



[2023] JMSC Civ. 152

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV02803

BETWEEN	KERRIE-ANN DRYDEN	CLAIMANT
AND	MINISTRY OF ECONOMIC GROWTH AND JOB CREATION	1ST DEFENDANT
AND	THE PUBLIC SERVICE COMMISSION	2ND DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	3RD DEFENDANT
AND	AUDREY SEWELL	4TH DEFENDANT

OPEN COURT

Ms. Analisa Chapman for the Claimant.

Ms. Faith Hall instructed by the Director of State Proceedings for the Defendants.

April 19, 2023 & July 27, 2023

**JUDICIAL REVIEW - Civil Procedure Rules – Part 56 of CPR – Constitutional law –
– Breach of Public Service Regulations – Staff Orders for Public Service –
Performance Management Appraisal System (PMAS) guidelines – Delay in
completing job performance reports and PMAS appeal process – Right to fair
hearing within reasonable time under Section 16(2) of the Charter of Fundamental
Rights and Freedoms – Mandamus – Declaration – Damages.**

SIMONE WOLFE-REECE, J

INTRODUCTION

- [1] The Claimant, Ms. Kerrie-Ann Dryden is an Attorney-at-Law and former Senior Legal Officer in the Ministry of Economic Growth and Job Creation (1st Defendant). She is seeking judicial review of what can best be described as the failure of Audrey Sewell (4th Defendant), the Permanent Secretary of the 1st Defendant, to review the Claimants performance evaluations for the period 2016 to 2021 under Performance Management Appraisal System (PMAS), of the Government of Jamaica. The Claimant asserts that this failure affected payment of increments due to her in accordance with the requirements of the Public Service Regulations and the governments public policy procedures.
- [2] Ms. Dryden is also seeking declarations that the 1st, 2nd, (Public Service Commission) and the 4th Defendants have breached her constitutional rights to a fair hearing and fair hearing within a reasonable time.

OVERVIEW

- [3] The Claimant began working with the Public Service as a legal officer in March 2005. She spent seventeen (17) years in the public service and has held several posts as legal officer within the Government of Jamaica. The Claimants post as Senior Legal Officer in the offices of the 1st Defendant has acquired pensionable status.
- [4] As Senior Legal Officer at the 1st Defendant, the Claimant had a direct reporting relationship with the 4th Defendant. The PMAS system was the medium of evaluation of staff which has direct implications on the payment of increments to the Claimant. The Claimant asserts that the 4th Defendant failed to initiate the process in accordance with the requirements of the PMAS framework, which includes agreement of a work plan and engaging and holding quarterly meetings. quarterly meetings with her.

- [5] The PMAS process recommends that the employee does what is best described as a self- evaluation first. The employee then submits same to their supervisor who will then review and do an assessment. If there are issues of dispute, PMAS provides that there should be at an attempt between supervisor and officer. If that fails, then the aggrieved party may submit a written appeal within 5 days of receiving a copy of the completed Appraisal signed by all the required parties.
- [6] In 2021 the Claimant completed her portion of the evaluations for the period 2016 -2021 to the 4th Defendant. It was not until February 2022 that the 4th Defendant completed her review of the Claimants performance which she categorized as unsatisfactory. The Claimant contends that the assessment by the 4th Defendant was unjust and without basis
- [7] The Claimant says she has sought to engage the 1st and 2nd Defendant in writing to dispute the assessments but they have failed to facilitate the process under PMAS for her dispute to be addressed.
- [8] The Claimant asserts that the 1st and 4th Defendants have delayed processing her requests for a PMAS review of the reports. This has had directly affected her receiving her increments and has affected her personally. Specifically, she has stated failure to pay over her increment at the stipulated times has affected the calculation of her pension.
- [9] The Claimant resigned her post as Senior Legal Officer at the 1st Defendant on August 10, 2022.
- [10] The Claimant is of the view that seeking orders of mandamus is her only redress for the prompt processing of the PMAS review. On October 19, 2022 K. Anderson, J granted leave to the Claimant to apply for orders of mandamus. The Claimant filed a Fixed Date Claim form on October 31, 2022 and an Amended Fixed Date Claim Form seeking the following orders:
1. *An Order of Mandamus compelling the 1st Defendant to take the necessary steps to conclude or complete the review exercise of the*

Performance Management Appraisal System for the Applicant in keeping with the relevant Government of Jamaica policy.

2. *An Order of Mandamus for the 1st Defendant to process the payment of increments and allowances duly and justly owed to the Claimant and accrued from 2016 to 2021 as the 4th Defendant failed and/or neglected to observe due process and comply with regulation 38 of the Public Service Regulations, 1961 (preserved by section 2 of the Jamaica (Constitution) Order in Council, 1962) which prohibits the Non-payment of annual increments to an officer public employees without first having notified the officer in the relevant year, 30 days in advance of the payment becoming due to the officer.*
3. *A Declaration that the Claimant is entitled to payment of all increments and allowances or any sum arising to the Claimant by virtue of employment with the 1ST Defendant in keeping with regulation 38 of the Public Service Regulations, 1961.*
4. *A Declaration that the Claimant is entitled to have the 2ND Defendant recommend to the Governor General the approval of the payment of a special increment in additions to the ordinary increment pursuant to regulation 38 (7) of the Public Service Regulations, 1961.*
5. *A Declaration that the 4TH Defendant failed and/or neglected to observe due process and comply with regulation 38 of the Public Service Regulations, 1961 which prohibits the non-payment of annual increments to an officer public employees without first having notified the officer in the relevant year, 30 days in advance of the payment becoming due to the officer.*
6. *A Declaration that the Defendants have breached the Claimant's right to a fair hearing pursuant to subsection 16(2) of the Charter of Fundamental Rights and Freedoms.*
7. *A Declaration that the Defendants have breached the Claimant's right to a fair hearing within a reasonable time pursuant to subsection 16(2) of the Charter of Fundamental Rights and Freedoms.*
8. *Damages for defamation, harassment and mental distress pursuant to its authority for joinder of claims under CPR 56.10(2).*
9. *Such further and/or other relief that this Honourable Court deems just.*
10. *Costs to be costs in the claim.*

