



[2024] JMFC Full 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2021CV03679

**CORAM: THE HONOURABLE MRS. JUSTICE C. BROWN BECKFORD
 THE HONOURABLE MRS. JUSTICE T. HUTCHINSON SHELLY
 THE HONOURABLE MRS. JUSTICE T. CARR**

BETWEEN	DALE AUSTIN	CLAIMANT
AND	THE PUBLIC SERVICE COMMISSION	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT
AND	MARLENE ALDRED	3RD DEFENDANT

FULL COURT

Mr. Dale Austin instructed by Hugh Wildman & Company for the Claimant

**Mr. Garth McBean KC and Miss Dian Johnson instructed by Garth McBean & Co.
for the 1st Defendant**

**Mr. Allan Wood KC, Daniella Gentles-Silvera KC and Miss Analeise Minott
instructed by Livingston, Alexander & Levy for the 2nd and 3rd Defendants**

Heard: 5th and 6th March and 17th December 2024

**Constitutional Law – Judicial Review – Legality of an Accountability Agreement –
Constitutionality of Regulation 14(2) of the Public Service Regulations – Whether
the actions of the 1st and 3rd defendants were tainted with illegality, irrationality or
procedural impropriety – Right to Make Representations and Review
Documentation – Obligation to Give Reasons – Legitimate Expectation – Bias –
Breach of Constitutional Right to Equality Before the Law – Constitutional**

Damages – Costs – The Constitution of Jamaica sections 125 and 127 – The Charter of Fundamental Rights and Freedom section 13(3)(g) – Interpretation Act sections 3 and 31 – Public Service Regulations 14, 15, 17, 18 and 37

BROWN BECKFORD, J

[1] I have read the judgment of Hutchinson Shelly J, and I concur with her findings.

HUTCHINSON SHELLY, J

INTRODUCTION

[2] The Claimant, Mr. Dale Austin, was “temporarily employed” as an Assistant Crown Counsel in the Litigation Department at the Attorney General’s Chambers (“AGC”) in 2011. In March 2012, he claimed that he was unfairly dismissed. Legal proceedings were instituted against the 1st and 2nd Defendants. Mr. Austin was successful in his claim, and he was reinstated in his position and appointed to the substantive post of Assistant Crown Counsel.

[3] During Mr. Austin’s tenure at the AGC, what he would likely describe as a narrative of struggle and perseverance emerges. Despite his years of service and approximately five (5) good performance reviews, promotion has remained elusive. Mr. Austin attributes this to bias, victimization, punitive measures, threats, and reprisal, among other things, arising from an alleged unfair dismissal and subsequent legal proceedings which resulted in his reinstatement and an award of damages against the 1st and 2nd Defendants.

The Claim

[4] Mr. Austin was granted leave to apply for Judicial Review on April 29, 2022, by Pettigrew Collins, J. By way of a fixed date claim form filed on May 12, 2022, he seeks the following:

- i. An Order of Mandamus to compel the Defendants to establish forthwith a process of fair and continuous consideration of Mr. Dale Austin's promotion

to higher posts as they become available from time to time pursuant to Public Service Regulation 17.

- ii. An Order of Mandamus to compel the First Defendant and/or the lawfully determined authority to carry out the administrative duties in respect of consideration for Mr. Dale Austin's promotion pursuant to Public Service Regulation 17.
- iii. An Order of Certiorari to quash the decision of Marlene Aldred communicated by way of letter dated April 13, 2021, in which she purported to exercise the power of considering and refusing to recommend the promotion of the Applicant, Mr. Dale Austin, to the post of Assistant Attorney General.
- iv. An Order of Certiorari to quash the decisions of the Public Service Commission on May 20, 2021, or July 21, 2021, in which they refused to consider Mr. Dale Austin for promotion in accordance with the Public Service Regulations, and instead unlawfully constituted themselves as an appeals body and affirmed the decision to refuse his promotion.
- v. An Order of Mandamus to compel the lawfully constituted authority under law to consider Mr. Dale Austin's promotion in accordance with Public Service Regulation 17.
- vi. A Declaration that the First Defendant acted contrary to Public Service Regulation 17 over a ten (10) year period in that it failed to discharge its continuing duty and obligation during this period to ensure a fair process for the consideration of Mr. Dale Austin's promotion over the course of his tenure in the civil service.
- vii. A Declaration that the Third Defendant acted unlawfully and *ultra vires* the Constitution and the Public Service Regulations when she purported to

exercise the powers and/or authority in law delegated to the Permanent Secretary of the Ministry of Justice.

- viii. A Declaration that the Third Defendant acted unlawfully as she was not properly authorized to act in the capacity that she did when she purported to exercise powers pursuant to the Accountability Agreement executed on July 31, 2015 between the Public Service Commission (PSC) and the Permanent Secretary of the Ministry of Justice.
- ix. A Declaration that the failure of the First Defendant to give the Claimant Mr. Dale Austin reasons for its decisions after convening hearings on May 20, 2021, and July 21, 2021, to decide whether the Claimant Mr. Dale Austin ought to be promoted is indicative of the unreasonableness of its decision and/or an error of law.
- x. A Declaration that the refusal by the First Defendant to give reasons for its decisions on May 20, 2021 and July 21, 2021 was fundamentally unfair, and it further deprived the Claimant Mr. Dale Austin of an opportunity, if possible, to secure a modification or reversal of the decision not to promote him after ten (10) years of service.
- xi. A Declaration that the Claimant Mr. Dale Austin was entitled to the recourse of the appeal process outlined at section 125 and section 127(4) of the Constitution and the deprivation by the defendants of this lawfully constituted appeal process was fundamentally unfair and unlawful, and in all the circumstances deprived the Claimant of a fair hearing.
- xii. A Declaration that the First Defendant's decisions on May 20, 2021, and July 21, 2021, at the hearings of the appeal of Mr. Dale Austin against the decision by the Second Defendant's department to refuse his promotion were unreasonable and irrational in the Wednesbury sense.

- xiii. A Declaration that the document referred to as the Accountability Agreement between the Public Service Commission (PSC) and the Permanent Secretary of the Ministry of Justice, signed on July 31, 2015, in which the PSC purported to constitute themselves as an appeals body and monitoring oversight body and to delegate their constitutional jurisdiction, authority and public functions is unlawful, lacks statutory status and is void in law.
- xiv. A Declaration that the purported lawful exercise of the powers and authority by the Solicitor General to set up and carry out the process for consideration of the Claimant Mr. Dale Austin's promotion and to recommend persons for promotions to higher posts in the Attorney General's Chambers based on a scheme of arrangement contained in an un-Gazetted government document is ultra vires the Constitution and the Public Service Regulations, and is accordingly unlawful.
- xv. A Declaration that the Defendants have misdirected themselves and taken into account irrelevant considerations and/or failed to take into account all the relevant factors in the process of consideration of Mr. Dale Austin's promotion in breach of Public Service Regulation 17;
- xvi. A Declaration that in all the circumstances the Defendants/Defendants contravened Mr. Dale Austin's constitutional right guaranteed by section 13(3)(g) of the Constitution of Jamaica.
- xvii. A Declaration that the Delegation of Functions (Public Service) (Specified Ministry) 2015 Order is unconstitutional on the basis that by delegating authority to the Permanent Secretary within the Executive, this erodes the safeguards enshrined in the Constitution to insulate the process of public service appointments, removals and disciplinary control from political interference from the Government of the day.

- xviii. A Declaration that the Public Service Commission is not properly constituted in law as an appeals body and that the Claimant Mr. Austin had proper recourse under law to the local Privy Council as the lawfully constituted appeals body.
- xix. A Declaration that the decisions of the defendants to refuse to promote the Claimant Mr. Dale Austin on May 20, 2021, and July 21, 2021, are vitiated by virtue of their illegality and/or fundamental fairness and/or irrationality.
- xx. Damages
- xxi. Costs

The Case for The Claimant

- [5] Mr. Austin contends that during his employment at the AGC, he had undergone five (5) performance evaluations which indicated that he had “exceeded expectations.” Nonetheless, he has not been promoted despite numerous senior posts becoming available during his tenure of employment. Mr. Austin avers that he “raised” the issue of his lack of advancement within the AGC with the 3rd Defendant via written communication on at least three (3) different occasions between 2019 and 2020. However, he received no response.
- [6] On or around January 9, 2020, he applied for the vacant post of Assistant Attorney General within the General Legal Advice Department of the AGC. Again, he received no response to this application for several months which prompted him to send an internal memorandum to the 3rd Defendant on or about July 30, 2022, highlighting concerns about his non-promotion after ten (10) years of employment at the AGC. This communication also received no response.
- [7] Mr. Austin’s applications for promotion followed the implementation and execution of a document referred to as the Accountability Agreement (“the Agreement”) as between the 1st Defendant and the Permanent Secretary of the Ministry of Justice on July 3, 2015. The document significantly affected how promotions were done in

the AGC. Prior to the Agreement the powers of appointment selection and promotion rested with the Governor General acting upon the advice of the 1st Defendant.

- [8] The promulgation of the Agreement effected what Mr. Austin describes as a “new regulatory scheme of arrangement” by which the authority for promotions were given to the Permanent Secretary of the Ministry of Justice, and the 1st Defendant was appointed as an appellate body with monitoring and oversight functions. The “scheme” now required public officers to apply for promotion and no longer considered the markings and comments of the senior officers under whom the candidate worked as part of the selection process. The Agreement was never gazetted but was argued by Mr. Austin to have predated the Gazette Publication and coming into effect of the Delegation of Functions (Public Service) (Specified Ministry) Order (“the Delegation Order”) by which the Governor General delegated his power of appointment selection and promotion of public officers to the Permanent Secretary of the Ministry of Justice on September 14, 2015. It is Mr. Austin’s contention that the Agreement is void and of no legal effect.
- [9] On November 2, 2020, Mr. Austin was invited to and participated in a written assessment for the vacant post of Assistant Attorney General in the General Legal Advice Division of the AGC along with two (2) other candidates. Each candidate was assigned a unique number to utilize on the assessment instead of their names. The markers of the assessment were therefore unaware of the candidates to whom the numbers were assigned. After completing the written assessment, Mr. Austin was invited to participate in the interview stage before a panel. This panel was chaired by the 3rd Defendant and included the Human Resource Director, a Senior Assistant Attorney General and two (2) panellists independent of the AGC.
- [10] On or about April 16, 2021, in a letter from the 3rd Defendant dated April 13, 2021, Mr. Austin was notified that he would not be recommended for promotion to the post of Assistant Attorney General in the General Legal Advice Department of the AGC on the basis that he scored lower than the other candidates in the written

assessment and the interview. On or about April 23, 2021, Mr. Austin submitted a written notification of appeal to the 1st Defendant against the adverse recommendation of the 3rd Defendant. This written notification included grounds of appeal prepared by him. Mr. Austin's participation in the appeal process was restricted to the application for the appeal.

- [11] The 1st Defendant requested and was furnished with information to consider the appeal, such as the job description, the notes and/or score of the interview panel, the assessment grades and the qualifications of Mr. Austin. The 1st Defendant considered the appeal on May 20, 2021, and July 21, 2021. On each occasion, the appeal was dismissed and the recommendation of the 3rd Defendant affirmed. Mr. Austin was not provided with reasons for the dismissal of the appeal despite requesting same from the 1st Defendant.

