[2023] JMSC Civ 100

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV00726

BETWEEN	**DEBORAH PATRICK GARDENER**	**APPLICANT**
AND	**COLETTE ROBERTS RISDEN PERMANENT SECRETARY IN THE MINISTRY OF LABOUR AND SOCIAL SECURITY**	**RESPONDENT**

IN CHAMBERS

Ms. Carlene Larmond K.C., Mr. Harrington McDermott and Ms. Giselle Campbell instructed by Patterson Mair Hamilton on behalf of the Applicant

Ms. Lisa White and Ms. Kristina Whyte instructed by The Director of State Proceedings on behalf of the Respondent

Dates Heard: October 5, November 17 and December 15, 2022 and April 27, 2023

Civil Practice and Procedure – Administrative Law – Part 56 of the Civil Procedure Rules – Application for leave to apply for judicial review – Threshold in Sharma v Brown-Antoine and Others – Illegality – Section 125 of The Constitution – Establishing reasonable cause to remove or otherwise discipline – Public Service Regulations, 1961 – Breach of Natural Justice – Unreasonableness/Irrationality – Improper Purposes – Injunction – Part 17 of the Civil Procedure Rules – American Cyanamid Principles – Whether there is a serious issue to be tried – Whether damages would be an adequate remedy for the Applicant – Whether the undertaking in damages is adequate protection for the Respondents – The balance of convenience

PALMER HAMILTON, J.

THE APPLICATION

[1] The Applicant is seeking leave to commence judicial review proceedings for a prerogative order of certiorari quashing the decision of the Permanent Secretary in the Ministry of Labour and Social Security. The Applicant is also seeking interim injunctive relief pending the hearing of a claim for judicial review. The Applicant is relying on several grounds which were summarized by King's Counsel Ms. Larmond as follows:

> *(a) The Respondent acted ultra vires The Constitution and the Public Service Regulations, 1961 when she purported to bar the Applicant from performing her functions of Chief Technical Director, Labour – Grounds (i) and (v);*
>
> *(b) The Respondent breached the rules of Natural Justice in not affording the Applicant an opportunity to be heard prior to removing the Applicant from performing the functions of Chief Technical Director, Labour – Ground (ii);*
>
> *(c) The Respondent acted unreasonably/irrationally as she took into account irrelevant considerations and failed to consider relevant matters in: (i) arriving at her decision to remove the Applicant from performing the functions of Chief Technical Director, Labour; and (ii) purporting to reassign the Applicant to duties at the Jamaica Productivity Centre – Grounds (iii) and (iv); and*
>
> *(d) The Respondent exercised her discretion for an improper purpose when she purported to remove the Applicant from performing the functions of Chief Technical Director, Labour – Ground (vi).*

[2] The Application came on for hearing before Pettigrew-Collins J and after reviewing the file noted that it would appear that there are arguable grounds for judicial review with a realistic prospect of success. She made an Order that there should be an inter partes hearing given that the application includes a claim for immediate interim relief. This was done pursuant to Rule 56.4(3) (b) of the CPR.

[3] The Applicant, who is no stranger to the Courts and working in the Public Sector, is an Attorney-at-Law and was at all material times the Chief Technical Director,

(nomenclature) Labour (hereinafter referred to as 'CTDL') in the Ministry of Labour and Social Security (hereinafter referred to as 'the MLSS' or 'the Ministry'). She was assigned to this post by the Public Service Commission (hereinafter referred to as 'the PSC') in 2018 in accordance with the decision of the Full Court. In 2016, the Applicant brought a claim for Judicial Review against the Acting Chief Personnel Officer of the Office of the Services Commission and the PSC. An Order of certiorari was made to quash the decision purporting to retire the Applicant and the Court stated that she is to remain as a public servant as long as she is willing and able to provide service, or unless she is removed in a lawful manner. (see **Deborah Patrick-Gardener v Jacqueline Mendez and Public Service Commission** [2018] JMFC Full 2). This is the post that has now brought the Applicant back before the Courts.

THE EVIDENCE

[4] The Applicant in her Affidavit outlined her job description for the post of CTDL and noted that it was second only to the post of Permanent Secretary within the Ministry's hierarchy. The Applicant averred that she became the target of a combination of fabricated accusations and frivolous grievance complaints aimed at undermining her in the post.

[5] The Applicant observed that her work as CTDL was structured in a manner that required her to report to the Director, Industrial Relations and Allied Services (hereinafter referred to as 'DIRAS'), when it should have been the DIRAS who was to report to her. In fact, the DIRAS was reporting directly to the Permanent Secretary without reference to the Applicant. There were even attempts by the Permanent Secretary to hold the Applicant accountable over areas which were managed exclusively by the DIRAS, in a context where information was withheld from her and important decisions regarding the labour portfolio were being taken without her. The effect of this, the Applicant further averred, was to remove her supervision and oversight over the division's operations for which she was responsible by virtue of her job description. It was not only the DIRAS who was not

reporting to her when they should have been. The Applicant averred that the Permanent Secretary would direct junior staff in the management hierarchy, bypassing the Applicant.

[6] There was even an attempt by the Permanent Secretary to remove the Applicant from an audit committee which proved futile. After this the Permanent Secretary embarked on a, … *"course of coercive and retaliatory actions…this included false and malicious accusations,"* towards and against the Applicant. There was one instance where the Applicant was relocated from the executive suite office which had accommodated the CTDL that preceded her to an office of an entry level officer due to renovations being undertaken. The Applicant averred that the accommodation was totally inadequate and she relocated to another office pending the completion of the renovations. Once renovations were complete, the Applicant was not returned to her original office but to a different space which was inferior to the original office and noticeably inferior to spaces afforded to junior officers in the MLSS. The Applicant further averred that her right to privacy of communication was violated when the Permanent Secretary gave instruction to junior officers to enter her locked office on a holiday, when she was off work, and remove her files and personal belongings to the new inferior space. Notice was not given to the Applicant and therefore she could take no security measures to secure her personal belongings. The Applicant was even denied entry to where the renovated executive suites were located at the MLSS.

[7] In December 2019, the Applicant received a memorandum from the Permanent Secretary which concerned her areas of responsibility. The memorandum restructured the areas of the Applicant's responsibility and removed direct responsibility for matters related to industrial relations and the Industrial Disputes Tribunal. The memorandum also stated that the restructuring of the Applicant's duties became necessary due to the Applicant's apparent un-involvement and lack of guidance in industrial relations related activities and is compounded by the interpersonal challenges between the Applicant and the DIRAS. The Applicant

averred that she was not consulted by the Permanent Secretary nor did she receive a hearing before her duties were stripped from her. The organizational chart of the MLSS was revised and it showed that this restructuring stripped the Applicant of 12 of the 14 programme areas that were under her with the DIRAS was now performing majority of the CTDL's functions. The DIRAS now reported directly to the Permanent Secretary. The Applicant averred that the she verily believes that the Permanent Secretary's actions were meant to degrade and strip her of the dignity of her office and was done in breach of her constitutional right to equality before the law.

[8] The Applicant in 2020 reviewed her personnel file and discovered a letter from the Permanent Secretary to the Registrar of the Medical Council of Jamaica which "*bore an unmistakable implication that the doctor and I were accomplices in committing some dishonesty or in doing some wrong that was deserving of sanction…"* The Applicant averred that she verily believes that this letter served to lower her before well thinking individuals and was defamatory. This correspondence was placed on the Applicant's file without her knowledge in breach of section 2.2 (iii) of the **Staff Orders for the Public Service**.

[9] Several complaints were made by the Applicant to the PSC concerning the conduct of the Permanent Secretary and she was told that the matter would be examined. In relation to the correspondence the Chief Personnel Officer at the Office of the Services Commission (hereinafter referred to as 'the OSC') sent a letter to the Applicant noting that they will await investigation and decision of the Medical Council of Jamaica in this matter.