[11] The evidence before the Court is contained in four (4) affidavits of the Claimant. The first two (2) were filed on November 1, 2022, December 16, 2022 respectively

and final two (2) were filed on January 19, 2023. The Defendants have filed two (2) affidavits in response to the claim. The affidavit of Audrey Sewell in response and the affidavit of Jacqueline Mendez in response both filed on January 12, 2023. Full submissions orally and in writing were made by Ms. Chapman and Ms. Hall. I thank Counsel for same, even though I have not reproduced them in their entirety I have considered them in full and referred to them as I have addressed the issues for my consideration.

PRELIMINARY OBJECTION

Defendant's Submissions

[12] At the hearing, Ms. Hall made oral submissions in respect of a preliminary oral application for the Court to use its powers pursuant to CPR. 29.1 and 30.3 to exclude evidence and strike out portions of the Claimants affidavits which she deemed to be scandalous. In particular, it was submitted that the Claimant's 3rd Affidavit filed on January 19, 2023 does not comply with the law and the rules of evidence. Issue was taken specifically with paragraphs 22 ,26; 28 - 29; 30 - 35; 43 and 44 of the affidavit. Also the 4th affidavit of the Claimant filed on January 19, in respect of paragraphs 3 - 5.

[13] Counsel submitted that the matter before the Court is one of judicial review. The Claimant is seeking orders of mandamus specifically in relation to the completion of her performance reviews and payments of increments. The paragraphs identified above have no bearing on the Court's determination of the issue. Counsel concluded they were irrelevant and provided no probative value to the determination of the claim. The claim is not about the Claimant's performance of her job and performance of the unit she formerly led. The paragraphs are therefore irrelevant and should be struck out.

[14] Ms. Hall also submitted that the PMAS is not the subject of these judicial review proceedings. It is not for the Court to perform its own assessment, which is what the Claimant is purportedly seeking to do.

Claimant's Submissions in response

- [15] Ms. Chapman responded to the application on the basis that the application should have been made in chambers on the 24th January, 2023. The substantive content of the PMAS are extremely relevant to these proceedings, as failure to follow PMAS is the crux of the matter. Any effort to strike out contents of the PMAS should not be upheld.
- [16] The performance issue raised is in direct relation to the 4th affidavit of the Claimant, in relation to the circumstances when the PMAS took place. The Defendant has failed to meet the standard in the relevant unit. All the evidence together will give a wholistic view in order to arrive at a just and balanced conclusion or determination.
- [17] Ms. Chapman rejected the argument that the paragraphs identified have no probative value, stating that this view is incorrect. Counsel submitted taking in the context, it is relevant to the principle of fairness. It is whether the party acted fairly, impartially and with transparency.

Ruling on the application

- [18] The Court is of the view having assessed the paragraphs outline that they speak to the extensive work done by the Claimant. It seeks to challenge the veracity of the review done of her under PMAS I must agree that whilst this point should have been taken prior to the trial of this claim. The test is still whether the evidence is relevant. I cannot agree that the evidence is relevant to the determination of the issues before the Court and therefore those paragraphs as outlined in paragraph 12 are struck and will not form part of the evidence for the Courts deliberation.

The Role of the Court

- [19] It is settled law that judicial review is a process in which certain administrative remedies are available. Persons aggrieved with the decision-making of a public

body or authority make seek such orders with certain parameters. It is also settled law that the Court exercises this function in a supervisory capacity. Judicial review is the process by which this Court exercises its inherent supervisory jurisdiction over inferior courts, tribunals and other bodies or persons performing public law functions to ensure that their decisions do not offend the core principles underpinning administrative law. It is now a well-established principle of law that the core principles pertain to illegality, irrationality or procedural impropriety in the award.

[20] In order to invoke the supervisory jurisdiction of the Court, the Claimant must allege that at least one of these grounds - 'illegality', 'irrationality' or 'procedural irregularity/impropriety' - arose in the decision-making process by the public authority'. The grounds of judicial review were outlined in the oft-cited case of ***Council of Civil Service Unions and Others v Minister for the Civil Service***¹. I rely on the following statement by Lord Diplock at page 950 of the judgment, in which His Lordship stated that:

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

*By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Limited Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well-equipped to answer, ... 'irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.*

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with

¹ [1985] AC 374

procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice...

- [21] The decision-making process sought to be reviewed in this case relates not to the making of a decision, but the failure to make a decision. Where the act complained of consists of an alleged failure to perform a duty, such circumstances do not make the public authority immune from the process of judicial review. This was the position in the dicta of Lord Wilberforce in ***Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd***².

This position was applied in the case of ***Latoya Harriott v University of Technology***.³ Brooks P at paragraph 13 of the judgment stated:

*“It has long been accepted that a refusal, especially by a public institution, to perform a public duty is subject to judicial review. Lord Diplock in **Council of Civil Service Unions and Others v Minister for the Civil Service [1985] AC 374** (**CCSU v The Minister**), made that point clear when he said, in part, at page 408:*

Judicial review... provides the means by which control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I call the ‘decision-maker’ or else a refusal by him to make a decision.”

Issue 1: Whether the 1st and 4th Defendants acted in contravention of regulation 38 of the Public Service Regulations and public policy guidelines within the PMAS

- [22] Regulation 38 of the **Public Service Regulations**⁴ provides that:-

“38.- (1) Subject to the provisions of this regulation an increment shall not be suspended, deferred or withheld except by the Governor-General acting upon the recommendation of the Commission.