The Case for the Defendants

- [12] The Defendants contend that they have not engaged in any unlawful behaviour that would hinder Mr. Austin's career progression. It is asserted that the reason for Mr. Austin's non-promotion included the fact that there was pending litigation concerning the status of his employment at the AGC, and his failure to formally apply for higher positions. It was noted that, during his tenure at the AGC, Mr. Austin has only applied for two (2) higher posts, one in 2019 and another in 2020 which forms the basis of this claim. In respect of the 2019 application, he was not shortlisted. In respect of the 2020 application, his shortcomings in the written assessment and the interview are the primary reasons he was not recommended for the position.

ISSUES

- [13] The main issues for consideration are as follows:

1. Whether the July 30, 2015, Accountability Agreement is legally valid?
2. Whether Regulation 14(2) is unconstitutional?

3. Whether the decision of the 3rd Defendant not to recommend Mr. Austin for promotion was tainted with illegality, irrationality or procedural impropriety?
4. Whether the 1st Defendant's decision to dismiss Mr. Austin's appeal was tainted with illegality, irrationality and procedural impropriety?
5. Whether there is an attempt to relitigate bias by Mr. Austin?
6. Whether there was a breach of Mr. Austin's right to equality before the law pursuant to section 13(3)(g) of the Charter of Fundamental Rights and Freedom?
7. Whether Mr. Austin is entitled to Damages/Constitutional Damages?

DISCUSSION

Issue 1: Whether the July 30, 2015, Accountability Agreement is legally valid?

Is the Accountability Agreement (the Agreement) a Regulation?

The Claimant's Submissions

[14] Mr. Austin argues that the Agreement is invalid and of no legal status. Reliance is placed on the case of **Harinath Ramoutar v Commissioner of Prisons and Public Service Commission**¹ where the Privy Council indicated that the Accountability Agreement in that case was ineffective in law because it was not gazetted nor was it a discrete legislative instrument. It cannot be said to have legal precedence over the regulatory provisions of the Public Service Regulations (PSR) in respect of promotions. In support of this position, he cited the case of **Joachim & Anor v The Attorney General & Anor (St. Vincent & the Grenadines)**² in

¹ [2012] UKPC 29

² [2006] UKPC 6

which the Privy Council noted that a document which has not been gazetted does not take legal effect.

- [15] Mr. Austin further submits that the Agreement is an attempt to establish the validity of new regulations or “scheme of arrangements” which are inconsistent with the PSR, in that, material parts of the regulatory scheme of the PSR are different from that of the Agreement.

1st Defendant’s Submissions

- [16] King’s Counsel, Mr. McBean, conceded that the Agreement was not gazetted. However, he contends that the Agreement contains mere guidelines. As such, it does not fall within the definition of “regulations” pursuant to section 3 of the Interpretation Act and it is not required to be gazetted pursuant to section 31 of the Interpretation Act. Mr. McBean further submitted that there was no intention for the Agreement to have legislative effect. Reference was made to various portions of the Agreement such as the “Mandate”, paragraphs 3.1 and 3.2 which makes it evident that it is only intended to be guidelines.

2nd and 3rd Defendants’ Submissions

- [17] King’s Counsel Mr. Wood submitted that the Agreement need not be gazetted pursuant to sections 3 and 31 of the Interpretation Act as it does not fall within the definition of “regulations.” He referred to the authority of **Alliance Financial Limited v The Bank of Jamaica**³. He concurred with Mr. McBean that the Agreement included guidelines meant to capture the essence of Part III of the Labour Relations Code.
- [18] It was further submitted that to make the Agreement void would call into question every appointment made pursuant to it. He argued that even if the Agreement is

³ [2021] JMSC Civ 195

made invalid it does not impugn the Delegation Order. Therefore, voiding the Agreement would not affect the Permanent Secretary's decisions made upon the recommendations of the interview panel.

Law and Analysis

- [19] Central to the determination of the legality of the Agreement is whether it is a "Regulation" pursuant to the definition of section 3 of the Interpretation Act and was therefore required to be gazetted pursuant to section 31 of the Interpretation Act. Upon a careful consideration of the Agreement and the attached guidelines, it is apparent that various portions of it are a restatement of the Staff Orders for the Public Service and the PSR in relation to the appointment, removal and disciplinary control of public officers. It is for this reason that the Defendants refer to it as mere guidelines which were not intended to have legislative effect.
- [20] To this end, the Court's attention was directed to various portions of the Agreement which was intended to prove whether it is a guideline or a regulation. Clause 1 of the Accountability Agreement is reflected as follows:

1. MANDATE

This Accountability Agreement is pursuant to the Delegation of Functions (Public Service) (Specified Department) Order, 2015 and subject to the Guidelines established by the Public Service Commissions.

Clause 3.1 is reflected as follows:

3.1 Establishment of Guidelines

The Public Service Commission shall establish Guidelines consistent with the Public Service Regulations, 1961, for the Permanent Secretary (see Appendix 1); ensure that adequate training is provided to designated Department personnel; and act as a source of consultation and advice.

The Compliance clause is reflected as follows:

COMPLIANCE

Failure to comply with the provisions of the Accountability Agreement will result in appropriate sanctions by the Public Service Commission up to and including revocation on the delegated functions either from designated personnel within the Departments or, ultimately from the Permanent Secretary.

Introduction to the Guidelines is reflected as follows:

INTRODUCTION

The Governor General, acting on the advice of the Public Service Commission has agreed to delegate most of the Functions under the Public Service Regulations, (161) to Permanent Secretaries/Heads of Department. This delegation is effected through the Delegation of Functions (Public Service) (Specified Department) Order, 2015 and governed by an Accountability Agreement between the Public Service Commission and the respective Heads of Department: Office of the Chief Parliamentary Counsel, Office of the Director of Public Prosecutions, Legal Reform Department and Attorney General's Chambers.

- [21]** The parties agree that sections 125 and 127 of the Constitution contain the primary rules in relation to the appointment, removal and disciplinary processes of public service officers. Section 125 of the Constitution states as follows:

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 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.

(5) Except for the purpose of making appointments thereto or to act therein or of revoking an appointment to act therein, the provisions of this section shall not apply in relation to the office of the Director of Public Prosecutions.

[22] Section 127 of the Constitution states as follows:

127. *(1) The Governor-General, acting on the advice of the Public Service Commission, may by instrument under the Broad Seal direct that, subject to such conditions as may be specified in that instrument, power to make appointments to such offices, being offices to which this section applies, as may be so specified and power to remove and power to exercise disciplinary control over persons holding or acting in those offices, or any of those powers, shall (without prejudice to the exercise of such power by the Governor-General acting on the advice of the Public Service Commission) be exercisable by such one or more members of the Public Service Commission or by such other authority or public officer as may be so specified.*

(2) In relation to any power made exercisable under subsection (1) of this section by some person or authority other than the Governor-General acting on the advice of the Public Service Commission, the offices to which this section applies are all offices in respect of which that power is, apart from this section. vested by this Constitution in the Governor-General acting on such advice.

(3) In any case where an appointment is to be made by virtue of an instrument made under this section and the person to be appointed holds or is 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, the person or authority specified in the said instrument shall consult with the Judicial Service Commission or the Police Service Commission, as the case may be, before making the appointment.

(4) Where, by virtue of an instrument made under this section, the power to remove or to exercise disciplinary control over any officer has been exercised by a person or authority other than the Governor-General acting on the advice of the Public Service Commission, the officer in respect of whom it was so exercised may apply for the case to be referred to the Privy Council, and thereupon the action of the aforesaid person or authority shall cease to have effect and the case shall be referred to the Privy Council accordingly and the Governor-General shall take such action in respect of that officer as the Privy Council may advise:

Provided that –

- a) where the action of the aforesaid person or authority included the removal of that officer or his suspension from the exercise of his office, that person or authority may nevertheless suspend him from the exercise of his office pending the determination of the reference to the Privy Council; and*
- b) before advising the Governor-General under this subsection, the Privy Council shall consult with the Public Service Commission*

[23] Regulation 14 of the PSR also indicates the process for appointments. It states:

14. *1) The Commission shall make recommendations to the Governor-General with respect to –*

- a) appointments, promotions, and transfers of suitable officers;*
- b) appointments or promotions of officers where the Commission is of the opinion that a candidate should be given direct entry into a salary scale (whether on first appointment to the public service or on promotion where such promotion is not promotion in the ordinary course) at an incremental point higher than the minimum of the salary scale attaching to the office to which he is being appointed or promoted;*
- c) confirmation of individual officers in their appointments and the passing of promotional or efficiency bars.*

(2) The Commission shall not (unless so requested by the Governor-General) make any such recommendation in relation to a function which has been delegated to an authorized officer.

[24] It can be gleaned from the provisions that prior to the operation of the Agreement, public service officers were being appointed by the Governor General on the advice of the 1st Defendant. With the promulgation of the Agreement, this power was delegated to the Permanent Secretary on the advice of the Heads of Departments. The question is whether the Agreement ought to have been gazetted to take effect?

[25] In addressing this issue, a clear distinction must be made between the terms “regulations” and “guidelines”. Section 3 of the Interpretation Act provides a description of a regulation. Regulations are said to include “*rules, by-laws, proclamations, orders, schemes, notifications, directions, notices and forms.*”

Guidelines are defined as information which provides directions on regulatory policy or intent, which is not intended to be binding or enforceable.

[26] In **Ramoutar v Commissioner of Prisons & Anor** the Appellant Harinath Ramoutar was considered for a promotion based on his years of experience. Unfortunately, the Appellant was not recommended for promotion because he did not possess the requisite degree pursuant to the “Job Specification and Description”. The promotion was given to Mr. Charles who had a degree and was the most senior person after the Appellant. The Judicial Committee of the Privy Council considered whether the “Job Specification and Description”, being the document upon which reliance was placed to disapprove the Appellant’s recommendation for promotion was valid. Lord Sumption in paragraphs 14 to 17 of that judgment, opined:

14. On the footing that eligibility in Regulation 26(1)(a) is a threshold condition, what are the relevant criteria of eligibility? None are specified in Regulation 26, except that that the person appointed must be a current officer of the prison service. Nor is there anything in the Regulations which can be described as a criterion for eligibility for acting appointments generally. The Respondent Commission submits, as it has to, that the possession of a degree in social work was a threshold condition. But the only basis for that submission is that it was part of the Job Specification and Description for the corresponding permanent appointment. The Board rejects this submission for three reasons.

15. ...

16. Second, the Job Specification and Description has no statutory status. It is a government document, agreed with the relevant professional association for the prison service. It was suggested to the Board on behalf of the Commission that it had statutory force under section 15 of the Prison Service Act, which provides that it is the duty of the service’s Personnel Department to “provide for and establish procedures for consultation and negotiation between the Personnel Department and an appropriate recognised association or associations in respect of... (iv) the terms and conditions of appointment.” But this simply means that they must consult upon and negotiate the terms of the contract of service. The Job Specification and Description appears to have been the result of consultation and negotiation between the Personnel Department and the relevant association, but it does not record of the terms of the contract of service. It is exactly what it says it is: a job description, including a statement of qualities required to perform the duties.