[10] The Applicant observed that she was hardly assigned any work and was unable to obtain support to perform her duties. Salary increments, which the Applicant was entitled to by virtue of her appointment and seniority as a public officer, have been withheld. Due to an injury which the Applicant suffered while undertaking official duties, she was unable to access her office and attend meetings as she was unable to physically reach the 6th floor at the MLSS due to the lifts being out of service.

The Applicant's repeated requests to have accommodations made for her went unanswered and after about 10 months since the Applicant sustained the injury she received a memorandum from the Permanent Secretary which stated that her office will be relocated to the Jamaica Productivity Centre to accommodate her special needs. The Applicant reported to the Jamaica Productivity Centre but no accommodation was made for her and she was told that they were not aware that she wold be going there. The office given to her was inadequate. The Applicant was relocated to a different office which she averred was, *"…worse than the office to which the CTDL was relocated…"* at the MLSS.

[11] In January of 2022, the Applicant received a memorandum (hereinafter referred to as "the January 6 memorandum") from the Permanent Secretary regarding reassignment of duties. The Applicant averred that this memorandum stripped her of the remaining 2 programme areas that remained under her direct responsibility. The Applicant's privacy was once again invaded when her secretary advised her that the Permanent Secretary instructed the secretary to look if the Applicant has anything personal in the office located at MLSS. In a meeting with the Permanent Secretary and the Acting Director of Human Resources, the Applicant was advised that her secretary was being reassigned and that the move to the Jamaica Productivity Centre was not temporary and was in fact a complete removal from the labour portfolio. The Applicant was also left off of an agenda which lists all the Chief Technical Directors in the MLSS and she believes that this confirms that she has been removed from her post and completely excluded from the MLSS's operations.

The Respondent's Evidence

[12] The Respondent has at all material times served as the Permanent Secretary for the MLSS since January 2015. As Permanent Secretary she is also the Chief Accounting Officer pursuant to the Constitution, Public Service Regulations and the Financial Administration and Accounting and Audit Act. The Respondent in her

Affidavit stated that the aspects of the Applicant's Affidavit are prejudicial and hearsay and ought not to be considered by the Court.

[13] The Respondent was given instructions by the Chief Personnel Officer of the OSC which led her to form the view that the Applicant had been assigned to work at the MLSS temporarily in the capacity of CTDL effective May 2018. This assignment she averred was done without consultation with her. The Applicant was not interviewed or assessed to determine her suitability for the post of Chief Technical Director in the MLSS. The Respondent's understanding was that the Applicant was not appointed in the MLSS and her substantive post remained with the Court Management Services. The Applicant was not the only Chief Technical Director at the MLSS and it would therefore be incorrect to say that she was assigned to work as and is the only Chief Technical Director in the MLSS. The Respondent noted that there were 3 other CTD positions in the MLSS

[14] The Respondent exhibited an organization chart which was given to the Applicant on assumption of her duties as CTDL and averred that the said chart was incorrect. The Respondent noted that the Applicant would manage the DIRAS, among other things. By virtue of the job description for the position of CTDL the Applicant was required to directly report to the Permanent Secretary only. The Respondent averred that she explained to the Applicant that there would be circumstances where interaction by herself or the Minister is done directly with staff and it ought not to be viewed as the staff reporting directly to the Permanent Secretary and/or the Minister. The Respondent further explained to the Applicant that it was her, that is the Respondent's, expectation that staff members would be responsible for keeping their supervisors abreast of any happenings in those circumstances.

[15] The Respondent averred that she was aware of the "interpersonal conflicts" between the Applicant and the DIRAS and was also aware that the Senior Director of the Human Resource Management and Development made attempts to assist the parties to amicably resolve the conflicts. The relationship between the Applicant and the DIRAS continued to deteriorate and this on-going conflict had a

negative effect on the work of the MLSS. The Respondent took the decision to restructure the Applicant's duties to ensure that the MLSS' strategic priorities are achieved after recognizing the importance of the DIRAS in helping to maintain a stable industrial relations climate.

[16] The Respondent is of the view that the decisions made concerning the Labour Division without the Applicant's input were not meant to undermine and/or remove the Applicant's oversight of the operations of the division. The Applicant believed that she had the inherent right to be involved in all decisions related to the Labour Division of the MLSS despite the impracticability of same and it is that incorrect belief that has led to the assertions being made now by the Applicant.

[17] The Respondent averred that the Applicant failed to take the necessary initiative to lead and keep herself abreast of developments in the various departments under her portfolio. The Applicant failed to effectively communicate with the officers in the Labour Division of the MLSS. The Respondent further averred that she did not instruct the DIRAS or other directors of the Labour Division to send reports directly to her. However, being the Chief Accounting Officer for the Ministry, Directors would be required to provide her with copies of reports for review and relevant action. The Respondent further averred that she recalled instances where reports were submitted to the Applicant and she failed to address same in dereliction of her duties. The Applicant's failure to understand particular operational nuances caused the Applicant to errantly infer that the Respondent was purposely trying to circumvent the Applicant's authority and restrict her access to information concerning the operations of departments under her purview.

[18] The Respondent averred that an extensive renovation was to be undertaken at the MLSS and persons were required to vacate the space. The administration team was tasked with finding alternative temporary accommodation for all staff that occupied the area to be renovated. The Minister, the Respondent and their support staff were relocated to the offices of the National Insurance Fund and the Applicant was to be placed in an office where departments such as Legal and Public

Relations are housed. This temporary office for the Applicant was previously occupied by several former consultant advisors to previous Ministers and was never assigned to any member of the Ministry's Legal Services Division. However, the Applicant refused to occupy the office and instead advised the Respondent that she intended to move to an office space that was reserved for use by the external auditors. The Respondent advised the Applicant that she would be required to vacate the space should the external auditors require use of the said office.

[19] After the renovation was completed, the administration team unsuccessfully tried to engage the Applicant on several occasions to discuss her relocation to the renovated space. The Applicant wrote to the Director of Human Resource and Management Development seeking clarification regarding the physical location of her office. That memorandum was forwarded to the Respondent and she wrote to the Applicant to remind her of the previous discussions they had regarding the proposed new layout of her office. The Respondent had advised the Applicant that her office space would be different and smaller and that this was being done to better organize the space, especially to cater to the needs of the Minister. The Respondent averred that it is not correct that the renovated space was substandard and that same did not benefit the status of a CTD. The renovated office has three windows and is larger than the space currently occupied by two other CTDs. The Respondent refuted the assertion that the space was mole infested, not private and was cubicle like with inadequate ventilation. Another CTD now occupies said space and the Respondent stated that she has not received complaints regarding same.

[20] The Respondent averred that the Applicant appeared more concerned about the size of her office in relation to her position, rather than executing her job function and the various tasks assigned to her. The Respondent further averred that the Applicant subsequently used the office space as an excuse for not performing her tasks. Several attempts were made to relocate the Applicant and her secretary to

the renovated office but those proved futile. The Applicant was advised a few months after renovation was complete that all items belonging to her would be transferred to the renovated office as the temporary office that she occupied had to be prepared to accommodate the external auditors. The Applicant had raised concerns about the removal of her possessions and the Respondent reminded her that on a previous occasion she was advised that the office was reserved for use by the external auditors.

[21] The Applicant refused to occupy the renovated space and she was advised that the space she chose to occupy was reserved for the external auditors. However, the Applicant still refused to utilize the renovated office and unilaterally occupied the executive room which is designated for use by the Minister and Permanent Secretary. This action by the Applicant disrupted the smooth operation of the executive office and the Applicant was encouraged to desist from utilizing same as her office space. The Applicant refused to comply.

[22] The Respondent averred that she did not take any coercive and retaliatory actions against the Applicant. The Respondent further averred that it has been the custom and practice that the DIRAS represents the MLSS on the audit committee and she did in fact write to the MOFPS advising them that the current DIRAS would replace the Applicant on the committee. In accordance with the MOFPS instructions, the Respondent wrote to the Applicant requesting her resignation. The Respondent further averred that she is not aware that the Applicant was properly nominated to the audit committee and she is not able to locate any documentation evidencing the Applicant's initial appointment. The Applicant refused to comply with the Respondent's request.