² [1981] 2 All ER 93 @ page 98

³ [2022] JMCA Civ 2

⁴ Constitution of Jamaica Regulations, 1961

(2) The grant of an increment may be prejudiced by-

(a) lack of efficiency;

(b) unsatisfactory service or conduct; or

(c) failure to pass a requisite examination conditional to the grant of the officer's increment.

(3) Where a Permanent Secretary or Head of Department considers that for any of the reasons specified in sub-paragraph (a) or (b) of paragraph (2) an officer's increment ought not to be granted he shall

—

(a) notify the officer in writing at least one month before the date on which the increment is due of the reasons for which he considers that the increment ought not to be granted; or

(b) if he is unable to notify the officer in accordance with sub-paragraph (a), report the matter to the Chief Personnel Officer for the Commission's recommendation to the Governor-General as to whether the payment of the increment ought to be made on the date on which it becomes due.

(4) Where a Permanent Secretary or Head of Department has notified an officer in accordance with sub-paragraph (a) of paragraph

(3) he may suspend for a period not exceeding three months the payment to that officer of the increment to which the notification relates, and shall at the end of the period of suspension-

(a) grant the increment from the date on which it became due; or

(b) recommend through the Chief Personnel Officer for the consideration of the Commission that the increment be either deferred or withheld.

(5) In making a recommendation for the suspension, deferment or withholding of an increment the Permanent Secretary or Head of Department shall take into account the gravity of the original misconduct or dereliction of duty if any, and the nature of the officer's subsequent behaviour, or his present degree of efficiency, he shall bear in mind that-

(a) "suspension" is to be applied when for any reason it is thought desirable to "reserve judgment" and allow for reformation or otherwise;

(b) "deferment" is a substantial fine; and

(c) "withholding" is a very serious penalty which deprives the officer of the amount of that increment during each subsequent year of his service until the officer reaches the maximum of his scale.

(6) An increment may be deferred for a period not exceeding six months including any period for which it has been suspended, and shall be payable from the date on which it is restored.

(7) Where an increment has been withheld the Governor-General, acting on the recommendation of the Commission may at any subsequent incremental date grant to the officer concerned a special increment in addition to his ordinary increment."

[23] Ms. Chapman submitted that the orders should be granted as the Defendants have breached the provisions of the **Regulations**, specifically regulation 38 and the PMAS policy guidelines by failing to provide the Claimant with a fair hearing within a reasonable time. Ms Hall has submitted that the orders of mandamus nor the declarations being sought should be made as there has been no breach of the Regulations or the PMAS. She argued that the Defendants have acted within the law. It is her contention that regulation 38(7) does not apply since here has been no act of suspension, deferral or withholding of an increment by the 4th Defendant within the meaning of the regulation. In support of this submission she relied on affidavit evidence of Jacqueline Mendez⁵, in which Mrs. Mendez confirmed that regulation 38(7) is not applicable in the instant case since no process has been undertaken by the Public Service Commission to give effect to the granting of a special increment.

ANALYSIS

[24] The Public Service Commission is established under Section 124 of the **Constitution**. The powers of control and management of the Public Service Commission are conferred on it by virtue of Section 125 (1) of the **Constitution**.

⁵ Affidavit of Jacqueline Mendez Filed January 12, 2023 para 6

- [25] The **Public Service Regulations** are secondary legislation, entrenched within the laws of Jamaica by virtue of Section 2 of the Second Schedule of the **Constitution**. The Regulations make provisions for the appointment, removal and disciplining of officers within the public service.
- [26] The PMAS, unlike the Regulations is not secondary legislation and therefore lacks legislative authority with which the Regulations are applied and enforced. However, the PMAS forms part of public policy guidelines which guides the work process and assessment of public officers. It is considered as being important in streamlining efficiency and fair evaluations within the public service. Failure to adhere to its provisions can result in a determination of breaches of inherent rights that an aggrieved party.

Statutory duties under The Public Service Regulations

- [27] The payment of increments is provided for in the **Staff Orders for the Public Service**. Order 6.4.1 which states that increments are normally paid on the anniversary date of appointment to permanent employees who demonstrate fully satisfactory performance on the job during the previous year. Increments, however may be withheld as a result of unsatisfactory job performance or as a penalty following disciplinary procedure. Where increments are to be withheld, the employee must be notified at least two months before the increments are due.
- [28] Applying this position to the instant case, the Court concludes that neither does Staff orders or regulation 38 confer on the Claimant an absolute right or entitlement to the payment of increments, on the anniversary of her appointment. It is a discretionary measure that can be implemented based on the prerequisite of a good performance review, which must be done annually to determine if the increment may become due.
- [29] The regulations further provide that there are certain circumstances where the granting of an increment may be prejudiced, such as (a) lack of efficiency, (b) unsatisfactory service or conduct or (c) failure to pass a requisite examination

conditional to the grant of an increment. Regulation 38 imposes a duty on the 4th Defendant as the Permanent Secretary to notify the officer in writing at least one month before the increment is due of the reasons that she considers the increment ought not to be granted.