17. *Third, even if the Board were persuaded that the Job Specification and Description was produced pursuant to a statutory duty of the prison service, it would not follow that it defined the criteria for eligibility even of those appointed to permanent positions. It is one thing for the prison service to agree a job description with the relevant officers' association, but quite another to bind the Public Service Commission to treat it as a statement of the criteria for threshold eligibility. Moreover, the document itself appears to the Board to be wholly unsuitable for that purpose. Threshold eligibility, if it is to operate as a basis for excluding an application from consideration on its merits, has to be based on some objectively verifiable litmus paper test. Eligibility of this kind cannot be a question of degree. However, the qualifications expected of a Chief Prisons Welfare Officer are described in the Job Specification and Description in terms which call for an exercise of judgment about the strength of the candidate's personal qualities for the job. They refer, for example, to his "expert counselling skills" or "sound observational skills", to his "expert knowledge of principles and practices of correctional administration", his "sound knowledge of principles and practices of social work", to his "basic knowledge of relevant computer application." It is true that a few of the qualities said to be required are susceptible to a litmus paper test yielding a Yes/No answer, and one of these is the requirement for a degree in social work. But even in these cases, the document is not wholly prescriptive. Many of the specified qualities overlap. Read as a whole, the document leaves open the possibility, for example, that "sound knowledge of principles and practices of social work" (another of the listed criteria) may have been acquired by some means other than a degree.*

- [27] In the case of **Joachim & Anor v The Attorney General & Anor (St. Vincent and the Grenadines)**⁴ the Judicial Committee of the Privy Council addressed the issue of whether an ungazetted instrument has legal effect. It concluded that an ungazetted instrument cannot be concluded to have ever taken effect and that the consequence of "*total ineffectiveness*" was intended by Parliament by not gazetting the instrument.
- [28] However, in **Alliance Financial Services Limited v The Bank of Jamaica**, Palmer J did not find that the guidelines being challenged were void. In that case the Claimant was challenging the Respondent's decision to suspend their provision of cambio and remittance services to the Jamaican public on the ground that the charges laid against their directors would affect their "fit and proper" standing. The

⁴ [2016] UKPC 6

Claimant argued that the Respondent's Sandbox Guidelines and fit and proper notice were not gazetted and as such lacked legislative effect and should be deemed void. Palmer J opined at paragraph 52 of the judgment:

"The submissions were made for AFSL that in any event the act of the BOJ to suspend was ultra vires as the enactment under which it presumed to act, was not gazetted and therefore void for illegality. It was pointed out in response to the BOJ that this argument does not aid the Applicant, as not only would it mean all the current licenses and approvals granted under the regime (both for AFSL and others in the industry) be effectively unlawful, but it would mean that the BOJ would not be empowered to grant approval to the Applicant. While it is an argument that could be made, I find the argument of the Respondent in that regard preferable; that the power to grant approvals is a power delegated by the Minister to the BOJ under the BOJA. Implicit in the power to approve (pursuant to the provisions of the Interpretation Act) is the power to suspend or revoke. While the issue is being raised for consideration of the judicial review Court to declare on, it seems to me that the issue with more reasonable likelihood of succeeding is not whether the BOJ has the power to immediately suspend but whether the urgency to protect the financial system existed as the BOJ asserts or should AFSL have instead been heard before the decisions was made."

- [29] The cases of **Ramoutar v Commissioner of Prisons & Anor** and **Joachim & Anor v The Attorney General & Anor (St. Vincent and the Grenadines)** can be distinguished from the present claim. In the foregoing authorities, the documents challenged were relied on and an adverse decision was made with respect to the Appellants. In the instant claim, the Agreement was not used as the basis for the disapproval of a recommendation for promotion. Instead, it served as a procedural guide for appointing or promoting public officers, which was already established under the PSR and the Staff Orders.
- [30] Having considered the definition of "regulations", as provided for in the Interpretation Act, and the relevant portions of the Agreement, the Court is not of the view that the Agreement is a Regulation, but rather, an amalgamation of information contained in the PSR and the Staff Orders treating with the appointment, removal and disciplinary control of public officers.
- [31] The Court does not find favour with Mr. Austin's submissions that the Agreement creates a new regulatory scheme for the appointment, removal and disciplinary

control of public officers. Accordingly, the document does not need to be gazetted pursuant to section 31 of the Interpretation Act as it is evident that there was no intention for it to have legislative effect.

- [32] Consequently, the challenge to the legality of the Agreement on this basis, must fail.

Was the Accountability Agreement executed prior to the Delegation Order?

The Claimant's Submissions

- [33] Mr. Austin submitted that the Delegation Order was issued on September 14, 2015, as per its gazette publication whereas the Agreement was executed on July 31, 2015. Mr. Austin argued that the Agreement predated the Delegation Order and therefore the Agreement cannot be said to have its authority derived from the said Order and therefore is null and void in law.

The Defendants' Submissions

- [34] Kings Counsel for the Defendants, Mr. McBean and Mr. Wood, submitted that though the Agreement is dated July 31, 2015, page two of the Proclamations Rules and Regulations containing the Delegation Order indicates, that it was given under seal of the Governor General on July 17, 2015. Hence, the Governor General delegated the functions on July 17, 2015, before the executed Agreement.

Law and Analysis

- [35] The Delegation Order was gazetted on September 14, 2015, with an effective date of September 1, 2015. The following was endorsed on the Order:

"Given under my hand and the Broad Seal of Jamaica at King's House this 17th day of July in the year of Our Lord [2015] and the [64th] year of the Reign of Her Majesty Queen Elizabeth II."

- [36] The Accountability Agreement reflects:

Accountability Agreement made this 31st day of July 2015 between the Public Service Commission and the Permanent Secretary, Ministry of Justice, in relation to the Delegation of Functions (Public Service) (Specified Department) Order, 2015 for the following Departments effective the 1st September, 2015:

Office of the Chief Parliamentary Counsel

Office of the Director of Public Prosecutions

Legal Reform Department

Attorney General's Chambers

- [37] Upon examination of both the Delegation Order and the Agreement, the Court finds, as the Defendants submitted, that the Delegation Order predates the Agreement. Therefore, the Agreement rightly derives its authority from the Delegation Order. It is also clear that the Delegation Order was not intended to have effect until September 1, 2015, and therefore, the delegated functions were not exercised by the Permanent Secretary nor were they guided by the Agreement until September 1, 2015. Further, the Delegation Order did not have legal effect until gazetted on September 15, 2015. The Court does not find based on the evidence that the delegated functions were exercised by the Permanent Secretary prior to the gazetting of the Delegation Order. Accordingly, the arguments of Mr. Austin on the validity of the Agreement are without merit.

Issue 2: Whether Regulation 14(2) is Unconstitutional?

The Claimant's Submissions

- [38] Mr. Austin submits that there is a conflict between PSR 14(2) and sections 125(1), 127(1) and (2) of the Constitution. Mr. Austin argues that the PSR and the Constitution conflict in that:
- i. PSR 14(2) forbids the 1st Defendant from exercising its unfettered jurisdiction provided under section 125(1) of the Constitution to give advice regarding appointments, removals and disciplinary control.

- ii. PSR 14(2) modifies and/or abrogates the exercise of the 1st Defendant's constitutional jurisdiction conferred in section 125(1) of the Constitution; and,
- iii. PSR 14(2) fetters the jurisdiction of the 1st Defendant in relation to its functions where section 127(1) and (2) of the Constitution indicate that even where functions are delegated, the power exercisable by the Governor General (or anyone so delegated) must only be on the advice of the 1st Defendant.

Therefore, Mr. Austin contends that PSR 14(2) is ultra vires and void.

[39] It was further submitted that the exercise of functions by the 1st Defendant is to be properly termed as their “jurisdiction.” Mr. Austin relied on the cases of **Endell Thomas v Attorney General of Trinidad and Tobago**⁵ and **Anisminic Ltd. v Foreign Compensation Commission**⁶ to make this point. It was suggested that it is an established principle that regulatory provisions can regulate the exercise of an existing jurisdiction however, the regulations cannot by themselves confer jurisdiction. Further reliance is placed on the case of **Levy v Ken Sales & Marketing Ltd. (Jamaica)**⁷. Hence, PSR 14(2), a regulatory provision, cannot confer or deprive jurisdiction where such jurisdiction was conferred by the Constitution. As such, Mr. Austin submitted that the Constitution did not provide for the advisory function of the 1st Defendant to be delegated.

[40] Mr. Austin argued that the framers of the Constitution sought to prevent any one person or body from having unchecked authority over the functions at section 125(1) of the Constitution. These functions ought to be shared between the Governor General and an independent public body or person outside the direct control of the Executive branch. Mr. Austin relied on the cases of **Endell Thomas**

⁵ [1981] AC 113

⁶ [1969] 2 AC 147

⁷ [2008] UKPC 6

v Attorney General of Trinidad and Tobago⁸ and Ausbert Regis, Commissioner of Police v Attorney General of Saint Lucia⁹ in support of his contentions.

- [41] It is further submitted by Mr. Austin that the purpose of the 1st Defendant is to remove the decision-making authority on appointments, removals and disciplinary matters away from the Executive branch (and any person from the Executive such as the Solicitor General and Permanent Secretary and their influences). Mr. Austin also submitted that the Delegation Order, though not in issue in these proceedings, is unconstitutional because it departs from the basic structure of the Constitution and infringes the principle of separation of powers.

The 1st Defendant's Submissions

- [42] Mr. McBean KC submitted that section 127 of the Constitution empowers the Governor General to delegate the function of the 1st Defendant by instrument in writing. He argued that this was done through the Delegation Order which was gazetted. Furthermore, PSR 14(2) prohibits the 1st Defendant from exercising delegated functions and is consistent with the Constitution as it gives effect to the delegation functions of the Governor General under section 127 of the Constitution. It would be inconsistent for the 1st Defendant to be allowed to continue to exercise functions that have been delegated pursuant to a provision of the Constitution.
- [43] Mr. McBean KC contended that section 2 of the Constitution allows for amendments to Regulations, inclusive of the PSR. He further contended that amendments have been made to the PSR; one such amendment being PSR 47 that deals with the exercise of delegated functions.

⁸ (1981) UKPC 28

⁹ (unreported), Supreme Court, Eastern Caribbean, Claim No. SLUHCV 2010/0497, delivered 21 November 2011

The 2nd & 3rd Defendants' Submissions

- [44] It was submitted by Mr. Wood KC that the Governor General delegated the power to appoint and remove public officers (except the Solicitor General) to the Permanent Secretary of the Ministry of Justice pursuant to section 127(1) of the Constitution. This was done through the Delegation Order. It was further submitted by King's Counsel that this was not the first of its kind as the Governor General, in 1963, delegated his power to make acting appointments under PSR 18(2). The said delegation was unsuccessfully challenged in the case of **Lackston Robinson v Daisy Coke et al**¹⁰ on which the 2nd and 3rd Defendants rely.
- [45] Mr. Wood KC contended that the powers of appointments, removals and disciplinary control are legally delegated by the Governor General to the Permanent Secretary of the Ministry of Justice and that the 1st Defendant was properly prohibited from exercising these powers pursuant to PSR 14(2). Mr. Wood reminded the Court that the Solicitor General did not usurp the delegated powers; she merely did not recommend Mr. Austin for promotion based on his subpar performance in the selection process.

Law and Analysis

- [46] Regulation 14(2) of the PSR notes that:

"The Commission shall not (unless so requested by the Governor-General) make any such recommendation in relation to a function which has been delegated to an authorized officer."