[23] The Applicant began to conduct herself in a manner not befitting her post including her failure to attend important meetings, failure to complete tasks assigned to her and an overall lack of leadership of the Labour Division. As a result of the Applicant's apparent un-involvement and lack of guidance in industrial relations activities, which was compounded by the interpersonal challenges between the

Applicant and the DIRAS, the Respondent decided that it would be in the best interest of the MLSS to restructure the Applicant's areas of responsibilities. This would allow for the MLSS to meet its strategic priorities. This decision was in keeping with the Respondent's supervisory role. A new revised organizational chart was provided and it was in keeping with the restructuring. The Respondent does not agree that this restructuring made the DIRAS the de facto CTD and the DIRAS was not given any new or additional responsibilities. The only change being made was in relation to the reporting relationship with the Applicant.

[24] Despite this restructuring, the Applicant continued to neglect her duties and her overall conduct began to deteriorate resulting in more issues. This included the Applicant being insubordinate, refusing to comply with directions and not being punctual for work.

[25] The Respondent averred that there has been no decrease in the Applicant's emoluments nor was there any contemplation reclassify the position to which she remains assigned. The Respondent's actions with respect to the changing of job functions were taken in the best interest of the MLSS to ensure that the work was executed and that the MLSS's strategic objectives and priorities were achieved.

SUBMISSIONS

[26] I wish to thank Counsel for their very helpful submissions and supporting authorities which provided valuable assistance to the Court in deciding the issues. They were thoroughly considered, however, I do not find it necessary to address all the submissions and authorities relied on but I will refer to them to the extent that they affect my findings.

ISSUES

[27] The main issue for my consideration is whether the Applicant has an arguable ground for judicial review having a realistic prospect of success. In order to come

to a determination regarding same, there are several sub-issues which the Court ought to consider, such as:

(i) Whether the Respondent acted ultra vires The Constitution and the Public Service Regulations, 1961 when she purported to bar the Applicant from performing her functions of CTDL;

(ii) Whether the Respondent breached the principles of Natural Justice in not affording the Applicant an opportunity to be heard prior to removing the Applicant from performing the functions of CTDL;

(iii) Whether the Respondent acted unreasonably/irrationally as she took into account irrelevant considerations and failed to consider relevant matters in: (a) arriving at her decision to remove the Applicant from performing the functions of Chief Technical Director, Labour; and (b) purporting to reassign the Applicant to duties at the Jamaica Productivity Centre;

(iv) Whether the Respondent exercised her discretion for an improper purpose when she purported to remove the Applicant from performing the functions of CTDL;

(v) Whether the application is barred by delay on the part of the Applicant; and

(vi) Whether there is an alternative remedy that is available to the Applicant.

[28] The Applicant is also seeking an interim injunction. In deciding whether the injunction ought to be granted I must make a determination as to the following issues:

(i) Whether there is a serious issue to be tried;

(ii) Whether damages would be an adequate remedy for the Applicant. If damages are not an adequate remedy for the Applicant, is the Applicant's undertaking in damages adequate for the Respondent; and

(iii) Whether the balance of convenience lies in favour of the granting of the Application.

LAW AND ANALYSIS

JUDICIAL REVIEW

A. *LEAVE TO APPLY FOR JUDICIAL REVIEW*

[29] Applications for Judicial Review are governed by Part 56 of the Civil Procedure Rules, 2020 (as amended). Before an applicant is able to file their substantive application for judicial review, they must first obtain leave from the Court to apply for same. (see Rule 56.3 of the CPR). The burden of proof for such an application rests with the Applicant, who in this case is Mrs. Patrick-Gardener.

[30] It is trite law that, *"the ordinary rule is that the Court will refuse leave to apply for 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."* This test has been adopted in our jurisdiction in numerous cases. It was stated by Lords Bingham and Walker in their joint judgment in the Privy Council case of **Sharma v Brown-Antoine and Others** [2007] 1 WLR 780. The Lords went on to state 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: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently*

> *said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:*
>
> > *"…**the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities**. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), **but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.***
> >
> > ***It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings** upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen; Matalulu v The Director of Public Prosecutions [2003] 4 LRC 712 at 733."* ***[emphasis mine]***

[31] Judicial review, as Lord Brightman stated in **Chief Constable of the North Wales Police v Evans** [1982] 3 All ER 141 at 155, [1982] 1 WLR 1155 at 1174, *"is not an appeal from a decision, but a review of the manner in which the decision was made."*

[32] Mangatal J in **Hon. Shirley Tyndall, O.J. and Others v Hon Justice Boyd Carey (Ret'd)** Claim No. 2010HCV00474 unreported delivered February 12, 2010 in explaining the concept of 'arguable ground with a realistic prospect of success' stated that-

> *"It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth though it must ensure that there are grounds and evidence that exhibit this real prospect of success."*

[33] At this stage the Court is not concerned with making a determination of the substantive issues that are raised by the Applicant. The Court's concern at this stage is whether the threshold to obtain leave has been met. Thus, if the Court is of the view that an arguable case has been made out for judicial review after

perusing the materials which have been led, then leave will be granted for the matter to be fully argued at the hearing for judicial review. (See **Hon. Shirley Tyndall, O.J. and Others v Hon Justice Boyd Carey (Ret'd)** *(supra)*, **Dale Austin v The Public Service Commission and Others** [2022] JMSC Civ. 55 and **Inland Revenue of Commissioners v National Federation of Self Employed and Small Business Limited** [1981] 2 All ER 93 at 106).

[34] In the case of **Council of Civil Service Unions (CCSU) v Minister of State for the Civil Service** [1985] AC 374, HL, Lord Diplock stated three heads under which review may be sought. These are illegality, irrationality and procedural impropriety. These concepts will be explained. The Applicant has placed reliance on all three bases

[35] I also find useful the cases relied on by Pettigrew Collins J in paragraph 20 in **Dale Austin v The Public Service Commission** *(supra)*. Paragraph 20 states that-

> *"In* ***Linton Allen v His Excellency the Right Honourable Sir Patrick Allen and the Public Service Commission****, [2017] JMSC Civ. 24, Straw J at paragraph 66 of the judgment said:*
>
> > *"The process of judicial review is the basis on which courts exercise supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi judicial functions or making administrative decisions affecting the public. It is trite that judicial review is concerned only with the decision making process of a tribunal and not with the decision itself. Lord Hailsham of St. Marylebone L.C. expressed in* ***Chief Constable of the North Wales Police v Evans*** *[1982] 1 WLR 1155 at page 1161a that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which is correct in the eyes of the court. Lord Diplock in* ***Council of Civil Service Unions v Minister for the Civil Services*** *[1985] AC 374 at page 410 F-H, discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:*
> >
> > > *i. 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*

> *justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *ii. By 'irrationality' I mean what can now be succinctly referred to as — Wednesbury unreasonableness* ***(Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** *[1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.*
>
> *iii. I have described the third head as – procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with 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."*

[36] Learned King's Counsel submitted that a review of the evidence before the Court as well as the legal principles will reveal that the Applicant has met the threshold for leave to apply for judicial review. On the other hand, Learned Counsel Ms. White submitted that the application for leave ought to fail.