- [30]** The regulations stipulate timelines within which a suspension or deferment of the increment can be done. A suspension can be for no more than three months and a deferment for no more than six months. Where the is unable to provide the requisite notice, the 4th Defendant has an additional duty to escalate the matter to the Chief Personnel Officer of the Commission, for the Commission to recommend to the Governor-General whether the payment of the increment ought to be made on the due date.
- [31]** Mrs. Mendez averred that based on checks, there was no record that any document in relation to the non-payment of the Claimant's increment had been received by the OSC. In the circumstance, there was no communication regarding compliance with regulation 38 in relation to the Claimant that existed, and on which the Public Service Commission could reasonably be expected to act.
- [32]** The evidence is undisputed that there have been no performance evaluations done in respect of the Claimant between 2016 and 2021. There is no evidence to support that during that time period either the Claimant or the 4th Defendant made any inquiries as to why there was no performance evaluation in relation to the Claimant. The Court finds that this is somewhat curious on part of the Claimant and the 4th Defendant. It is indeed remarkable that the Claimant a Senior Legal officer, with many years' service in the public service, who was working well and who remained at the salary since the year 2015 never sought to initiate the process before 2021.

- [33]** It is equally remarkable I find on the part of the 4th Defendant that based on her affidavit evidence⁶ of the numerous concerns that had been raised re the Claimants absenteeism from work and general deficiencies at work that she as the Permanent Secretary did not seek to ensure that evaluations were done on an annual basis for a senior legal officer who based on her evidence was under performing.
- [34]** There is however no evidence that the 4th Defendant sought to withhold, defer or suspend any increment due to the Claimant. The Court is not of the view that it can be inferred from the evidence either as both the Claimant and the 4th Defendant failed to complete requirements under PMAS to facilitate an evaluation of the Claimant. The 4th Defendant did not dispute that no notice pursuant to regulation 38 was sent to the Claimant, nor did she dispute that no notification was sent to the Chief Personnel Officer for the Commission's recommendation to the Governor General as to whether the payment of the increment ought to be paid to the Claimant when it became due.
- [35]** The Court concludes that in the instant case there was no performance evaluation therefore there was no basis on which consideration could be given for increments to be paid to the Claimant. There also is no evidence that the 4th Defendant withheld any increment from the Claimant. Further, the Court finds that based on PMAS procedure, self -evaluation is a part of the evaluation process, which the Claimant failed to do for 2016-2021, it cannot be concluded that the actions or lack thereof by the 4th Defendant amounted to withholding the increment from the Claimant.

⁶ Affidavit of Audrey Sewell filed January 12, 2023 para 13

[36] The Claimant, not having satisfied the Court that she has a legal right or entitlement to payment of increments, there is no basis on which the Court could grant orders 3 and 4 of declarations sought in the Amended Fixed Date Claim Form.

Role of delay in the decision making process

[37] In her affidavit evidence in response, the 4th Defendant did not dispute the delay between 2016 and 2020 in conducting the Claimant's evaluation. The 4th Defendant agreed that there was delay but that it was partially attributable to the Claimant, as the Claimant herself failed to initiate her work plan and send to the 4th Defendant until June 2021. In her affidavit⁷ she stated:

"The Claimant had a duty to prepare the work plan for discussion as well as completing her self-assessment in the OMAS report however she never initiated this process prior to June 2021. It was not till around June 4, 2021 that the Claimant submitted in bulk her PMAS reports for the years 2016-2017, 2017-2018 and 2018-2019. PMAS report for 2019-2-2- and 2020-2021 were submitted September 2, 2021".

[38] The 4th Defendant admits that the timing of submission of the reports and demands of her desk she was not able to review them at the point they were submitted. I do not find that evidence to be unreasonable. However, the Claimant submits that further delay occurred after January 2022 when the 4th Defendant completed the outstanding PMAS reports for the period 2016 – 2021 and the Claimant was dissatisfied with the assessments, the Claimant contends she could not obtain a formal hearing to resolve her dispute within a reasonable time.

[39] The further evidence of the 4th Defendant is that where there is a dispute the first step is for the officer and the supervisor to try to resolve same. It seems that this was not done, and little or no effort was made on either the part of the Claimant or the 4th Defendant.

⁷ Affidavit of Audrey Sewell filed July 12, 2023 para 8

[40] The 4th Defendant averred that once the PMAS reports for the periods were completed, her comments regarding her assessment of the Claimant's performance were fair and reasonable. The 4th Defendant further averred at paragraph 16 of her affidavit in response to the fixed date claim form that:

“As I understand it, the payment of increment is dependent on the employee's performance review. An increment is payable when an employee has achieved an overall score of at least seventy-five percent (75%), based on targets and competencies agreed. I have never withheld payment of an increment to the Claimant as there was no legal basis to do so.”

[41] In light of this dispute between the Claimant and 4th Defendant, I find that there was a need for expediency to be employed by the employer especially having regard to the fact that there had already been a delay of about five years in completing the assessments for 2016 - 2021.

The appeals process

[42] Section 2.10 of the PMAS provides the performance management appeals process⁸. It provides 13 possible steps. At page 23 it states:

To begin the Performance Management Appeals Process, the following should have been done.

1. The problem and basis for disagreement must have been identified
2. Existing records including interventions designed to improve performance in specific areas identified as problematic **must** have been reviewed with the employee.
3. If after completing 1 & 2 the Claimant and the 4th Defendant cannot resolve the issue, the intervention of the Human Resources department should be

⁸ Performance Management Appraisal System Civil Service Page 24 & 25

sought by submitting a written appeal within **5** days of receiving a copy of the completed Performance Appraisal

4. The HR Division must acknowledge in writing, receipt of the appeal within **5** days of receiving the appeal
5. Senior officer from HR Division is required to meet with the employee, supervisor and reviewing manager within **10** days of the date of the written acknowledgement of the grievance by the HR Division

[43] Based on the provisions of section 2.10, it further emphasizes that the PMAS policy in relation to disputes regarding Performance Appraisals are intended to be collaborative, resolved with due expedition, and within a reasonable and timely manner and with avoidance of any undue delay. It is without doubt that those guidelines were not employed here.