- [47] The challenge to this provision by the Claimant appears to be on the premise that though it is a regulation, the effect of it is to fetter the jurisdiction of the 1st Defendant as provided for in the Constitution

¹⁰ [2009] UKPC 14

[48] In **Endell Thomas v The Attorney General of Trinidad and Tobago**, the Appellant was a member of the police force and was charged in 1972 with three (3) offences against discipline. The Police Service Commission purporting to act under certain regulations of the Police Service Commission Regulations dismissed the Appellant from the police force. The Appellant sued the Respondent and was successful at first instance. Upon appeal, the Court of Appeal ruled in favour of the Respondent. The matter was brought to the Privy Council for a determination as to whether a certiorari clause existed in the constitution of Trinidad and Tobago which ousted the jurisdiction of the Court to inquire into the circumstances of validity of administrative orders made by the commission. At page 134, the Privy Council noted:

*... Clearly the question that it was sought to have decided by the High Court in the action brought by the plaintiff was the validity of the commission's order removing him from the police service which it made in purported exercise of disciplinary control over him. Jurisdiction to remove him from the police service and also generally to exercise disciplinary control over him while he remained a member of the police service is expressly conferred upon the commission by section 99 (1) of the Constitution in words so ample, simple and unqualified that they are in marked contrast to the detailed and restrictive definitions of the jurisdiction of administrative tribunals that are normally found in the Acts of Parliament which set them up. Their Lordships use the expression "jurisdiction" rather than "power" because of the use of this expression in **Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147** which was relied on in the instant case by Phillips J.A., and because in acting as it did in relation to the plaintiff, the commission, although an administrative body, was performing a quasi-judicial function which would affect his legal rights and obligations and so attracted his constitutional right under section 2 (e) of the Constitution to a fair hearing in accordance with the principles of fundamental justice.*

[49] In **Levy v Ken Sales & Marketing Limited**¹¹ the Privy Council considered whether regulations can confer jurisdiction. It was noted that while regulations can regulate

¹¹ [2008] UKPC 6

the exercise of existing jurisdiction, it cannot confer jurisdiction where none previously existed. Lord Scott opined at paragraph 19:

*“... There appears to have been no statutory power for courts in Jamaica to make charging orders until the recent enactment of legislation enabling courts to do. That legislation came into effect on 25 March 2003. Neither the charging order made by Anderson J on 23 October 2001 in action K-062 nor the charging order made by McIntosh J on 15 January 2003 can draw support from that enactment. The Civil Procedure Rules 2002, which came into effect on 1 January 2003, contain Rules relating to the making of charging orders but **while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction...** [b]ut the absence of any clear statutory authority for the practice persuades their Lordships that the charging order must be read as an adjunct to the proprietary effect of the execution order for sale and cannot be given a life of its own divorced from that proprietary effect. Accordingly, in their Lordships’ opinion, if the proprietary effect of an execution order for sale becomes spent by reason of the last paragraph of section 134, a charging order made prior to 25 March 2003 must become spent at the same time. **Any other conclusion would, moreover, allow a somewhat questionable practice to circumvent the statutory intention evident in that last paragraph.**” (emphasis mine)*

- [50] In **William Clarke v Bank of Nova Scotia**¹², the Jamaican Court of Appeal sitting with five (5) Justices of Appeal had to consider whether there was a rule of the court or an Act of Parliament which required the sitting of an uneven number of Judges (not being less than three (3)) to consider appeals from the Supreme Court in matters except procedural appeals. The Court of Appeal reaffirmed the judgment of the Privy Council in **Levy v Ken Sales & Marketing Limited** in coming to a decision that this requirement was a rule. The Court of Appeal found that the said rule was inconsistent with the constitution and was deemed as void.
- [51] Upon examination of the above cases, the Court agrees with Mr. Austin that a regulation cannot effectively change a constitutional provision. A determination of the constitutionality of Regulation 14(2) of the PSR turns on the interpretation given to section 125 of the Constitution.

¹² [2013] JMCA App 9

[52] In **Lackston Robinson v Daisy Coke et al**¹³, the Judicial Committee of the Privy Council dealt with the powers of delegation under a 1963 Delegation Order. In dealing with this issue, they had this to say at paragraph 21:

21. *The Board comes back therefore to the central issue. Was there reasonable cause for the recommendation which Mr Hylton made and the decision which the Chief Personnel Officer took to accept it? The situation was a specific one. The reasonable cause relied upon was the wish of Mr Hylton after nine months in his office to see another officer act and perform as his Deputy for a limited period of months in order to be better placed for the forthcoming decision on a permanent appointment. Lord Diplock said in Thomas (cited above), a matter of which the Commission (in that case) was "constituted the sole judge". **Here the decision was delegated to the Chief Personnel Officer and it was she who was "constituted the sole judge"**. If no-one had been acting as Deputy Solicitor General, the Board would have thought it fairly clear that Mr Hylton could reasonably have taken the view, if there were two fairly equally matched possible candidates for a permanent position, that he should, notwithstanding seniority, see each in turn for a period. Here, Mr Hylton had, as he put it, 'inherited' the appellant, but wanted to see another possible candidate act and perform, in order the better to compare and decide which he preferred. The Chief Personnel Officer accepted his corresponding recommendation, and both courts below, with their knowledge of local conditions, have concluded that the recommendation and the Chief Personnel Officer's decision cannot be impugned as based on inadmissible factors or as outside the range of the reasonable. The Board sees no basis on which it could or should differ from any of their assessments. (emphasis mine)*

[53] Mr. Austin's argument is that section 125 of the Constitution creates two (2) functions. That is, (i) that the Governor-General has a formal power to appoint, and (ii) the 1st Defendant has an advisory power in relation to appointments. Mr. Austin contends that the Governor General, pursuant to section 127 of the Constitution, can only delegate his formal power to appoint and not the 1st Defendant's advisory power on appointments. Therefore, since the Constitution entrusts the 1st Defendant with advisory powers, the PSR cannot indicate that those powers depend on the Governor General's request.

¹³ [2009] UKPC 14

- [54] To determine the interpretation to be given to section 125 of the Constitution, one must understand the role of the Governor General. The Governor General has little to no discretion in the exercise of his duties. Specifically, as it relates to section 125, the Governor General cannot act contrary to or decline to act on the advice of the 1st Defendant. This means that the 1st Defendant determines who is to be appointed and the Governor General must accept this. Therefore, the powers exercisable under this section are not separated into an active role and an advisory role. Instead, there is a singular power granted which is vested in two (2) authorities, the Governor General and the 1st Defendant.
- [55] It follows therefore, that this singular power can be delegated to one authority who may utilize their discretion in ways that the Governor General could not. The authority to whom this power is delegated need not act on the advice of the 1st Defendant. It is also important to indicate that the delegation of the powers under section 125 is a full delegation, as section 127 indicates that **BOTH** authorities make the decision (i.e. the Governor General acting on the advice of the 1st Defendant) to delegate the functions. Accordingly, this Court adopts the reasoning in the case of **Lackston v Daisy Coke et al** and finds that the sole determinant of appointments pursuant to the Delegation Order is the Permanent Secretary.
- [56] The role of subsidiary legislation (i.e. the PSR) is to help with the implementation of policies and principles set out in primary legislation (i.e. the Constitution). Upon reading section 127 of the Constitution, it may be argued that it is not immediately clear that the person to whom the power is delegated should or should not act on the advice of the 1st Defendant in exercising these functions. The section indicates, however, that the instrument for delegation can indicate “*such conditions*” as may be necessary for the exercise of the delegated functions. In view of this and the preferred interpretation of section 125 of the Constitution, Regulation 14(2) of the PSR makes clear:
- (i) That the exercise of functions by the delegated authority need not be on the advice of the 1st Defendant; and

- (ii) That a condition which may be imposed regarding the delegation of the function is that the exercise of the delegated function is to be on the advice of the 1st Defendant.

[57] Accordingly, the Court does not hold the view that Regulation 14(2) of the PSR is unconstitutional.

Issue 3: Whether the decision of the 3rd Defendant not to recommend Mr. Austin for promotion was tainted with illegality, irrationality or procedural impropriety?

[58] In the course of examining this issue, a number of sub-issues arose for consideration, and these are addressed below.

Is the 3rd Defendant a proper party to the Claim?

The Claimant's Submissions

[59] Mr. Austin submitted that according to established legal principles, an administrative decision can be invalidated if it suffers from self-misdirection, considers irrelevant factors, overlooks relevant ones, or if the decision is so obviously unreasonable that no reasonable authority with the given power could have made it. Reliance was placed on the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corp**¹⁴; **Re W (An Infant)**¹⁵; **R v Parliamentary Commissioner for Administration ex parte Balchin**¹⁶ and **Secretary of State for Education and Science v Tameside Metropolitan Borough Council**¹⁷. Mr. Austin further submitted that if any of the several grounds as identified in **Associated Provincial Picture Houses Ltd v Wednesbury Corp** exists then

¹⁴ [1947] 2 All ER 680

¹⁵ [1971] AC 682

¹⁶ [1998] 1 PLR 1

¹⁷ [1977] AC 1014

there is a basis for a court to rule that the decision was Wednesbury unreasonable and irrational.

[60] Mr. Austin submitted that the 3rd Defendant's recommendation was tantamount to a decision, and this is confirmed in the evidence. He further submitted that there was no evidence to suggest that, upon the recommendation of the 1st or 3rd Defendant, a final decision would be forthcoming from the Permanent Secretary of the Ministry of Justice. Therefore, the recommendation of the 3rd Defendant stands as the final decision in relation to the promotion, as is standard practice within the AGC. Mr. Austin argued that the recommendation is susceptible to Judicial Review and can be challenged before there is formal notification of the final decision. Reliance is placed on the cases of **Deborah Patrick-Gardner v Jacqueline Mendez and the Public Service Commission**¹⁸, **R v Agricultural Dwelling House Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire ex parte Borough**¹⁹ and **Aston Reddie v The Firearm Licensing Authority, The Minister of National Security and the Attorney General**²⁰ in support of this position.

[61] Finally, Mr. Austin submitted that the recommendation of the 3rd Defendant was made using a "*legally and procedurally flawed process*" and that the subsequent decision of the 1st Defendant to uphold the recommendation of the 3rd Defendant would have been flawed as well. Therefore, the recommendation of the 3rd Defendant is subject to Judicial Review.

The 2nd and 3rd Defendants' Submissions

[62] Mr. Wood KC asserted that since 2015, the powers of appointment, removal and disciplinary control for offices and officers in the AGC, save for the Solicitor

¹⁸ [2018] JMFC Full 2

¹⁹ [1987] 1 EGLR 106

²⁰ (unreported), Supreme Court, Jamaica, Claim No 2010HCV01681, delivered 24 November 2011,

General, were delegated to the Permanent Secretary of the Ministry of Justice by the Delegation Order. He submitted that these powers were not usurped by the 3rd Defendant as she merely made a recommendation and the final decision in relation to promoting Mr. Austin rested with the Permanent Secretary, who is not a party to these proceedings.

Law Analysis

- [63]** The arguments in respect of the 3rd Defendant being a party to this claim were made and considered at the stage of the application for leave to apply for judicial review which was determined by Pettigrew-Collins J in her judgment which was delivered on April 29, 2022²¹. In that decision, it was found that for practical purposes, the 3rd Defendant was the one who effectively decided whether the Claimant would be promoted²². Further, that the letter sent by her informing him that he was not recommended was notification to him that he would not be promoted. Leave was then granted in relation to the matter proceeding against the 3rd Defendant.
- [64]** In considering this issue, it is noted that Pettigrew Collins, J found that it was incorrect to say that the power of appointment had been delegated to the 3rd Defendant. Rather, it was the authority to select and recommend that had been delegated to the 3rd Defendant. It was her view that practically speaking, the recommendation became the decision as it was not departed from and was in fact upheld by the 1st Defendant consequent on the Claimant's appeal.
- [65]** In Judicial Review proceedings, the focus is on the decision maker to determine if all relevant factors had been considered, and all applicable procedures followed while arriving at the impugned decision. In the instant claim, the 3rd Defendant made the recommendation not to recommend Mr. Austin for promotion. There is

²¹ [2022] JMSC Civ 55 at paragraph [22].