B. *Whether the Respondent acted ultra vires The Constitution and the Public Service Regulations, 1961 when she purported to bar the Applicant from performing her functions of CTDL*

[37] This ground is concerned with whether the authority in question has been guilty of an error in law in its actions, for example purporting to exercise a power which in law it does not possess. (see **Council of Civil Service Unions v Minister for the Civil Service [1984]** 3 All ER 935). I also find useful the dicta of Lord Browne-Wilkinson in **R v Lord President of the Privy Council Ex parte Page** [1993] A.C. 682 where he stated that, *"…as to illegality, recent developments in the law have shown that any relevant error of law made by the decision maker, whether as to his powers or as to the law he is to apply, may lead to his decision being quashed."*

[38] I find instructive, the 5th Edition of the text Judicial Review of Administrative Action, relied on by Anderson, J in **Arlene Elmarie Peterkin v Natural Resources Conservation Authority, Town and Country Planning Authority and National Housing Trust** [2022] JMSC Civ. 153. Learned authors, De Smith, Woolf and Jowell in chapter 6 discussed the ground of illegality in a more thorough manner and stated that -

> *"'The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within its "four corners". In so doing the courts enforce the rule of law, requiring administrative bodies to act within the bounds of the powers they have been given."*

[39] Ms. Larmond K.C. submitted that the removal or the exercise of disciplinary control over the Applicant could not be done other than in accordance with the procedures set out in the Constitution and/or the Public Service Regulations. Learned King's Counsel further submitted that the removal or exercise of disciplinary control over the Applicant could only be properly done for a reasonable cause. Such reasonable cause must be determined in accordance with the procedures set out in the Public Service regulations. In applying the principles from **Endell Thomas v Attorney General** Privy Council Appeal No. 47 of 1980, delivered on July 27, 1981, by virtue of section 125(1) of the Constitution, the Applicant could only be properly removed from her position of CTDL or disciplined for a reasonable cause. The processes involved in determining reasonable cause for the purpose of removal or discipline are clearly set out in the Public Service Regulations and they were not afforded to the Applicant. The evidence shows that the Respondent barred the Applicant from performing her functions as CTDL, removed all duties from her related to the post and effectively demoted her. The January 6 memorandum speaks about restructuring as the basis for the Respondent's decision however the Respondent's affidavit demonstrates the punitive intent behind the decision. These actions amounted to a removal of the Applicant from her public office.

[40] King's Counsel directed the Court's attention to the case of **Rees v Crane** [1994] 2 A.C. 173 where a similar situation arose. The Chief Justice had delisted a judge from the roster of sitting judges and had not told him the complaints against him or given an opportunity to answer them. It was argued on behalf of the Chief Justice that as head of judicial administration he has the power to organize procedures and sittings of the Court including arranging for a temporary period a particular judge did not sit in Court. The delisted judge continued to receive his salary but he was effectively barred from exercising his functions as a judge sitting in Court. The Court of Appeal held that the Constitution provides a procedure for the actions taken by the Chief Justice as he had power or function in relation to the suspension or removal of a Judge other than the powers laid down in the Constitution. The Chief Justice therefore had no power to delist the judge from the roster of sitting judges having not told him the complaints against him or given an opportunity to answer them.

[41] Ms. Larmond K.C. further submitted that in assigning the Applicant duties at the JPC, the Respondent in substance removed the Applicant from her established post and demoted her without having regard to the law concerning the removal, discipline and/or demotion of public officers and as such acted illegally.

[42] Learned Counsel Ms. White submitted that the assertion by the Applicant that section 125 of the Constitution was not considered by the Respondent presupposes that the Respondent purported to remove the Applicant from office or exercise disciplinary control over her. However, the evidence as put forward by the Applicant falls short of establishing that the Respondent took any such steps. Ms. White contended that this ground has no merit in law or in fat as the attempt to equate the reassignment of the Applicant to a removal from office cannot be maintained in circumstances where the Applicant has not alleged or provided any evidence of any actual demotion in rank or reduction of emoluments. Learned Counsel directed the Court to section 22 (1) (a) of the Public Service Regulations which empowers the Permanent Secretary to make a transfer not involving a

change in the emoluments of an officer or nomenclature of his post where the transfer is within the Ministry or between a Ministry and any department of that Ministry. Regulation 22(1) (a) rubbishes the Applicant's contention that the reassignment was ultra vires. It was further submitted that the Applicant made no averment that the Respondent effected any change in her emoluments or the nomenclature of the post. The Applicant failed to put forward any evidence to establish that she in fact suffered a reduction in rank or remuneration.

[43] I find it appropriate to start with the relevant provisions of the Constitution as relied on by the Applicant. Section 125 of the Constitution encapsulates the procedure for appointment and removal of a Public Officer. It provides that -

> *125.-(1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding office. or acting in any such offices is hereby vested in the Governor-General acting on the advice of the Public Service Commission.*
>
> *(2) Before the Public Service Commission advises the appointment to any public office of any person holding or acting in any office power to make appointments to which is vested by this Constitution in the Governor General acting on the advice of the Judicial Service Commission or the Police Service Commission, it shall consult with the Judicial Service Commission or the Police Service Commission, as the case may be.*
>
> *(3) Before the Governor-General acts in accordance with the advice of the Public Service Commission that any public officer should be removed or that any penalty should be imposed on him by way of disciplinary control, he shall inform the officer of that advice and if the officer then applies for the case to be referred to the Privy Council, the Governor-General shall not act in accordance with the advice but shall refer the case to the Privy Council accordingly : Provided that the Governor-General, acting on the advice of the Commission, may nevertheless suspend that officer from the exercise of his office pending the determination of the reference to the Privy Council.*
>
> *(4) Where a reference is made to the Privy Council under the provisions of subsection (3) of this section, the Privy Council*

> *shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice.*

[44] It is not in dispute and I accept the submission of King's Counsel that pursuant to powers granted under section 127 (1) of the Constitution, the Governor General delegated the power to remove and exercise disciplinary control over its officers to the MLSS by virtue of the Delegation of Functions (Public Service) (Specified Ministry) Order, 2017.

[45] The following sections of the Public Service Regulations are of importance, 28, 42, 43 and 47. Pursuant to those regulations disciplinary proceedings against officers are dealt with by the PSC in light of reports from Permanent Secretaries and Heads of Departments, or otherwise. If based on that report the PSC is of the opinion that disciplinary proceedings ought to be instituted against an officer, then they may recommend to the Governor General that such proceedings be instituted. The Regulations also set out the proceedings for hearings for misconduct not warranting dismissal and proceedings for dismissal. It also provides that these Regulations apply where the powers to remove and exercise disciplinary control over public officers are delegated. The MLSS therefore has to act in accordance with the Constitution of Jamaica by virtue of the provisions outlined.

[46] After examining the Affidavits of both parties, I am of the view that the Applicant has a realistic prospect of success under this ground. The Applicant outlined several instances where the actions of the Respondent seem to amount to removal of the duties assigned to her without affording to the Applicant the protection under the Constitution and the Public Service Regulations. The Applicant has maintained that at no time was she informed of the Respondent's intention to take any action involving a restructuring of her duties. At the very least, the Applicant should have been advised of the restructuring prior to it taking place and given an opportunity to be heard. It would seem as if the Applicant was stripped of her duties as CTDL at the MLSS and then reassigned to the JPC. This is even supported by the

exclusion of listing the Applicant as CTDL in the MLSS off the agenda which lists all the CTDL at the MLSS.

[47] Respectfully, I find no merit in the submission put forward by Learned Counsel Ms. White that the failure of the Applicant to put forward evidence of a reduction in rank or remuneration demonstrates that the Applicant does not have an arguable case with a realistic prospect of success. I found **Rees v Crane** *(supra)* instructive to the extent that the Court held that despite the fact that the Judge continued to receive his salary he was effectively barred from exercising his functions as a judge sitting in Court. Even if the Applicant theoretically still held the same post and received the same emoluments, at the substantive hearing of the matter a finding could still be made that the Respondent acted illegally in her actions.

[48] I agree with Learned King's Counsel that the evidence shows that the Applicant was barred from performing her duties as CTDL effectively. In my view, on the face of it, the actions of the Respondent purports to remove the Applicant from office and/or exercise disciplinary control over her.