[44] The issue of delay in the decision-making process of a public authority leading up to an application for judicial review was considered by the Full Court in ***Kevin Simmonds v Ministry of Labour and Social Security and Attorney General***⁹, Jackson-Haisley, J posited these questions that I think are important:

- i) How long has the delay been?*
- ii) What are the reasons provided for the delay?*
- iii) Is the delay reasonable in light of the particular circumstances of the case such its complexity and the conduct of the parties?*
- iv) Has the Claimant contributed to the delay or has he done anything to assert his rights?*
- v) What is at stake for the Claimant, or what does he stand to lose?*

⁹ [2022] JMFC Full 02

vi) ***Has there been any prejudice occasioned to the Claimant resulting from the delay?***

[45] The matter of delay of a public authority to make a decision is no doubt a real risk of prejudice to the party personally and directly affected by the decision. The Claimant averred that the delay in processing the PMAS reports over the 2016 – 2020 period had adverse implications on her calculating her pension.

[46] In my view that when one assesses the evidence, it is patently clear that there was delay by the Claimant in submitting the PMAS reports. There was delay on the part of the 4th in completing the review of same. Then was delay of at least eight months between the submission of the reports by the 4th Defendant and the proper procedure of initiating of the appeals process was never employed before the claim was filed.

[47] The requirements of a decision-maker to adhere to standards of procedural fairness was addressed by Thompson-James J. at paragraph 107 of her judgment in ***Deborah Patrick-Gardner v Jacqueline Mendez and Public Service Commission***¹⁰, who stated the following:

*“The requirement of a decision maker to adhere to standards of procedural fairness was outlined by our Court of Appeal in the case of **Derrick Wilson v The Board of Management of Maldon High School and The Ministry of Education [2013] JMCA Civ 21**. In assessing whether the Appellant ought to have been given the opportunity to make representations before it was recommended that he not be appointed in his post, the Court made it clear that the absence of a specific statutory provision requiring same does not negate the requirement for a decision maker to adhere to the rules of natural justice...”*

[48] At paragraph 47 of her judgment in ***Derrick Wilson***, Harris JA went on to state the following:

*“A decision maker is required at all times to observe the requirements of procedural fairness. The rule is of universal application and founded on the plainest principles of justice” – see **Ridge v Baldwin** [sic]. As a*

¹⁰ [2018] JMFC Full 2

consequence, an aggrieved party must be given an opportunity to address any adverse complaint affecting his rights.”

[49] I find that on a balance of probabilities that when the entire evidence is assessed it cannot be concluded that the Defendants acted procedurally unfair and unjust towards the Claimant.

Issue 2: Whether the 1st and 4th Defendants breached the Claimant’s right to a fair hearing within a reasonable time under Section 16(2) of the Charter of Fundamental Rights and Freedoms

[50] The Claimant seeks constitutional relief for breach of her right to a fair hearing within a reasonable time. The right to a fair hearing within a reasonable time is protected under Section 16(2) of the Charter of Fundamental Rights and Freedoms. Ms. Chapman submitted that based on the facts outlined in the Claimant’s case, the Claimant’s right under Section 16(2) of the Charter was contravened. As a result, the Claimant requests that the Court invokes its power under rule 56.10(1) and (2) of the CPR to order declarations as a remedy for breach of her constitutional right.

[51] Section 16(2) of the Charter provides that:-

“In the determination of a person’s civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial authority established by law.”

The legal and constitutional approach

[52] The approach to resolving issues concerning constitutional rights guaranteed under the Charter is seen in the decision of ***Julian J Robinson v The Attorney General of Jamaica***¹¹ In delivering his judgment, Sykes, C.J. stated at paragraph 99 that there is a presumption in favour of guaranteed rights and freedoms. The

¹¹ [2019] JMFC Full 04

Claimant, however has a burden of proving that the violation has occurred. If the Claimant discharges this burden, then the burden shifts to the Defendants. The distinction must be made that in the instant case, the issues do not concern constitutionality of legislation but whether the actions of the Defendants, as agents of the State contravened the Claimant's fundamental right and freedom. Therefore, the Defendant's burden is to prove that the alleged breach has not occurred. The standard of proof required in determining both the Claimant and the Defendants' cases is on a balance of probabilities.

- [53] In determining the issues, the Court also applied its mind to Strasbourg jurisprudence, which apply and interpret Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, referred to as the European Convention on Human Rights ('the Convention' or 'ECHR'). Article 6(1) of the Convention, which contained in its preamble are similar words found in Section 16(2) of the Charter, provides that: -

"In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

- [54] The approach of the Strasbourg Court is that the factors it considers in determining whether a public authority acting on behalf of the State has breached the applicant's right to a fair hearing within a reasonable time are (i) the complexity of the case, (ii) the conduct of the applicant and of the relevant authorities; and (iii) what is at stake for the applicant in the dispute. These factors were derived from a line of authorities including, ***Thomas John Crompton v The United Kingdom Application no 42509/05***; ***Nicholas Frydlender v France Application no 30979/96***; ***Lupeni Greek Catholic Parish and others v Romania Application***

no 76943/11, Comingersoll SA v Portugal [GC] no 35382/97 § 19, ECHR 2000-IV.