²² Paragraph 40

no evidence that the Permanent Secretary was bound by this decision and had to adopt it. It is accepted that the Agreement did not delegate the power to appoint. That power remained with the Permanent Secretary who would have the authority to overrule or depart from the recommendation made. While the 3rd Defendant's decision not to recommend the Claimant would have negatively impacted his prospects for promotion, this did not deem her the ultimate decision maker. It is in these circumstances that the Court finds that while the 3rd Defendant may have been akin to an interested party in her role as Solicitor General and the individual who made the recommendation adverse to the Claimant, the appropriate Defendant should have been the Permanent Secretary.

Did Mr. Austin have a right to make representation and review documentation?

The Claimant's Submissions

[66] Mr. Austin submits that once a person's right would be prejudiced, they should be given an opportunity to review material upon which an adverse decision is based and further, an opportunity to make representation before that adverse decision is made. Reliance is placed on the authorities of **Aston Reddie v The Firearm Licensing Authority et al**; **Deborah Patrick-Gardner v Jacqueline Mendez & Anor**; **R v Commissioner of Police ex parte Keith Pickering**²³; **Derrick Wilson v The Board of Management of Maldon High School and The Ministry of Education**²⁴ and **Ausbert Regis Commissioner of Police v Attorney General of St Lucia**²⁵. It was further submitted that the principles of natural justice and procedural fairness applied, and, in these circumstances, they were breached by the 3rd Defendant.

²³ [1995] 32 JLR 123

²⁴ [2013] JMCA Civ 21

²⁵ [2011] ECSC J1121-3

[67] It was further submitted that he was deprived of a fair opportunity in circumstances where he would not have had sight of documentation on which great reliance had been placed by the 3rd Defendant in coming to a decision. He relied on the case of **Regina v Board of Visitors of Hull Prison ex parte St. Germain and Ors (No. 2)**²⁶ in support of this argument. It was argued that the 3rd Defendant should have ensured that he was given a fair opportunity and hearing to make his case regarding his promotion, especially since he had not been promoted after 10 years of service.

The 2nd and 3rd Defendants' Submissions

[68] Mr. Wood's submission, simply put, is that there is no obligation on behalf of the 3rd Defendant to allow Mr. Austin to view documentation relied upon and/or to make representations at the interview stage considering that it is not a hearing.

Law and Analysis

[69] The question of the right of an affected individual to make representation was considered in the case of **Aston Reddie v Firearm Licensing Authority et al.** In this case, the Claimant was charged with criminal offences regarding an allegation of assault on his wife. The Claimant's firearm and firearm booklet were seized by the investigating officer and submitted to the Firearm Licensing Authority. The charges were subsequently dismissed for want of prosecution. The Court's attention was drawn to portions of paragraphs 46 to 64 of the judgment:

[46] This raises the question as to what is a "hearing". An attractive description of what constitutes a "hearing" has been succinctly given by the Indian textbook writer, S.P. Sathe, in his book Administrative Law (7th edition) pp. 188-189. The relevant portion of the passage, which I have adopted for these purposes read:

"Hearing means giving an opportunity to a person against whom an adverse action is proposed to be taken to say why it should not so be taken.

²⁶ [1979] 1 WLR 140

What does such an opportunity mean? It means that the person must be given a notice as to what is proposed to be done against her and why. Further, it should be possible for her to put forth her say either orally or in writing; she should be able to cross-examine the witness, if any, who might have testified against her, and be able to contradict the allegations against her through such evidence as may be necessary. In order to be able to do so, she must have access to such documents as might have been used against her."

[47] In **R. v. Commissioner of Police ex parte Keith Pickering** (1995) 32 JLR 123 at page 127, Langrin, J (as he then was) in delivering the judgment of the Full Court noted in similar vein that the ingredients of a fair hearing may be divided in three categories as follows: (1) advance notice of charges or accusations; (2) right to see factual evidence in possession of the decision-maker and (3) the right to make representations.

...

[51] *From the evidence presented by the defendants, there is no indication that any form of hearing of evidence was held in which the claimant participated following on his application for review. Furthermore, there is no indication that the claimant was served with the statements of his accusers or reports from the police that were forwarded to Board or, that, at the very least, he was advised of the gist of them so as to give him a chance to properly prepare his case in response and to say whether he wished to cross examine witnesses on oath. Neither was he invited by the Review Board to make submissions as to why the decisions ought not to be upheld.*

...

[57] *The claimant's contention is that the Authority and the minister acted contrary to the rules of natural justice and this unfairly for the following reasons which I have seen fit to paraphrase. The claimant was denied due process. He was never accorded a hearing to rebut the allegations made against him. He was never informed of the date for a hearing of his appeal at which time he could have requested to be present either in person or to be represented by counsel and to make detailed oral or written submissions in the matter. He was never given the reasons for the revocation with any specificity that would have allowed him to respond adequately or at all. The Authority and the Minister came to their decision by considering allegations not yet tested in a court of law and for which the claimant was acquitted. They failed to take into account adequately, or at all the good antecedent of the claimant to include the fact that he has never been convicted or that he is not a restricted person. For these reasons the decision-making process must be regarded as manifestly unfair.*

...

[63] *To take the discussion even further, I must state what I accept natural justice to be. Natural Justice is said to be an expression used for describing the criteria of procedural fairness of the administrative process that ensure that decisions are taken objectively, impartially, without prejudice and after hearing the person likely to be affected. One more rule of procedural fairness is that the actions must be accompanied by reasons. It has been settled by the courts as a general principle of English common law that the rules of natural justice are pre-requisites to the procedure that all decision-making authorities ought to observe. The presumption, it is said, is that Parliament could not have intended to dispense with them and hence only when it does so explicitly, they are excluded (see; S.P. Sathe, **Administrative Law**, 7th edn. pp 210-211)*

[64] *The function of the principles of natural justice in cases of this nature has been helpfully clarified by Sathe (supra at page 189), who noted that in judicial proceedings, the laws of procedure and evidence ensure that the parties get enough opportunities to put forward their case. In administrative proceedings, where the rules of procedure and evidence applicable to judicial proceedings are not entirely applicable, the rules of natural justice constitute the irreducible minimum procedure that must be observed.*

[70] In **Deborah Patrick-Gardner v Jacqueline Mendez & Anor**, the Claimant challenged the decision of the Chief Personnel Officer and the Public Service Commission to retire her from the Public Service. In addressing the question of the right of the Applicant to be heard, the Full Court opined at paragraph 107:

[107] *The requirement for a decision maker to adhere to standards of procedural fairness was outlined 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...*

[71] The Full Court relied heavily on the case of **Derrick Wilson v The Board of Management of Maldon High School et al** in coming to a decision. The following extracts from paragraphs 28 to 49 of that case are instructive to the Court:

[28] *The Act and the Regulations made thereunder are silent as to the right of a party to be heard during the conduct of proceedings which affects him or her. However, the lack of statutory provisions would not operate as a bar to an aggrieved party praying in aid the rules of natural justice. It is well settled that, where the circumstances so demand, the court, by implication,*

may give consideration to the principle of natural justice despite the absence of statutory guidance. In **Wiseman v Borneman**, Lord Guest at page 310 had this to say:

“It is reasonably clear that on the authorities that where a statutory tribunal has been set up to decide the final questions affecting parties’ rights and duties, if the statute is silent upon the question, the courts will imply into the statutory provisions a rule that the principle of natural justice should be applied. This implication will be upon the basis that Parliament is not, to be presumed to take away parties’ rights without giving them an opportunity of being heard in their interest”

[29] 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.”

...

[47] A decision maker is required at all times to observe the requirement of procedural fairness. The rule is “of universal application and founded on the plainest principles of justice” - see *Ridge v Balwin* [sic]. As a consequence, an aggrieved party must be given an opportunity to address any adverse complaint affecting his rights.

[48] The importance of observing the *audi alteram partem* maxim has been pronounced in a trilogy of authorities. This rule embraces the concept of fairness. In **Regina v Secretary of State for the Home Department v ex parte Doody** [1993] 3 WLR 154 at page 169, Lord Mustill speaking to the requirement of fairness within the rules of natural justice had this to say:

“My Lords, I think it unnecessary to refer by name or to quote from, any of the often- cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them,

I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances, (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and shape of the legal and administrative system within which the decision is taken (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable results or after it is taken with a view to procuring its modification; or both (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest, fairness will often require that he is informed of the gist of the case which he has to answer."(emphasis added)

- [72] The Court is of the view that there is no requirement in natural justice or procedural fairness which would permit Mr. Austin to make representations or see the material upon which the panel made its decision at the interview stage. Not only would this be unfair to the other candidates, but the interviews conducted would not constitute a hearing in the context to which the authorities relied on by Mr. Austin are applicable. It follows therefore, that any challenge which Mr. Austin makes in relation to the fairness of the interview on these grounds must fail.

Was there a failure to give sufficient reasons?

The Claimant's Submissions

- [73] Mr. Austin submitted that the 3rd Defendant is under an obligation to provide sufficient reasons for her decision not to recommend him for promotion. He contended that her failure to do so was a breach of natural justice and procedural fairness and irrational and unreasonable in the circumstances.

2nd and 3rd Defendants' Submissions

- [74] In response, Mr. Wood KC argued that there was no obligation to provide such reasons and in any event the reasons subsequently provided were sufficient. The

reason provided for Mr. Austin's non-promotion was that he achieved lower scores than the other candidates in both the assessment and the interview. It was Mr. Wood's submission that in these circumstances the rules of natural justice and procedural fairness were not breached.

Law and Analysis

[75] The Court is of the view that since the interview does not fall within the context of a hearing, there was no obligation on the 3rd Defendant to provide reasons for her recommendation which led to the Claimant's non-promotion. In any event, the Court finds that the 3rd Defendant's reasons which were subsequently provided to Mr. Austin and the 1st Defendant were sufficiently meritorious to justify him not being recommended, as they adequately explained that his non-promotion was because of his poor performance in the written assessment and interview.

Were all the relevant factors considered in coming to a decision?

The Claimant's Submissions

[76] Mr. Austin argued that the decision of the 3rd Defendant was irrational and/or unreasonable as she failed to take into consideration the relevant factors pursuant to Regulation 17 of the PSR and took into consideration irrelevant factors in relation to his promotion. Mr. Austin avers that the 3rd Defendant failed to consider the factors at Regulation 17(3)(d), (e), (f) and (k). He contended that the over reliance on the assessment scores and interview panel comments by the 3rd Defendant, without considering the aforementioned factors, made the decision of the 3rd Defendant irrational and/or unreasonable. Reliance was placed on the cases of **Joseph v The Public Service Commission**²⁷ and **Ramoutar v Commissioner of Prisoners and Anor.**

²⁷ (unreported), Supreme Court, Grenada, Claim No. GDAHCV 2019/0592, delivered 10 June 2021

2nd and 3rd Defendants' Submissions

- [77] It is King's Counsel Mr. Wood's submission that the 3rd Defendant considered Mr. Austin's seniority or length of service when she insisted that he be advanced to the interview stage despite failing the written assessment. Mr. Wood noted that while seniority or length of service is important, Regulation 17 of the PSR also permits the consideration of the merit and ability of the candidate and even more so where the job requires greater responsibility. He contended that all relevant factors were considered when the 3rd Defendant made her decision.
- [78] Mr. Wood further submitted that the Agreement at Guideline 20 sheds light on the composition of the selection board required by the 1st Defendant and set out a process for recruitment and selection on a competitive basis with criteria designed to establish, knowledge, skill and ability. Mr. Wood indicates these criteria were scrupulously followed.
- [79] In relying on **Ramoutar v Commissioner of Prisons & Anor**, King's Counsel Mr. Wood submitted that the Privy Council emphasized that in cases of Judicial Review regarding non-selection for promotion, the focus of the Court should be on ensuring that public bodies fulfil their duties according to the law rather than delving into the merits of candidates or micromanaging personnel decision. He also relied on the case of **Joseph v The Public Service Commission** in support of this point.