C. *Whether the Respondent breached the principles of Natural Justice in not affording the Applicant an opportunity to be heard prior to removing the Applicant from performing the functions of CTDL*

[49] I find helpful the judgment of Lord Hope of Craighead in **Auburn Court Ltd v The Kingston and Saint Andrew Corporation and others** [2004] UKPC 11 where he stated that-

> *"There is no doubt that the principles of natural justice require that before a decision is taken by a tribunal that is acting judicially the person against whom it is taken must be given a fair opportunity of setting out the facts which he thinks are relevant and the arguments on which he relies."*

[50] Harris JA in **Derrick Wilson v The Board of Management of Maldon High School and The Ministry of Education** [2013] JMCA Civ 21 opined that -

> *"Natural justice demands that both sides should be heard before a decision is made. Where a decision had been taken which affects the right of a party, prior to the decision, in the interests of good administration of justice, the rules of natural justice prevail. In Sir William Wade's Administrative Law (6th Edition) at pages 496 and 497, the learned author placed this proposition in the following context:*
>
> > *"As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual Ministers and officials as well as to the acts of collective bodies, such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. Even where an order or determination is unchallengeable as regard its substance, the Courts can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration."*

[51] Learned King's Counsel submitted that the Applicant's fundamental position is that the Respondent acted illegally in barring her from performing her functions as CTDL and demoting her. In removing the Applicant's roles and functions, reassigning her to the Jamaica Productivity Centre and otherwise penalizing her, the Respondent acted in breach of the principles of natural justice. The Respondent deposed that she decided to restructure the Applicant's duties due to the Applicant's non-performance and lack of leadership. There was no complaint or charge lodged against the Applicant for her to answer and she was not afforded a hearing. At no point was the Applicant allowed to be heard in relation to these issues and the Respondent's intention to impose adverse consequences on her as a result. Learned King's Counsel further submitted that her client was denied any opportunity to make representations on her own behalf so as to influence another outcome. The Applicant was however subjected to penalties which may be imposed on an officer where a disciplinary charge has been established, see

Regulation 37 (1) of the **Public Service Regulations**. The penalties included reduction in rank and withholding of increment, which Learned King's Counsel contended were imposed unlawfully by the Respondent.

[52] Learned King's Counsel relied on the cases of **Derrick Wilson v The Board Management of Maldon High School and The Ministry of Education** *(supra)*, **Faith Webster v The Public Service Commission** [2017] JMSC Civ 69 and **Deborah Patrick-Gardener v Jacqueline Mendez and The Public Service Commission** *(supra).*

[53] Learned Counsel Ms. White maintained her submission that Regulation 22 (1) (a) of the **Public Service Regulations** empowers the Respondent to effect a transfer of an officer within a Ministry or between a Ministry and any Department of that Ministry. The decision to reassign the Applicant did not offend the principles of natural justice and was in keeping with the said Regulation. Learned Counsel contended that the evidence of the Respondent sets out in detail the considerations which led to the decision which was justified in all the circumstances.

[54] If the actions of the Respondent, (that is removing the core roles and functions of the Applicant, being moved to a non-existent office at the JPC, giving the Applicant work that is below her appointed level and providing inferior physical accommodation), constitute penalties on the Applicant, then a decision to impose said penalty could only properly be made after the Applicant had been advised of what the disciplinary charge is and be given an opportunity to answer the said charge. McDonald-Bishop J in **Linton C Allen v His Excellency The Right Hon Sir Patrick Allen and The Police Service Commission** [2020] JMCA Civ 53 accepted Queen's Counsel Mr. Braham's submission and reliance on **Cooper v The Wandsworth Board of Works** (1863) 14 CB (NS) 180 where it was held that it is a fundamental rule of natural justice that the party likely to be affected shall be heard prior to the imposition of any decision which is adverse to him. McDonald-Bishop went on to say that case law is replete with instances where the Court, in

its bid to ensure fairness and justice in administrative law cases, has held that an aggrieved party has the right to be heard.

[55] On a detailed examination of the evidence, I am inclined to agree with the submissions of Learned King's Counsel Ms. Larmond. Even though the January 6 memorandum speaks to a restructuring of duties to satisfy operational requirements the Respondent in her Affidavit stated that it was based on the Applicant's non-performance and lack of leadership for areas under her responsibility that she decided to restructure the Applicant's duties to satisfy operational requirements for the MLSS. The rules of natural justice require that the Applicant ought to have been afforded a hearing and an opportunity to make representation of her own behalf before any decision to impose a penalty is taken. There is no evidence of whether an allegation was laid against the Applicant and brought to her attention before any of the adverse steps were taken by the Respondent. The Respondent cannot merely accuse the Applicant of failing to attend meetings, failing to complete tasks, among other things without giving the Applicant a chance to respond and an opportunity to respond.

[56] Any decision that is found to have been made in breach of natural justice is void. It is my view that there is an arguable ground that the Respondent breached the principles of natural justice by subjecting the Applicant to penalties without the proper procedure(s) being followed. The Respondent gave a number of instances which she has used to come to the conclusion that the Applicant failed to complete tasks. However, there is prima facie evidence to show that the principles of natural justice were not followed as the Respondent is accusing the Applicant of not completing tasks, attending meetings and a lack of leadership without giving the Applicant an opportunity to answer or make representations.

D. *Whether the Respondent acted unreasonably/irrationally as she took into account irrelevant considerations and failed to consider relevant matters in: (a) arriving at her decision to remove the Applicant from performing the functions of Chief Technical Director, Labour; and (b) purporting to reassign the Applicant to duties at the Jamaica Productivity Centre*

[57] Under this ground, Learned King's Counsel directed the Court to the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 233, where the concept of 'Wednesbury unreasonableness' was derived.

Regarding the test of unreasonableness Lord Greene M.R. stated at page 229 that:

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Lord Justice Warrington in* ***Short v. Poole Corporation*** *[1926] Chancery 66 at pages 90 and 91, gave the example of the redhaired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."*

[58] Lord Greene M.R. at pages 233-234 summarized the principle as follows:

> *"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I*

> *think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in them."*

[59] Ms. Larmond K.C. submitted that the Respondent by removing the Applicant's functions and purporting to assign her to duties at the Jamaica Productivity Centre failed to take into account relevant considerations, to *wit:*

> *(i) In assigning the Applicant responsibility for "the development of special projects and policies in the Ministry" the Respondent failed to take into account the fact that there is no such CTD post or portfolio in the MLSS and there is therefore no corresponding job description.*
>
> *(ii) In assigning the Applicant the responsibility for 'supporting the Jamaica Productivity Centre in the finalization of a Concept Paper and following Cabinet's approval, the development of a Jamaica Productivity Policy,' the Respondent failed to take into consideration that the Applicant will be required to report to her junior, who is the Jamaica Productivity Centre, Mrs. Tamar Nelson.*
>
> *(iii) Based on the Respondent's reassignment of the Applicant, the Applicant would not be heading a department or any unit and would have no control over the resources whether human, financial or physical, which are critical to the performance of any duty assigned. This is also not in keeping with the roles and functions of a CTD. This is also highly irregular and inconsistent with the principles enunciated in the Government of Jamaica Accountability Framework for Senior Executive Officers.*
>
> *(iv) The Applicant was being tasked to perform the policy functions that ought to be carried out by policy analysts under her direction and leadership.*
>
> *(v) The Applicant's assignment "to chair an interagency committee to monitor and drive the implementation of (labour market reform) recommendations" is not in keeping with expert recommendation emerging out of consultative process with the Planning Institute of Jamaica. The recommendation is for such a mechanism to be driven at the political level as it was concluded that without a strong political mandate, any such mechanism would not succeed. There is also no interlinkage with the tripartite Labour Advisory Council chaired by the Minister of Labour and the committee is detached from the implementing units under the Labour Department which are under the leadership of junior officers who do no report to the CTD."*

[60] King's Counsel further submitted that the Respondent took into account irrelevant considerations as the Applicant's performance ought and could not have been a relevant consideration when reassigning the Applicant as the Respondent had never assessed the Applicant. She further submitted that the views of what the Respondent referred to as "senior persons" was not a relevant consideration as the Applicant reported only to the Respondent and "senior persons" would not have been in a position to assess the Applicant's work and the merits of the Respondent's proposed decision. All these matters as submitted by Ms. Larmond K.C. point to an improper discretion based on irrationality.

