oxfordshire County Council** decision above, considered the fairness of a review/reconsideration by the same tribunal:

"Insofar as it is submitted that it is inherently unfair to commit the matter to be reconsidered to the same Tribunal because they could not be wholly free from the impressions created at the first hearing, I would reject that argument also. Indeed it seems to me that the submission is inconsistent with the regulation to which I have made reference. It is plain that in principle a review should be heard by the same Tribunal where possible. Clearly, therefore, it is implicit in the regulations that the review will be carried out by the same body that already will, to some extent, have had its impressions formed and moulded by an earlier hearing. Moreover, as I have pointed out, occasionally the outcome will be to remit the matter for a rehearing so that there can be a fresh

determination. That, of course, demonstrates that there is intended to be a clear distinction between a full rehearing and a review."

81. The factors to be taken into account in determining whether there has been overall fairness have been set out in ***De Smith's Judicial Review***, 8th Ed. at p. 493, para. 8-045:

"The question of whether a decision vitiated by a breach of the rules of fairness can be made good by a subsequent hearing does not admit of a single answer applicable to all situations in which the issue may arise. Whilst it is difficult to reconcile all the relevant cases, case law indicates that the courts are increasingly favouring an approach based in large part upon an assessment of whether, in all the circumstances of the hearing and appeal, the procedure as a whole satisfied the requirements of fairness. Of particular importance are (a) the gravity of the error committed at first instance, (b) the likelihood that the prejudicial effects of the error may also have permeated the rehearing, (c) the seriousness of the consequences for the individual, (iv) the width of the powers of the appellate body (d) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of fresh hearing, or rehearing de novo, and (e) if applicable, the purpose of the statutory scheme."

82. The Defendant in this case admits at paragraph 63 of submissions that there was a complete failure to accord the Claimant its right to fairness before the Committee. The Defendant submits, however, that the proposed hearing before the Board to reconsider the matter after allowing the Claimant to make representations would satisfy the requirements of fairness.

83. Applying the factors outlined in **De Smith,** the Defendant submits that the consequences of the initial finding were not serious. The Claimant was simply reminded of its obligations under the Concession and warned that, if a similar occurrence took place in future, harsher measures might be taken. Further, given that it was the Board and not the Committee that would be considering the matter, there was no likelihood that prejudicial effects of the error made by the Committee would

permeate the "rehearing" by the Board. Finally, the wide powers of the Board allowed it to consider the matter afresh and it could reverse the decision of the Committee.

84. The decision of the Privy Council in **Calvin v Carr & ors [1980] A.C. 574**, particularly at p. 592-593, firmly holds that there is no general rule that a defect of natural justice in initial proceedings can be "cured" on appeal. The Court emphasizes that the presence of fairness in proceedings should be determined by the Court on a case by case basis:

> *"…their Lordships recognise and indeed assert that no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be "cured" through appeal proceedings. The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that this must be so.*
>
> *…*
>
> *… it is for the court, in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally, there may be instances when the defect is so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result. Many rules (including those now in question) anticipate that such a situation may arise by giving power to remit for a new hearing. There may also be cases when the appeal process is itself less than perfect: it may be vitiated by the same defect as the original proceedings: or short of that there may be doubts whether the appeal body embarked on its task without predisposition or whether it had the means to make a fair and full inquiry, for example where it has no material but a transcript of what was before the original body. In such cases it would no doubt be right to quash the original decision. These are all matters (and no doubt there are others) which the court must consider."*

85. In the present situation, the finding of the Defendant is expressed in words that amount to a warning. The wording in the letter issued on 17 April 2019 does not meet the formal requirements for a "1st Warning" in the progressive sanction regime provided for at 4.4.3(1) of the Draft Broadcasting Code. It is, therefore, not clear that it amounts to a **sanction**. The CEO's contention that her letter was intended more as an encouragement to abide by the terms of the Concession is on the face of it somewhat persuasive.

86. Although the Defendant insists that the consequences of this letter were not serious, the Claimant is of an opposing view. The Claimant contends that the content of the letter is serious, bearing in mind the warning of further sanction. They also argue that it affects the constitutional right to freedom of expression.