Law and Analysis

- [80] Regulation 17 indicates the principles of selection for promotion of public service officers, it states:

17. (1) From time to time as vacancies occur the Commission shall consider the eligibility of all officers for promotion, and in respect of every such officer shall take into account not only his seniority, experience and educational qualifications but also his merit and ability.

(2) For promotion to a post involving work of a routine nature more weight may be given to seniority than where the work involves greater responsibility and initiative. Merit and ability shall be given more weight progressively as the work involves a higher degree of responsibility and initiative.

(3) In the performance of its functions under paragraphs (1) and (2), the Commission shall take into account as respects each officer –

- a) his general fitness;*
- b) the position of his name on the seniority list;*
- c) his basic educational qualifications and any special qualifications;*
- d) any special course of training that he may have undergone (whether at the expense of the Government or otherwise);*
- e) markings and comments made in confidential reports by any Permanent Secretary or other senior officer under whom the officer worked during his service;*
- f) any letters of commendation in respect of any special work done by the officer;*
- g) the duties of which he has had knowledge;*
- h) the duties of the post for which he is a candidate;*
- i) any specific recommendation of the Permanent Secretary or Head of Department for filling the particular post;*
- j) any previous employment of his in the public service or otherwise;*

[81] As indicated by King's Counsel Mr. Wood, the process of judicial review requires an examination of the process utilised in arriving at the decision. In reviewing the documents presented by the 3rd Defendant contained in her affidavit²⁸ we took note of the following:

- (i) The Final Score Sheet for the Interview – this includes an average grade for the candidates and their individual grade in the written assessment and interview as scored by the panellist.

²⁸ Dated November 11, 2021

- (ii) The Interview Rating Sheet for Each Panellist in Relation to Mr. Austin
- (iii) Educational Qualification of Mr. Austin

[82] The Court observed that the interview rating sheet scored Mr. Austin in relation to his:

- (i) qualification and experience,
- (ii) skills/competencies,
- (iii) initiative/flexibility/adaptability and
- (iv) deportment/sociability.

[83] From an assessment of the documents which were relied upon, the Court is satisfied that the 3rd Defendant considered the following factors at Regulation 17(3):

- a) *his general fitness;*
- b) *the position of his name on the seniority list;*
- c) *his basic educational qualifications and any special qualifications;*
- d) ...
- e) ...
- f) ...
- g) *the duties of which he has had knowledge;*
- h) *the duties of the post for which he is a candidate;*
- i) ...
- j) ...

- [84]** Factors (i) and (j) are not relevant here, but factors a, b, c, g and h tend more toward the merit and ability of Mr. Austin. The question arose, however, whether it was the case that factors (d), (e) and (f) were not considered?
- [85]** In relation to factor (d), that is the special training of Mr. Austin, the 3rd Defendant noted that any such training was not disclosed to the AGC and as such they had no knowledge of same. The 3rd Defendant indicated that it is a requirement of AGC that their employees update their personnel file with further education/training. Therefore, the special training of Mr. Austin could not be considered if they had no knowledge of it. Mr. Austin has not denied that he has failed to provide the AGC with this information. The Court notes that no evidence was provided during these proceedings to substantiate a finding that the AGC was aware of any further training that Mr. Austin had undergone. It is accepted that in these circumstances, the 3rd Defendant had no knowledge of the Claimant's special training.
- [86]** In relation to factor (e), Mr. Austin disclosed various performance evaluations. The 3rd Defendant noted that these were considered, despite questions as to the provenance of some. Her explanation outlined that the consideration of these evaluations applied only to the shortlisting of the candidates. There is no evidence however that it was considered in the decision to recommend Mr. Austin for promotion. It is the 3rd Defendant's argument that even if the evaluations had been considered, they would have been given less weight than the factors which went towards ability and merit – categories in which Mr. Austin was inferior to the other candidates. In the circumstances, the Court finds that the failure of the 3rd Defendant to take this single factor into account is not enough to conclude that the decision was irrational or unreasonable.
- [87]** In relation to factor (f), there was no evidence that there was any special letter of commendation in respect of any special work done by Mr. Austin, neither did he exhibit any in these proceedings.

[88] Given the factors considered by the 3rd Defendant, we are unable to conclude that her recommendation was based on irrationality or unreasonableness.

Issue 4: Whether the 1st Defendant's decision not to promote Mr. Austin was tainted with illegality, irrationality or procedural impropriety?

Is the 1st Defendant properly constituted as a monitoring and appellate body?

The Claimant's Submissions

[89] In challenging the decision of the 1st Defendant as tainted with illegality, irrationality and procedural impropriety, Mr. Austin also sought to challenge its designation as a monitoring and appellate body under the Agreement. He submitted that these roles were not previously delineated under the PSR, and the Agreement does not have the legal authority to establish the 1st Defendant as a monitoring and appellate body.

Law and Analysis

[90] In analysing this submission, it was noted that Regulation 15 of the PSR states as follows:

15. In order to perform its functions under regulation 14, the Commission shall supervise the selection of persons for admission to the public service, for the grant of study leave and for the award of scholarships for special training for the public service.

[91] This provision appears to recognise a monitoring/supervisory role of the 1st Defendant in the appointment of public service officers pursuant to Regulation 14 of the PSR. It also appears that the appellate function of the 1st Defendant is implicit in the supervisory function delineated under Regulation 15 of the PSR as another rung in the supervision and monitoring of actions taken to ensure conformity with the standards set. It is important to note however, that these functions are limited to the appointment function as outlined in Regulation 14 of the PSR.

[92] While the Agreement limits the appellate function to the appointment process, the monitoring functions were extended to all functions delegated to the Permanent Secretaries. This means that the 1st Defendant, pursuant to the Agreement, would exercise monitoring functions for the removal and disciplinary control of public service officers. When the PSR is read in its entirety, and put into context, it implies that the 1st Defendant possesses these monitoring functions in relation to removal and disciplinary control as well. Accordingly, the Court is satisfied that the functions complained of were established by the PSR and existed prior to the execution of the Agreement, which is merely a restatement of what exists under the PSR.

Does Mr. Austin have a right to review documentation and to make representations before the 1st Defendant made a decision?

The Claimant's Submission

[93] Mr. Austin also argued that he was not afforded an opportunity to review the documentation relied upon by the 1st Defendant to make their decision nor was he given an opportunity to make representations to them prior to their decision. He argued that this was a breach of the rules of natural justice. Mr. Austin's submissions on this point mirrored those made in relation to the 3rd Defendant.

The 1st Defendant's Submissions

[94] Mr. McBean KC submitted that the 1st Defendant acted in accordance with the rules of natural justice and procedural fairness and as such they were not breached. He argued that Mr. Austin made representations before the 1st Defendant in relation to his appeal. These representations, Mr. McBean KC argued, were written in the extensive "grounds for appeal" provided to the 1st Defendant by Mr. Austin.

The 2nd and 3rd Defendant's Submissions

[95] Mr. Wood KC submitted that the right to an appeal is conferred by the Agreement and limited to reassessing the appellant's performance in the selection process.

Mr. Wood KC contended that the appeal before the 1st Defendant was not a court proceeding. Therefore, it was properly considered without an oral hearing which, in any event, would not be of any utility in reviewing Mr. Austin's performance in the selection process. Reliance was placed on the case of **Symbiote Investments Limited v Minister of Technology**²⁹ where the Court of Appeal decided that the Minister did not act unlawfully by revoking a licence without affording the licensee an oral hearing.

Law and Analysis

- [96] The Court is of the view that the appeal was a hearing in accordance with the definition of *S.P. Saithe* as previously mentioned herein. Accordingly, representation could properly be made before the 1st Defendant regarding the appeal. The Court must therefore consider whether there was a failure by the 1st Defendant to allow Mr. Austin to make representations and review the documentation relied upon prior to their decision.
- [97] Mr. Austin relied on several authorities in support of his contention on this point. However, those authorities are in relation to disciplinary actions being taken against a Claimant. A non-selection or non-recommendation of an employee for a higher post or a promotion and the subsequent dismissal of an appeal thereof is not considered as a disciplinary action against an individual. Further, the adverse decision in those cases and a subsequent reversal of those decisions affect only the Claimants therein. However, in this case, the adverse decision and a possible reversal does not only affect Mr. Austin. This means therefore that the Court must take a balanced approach when considering the effect of the rules of procedural fairness and natural justice.

²⁹ [2019] JMCA App 8

- [98] Considering the above, the Court is of the view that Mr. Austin was afforded the opportunity to make representation to the 1st Defendant in relation to the appeal of the selection process. The Court had sight of the “grounds of appeal” that Mr. Austin used to initiate his appeal before the 1st Defendant. The Court finds that these grounds were extensive and sufficiently advanced by him in challenging the selection process (see: **Symbiote Investments Limited v Minister of Technology**³⁰). In fact, it was very similar to the substance of his submissions in this matter. Therefore, there was no failure on the part of the 1st Defendant to allow Mr. Austin to make representations as there were written grounds provided by him for their consideration.
- [99] Mr. Austin was not recommended for promotion because he scored lower than the other candidates in the selection process. For him to have a full appreciation of his score in relation to the other candidates, disclosure of his performance alone would not be sufficient. The 1st Defendant would be required, based on his submissions, to disclose the information for the other candidates as well.
- [100] It is our considered view that there was no duty on the part of the 1st Defendant and by extension the 3rd Defendant to disclose documents pertaining to other candidates in the selection process. The Court is satisfied that the non-disclosure of these documents during the appeal stage did not put Mr. Austin at a disadvantage in bringing his appeal to the 1st Defendant. This is because the appeal before the 1st Defendant turned on the integrity of the selection process.
- [101] In summary, the failure to disclose the test scores of the other applicants did not breach the rules of natural justice and procedural fairness nor was it unreasonable or irrational in the circumstances.

Did the 1st Defendant fail to give sufficient reasons for dismissing the appeal?

³⁰ Ibid 26 at paras 70 – 77

The Claimant's Submissions

[102] Mr. Austin submitted that the 1st Defendant failed to give reasons, for their decision to dismiss his appeal. He argued that there is an obligation on the part of the 1st Defendant to provide reasons. He relied on the cases of **Aston Reddie v Firearm Licensing Authority et al**; **Ausbert Regis, Commissioner of Police v Attorney General of Saint Lucia** and **Denis O'keefe v. An Bond Pleanaela and Francis O'Brien and the Attorney General**³¹ in support of his submissions.

The 1st Defendant's Submissions

[103] Mr. McBean KC asserted that there is no statutory requirement for the 1st Defendant to provide reasons generally. Reliance was placed on the case of **Linton C. Allen v His Excellency the Right Hon. Sir Patrick Allen and the Public Service Commission**³² in support of this argument. King's Counsel argued that the 1st Defendant was not required to provide reasons in these circumstances due to the limited scope of the appeal and factors considered. To conclude arguments on this point, he submitted that there is no evidence which suggests that the 1st Defendant acted ultra vires or unlawfully in considering and dismissing Mr. Austin's appeal.