[61] On the other hand, Learned Counsel Ms. White submitted that notwithstanding the several examples of alleged discrimination cited by the Applicant, the Applicant has failed to put forward any evidence to indicate what irrelevant considerations were taken into account by the Respondent at the time the reassignment was made. The Applicant has also not provided any evidence as to what considerations were relevant. However, the Respondent has supplied evidence to this Court of the matters which informed her decision. The Respondent acted within her jurisdiction under the Regulations.

[62] The Respondent has maintained throughout her Affidavit that the Applicant, inter alia failed to perform her duties, had poor attendance, was insubordinate and had poor work ethic. These are the reasons given for the alleged reassignment of the Applicant and/or her duties. However, if in reassigning the Applicant's duties the Respondent has acted in a manner which is unreasonable and/or irrational then the Respondent's actions ought to be open for review.

[63] There is no evidence that a proper investigation was conducted by the Respondent before her decision to reassign the Applicant was made. In my view it is unreasonable to make such a decision without assessing the Applicant and taking into consideration recommendations from persons who the Applicant does not report to. It therefore follows that the Respondent failed to exercise reasonably any discretion she had. I am unable at this time to make a finding as to whether the

decision itself was so unreasonable that no sensible person who has applied his mind to the question to be decided could have arrived at it. That, in my view, is a question for the substantive hearing of this matter.

E. *Whether the Respondent exercised her discretion for an improper purpose when she purported to remove the Applicant from performing the functions of CTDL*

[64] Learned King's Counsel submitted that the evidence points to there being spite and ill-will on the part of the Respondent towards the Applicant. In removing the Applicant from performing her functions as CTDL that Respondent exercised her discretion for an improper purpose this rendering her decision ultra vires. Learned King's Counsel relied on the case of **Municipal Council of Sydney Campbell v Campbell** [1925] AC 338 to establish that the exercise of power for an improper purpose is invalid and it can include malice on the part of a public official. Learned King's Counsel contended that the Applicant's evidence points to the following matters:

> *(i) The Respondent obstructed the Applicant in the performance of her duties;*
>
> *(ii) The Respondent openly and publicly disrespected, humiliated and belittled her in front of other officers;*
>
> *(iii) The Respondent wrongfully accused her of infractions that were not supported by evidence and which were of a disciplinary nature;*
>
> *(iv) There were attempts by the Respondent to convey temporary status to the Applicant's position within and without the Ministry;*
>
> *(v) On the directions of the Respondent, there was a reduction in the physical space from which the Applicant was assigned to work; and*
>
> *(vi) The Respondent unilaterally removed key responsibilities under the labour portfolio and within the Ministry from the Applicant and assigned them to officers junior to the Applicant.*

[65] This, Learned King's Counsel has contended, is against the background of the Respondent's assertion that the Applicant's assignment to the MLSS was done without consultation to the Respondent. It all culminated with the Respondent

effectively removing all duties associated with the post of CTDL from the Applicant. The accusations against the Applicant were not previously brought to her attention and that points further to the Respondent's malice towards the Applicant. It raises the question as to why bearing in mind the seriousness of the matters raised the Applicant was not disciplined in the manner provided by the **Public Service Regulations**. The evidence however shows that the Respondent embarked upon a series of acts culminating with the decision of January 6, 2022 that had the effect of removing the Applicant from her post and which amounted to exacting adverse consequences upon the Applicant with no basis in law. Ms. Larmond K.C. further contended that the Respondent's evidence raises issues of credibility which will require a resolution by the Court at an appropriate time.

[66] Learned Counsel Ms. White submitted that there is no evidential basis for this ground as the Applicant has failed to state the improper purpose for which the Respondent has acted. The Applicant would be required to substantiate this ground to enable a response and for the assessment of this Court, the Applicant has not. Respectfully, I find no merit in the Learned Counsel Ms. White's submission. In my view, the Applicant has outlined evidence which prima facie shows malice on the part of the Respondent in exercising her discretion to reassign the Applicant, effectively removing her from the post of CTDL at the MLSS.

[67] The Affidavits of the Respondent are laced with accusations against the Applicant and goes as far as to say that her actions are unbecoming of a Senior Civil Servant and that the Applicant has damaged her own career prospects while listing the various ways this was done. The Respondent has listed several serious allegations but there is no evidence of this having been brought to the Applicant's attention and further no disciplinary proceedings were brought against her. I agree with the submission of Ms. Larmond K.C. that bearing in mind the seriousness of the matters raised, it begs the question as to why the Applicant was not in some way disciplined in the manner provided by the Regulations. In my judgment, there is

enough evidence to show that the Respondent may have exercised her discretion for an improper purpose.

F. *Whether the application is barred by delay on the part of the Applicant and; Whether there is an alternative remedy that is available to the Applicant.*

[68] I will now examine whether or not a discretionary bar, such as delay or an alternative remedy is applicable. The Respondent has submitted that the application ought not to be granted because a discretionary bar and an alternative remedy are both present in this case.

Delay

[69] Learned Counsel Ms. White outlined the relevant rule of the CPR that deals with delay. Rule 56.6 of the CPR provides that:

> *(1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when the grounds for the application first arose.*
>
> *(2) However the court may extend the time if good reason for doing so is shown.*
>
> *(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which ground for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.*
>
> *(4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.*
>
> *(5) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –*
>
> > *(a) cause substantial hardship to or substantially prejudice the rights of any person; or*
> >
> > *(b) be detrimental to good administration.*

[70] Learned Counsel Ms. White submitted that the Applicant is seeking to impugn two decisions concerning the restructuring of her duties. These decisions are

contained in memorandum dated December 18, 2019 and January 6, 2022. Time therefore began to run from the date of the decision in each instance. The Applicant therefore did not act promptly in making the application for judicial review regarding the December 18, 2019 memorandum. Learned Counsel accepted that regarding the January 6, 2022 memorandum, the application was made within the 3-month period albeit that it may not be reasonably deemed to have been made promptly. The context, Learned Counsel contended, is where there are two separate decisions and the former does not flow into and continue with the latter as each decision stands on its own. The Applicant has proffered no explanation whatsoever for the delay. It was further contended that to grant the order of certiorari to quash the decisions of the Respondent would have the effect of subverting the lawful authority of the Respondent and effectively operate to reinstate the former duties of the Applicant which were being satisfactorily performed. This would no doubt be detrimental to public administration and the functions of the Ministry.

[71] King's Counsel Ms. Larmond made no substantive submissions regarding delay. However, the Application for leave states that no time limit for making the application has been exceeded.

[72] The Applicant is seeking an order of certiorari to quash the decision of the Respondent contained in memorandum dated January 6, 2022. The date therefore on which the grounds for leave arose is the date of the said memorandum. I found useful the case of **City of Kingston Co-operative Credit Union Limited v Registrar of Co-operatives Societies and Friendly Societies and Anor** (unreported) Claim no. 2010 HCV0204 delivered on October 8, 2010 relied on by Learned Counsel Ms. White. In that case Sykes J in dealing with an application to set aside grant of leave to apply for judicial review, formed the view that the case law shows that the date of the decision (and not the date the applicant acquires subjective or actual knowledge of the decision) is the date from which time begins to run against the applicant.

[73] The Applicant is not challenging the December 18, 2019 decision, it was exhibited to as part of the Applicant's case to show the actions of the Respondent leading up the January 6, 2022 decision. In my view, the memoranda are connected and do flow into each other. It is therefore my judgment that there exists no delay on the part of the Applicant in making the application for judicial review. Rule 56.6 requires that an application for leave to apply for judicial review must be made promptly and certainly within 3 months from the date the grounds first arose. I see no need to embark on the rest of the Respondent's submissions on delay since in my view, the application was made within the time limit.