87. There is, however, no evidence on record before the Court that the hearing of the Board, if accessed, would be prejudiced by the decision of Management/the Committee before it. Under Section 83 of the Act, it is clear that the Board has the discretion to reconsider and make a decision that would supersede the initial findings. It is clear from the invitation to the Claimant to make representations to the Board that any information presented by the Claimant would be taken into account in the Board's decision. There does not appear to be any reason to believe otherwise. Therefore, the unfairness in the procedure that was followed by the Committee in coming to the initial finding could have been "cured" by the offered consideration by the Board.

88. In light of the Defendant's admission at para. 63 of submissions that there was a complete failure to accord the Claimant its right to be heard before the Committee, it is not in dispute that the decision being challenged was arrived at by a procedure that was procedurally unfair. However, there is merit to the submissions of the Defendant that the Court should reject the reliefs sought by the Claimant because the same result could have been achieved by accepting the offer of re-consideration by the Board.

89. The Defendant submits that even if the Court finds that the initial procedure was unfair and an alternative remedy did not exist, it has the discretion to reject the reliefs

sought. This is so having regard to the fact that the Defendant has been, since its letter of 17 May 2019, willing to reconsider the matter which brought the Claimant to court, affording the Claimant its right to be heard. The Defendant further submits that the grant of the relief sought would serve no useful purpose given the indication from the Defendant that the Board remains prepared to hear the representations of the Claimant.

90. The Defendant cites **R vs. Secretary of the State for the Home Department ex parte Pierson [1998] 1 AC 539** as precedent for the Court taking such an approach. In that case, despite the Court's conclusion that there had been unfairness in the decision, the Court denied the relief sought on the basis that the Defendant was willing to consider further representations of the Claimant. In coming to its conclusion however, the Court considered that no challenge had been made to the Defendant's good faith.

Bad Faith

91. In the present case, there is a direct assertion of bad faith on the part of the Defendant. In summary, the Claimant asserts bad faith due to the failure of the Defendant to adhere to its own policies/procedures, the refusal to provide an opportunity to be heard, the refusal to rescind the finding, the failure to verify the information it relied upon, and the speed in which it made the decision. The Claimant also asserts that the findings were made public by the Defendant and were made to cause public embarrassment. However, there is nothing in the evidence to suggest that the Defendant was responsible for the publication of the finding.

92. These assertions by the Claimant do not appear to substantiate an allegation of bad faith. As the Defendant submits, bad faith is "a serious allegation that attracts a heavy burden of proof" (**De Smith on Judicial Review** p. 291, para. 5-097) and something more than the failure to afford natural justice is required. The failure to adhere to policies and the speed at which the Defendant came to its decision both relate to the failure to hear the Claimant. The information upon which the Defendant relied (a video recording and a newspaper article), though ideally requiring verification prior to a finding being made, was weighty enough to go against an assumption of bad faith.

Further, the Defendant's refusal to rescind its finding is weighed against its offer of referral to the Board for reconsideration and invitation to make representations.

93. In all the circumstances, there is insufficient evidence on record for a finding of bad faith on the part of the Defendant. This absence of bad faith supports the Defendant's case that the Court should exercise its discretion to refuse the relief sought by the Claimant. This is so especially as the grant of the relief sought would serve no useful purpose, as there remains the option for reconsideration by the Board in which there will be an opportunity to be heard. Considered in the round, in line with the decisions of **Pillai**, **King** and **Harelkin** cited above, the procedure afforded to the Claimant by the Defendant could satisfy the common law and statutory requirements of fairness.

94. Accordingly, there is no merit to the Claim for relief to cure the procedural defects in the initial issuing of TATT's warning letter.

Opportunity to be heard would have made no difference?

95. The final submission by the Defendant is that despite any unfairness in the process, the actions of the Claimant in broadcasting the material in question would undoubtedly have attracted sanction in D9. The Defendant submits that the Claimant has not put before this Court any analysis of the words to offer a view as to whether they fit the description of prohibited material under D9.

96. The Defendant in submissions at paras. 83 – 101 proffers an analysis of the words in the Broadcast. They submit inter alia, that the statements therein are:

- "at best at the upper end of the scale of offensiveness";
- "not the lifeblood of democracy" but rather,
- "the death knell of the civilised discourse which nourishes democratic practices".

It was further submitted by the Defendant that:

- it would be "impossible to conceive that anyone would not consider that these words degrade Tobagonian men", and

- the statements constituted “hate speech”.

97. The Claimant submits, on the other hand, that the Defendant’s position that there would be no material difference had the Defendant given the Claimant a right to be heard is an unsustainable argument particularly in the context of freedom of speech being protected by the Constitution.