The 2nd and 3rd Defendant's Submissions

[104] King's Counsel, Mr. Wood, added that the appeal process' limited scope does not necessitate detailed reasons or an oral hearing. Instead, rejection on grounds of lacking merit is deemed adequate, especially since Mr. Austin's performance ranked lowest among all candidates.

Law and Analysis

³¹ [1993] 1 IR 39

³² [2017] JMSC Civ 24

[105] At paragraph 63 of **Aston Reddie v Firearm Licensing Authority et al**, McDonald-Bishop J (as she then was) opined that a rule of procedural fairness is that actions must be accompanied by reasons. In the case of **Ausbert Regis, Commissioner of Police v Attorney General of Saint Lucia**, the Claimant was transferred without a hearing by the Police Service Commission. It was opined at paragraph 59:

*“Whilst the Court is aware that there is no requirement for the PSC to state its reasons it would have been helpful no doubt if there could have been avoided some of the issues that arose on cross-examination as Ms. Calderon attempted from memory to fill the gaps in the minutes. The Court notes the principles laid down in **Denis O’Keefe v. An Bond Pleanaela and Francis O’Brien and The Attorney General** which held that the decision of the Board was procedurally bad and therefore void by reason of (i) the failure of the Board to state adequate reasons for its decision, and (ii) the failure of the Board to keep minutes of the deliberations leading to its decision.”*

[106] The decision in the case of **Denis O’keefe v. An Bond Pleanaela & Others** was reviewed for the purpose of this judgment. It was gleaned from this decision that there was a statutory duty for the Respondent to provide reasons for their decisions.

[107] In the case of **Linton Allen v Sir Patrick Allen and The Police Service Commission**, Straw J considered the issue of an administrative body failing to provide reasons. Straw J opined (obiter) at paragraphs 151 to 152 of her judgment as follows:

*[151] It is my belief that we are approaching a time, when the circumstances will demand that fairness has been breached by the lack of reasons. I note that Barbados has sought to reform this area of law and that the duty to state reasons now finds statutory expression in the **Administrative Justice Act, 1980**. This Act mandates a conditional duty to state reasons imposed on any person or body making a decision. The duty only arises however when a statement of reasons is requested within fourteen (14) days of the decision. However, I note that there are some exceptions to this duty which includes both the Police Service and Public Service Commissions. There is therefore, a healthy tension to be observed between judicial vigilance and judicial restraint and while the courts will do what is required to ensure fairness, it must also grapple with the question of ‘where precisely to draw the line, in deciding when a public body goes*

so 'badly wrong' as to warrant interference by the Courts.' (Michael Fordham QC, **Judicial Review Handbook**, page 156 paragraphs 14.1 and 14.2).

[152] I would however remind our Legislature that Parnell J (as he then was) made a certain recommendation from as far back as 1970 in **R v Licensing Authority ex parte Panton Ltd.** [1970] 15 WIR 380, 386 and his words bear repeating:

The episode of the case has impelled us to make a certain recommendation. With the proliferation of statutory bodies and other tribunals which are given power to hear and determine causes affecting the rights of citizens and others within our shores, Parliament should require that these tribunals or those to be specified should give reasons for any order or judgement made by them and in particular, every party who is affected should be given the right to demand the drawing up of the order and a copy of the same. The report of the Franks Committee touching Administrative Tribunals and Enquiries [Cmnd. 218, July 1957] recommended as follows in paragraph 98 of the report:

"Almost all witnesses have advocated the giving of reasoned decisions by tribunals. We are convinced that if tribunal proceedings are to be fair to the citizens, reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out. Further, a reasoned decision is essential in order that where there is right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal."

[108] This decision was appealed, and the Jamaican Court of Appeal discussed the failure to give reasons at length. McDonald-Bishop JA³³ (as she then was) in delivering the judgment noted at portions of paragraphs 93 to 100, the following:

[93] Professor Eddy Ventose in his very informative text, Commonwealth Caribbean Administrative Law, has provided a most invaluable insight into the development in the law in the Commonwealth Caribbean courts, surrounding this question of the giving of reasons in administrative law cases. At the opening of chapter 14, at page 339, he usefully observed:

"The debate as to whether the common law should provide a general right to reasons is also raging in the Commonwealth Caribbean. The UK courts have remained adamant that there is no such general right at common law for administrators to provide reasons for their decisions. The Commonwealth Caribbean courts have followed suit and have similarly

³³ See: **Linton Allen v His Right Excellency the Hon. Patrick Allen** [2020] JMCA Civ 63

held that no such right exists at common law. The courts have, nonetheless, approached the issue on a case-by-case basis and have avoided articulating principles that would lead to a general duty to state reasons.”

[94] As pointed out by Professor Ventose, Barbados and Trinidad and Tobago are two countries in the Commonwealth Caribbean in which Parliament has intervened into this area, therefore, modifying the common law. It must be highlighted, however, that despite the change in the common law position in Barbados, there are some proceedings that are still exempted from the statutory duty to give reasons. This proves, therefore, that it is an area that is not free from difficulty and the mere fact that there may be a trend towards that requirement, would not have been enough to bind the learned judge.

[95] In the absence of legislation, Sergeant Allen has brought no authority that would have been binding on the learned judge to hold that there was a legal obligation or duty on the Commission, Governor-General or Privy Council to give reasons for their decision.

[96] I endorse the view that there is no common law or statutory requirement for reasons for the decision to reduce Sergeant Allen’s rank from Inspector to Sergeant to be furnished to him. I would only slightly depart from the learned judge’s view that “we are approaching the time” when circumstances will demand that fairness has been breached by lack of reasons. I would say instead that the time has already come for the court to determine whether fairness is manifestly eroded by the absence of reasons so that an impugned decision ought not to be allowed to stand. Therefore, the mere fact that there is no legal requirement for reasons to be provided should not preclude the court from determining whether the decision should stand in the absence of reasons.

[97] Therefore, I would go further to say, as several authorities seem to have established, that the absence of a settled rule should not be a bar to the court quashing a decision in the absence of reasons being provided for it. In my view, the court should exercise its supervisory powers, if without reasons, a decision, in the light of all the facts and circumstances disclosed to the court, is found to be irrational, aberrant or perverse...

...

[100] The learned judge obviously appreciated that despite the absence of statutory or common-law requirements for reasons to be given for the Governor-General’s decision, she could not end her consideration of the issue on that point. Therefore, she did not base her decision merely on the fact that there is no requirement in law for reasons to be furnished for the decision and rightly so. It is seen that, as part of her analysis, she examined whether it could be said that the decision was illegal and concluded it was not because the Commission and the Governor-General did not act outside

the Constitution or the Regulations. This court has no basis in law to disturb that finding.

[109] Having carefully considered the authorities, the Court is of the view that there was no general duty on the 1st Defendant to provide any reasons to Mr. Austin for their decision to refuse the appeal even in circumstances where he had made such a request. It is recognized however, that it is necessary to ascertain whether the failure to give reasons made the decision to dismiss his appeal “irrational, aberrant or perverse.”

[110] The locus classicus in relation to irrationality and unreasonableness of an administrative decision is the case of **Associated Provincial Picture Houses Ltd. v Wednesbury Corp**³⁴. Lord Greene M.R. indicated the test of unreasonableness/irrationality and the meaning for unreasonable at page 229 where he stated as follows:

“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. Warrington L.J. in Short v. Poole Corporation (1) gave the example of the red-haired 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.”

³⁴ [1948] KB 223

[111] The case of **Council of Civil Service Unions and Others v Minister for the Civil Service**³⁵ added further context to **Associated Provincial Picture Houses Ltd. v Wednesbury Corp**, wherein it was stated at page 410:

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 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 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, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

[112] Paragraphs [98] to [99] of **Linton Allen v Sir Patrick Allen and the Police Service Commission**³⁶ are also relevant on this issue and state as follows:

*[98] Professor Ventose at page 339 of his text referenced the decision from this court in **Brian Alexander v Land Surveyors Board of Jamaica** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 13/2008, judgment delivered 2 July 2009. In that case, the appellant, a land surveyor, challenged the decision of the Disciplinary Committee of the Land Surveyors Board of Jamaica ("the Committee") to suspend him. The issue arose as to whether the Committee had failed to give adequate reasons for its decision. The court considered that there was no statutory requirement for the Committee or the Land Surveyors Board of Jamaica ("the Board") to give reasons for its decision. **The court noted that, at common law, there seemed to be no general duty to give reasons for administrative or quasi-judicial decisions and that the mere fact that a decision-making process was held to be subject to the requirements of fairness did not automatically or naturally lead to the further conclusion that reasons must be given. The court stated, however, that fairness may require that a person aggrieved by a decision, and who had a right of appeal from that decision, be provided with reasons for it. In such a case, it opined, a failure to give reasons might provide a basis for challenging an administrative decision. The court,***

³⁵ [1985] 1 AC 374

³⁶ [2020] JMCA Civ 63

however, did not consider the point in that case because the Committee and the Board provided reasons.

[99] In R v Civil Service Appeal Board, ex parte Cunningham [1991] 4 All ER 310 at page 316, Lord Donaldson of Lynton MR stated that:

"The principles of public law will require that those affected by decisions are given the reasons for those decisions in some cases, but not in others. A classic example of the latter category is a decision not to appoint or not to promote an employee or office holder or to fail an examinee. But, once the public law court has concluded that there is an arguable case that the decision is unlawful, the position is transformed. The applicant may still not be entitled to reasons, but the court is."

(Emphasis added)

[113] Applying the principles enunciated in these decided cases to the instant claim, the Court is of the view that there is no basis for finding that the failure to provide sufficient reasons, if any, was irrational, unreasonable or unfair as he had no right of appeal of the decision of the 1st Defendant to the local Privy Council for which the reasons would be necessary to advance his case.

Was there a failure to advise Mr. Austin of a right to appeal?

The Claimant's Submissions

[114] Mr. Austin argued that pursuant to section 125(3) of the Constitution the 1st Defendant should have informed him of his right to appeal to the local Privy Council where an adverse decision is made against him in respect of a removal or an exercise of disciplinary control against him. Mr. Austin contended that he was not considered for incremental increases in his salary because he was never promoted. He argued that he was being punished as the failure to access those increases was tantamount to a penalty as per Regulation 37(1)(d) of the PSR which states that withholding increments is a very serious penalty and is only done when a very serious offence has been committed by a public officer.

The Defendants' Submissions

[115] Counsel for the Defendants were united in their position on this issue. Simply put, their argument is that there was no disciplinary action against Mr. Austin nor was the non-selection an attempt to discipline him. It was submitted that there were no more increments due to Mr. Austin as he was at the end of his scale. Moreover, the actions of the 1st and 3rd Defendants were not an exercise of any power to remove Mr. Austin or discipline him, and therefore, there was no right of appeal to the local Privy Council and laterally, no duty to inform him of this right.

Law and Analysis

[116] Regulation 37(1) to which reference has been made by the Claimant provides as follows:

37. – (1) The penalties which may be imposed on an officer against whom a disciplinary charge has been established are –

- (a) dismissal;
- (b) reduction in rank;
- (c) suspension without pay for a period not exceeding three months;
- (d) **deferment or withholding of increment;**
- (e) a fine;
- (f) reprimand. (emphasis added)

[117] Section 125(3) of the Constitution which is also relevant to this area of discussion states:

“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”

[118] The PSR indicates that the payment of the increment must be withheld or deferred for it to be deemed a penalty. There is no evidence that there has been any disciplinary hearing against Mr. Austin. In fact, the evidence disclosed that because Mr. Austin has been on the LO2 scale for an extended period, he is now

at the end of the scale and as such there are no further increments which can be paid to him. This was an unfortunate and unintended consequence of the length of the previous proceedings and could not properly be attributed to a deliberate action of the Defendants in furtherance of any disciplinary control.