Alternative remedy

[74] I will rely on the dicta of Barnaby J in **Christopher Stephenson v The Board of Management of Penwood High School & Anor** [2021] JMSC Civ 148. Barnaby J stated at paragraph 12 that:

> *"One of the seminal principles of judicial review is that leave will not be granted where the appellant has an alternative avenue for redress. This bar has among its premises the fact that alternative avenues for redress are capable of being curative of defects in earlier decision making processes. This is demonstrated in the Court of Appeal decision in **James Ziadie v Jamaica Racing Commission** (1981) 18 JLR 131."*

[75] Learned Counsel Ms. White contended that an alternative remedy is available to the Applicant in the form of Regulation 22 (2) of the **Public Service Regulations**. Regulation 22 (2) provides that where any officer is, or is to be, transferred under any of the foregoing provisions of this regulation, a Permanent Secretary or Head of Department or the officer concerned (through the Permanent Secretary or Head of Department) may lodge a written objection with the Chief Personnel Officer. The Regulation further provides that the Chief Personnel Officer is to lay the matter before the Public Service Commission which may intervene and make a recommendation to the Governor General. It was further contended that having failed to challenge the decision of her reassignment by lodging an objection, it is inappropriate for the Applicant to be permitted to do so by way of judicial review.

The Applicant ought to have taken steps to utilize the mechanism set out by the Public Service Regulations and should not now have recourse to judicial review in these circumstances. Learned Counsel relied on the cases of **Christopher Stephenson v The Board of Management of Penwood High School & Anor** [2021] JMSC Civ 148 and **Kevin Simmonds v The Minister of Labour and Social Security and The Attorney General of Jamaica** [2022] JMFC FULL 02.

[76] Learned King's Counsel Ms. Larmond submitted that the Respondent's submission that the judicial review claim constitutes an alternative remedy is based on a misunderstanding of the nature of these proceedings. King's Counsel contended that the law as it pertains to pursuing an alternative form of redress contemplates that such redress is an effective remedy which is able to offer relief in the place of judicial review. It is due to the PSC's failure to exercise its statutory duty in the face of the Applicant's complaints against the Respondent that places the Applicant before this Honourable Court now seeking leave to apply for judicial review. The Applicant is therefore entitled to view the current judicial review proceedings as the only effective remedy available to her in the circumstances of this case. Learned Counsel Mr. McDermott also submitted that since the Respondent is saying that she did not effect a transfer as defined by Regulation 22 of the Public Service Regulations, then the alternative remedy afforded to a public servant under that Regulation is not applicable. The only remedy that would therefore be applicable is judicial review.

[77] Campbell J, in **Regina ex parte Livingston Owayne Small v The Commissioner of Police et al**, SC 2003/HCV2362, in delivering judgment in relation to an application for leave, stated at paragraph 16 that:

> *"The adequacy of the alternative remedy to deal with the question that is raised in the given case is a vital consideration. If the alternative is not suitable or effective, then there will be no bar to the applicant seeking relief by way of judicial review. Regina (on the application of Taylor) Maidstone Borough Council 204 EWHC254 (Admin). See also Dionne Holness v Coroner of Kingston and St. Andrew and the Attorney General of Jamaica,*

HCV00999/2005 Supreme Court (unreported) delivered 18th September 2006."

[78] It is well established, and has been adopted in our jurisdiction, that judicial review is a remedy of last resort. Therefore, where a suitable remedy is available, the Court will exercise its discretion by refusing to grant an application for leave for judicial review. There are exceptional cases where suitable remedy is available and the Court may exercise its discretion by granting an application for judicial review. However, I will not embark on those exceptional cases at this juncture. It is the adequacy of the alternative remedy to deal with the issue that is raised, that the Court ought to be concerned with. If the alternative is not suitable or effective, then there will be no bar to the applicant seeking relief by way of judicial review. The test is whether the alternative remedy will resolve the issue fully and directly. (see **Malica Reid v The Commissioner of the Independent Commission of Investigations and Ors** (unreported) Claim No. 2011HCV00981 delivered on March 18, 2011, **R (on the application of Lim and another v Secretary of State for the Home Department** (2007) EWCA Civ 773, **Yates v Wilson and others** (1989) 168 CLR, 338, and SC 2003/HCV2362, **Regina (on an application by JD Wheatherspoon Plc) v Guilford Borough Council** 2006 EWHC 815)

[79] The Applicant has exhibited a letter dated December 19, 2019 where she has written to the Office of the Services Commission complaining of the conduct of the Respondent in the MLSS. The Applicant received a response from the Office of the Services Commission dated January 24, 2020 and was told that the matter will be examined and a further correspondence will be sent in due course. In that further correspondence dated February 24, 2020 the Chief Personnel Officer stated that, *"…The Chairman has noted the contents and issues, which were outlined in your letter and has decided to allow the process to take its course."* It is clear that the Applicant's issues were not resolved and is now seeking redress from the Court. Respectfully, I am not persuaded by the submissions of Learned Counsel Ms. White. I find that there is no adequate alternative remedy and the

appropriate approach was for the Applicant to apply for leave to seek judicial review.

CONSTITUTIONAL REDRESS

[80] The Applicant was seeking a Constitutional Motion and alleged that her fundamental constitutional rights have been infringed and otherwise unjustifiably contravened and that she suffered damage and loss as a result of the actions of the Respondent and/or her servants and/or agents. The Applicant's entitlement was by virtue of section 13(3) (g) of the Charter of Fundamental Rights and Freedoms. The Applicant set out the particulars of contravention of the said section. However, in an amended Notice of Application the Applicant removed the claim for Constitutional Motion and had it as a relief that she will seek if she is granted leave to apply for judicial review.

[81] In light of that, I see no need to set out a detailed discussion of this issue as the application for Constitutional Motion is not a ground that is being advanced by the Applicant at this stage. Learned Counsel Ms. White asked this Court to impose a condition that the Applicant be barred from pursuing constitutional relief if leave to apply for judicial review is granted. However, Learned King's Counsel Ms. Larmond does not agree. She submitted that in light of the clear wording of section 19(1) and (4) of the Charter of Fundamental Rights and Freedoms, it is not within the jurisdiction of any Court to bar a future application for constitutional redress. Having looked at section 19 (1) and (4) of the Charter of Fundamental Rights and Freedoms, I find favour with Learned King's Counsel's submission. Where a person alleges that any of their rights and freedoms is being or likely to be infringed they may apply to the Supreme Court for redress. This is done without any prejudice to any other action with respect to the same matter which is lawfully available. It is when an application is made for redress that the Supreme Court may decline to exercise its powers given to them under section 19(4). Therefore, it is not for me at this time to bar the Applicant from pursuing constitutional relief.

It is for the Respondent to make the relevant submissions if or when the Applicant makes such a claim.

INTERIM INJUNCTION

[82] The Court is empowered at the leave stage under Rule 56.4 (10) to grant such interim relief as appears just. Rule 17.1 of the CPR also empowers the Court to grant an interim injunction. In determining whether or not to grant an interim injunction, the Courts are guided by the dicta of Lord Diplock in the locus classicus case of **American Cyanamid Co. v Ethicon Ltd.** [1975] AC 396**,** where he identified the list of principles as guidance for factors to be considered in doing so. The principles have been adopted in our jurisdiction.