- [55] The Courts in Jamaica in previously decided cases have also been guided by these cases when asked to determine a Claimant's fundamental right and freedoms under Section 16(2) of the Charter as was the approach in ***Kevin Simmonds v Ministry of Labour and Social Security and The Attorney General of Jamaica***¹² I find that an additional factor must be added, which is the length and nature of any delay within the entire circumstances and course of the proceedings.
- [56] It is well-established that the constitutional right to a fair hearing within a reasonable time before an independent and impartial court or tribunal consists of three separate and distinct rights. This is the approach seen in ***Solomon Marin Jr v The Queen [2021] CCJ 6 (AJ) (BZ); Darmalingum v The State [2000] 1 WLR 2303; and Porter and another v Magill [2002] 1 All ER 465***. The rights can therefore be determined by the Court separately and independently. Based on this approach, there can be a breach of one aspect of the right which does not automatically amount to a breach of the other two aspects of the right. It is for the Court to make a determination of whether a particular right within the overarching right has been breached, based on the particular circumstances of the case, taking into consideration whether the other aspects have also been breached and on what grounds.
- [57] Upon a comparison between the rights in Sections 16(1) and (2) of the Charter, the Courts have afforded different treatment to the right in civil proceedings than in criminal proceedings. The distinction in treatment of the rights can be drawn from the application of the right in judgments arising from cases of ***Herbert Bell v Director of Public Prosecutions [1985] 1 AC 937; [1985] 2 All ER 585; Spiers***

¹² Supra para 8 of judgment

(Procurator Fiscal) v Ruddy [2008] 1 AC 873; and *Mervin Cameron v The AG [2018] JMFC Full 1*.

- [58] The common factor of unusual or unreasonable delay in these cases was sufficient material for the Courts to find that there had been a breach of the right to a fair hearing within a reasonable time. The fact of the delay complained of may or may not suffice for the Court to determine that a fair trial is no longer possible because there are other relevant circumstances the Court may consider in deciding whether the remedy of bringing an end to the proceedings is an appropriate remedy, as a result of the breach of the accused's right to a fair hearing within a reasonable time. Where there is a breach of the reasonable time guarantee, it is less likely that the individual in criminal proceedings will be able to receive a fair trial, irrespective of the circumstances of the delay. Whereas, in the case of civil proceedings, the fact of a breach of the reasonable time guarantee by reason of delay carries less weight and other factors are attributed equal or more significant weight in determining whether the right to a fair hearing (or trial) has also been breached.
- [59] Even though the Courts apply a generous and purposive interpretation to constitutional provisions, the **Constitution** nor the Court's power under Part 56 to adjudicate hybrid judicial review and constitutional claims should be used arbitrarily. The purpose of the administrative and constitutional relief is not to punish agents of the State for failing to act, but rather to ensure good governance and accountability of administrative functions and vindicate constitutionally protected rights of the individual against breach of those rights by actions or inaction of the State in the exercise of its administrative functions.
- [60] In the instant case it must be addressed whether the administrative process of performance evaluation can be placed on equal footing as legal proceedings or disciplinary proceedings. The Defendants have submitted that in the instant case there was no charge or sanction that the Claimant was at jeopardy for and that these type of administrative proceedings were never contemplated within the meaning of the right to a fair hearing pursuant to section 16(2) of the Charter.

[61] I agree with the Defendants Counsel in that submission. Section 16(2) of the Charter states:

“16(2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.”

[62] In assessing the provision, I am not of the view that the legislators contemplated performance evaluations as a determination of a persons' civil rights, neither can the PMAS process be deemed to be legal proceedings. I therefore am of the view that declarations sought for a breach of s.16 (2) cannot be granted.

[63] The right to due process is a long standing principle known to the common law and is a deeply entrenched part of the principles of natural justice. Quite evidently, the terms “due process” and “natural justice” have been invoked interchangeably to arrive at the same result of ensuring justice and fairness in administrative decision-making. Whichever term is used, there is the requirement for public authorities to meet the now well-established standard of procedural fairness in public governance, administrative decision-making, which includes adjudication of matters involving civil consequences to individuals directly affected. The basis of due process is therefore to ensure the individual is protected by what is fair, just and reasonable. It has been expressed through the right to a fair hearing, now constitutionally guaranteed in the determination of an individual's civil rights and obligations and interests.

[64] According to the learned authors of De Smith's Judicial Review, (Sixth Edition), Woolf, Jowell, Le Sueur, Ch 7, para 7-003, the term natural justice has largely been replaced by a general duty to act fairly, which is a key element of procedural propriety. The nature of the right to a fair hearing was considered in **Ridge v Baldwin**, in which Lord Morris at paragraph 113 observed that where a public authority is under a statutory obligation to comply with regulations made under the Act: -

“... it is well-established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet: see Kanda v Government of Malaya. My Lords, here is something that is basic to our system: the importance of upholding it far transcends the significance of any particular case...”

Apparent bias

[65] The nature of the right to a fair hearing was considered in **Magill v Porter; Magill v Weeks**¹³. The House of Lords confirmed that it is possible that the right can be abrogated in circumstances where there is sufficient evidence to conclude that bias existed within the scope of the procedure that was undertaken in the decision-making by the public person or body of persons. Lord Hope of Craighead noted at para 99 – 103 of the judgment that the proper test for apparent bias is “... *whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*”

[66] The right to a fair hearing extends to decisions public authorities take in accordance with the statutory duties conferred on them. It therefore follows that the decisions of the 1st and 4th Defendants in accordance with the statutory duties conferred by the **Public Service Regulations**, any other applicable statute must not offend any officer’s constitutional rights. The **Regulations** do not address the matter of performance appraisals. However, the **Staff Orders** in Chapter 9 address the matter of performance management by outlining an acceptable standard of procedure that the Permanent Secretary or Head of Department (the assessor) on the one hand, and the employee (the assessee) on the other hand must follow. The nature of the procedure imposes mutual responsibilities on both the assessor and the assessee.

¹³ [2001] UKHL 67

[67] In the Claimant's evidence, she alleged bias in the appeals procedure because the Human Resources Department of the 1st Defendant failed to follow proper procedure outlined in the PMAS guidelines. The Claimant referred to oral representations Mr. Lee made to her at a meeting in August 2022 that Human Resources department would convene a panel as a next step in the appeals process, even though to her knowledge the next step would be an intervention. However, the Claimant deponed that no steps were in fact taken to conduct a hearing.