98. The analysis of the Supreme Court of England in **Osborn v The Parole Board [2013] UKSC 61** is cited in support. The Court, in that decision, addressed the purpose of procedural fairness. The highlights included that procedural fairness would result in better decision-making, the avoidance of the affected person’s sense of injustice at not being heard and adherence to the rule of law. The decision, therefore, emphasised the importance of natural justice and the reluctance of the Court to dispense with procedures that afford it:

> *“It is clear from the aforementioned treatise in Osborne (supra) that procedural fairness serves very important policy and Rule of Law purposes. Therefore, given these indispensable benefits of procedural fairness, we submit that it must be in the rarest of cases; akin to seeing the fabled chimera, when the Honourable Court could dispense with procedural fairness and/or Natural Justice.”*

99. The following dicta of Elias J in **R v Chelsea College of Art and Design, ex p.Nash [2000] ELR 686** was also outlined in the Claimant submissions:

> *“…It has been urged on me that even if there were defects in the procedure, they would have made no difference to the outcome. This is an argument that is very rarely accepted by the courts, for obvious reasons. It must be in the very plainest of cases, and only in such cases, where one can say that the breach could have made no difference…”.*

100. The Court in **R v Ealing Magistrates Court, ex p. Fanneran (1996) 160 JP 409** strongly cautioned against upholding a suggestion that no prejudice was caused to a claimant because the flawed decision would inevitably have been the same.

101. The learning in **De Smith's Judicial Review (8th Ed) at 8-070** also supports the submission:

> *"Natural justice is not always or entirely about the fact or substance of fairness. It is also has something to do with the appearance of fairness. In the hallowed phrase, justice must not only be done, it must also be seen to be done."*

102. In the present case, the Claimant has not proffered its substantive case against the Defendant's finding. This, as aforementioned, amounts to "new information" that could be considered by the Board. The present action being solely concerned with the procedural fairness of the Defendant's action, the Claimant was not required to present its response to TATT's 17 April 2019 finding in this forum. Despite the Defendant's suggestion that it is impossible to conceive that the statement in question did not breach Clause D9 and/or that it would not attract any sanction, it would be a further unfairness to the Claimant for this Court to make such a conclusion on the basis of the evidence and submissions before it.

103. At the very outset of the Claimant's submissions, at para. 1, they state that this is a right to be heard case. The Court is not called upon in this Fixed Date Claim to make a determination on the merits of whether there was a breach of the Concession or whether a proper sanction was imposed. Furthermore, an opportunity to be heard by the Board, if fairly conducted, will not be restricted to considerations of whether a breach was committed.

104. A responsible state authority, such as the Board, must also consider the best outcome of the matter taking into account the Claimant's representations and public interest concerns. Such best outcome considerations could take into account harm done to Tobagonians and the society as a whole by the broadcast and possible approaches to restoration.

105. Therefore, the Court rejects the Defendant's contention that the opportunity for the Claimant to be heard would have made no difference to the decision.

E. Conclusion

106. As aforementioned, a determination whether the Broadcast breached the Concession or the warning given was justified is not the subject matter of this decision. TATT has offered to have the Board consider that matter and my finding is that the Board hearing is the appropriate first recourse for such a determination. However, my observation as a matter of *obiter dicta* is that the statements made during the Broadcast appear to have been dismissive, unfair and disrespectful to Tobagonians.

107. Likewise, the Board can also take the flawed procedure of the TATT Committee into account during any re-consideration. In passing, I observe that the action of the Committee of TATT in deciding on a finding and issuing a warning was hastily taken within a two-hour period on 17 April 2019, without thorough investigation and without giving an opportunity to be heard. Such an opportunity could have generated a better outcome in terms of procedural fairness, restorative justice, reconciliation, and perhaps an expression of remorse to those adversely affected by the Broadcast.

108. This type of constructive outcome would be especially desirable as instances of racially charged offensive statements in both traditional and social media broadcasts are unfortunately an increasingly common scourge to be addressed by the relevant authorities including TATT. Instead, the action taken by the Committee appears to have been dismissive, procedurally unfair and disrespectful to the Claimant and the speaker of the words. No constructive purpose was served by the approach taken.