[83] Fraser J in **Gorstew Limited and Honourable Gordon Stewart, O.J. v The Contractor-General** [2013] JMSC Civ 10 accepted the submissions of Queen's Counsel that:

> *"…on an application for an interim injunction in public law proceedings, the approach set out **in American Cyanamid Co v Ethicon Ltd.** [1975] AC 396, and subsequently refined by the Judicial Committee of the Privy Council in **National Commercial Bank Jamaica Limited v Olint Corp. Limited**, [2009] 5 LRC 370 is applicable with the necessary modifications to reflect the public law nature of the proceedings (see **Belize Alliance of Conservation Non- Governmental Organisations v. Department of the Environment of Belize and another** (Practice Note) [2003] UKPC 63).*
>
> *In the **Olint** case, the Judicial Committee of the Privy Council reiterated that the purpose of an interim injunction was to increase the chances of the trial court doing justice between the parties after a determination of the merits of the case at trial. The role of the court in considering whether or not to grant an interim injunction is therefore to assess whether a just result will be achieved by granting or refusing the injunction, with the crucial determination being which course (granting or refusing the injunction) is likely to cause the least irremediable prejudice (See Lord Hoffman writing for the Board at paragraphs 16- 18)."*

[84] Mangatal J in the case **Michelle Smellie & Ors. v National Commercial Bank Jamaica Limited** [2013] JMCC Comm. 1 at paragraph 5 outlined the following considerations which arose in the cases of **American Cyanamid** and **NCB v Olint**:

(a) Is there a serious issue to be tried? If there is a serious question to be tried, and the claim is neither frivolous nor vexatious, the court should then go on to consider the balance of convenience generally.

(b) As part of that consideration, the court will contemplate whether damages are an adequate remedy for the Claimants, and if so, whether the Defendants are in a position to pay those damages.

(c) If on the other hand, damages would not provide an adequate remedy for the Claimants, the court should then consider whether, if the injunction were to be granted, the Defendants would be adequately compensated by the Claimants' cross-undertaking in damages.

(d) If there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered.

(e) Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are designed to preserve the status quo.

(f) If the extent of the uncompensatable damages does not differ greatly, it may become appropriate to take into account the relative strength of each party's case. However, this should only be done where on the facts upon which there can be no reasonable or credible dispute, the strength of one party's case markedly outweighs that of the other party.

(g) Further, where the case largely involves construction of legal documents or points of law, depending on their degree of difficulty or need for further exploration, the court may take into account the relative strength of the parties' case and their respective prospects of success. This is so even if all the court can form is a provisional view-see ***NCB v. Olint****, and the well-known case of* ***Fellowes v. Fisher*** *[1975] 2 All E.R. 829. This is of course completely different from a case involving mainly issues of fact, or from deciding difficult points of law, since, as Lord Diplock points out at page 407 G-H of* ***American Cyanamid****, "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult points of law which call for detailed argument and mature considerations".*

(h) There may also be other special factors to be taken into account, depending on the particular facts and circumstances of the case.

[85] In the case of **American Cyanamid** Lord Diplock in addressing the Court's consideration of whether there is a triable issue in the matter stated that:

> *"…The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.*
>
> *It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial… So* ***unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought****. [emphasis added]"*

[86] Learned Counsel Mr. McDermott submitted that there clearly are serious issues to be tried in this matter in relation to whether the Respondent acted illegally, irrationally and/or in breach of the principles of natural justice. Learned Counsel relied on the earlier submission made by Learned King's Counsel on the grounds for judicial review in support of this contention. Learned Counsel further submitted that the Applicant holds a public office and has been adversely affected in the very performance of her roles and functions by the Respondent's decisions. The Applicant's continuation in the public service and livelihood depends on supervisory powers of the Court in relation to the Respondent. Damages would therefore not be an adequate remedy. It was contended that neither the Respondent nor any third party is likely to suffer any financial loss in the event that the interim injunction is granted. The Court should therefore exercise its discretion pursuant to Rule 17.4(2) of the CPR to dispense with the requirement for an undertaking as to damages. Lastly, in considering the balance of convenience it was contended that:

> *(a) Without an injunction steps may be taken to appoint someone else as CTDL. This is particularly true in light of the Respondent's evidence as to what she views as the temporary status of the Applicant; and*

> *(b) The permanent appointment of someone else to the post would render the Applicant's claim for judicial review nugatory. In that regard, it is important that the Court precludes any decisions being taken pending the Applicant's claim for judicial review that would further prejudice the Applicant and/or affect the efficacy of the remedies for which leave for judicial review is being sought.*

[87] Learned Counsel Ms. White submitted that injunctive relief is not required as the Applicant does not satisfy the three-part test as laid out in **RJR-MacDonald Inc v The Attorney General of Canada** [1994] 1 R.C.S. 311 which was applied in the case of **The Jamaican Bar Association v The Attorney General and The General Legal Council** [2020] JMCA Civ 37. The three-part states that first, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

[88] I find merit in Learned Counsel Mr. McDermott's submissions. I have already made a determination that there exists arguable grounds for judicial review with a realistic prospect of success. It must therefore flow that there are serious issues to be tried. Due to the nature of the application that is before me, damages would not be an adequate remedy in the event that the Applicant should be successful at trial but did not obtain an interlocutory injunction. Any loss that the Applicant may suffer if the interim injunction is not granted is, in my view, not quantifiable. Concerning the issue of an undertaking as to damages, Rule 17.4(2) of the CPR gives the Court the discretion whether or not to require said undertaking. In my view, neither the Respondent nor any third party would be likely to sustain any financial prejudice or hardship if the interim injunction is granted. I will therefore exercise my discretion to dispense with the requirement of an undertaking as to damages.

[89] The Applicant is before the Court seeking an order of certiorari to quash the Respondent's decision. The balance of convenience lies in favour of the Applicant. The Applicant could be prejudiced if someone else is given the post of CTDL at the MLSS. This would render the Applicant's claim for judicial review nugatory. Therefore, with damages not being adequate and the balance of convenience lying in favour of the Applicant, it is my judgment that the interim injunction sought ought to be granted.

COSTS

[90] Pursuant to Rule 64.6 (1) of the CPR, the decision to award costs is discretionary. The general rule on costs is that the unsuccessful party is to pay the costs of the successful party. However, I am mindful of the interlocutory nature of the proceedings and the likelihood that either party could be successful upon the hearing of the substantive claim. I am therefore minded to reserve costs pending the determination of the judicial review claim.

CONCLUSION

[91] To conclude, the Applicant has arguable grounds with a realistic prospect of success. The Applicant has put before this Court sufficient evidence to show prima facie that the Respondent's actions were illegal, unreasonable/irrational and breached the principles of natural justice. The Respondent has throughout her affidavits made serious allegations against the Applicant and stated that the allegations were the reasons that led to the decision in the January 6 memorandum. It is therefore appropriate for the issues arising to be resolved at the hearing of the substantive claim. There are no discretionary bars applicable to this case as the application was not made out of time, nor is there an alternative redress available to the Applicant. Lastly, I am satisfied that the granting of the interim injunction is likely to cause the least irredeemable prejudice.

ORDERS AND DISPOSITION

[92] Having regard to the forgoing, these are my Orders:

(1) Leave to apply for judicial review is granted to the Applicant.

(2) Leave is conditional on the Applicant making a claim for Judicial Review within (14) days of the receipt of this Order granting leave.

(3) The first hearing of the Fixed Date Claim Form for Judicial Review is scheduled for July 25, 2023 at 2:30 pm for ½ hour. .

(4) The Respondent and/or any other authority whether by themselves, their employees or agents, are barred from taking any steps to give effect to or implement in any manner whatsoever the appointment of any other person as Chief Technical Director, Labour, pending the determination of the judicial review claim.

(5) The Respondent and/or any other authority whether by themselves, their employees or agents, are barred from taking any further steps, in any manner whatsoever, that adversely affects the status of the Applicant pending the determination of the judicial review claim.

(6) Issue of costs is reserved to May 30, 2023 at 10:00 am for ½ hour. Submissions on this point to be filed and served on or before May 5, 2023 by the Applicant's Attorney's-at-Law. Submissions in response to be filed and served on or before May 10, 2023 by the Respondent's Attorneys-at-Law.

(7) Applicant's Attorneys-at-Law to prepare, file and serve Orders made herein.