[68] The Claimant pointed to further elements of alleged conflict of interest or apparent bias. She alleged that based on the fact that the 4th Defendant chaired the Human Resources Executive committee; and the fact that the Director of Corporate Services who has responsibility for supervising the Human Resources Division of the 1st Defendant reports directly to the 4th Defendant, that is an indication that the 4th Defendant is biased against her.

[69] The Claimant pointed to further evidence of bias or lack of fairness in the process at paragraph 18 of her second affidavit in support of the Fixed Date Claim Form. She stated that: -

"I queried the reason for the exclusion of the intervention as the next step and also how the panel findings would be treated as the process is that the findings are to be sent to the 4th Defendant for her review as Permanent Secretary but that would be a conflict in the case involving her and I. This query was in addition to that previously communicated by me to the Human Resources Unit. I will rely on previously exhibited emails and memorandum to show that the 1st Defendant unduly delayed the convening of the relevant hearing and/or processing of the dispute involving the 4th Defendant and I. Also that the 4th Defendant failed and/or neglected to ensure that the requisite process for disputes was implemented given her knowledge of the Human Resources requirements of the 1st Defendant and her responsibilities having delegated duties from the 2nd Defendant."

[70] The 4th Defendant in her affidavit in response, denied having any malice, ill-intent or bias towards the Claimant. The 4th Defendant stated at paragraph 13 of her affidavit that: -

“I have no ill will or bias towards the Claimant. I am not aware of the Claimant making any prior complaints that I was biased or unfair towards her. My comments on her PMAS report were fair and reasonable based on my assessment of her performance over the relevant period. Nevertheless, the comments and ratings are not final as there was never a discussion with the Claimant as stipulated by PMAS Guidelines. The issues raised in my comments about the Claimant’s performance were not new and would have been communicated previously to the Claimant in our many meetings over the years as well as noted in several memoranda.”

[71] The 4th Defendant stated further that: -

“The issue of the Claimant’s absenteeism from work and lack of performance has been a constant issue while she was under my supervision. I would meet with the Claimant to discuss same as well as complaints received from both internal and external constituents. It was pointed out to the Claimant the deficiencies in her performance and identified areas for improvement. The Claimant in those meetings would explain certain challenges she was facing which affected her performance and as her supervisor, I was sympathetic and extended leniency. There was no improvement in attendance or performance. Therefore, the Claimant should not have been taken by surprised by the comments and scores. My concerns were noted in several memoranda to the Claimant over the years...”

[72] In applying the test of apparent bias, the 4th Defendant’s evidence contains assertions denying bias, even from the viewpoint of a fair-minded and informed observer. The proper approach is to also assess the actions of the 4th Defendant and conduct throughout the entire ordeal complained of, to assess whether the Claimant’s apprehensions are justified. In this regard, the matter should be assessed objectively. See ***Magill v Porter; Magill v Weeks***.

[73] Based on the evidence, it is difficult to conclude bias solely on the existence that the 4th Defendant is the Chairman on the Human Resources Executive Committee .As stated by McDonald-Bishop JA at paragraph 52 of her judgment in ***Jamaican Redevelopment Foundation Inc. v Clive Banton and Sadie Banton***¹⁴ referring to the Court of Appeal of Belize in *RBTT Trust Limited v Flowers*, which cited dicta

¹⁴ [2019JMCA Civ 19

of Gleeson CJ, McHugh, Gummow and Haynes JJ in ***Ebner v Official Trustee in Bankruptcy***:-

“There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an ‘interest’ in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.”

- [74] It is difficult for this Court to conclude that the Claimant has provided a logical connection the feared deviation of deciding the case on its merits. The perception of impartiality in the process has not been substantiated.

Illegality and procedural impropriety/unfairness

Where a judicial review claim succeeds on a ground of illegality and/or procedural unfairness or impropriety, this does not automatically amount to a breach of constitutional rights. The question of whether the right to a fair hearing has been breached depends on the nature and effect of the illegality and impropriety, and the entire conduct of the proceedings in which the illegality or impropriety involving the Claimant occurred, and the manner in which the Claimant is treated in those proceedings.

First stage of delay

- [75] The entire course of proceedings began with the first stage of delay. The claimant submitted the performance 5 years late. The evidence on why this occurred is sparse. The Claimant asserted that the performance reports from 2016 to 2021 were not completed until January 2022. It is accepted based on the evidence that both the Claimant and the 4th Defendant contributed to the delay in having these appraisals completed.

Second stage of delay

- [76] In February 2022, after the 4th Defendant completed the outstanding performance reports, the Claimant who, was not satisfied with the 4th Defendant's assessments of her sought to initiate the appeals process with Human Resources Division of the 1st Defendant. In August 2022. After the Claimant arrived at an impasse with the Human Resources Division, and it appeared no further steps were taken to attempt to resolve the dispute, the Claimant retained legal representation and thereafter filed the claim for judicial review and constitutional relief.
- [77] One of the considerations outlined in the Strasbourg jurisprudence is the conduct of the Claimant and public authority during the entire course of the proceedings. An assessment of the entire proceedings does not demonstrate that the Claimant has outright been denied her substantive or legal rights during the process.
- [78] There is no indication on the evidence of an outright denial of the Claimant's right to be heard and respond to any allegations against her or her right to retain legal representation during the proceedings.