109. Quite appropriately, counsel for the Defendant admits in submissions that the procedure adopted by the Committee of TATT was flawed. In these circumstances, the timely offer made on 17 May 2019 to remedy the situation by referring the matter for hearing by the Board was the appropriate response to the Claimant's request for re-consideration of the finding and warning contained in the letter issued on 17 April 2019.

110. It is unfortunate that the offer of a hearing by the Board and the invitation to the Claimant to make representations came within a letter dated 17 May 2019 that gave

the impression of a closed-minded approach to the matter. The letter said, "*Allowing your client an opportunity to make representations in the face of such an obvious breach would have served no material purpose, particularly since Management intended only to issue a warning*."

111. The 17 April 2019 warning letter from the CEO had not made clear that, although this warning letter was issued by TATT, the matter had not been considered by the Board. Thus, the proposal in the letter a month later on 17 May 2019 that a reconsideration could be addressed by the Board may have given the Claimant its first inkling that the Board had played no role in the initial warning. The fact that the Board played no such role was more clearly explained in the Affidavit of the CEO filed during the instant proceedings where she said at paragraph 19, "*the matter has not been brought before the Board for its consideration*."

112. The content and tone of the 17 May 2019 letter, offering consideration by the Board, may have sufficiently alarmed the Claimant's principals that they thought immediate recourse to the Court was necessary. This may, in my view, be a relevant factor when determining whether to make a costs order in this case.

113. However, while one can empathise with this thought process, which led to the filing of the instant Application for leave to apply for Judicial Review, it is not an acceptable basis for forgoing the re-consideration procedure provided by the governing legislation. The Claimant had, at least, to attempt this alternate remedy before accessing the Court's Judicial Review jurisdiction.

114. The Claimant's Application for Leave to apply for Judicial Review will not be granted. Although the Claimant raised issues of procedural unfairness and breaches of natural justice that had a realistic prospect of success, the Court exercises its discretion to refuse leave on the basis that there was an adequate alternative remedy available. Section 83 of the Act provided this alternative remedy and the Defendant offered it to the Claimant by letter of 17 May 2019.

115. Even if leave had been granted, the Claimant, although proving unfairness in the process that resulted in the initial finding of the breach of Clause D9, could not be granted the reliefs sought in the Fixed Date Claim. The Claimant failed to access the opportunity provided to it by the Defendant for reconsideration of the matter. This opportunity, provided for by the Act, would in all likelihood, have afforded the Claimant a fair hearing in accordance with principles of natural justice.

116. There is no evidence to the contrary. It would therefore serve no purpose to grant the reliefs sought as the Claimant still has the opportunity to be heard in the process of reconsideration of the decision by the Defendant's Board.

117. The Claimant has not established its entitlement to the grant of its Application to apply for Judicial Review. On the findings herein, there is no justification for the substantive relief sought in the Defendant's Fixed Date Claim to be granted by the Court. The opportunity for a re-consideration by the Board ought to have been accessed as the primary recourse to the relief sought. The Defendant is therefore the successful party in this litigation.

118. However, in light of the alarming absence of procedural fairness the Claimant faced in TATT Committee's approach to decision-making, the Claimant's belief that there was need for a rush to Court was understandable. Some of the content and tone of the letter sent by the Defendant's Attorneys making the offer of re-consideration by the Board may reasonably have fortified this belief. In particular, the comment that "*an opportunity to make representations in the face of such an obvious breach would have served no material purpose*" because Management only intended to issue a warning, unnecessarily sought to excuse the flawed approach taken by Management before offering a reconsideration by the Board.

119. This off-putting tone emanating from the Defendant which may have caused the Claimant to forgo making representations to the Board when offered the opportunity to do so, continued after this Claim was filed. There is merit to the Claimant's submission that the point made by Counsel for the Defendant that the Claimant "*got*

off light with a simple warning[6]*"* is perhaps demonstrative of the judgmental tone in communications from TATT when offering an opportunity to be heard.

120. I therefore make no order as to costs at this time but will hear submissions from the parties on costs if an application is made by the Defendant within 14 days of the date hereof.

121. **IT IS HEREBY ORDERED** as follows:

i. The Application for leave to apply for Judicial Review is dismissed.
ii. The words at paragraph two of this Judgment are to be redacted.
iii. The Defendant is permitted to file an Application for costs within 14 days of the date of this Judgement.
iv. Liberty to Apply.

……
Eleanor Joye Donaldson-Honeywell
Judge

[6] Paragraph 113