A Right to a fair hearing within a reasonable time

- [79] The fact that there is delay is not an automatic determination that there is a breach of the reasonable time requirement. The Court must consider the nature of the delay and whether a fair trial is still possible. The right to a fair hearing within a reasonable time was considered in ***Bell v DPP*** and ***Attorney General's Reference (No 2 of 2001) [2004] 2 AC 72***, which are authorities this Court finds helpful in determining the reasonable time requirement within the right. The guidance gleaned from ***Attorney General's Reference (No 2 of 2001)*** is that the two significant factors to consider are circumstances of the delay in proceedings and prejudice to either parties. The House of Lords was of the view that where there is a breach of the reasonable time requirement, this does not taint the basic fairness of the hearing at all. The House was of the view that the rule of automatic termination of proceedings in criminal cases upon breach of the reasonable time requirement cannot sensibly be applied in civil proceedings, as termination of the

proceedings would defeat the purpose of the claim and the Claimant's right to a fair hearing. On that premise, remedies such as a dismissal of proceedings due to unreasonable delay are less appropriate in civil proceedings unless (a) there is sufficient evidence that a fair hearing is no longer possible or (b) it would otherwise be unfair to try the Defendant.

[80] The Court finds that the Claimant has not shown that she cannot have a fair completion of the review process, considering the timelines of when the PMAS documents were submitted in 2021.

[81] The Court taking into account the principles of law and applied it to the circumstances before it as reasoned above finds that the Claimant has not succeeded in establishing that the Defendants breached her right to a fair hearing or a fair hearing within a reasonable time pursuant to the Charter of Fundamental Rights and Freedoms.

Issue 3: Whether the remedies of mandamus, declarations and damages should be granted

Submissions

[82] Mrs. Chapman argued that the Court must grant the orders sought as the Claimant has satisfied the Court of her entitlement to them. Mrs. Hill argued that the Court has no jurisdiction to make an order of mandamus in absence of completion of a performance review. Mrs. Hill also argued that declarations 3, 4 and 5 cannot in law be granted, and declarations 6 and 7 should not be granted, as those rights have not been breached.

Analysis

[83] It is well-settled law that the grant of administrative orders is a wide, discretionary power. In exercising its discretion, the Court will have regard to the particular circumstances of each case. The factors the Court will undoubtedly consider is the

matter of delay by either of the parties and any injustice, hardship or prejudice that will be caused by the grant or refusal of the order sought.

Mandamus

[84] In deciding whether to grant the order of mandamus for failure to act, the Court must consider whether the duty in question is one that must be exercised because of a mandatory duty under the statute. A duty may be mandatory but the manner of exercising the duty is discretionary. Brooks P in **Latoya Harriott** briefly discussed the issue with granting a mandatory order where the duty imposed on the decision-maker involves the exercise of a discretion. His Lordship stated at paragraph 21 of the judgment:

“That principle was applied in **Medical Council of Guyana v Dr Muhammad Mustapha Hafiz (2010) 77 WIR 277** at page 283, where the court said, in part:

“A clear and settled principle of law is that the person compelled to the performance of an act by an order of mandamus must have a clear duty imposed on him as opposed to a mere discretion.”

[85] The order of mandamus is also dependent on the decision-maker’s failure or effectively, refusal to act. The failure or refusal to act must have a direct effect on a legal right the Claimant, who is specially aggrieved by the non-performance of the duty is seeking to enforce. There are authorities that state that delay in making a decision may result in a mandatory order in a claim for judicial review but it is not automatic and depends on the entire circumstances. There must be clear indication of the refusal to carry out the act, which is proved by evidence that the aggrieved made a clear, unequivocal formal demand to the decision-making authority to carry out the act as required by the law. There is no precise wording that is required for the formal demand but it must have been expressed clearly and unequivocally.

[86] The evidence before the Court is that the PMAS appeals process had reached the third step of intervention by a Senior Human Resource Manager in March 2022.

However, this appeared to be the point of impasse between the parties, as Mr. Shaun Lee, the Senior Human Resource Manager of the 1st Defendant at the material time had communicated to the Claimant that he would proceed to the next step in the appeals process, which was to convene a panel, which the Claimant asserted was not the proper procedure within the process.

[87] Based on the evidence, the Court determines that in light of the delay in completing the PMAS appeal of performance appraisals process, which directly affects the determination of whether the Claimant should receive payment of increments for the relevant period, and that there is no other available remedy. The Court is therefore fortified in its view that and mandamus in respect of order 1 only in the amended fixed date claim form is appropriate.

Damages

[88] The award of damages in judicial review claims is a unique remedy. However, it is a well-established principle that to recover damages in a judicial review claim, the Claimant must first establish the private law cause of action being relied on. This common law rule has not been changed with the introduction of Part 56 of the CPR.

[89] The basis of the Court's power under CPR 56.10 remains; damages sought are only recoverable if there is a legal basis for it. There can only be a legal basis if the Claimant's statement of case sets out particulars of the cause of action of defamation and/or harassment and those pleadings are thereafter proved.

[90] Ms. Hall submitted that there is no claim for defamation before the Court, as the Claimant has failed to plead defamation, outlining to the Court the words spoken that the Claimant alleges has caused her damage, to put the Defendants in a position to respond. I agree with Counsel that the claim before the Court is void of pleadings that set out the factual circumstances of defamation or harassment.

[91] Each party at the Courts request submitted on the issue of Costs in this matter. They agreed that the successful party should be the beneficiary of costs in keeping with the principles that costs follow the event. In light of the Courts findings, the order will be that each party will bear their own costs.

DISPOSAL

- 1. An order of Mandamus is granted compelling the first Defendant to take all necessary steps to conclude or complete the review exercise of the Performance Management Appraisal System for the Claimant Kerrie-Ann Dryden in keeping with the relevant Government Policy of Jamaica within three (3) months of this Order.**
- 2. Orders 2,3,4,5,6,7, & 8 sought in the Amended Fixed Date Claim Form filed on December 16, 2022 are refused.**
- 3. Each party to bear their own costs.**