[119] Consequently, the Court is of the view that the circumstances of Mr. Austin's case is not one which meets the requirement for there to be a right of appeal to the Privy Council. Similarly, there was no duty imposed upon the 1st Defendant to inform him of a right to an appeal of their decision as none existed in the circumstances.

Non-Promotion from 2012 – Present

The Claimant's Submissions

[120] Mr. Austin also asserted that it was irrational and unreasonable for the 1st Defendant not to recommend him for promotion over the years even though there is a requirement for him to be continuously considered for promotion. He argued that the argument of the 1st Defendant that he must apply for a higher post to be considered was irrelevant and that they had also failed to comply with Regulation 17 by considering the relevant factors over this period. Mr. Austin also asserted that the 1st Defendant's consideration of the pending litigation surrounding his status as an employee was irrelevantly considered as a bar to his promotion.

The 1st Defendant's Submissions

[121] Mr. McBean KC submitted that during the period 2012 – 2015, the 1st Defendant was unable to consider Mr. Austin for any promotions due to the pending litigation in respect of his status as an employee. It was noted that during that matter, the AGC was ordered to reverse Mr. Austin's termination, and he was to continue in his original post until the determination of the matter. There was no final determination on the status of his employment until the judgment of the Full Court

in 2019³⁷, at which time, the 1st Defendant was no longer responsible for appointments.

[122] Mr. McBean KC asserted that promotion within the civil service typically requires applicants to apply for specific posts. It was indicated that while continuous consideration for promotion is emphasized in legislation, it is not mandated that this is to be done without an application by the officer. King's Counsel submitted that from the evidence provided, Mr. Austin was duly considered for promotion. However, he had failed to meet the performance threshold, particularly when compared to the other suitably qualified candidates.

Law and Analysis

[123] It is accepted that the status quo in respect of Mr. Austin would have remained until the resolution of the pending litigation. In those circumstances, Mr. Austin could not have been promoted to any other position. It is accepted that this was a relevant factor for consideration by the Defendants during the period 2012-2015.

[124] In the years following 2015, it was the Permanent Secretary of the Ministry of Justice who was tasked with the authority to consider the promotion of public service officers at the AGC.

[125] Mr. Austin conceded that he did not apply for any higher posts until 2019. He asserted that he was not shortlisted for the post in 2019, and thus there was no true consideration of his application. The Court disagrees with this position. The evidence disclosed that Mr. Austin's application was considered. However, he was not deemed suitable for the post, hence, he was not shortlisted. As such, the requirement for consideration of his application has then been satisfied. The Court does not accept that consideration starts or should start after a person is

³⁷ See: **Dale Austin v The Public Service Commission and Another** [2018] JMFC Full 6

shortlisted. Each applicant would be duly considered but only the best of the applicants is shortlisted to move on to the next stage of the process.

[126] Having considered the evidence as to the factors which would be considered for promotion, the Court accepts that it is the practice within the AGC for persons to be promoted competitively. The Court also acknowledges that while public service officers must be considered for promotion, there is no requirement in the PSR which makes such considerations continuous or automatic. Further, there is also no requirement in law which prevents such promotion or consideration from being done competitively or upon application.

[127] It is considered that a system must exist whereby an officer, upon making an application to a higher post, is vetted in a competitive process prior to promotion to ensure fairness. It may however be difficult for the relevant body(ies) or authority(ies) to keep track of every public service officer who is eligible for promotion. Especially in circumstances where the PSR considers that public service officers can be promoted in higher posts across different departments/divisions/agencies/ministries other than their own. In these circumstances, the fact that Mr. Austin has not been promoted after so many years, does not equate to irrationality or unreasonableness on the part of the 1st and 3rd Defendants and there is no basis for this Court to find that he was entitled to be automatically or consistently considered for a promotion.

Is there a legitimate expectation for Mr. Austin to be promoted?

[128] Ancillary to the argument that Mr. Austin should have been continuously considered for promotion is that he had a legitimate expectation to be promoted. Mr. Austin did not make any exhaustive submission on this point.

The Defendants' Submissions

[129] The Defendants denied that such a right existed and argued that there was no evidence that the Defendants made any representations or promise to Mr. Austin

as to his promotion. Reliance was placed on the cases of **Digicel (Jamaica) Limited v The Officer of Utilities Regulation**³⁸; **R v Secretary of State for Education ex parte Begbie CA**³⁹ and **Salada Foods Jamaica Limited v Jamaica Agricultural Commodities Regulatory Authority**⁴⁰.

[130] The promotion process for the Assistant Attorney General position was governed by established regulations and guidelines, which prioritize merit and ability over seniority. Mr. Austin was assessed alongside other candidates and ranked the lowest. Therefore, the Defendants contended that the allegations of a legitimate expectation hold no merit.

Law and Analysis

[131] It is settled law that a legitimate expectation arises where there is an express promise or representation that a public body will do or not do something, and such statement is reasonably relied upon by an individual or body (see: **Salada Foods Jamaica Limited v Jamaica Agricultural Commodities Regulatory Authority**⁴¹ and **Council of Civil Service Union and Ors v Minister of the Civil Service**).

[132] From the evidence presented there is no support for the claim that Mr. Austin has a legitimate expectation to be promoted as eligibility to be considered for a promotion is insufficient in and of itself to support such an expectation.

Issue 5: Whether Mr. Austin is making an attempt to relitigate bias

The 2nd and 3rd Defendant's Submissions

[133] Mr. Wood KC submitted that Pettigrew-Collins J had previously determined that Mr. Austin lacked a realistic chance of success in pursuing bias against the 3rd

³⁸ [2012] JMSC Civ 91

³⁹ [2000] 1 WLR 115

⁴⁰ [2020] JMSC Civ 198

⁴¹ Ibid 35 at paras [71] – [73]

Defendant when granting leave for Judicial Review. This was reiterated in her judgment on costs⁴², where she decided that Mr. Austin would only recover 80% of his costs. Mr. Wood contends that this precludes Mr. Austin from raising bias as a ground at this stage, suggesting any attempt to do so is an abuse of process. Additionally, Mr. Wood submitted that Mr. Austin failed to present new evidence supporting his bias allegations thereby making his arguments on this ground meritless.

Law and Analysis

[134] While the role of the Judge who grants leave is also to determine the merits of the arguments advanced for the Application for Judicial Review, any pronouncements made by her is not a final determination of the issue. Once the Applicant is granted leave to apply for Judicial Review, the Court believes that it is reasonable that he may proceed with an argument that, at the leave stage, failed to make out an arguable case.

[135] When one considers the stage at which the application for leave is being considered, it is acknowledged that all the material may not be before the Court. Further, there may be the disclosure of documents or information which may bolster or substantiate a ground which failed during the leave stage. Therefore, Mr. Austin is not precluded from advancing arguments on bias.

[136] However, the Court finds that similar to his predicament at the leave stage, Mr. Austin has failed to provide any evidence to substantiate claims of actual bias on the part of the 1st and 3rd Defendants. The state of the evidence is exactly as it was at the leave stage. Accordingly, the Court endorses and adopts the position of

⁴² See: **Dale Austin v The Public Service Commission and Others** [2022] JMSC Civ 73 at para [33]

Pettigrew-Collins J on this issue (see: **Dale Austin v Public Service Commission, the Attorney General and Marlene Aldred**⁴³)

Issue 6: Whether there was a breach of Mr. Austin's right to equality before the law pursuant to section 13(3)(g) of the Charter of Fundamental Rights and Freedom?

Inequality of Treatment

The Claimant's Submissions

[137] Mr. Austin submitted that the actions of the 1st and 3rd Defendants contravened his constitutional right pursuant to section 13(3)(g) of the Charter of Fundamental Rights and Freedoms. Mr. Austin argues that this entitles him to redress through constitutional damages.

[138] Mr. Austin contended that under section 125 of the Constitution, it is required that he is treated equally before the law when being considered for a promotion. However, he claims that the inverse happened. Mr. Austin submitted that he has been treated unfairly for the past ten (10) years and particularly so when he was being considered for the promotion. Furthermore, this unfair treatment breaches the rules of natural justice and is irrational, illegal and procedurally invalid. The characteristics of the treatment indicate that his right to equality before the law was breached. Reliance was placed on the case of **Jamaicans for Justice (Appellant) v Police Service Commission and Another**⁴⁴. Mr. Austin argued that the State, by way of the actions and inactions of the Defendants, has unjustifiably contravened the rights afforded to him at section 13(3)(g) of the Charter of Fundamental Rights and Freedoms.

[139] Mr. Austin further contended that the contravention of his rights was aggravated by various factors including being constantly overlooked for promotions and being

⁴³ [2022] Civ 55 at paragraphs [76] to [100]

⁴⁴ [2019] UKPC 12

the “*butt of the joke*.” Mr. Austin argued that there has been no show of remorse or apology made for the unlawful actions of the 1st and 3rd Defendants. He then asked the Court to grant the remedies sought.

The Defendants’ Submissions

[140] It was submitted that for Mr. Austin to establish the existence of unequal treatment under section 13(3)(g) of the Charter of Fundamental Rights and Freedoms, he must demonstrate that he has been treated differently from similarly circumstanced individuals. Reliance was placed on the authority of **Bhagwandeem v The Attorney General of Trinidad and Tobago**⁴⁵. It was asserted that Mr. Austin was treated equally to all other candidates during the application process. Additionally, despite a low grade in the written assessment, he was allowed to proceed to the interview stage. It was argued that there's no basis for the claim of unequal treatment.

[141] King’s Counsel for the Defendants further argued that there is no evidence that any inequity or inequality exists. They contended that for those inequities or inequalities which existed, Mr. Austin received compensation in previous litigation.

Law and Analysis

[142] The case of **Bhagwandeem v The Attorney General of Trinidad and Tobago** sets out the position of the law in relation to claims under this heading. In that case, the Judicial Committee of the Privy Council was concerned with the interpretation of similar rights in the Trinidad and Tobago Constitution. It was observed in that case at paragraph 18, page 408 by Lord Carswell that:

“A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or could be treated differently from some other similarly circumstanced person or persons as actual or hypothetical comparators, that comparison being such that the

⁴⁵ [2004] UKPC 21

relevant circumstances in one case are the same, or not or materially different in the other.”

[143] **Bhagwandeem v The Attorney General of Trinidad and Tobago** was applied in **Sean W. Harvey v Board of Management of Moneague College et al**⁴⁶ where the Full Court considered whether there was equality in treatment of a candidate for a job. They found that there was no evidence of inequality.

[144] Mr. Austin indicates that the following is evidence that he was not treated equally before the law:

- a) *Failing to carry out their duties and public functions in respect of the Claimant Mr. Dale Austin as prescribed by law, and specifically as set out in Public Service Regulation 17;*
- b) *Refusing and/or declining to continuously discharge their public law duties and functions under the Public Service Regulations and the Constitution in respect of the Claimant Mr. Dale Austin's promotion;*
- c) *Failing over the course of ten (10) years to discharge their positive obligations and public functions to ensure that the Claimant Mr. Dale Austin is continuously and fairly considered in respect of opportunities for promotion pursuant to Public Service Regulation 17, thereby depriving him of his constitutional right to equality of protection in law;*
- d) *Utilising an illegal regulatory scheme of arrangement that had no statutory status to confer authority on various functionaries purporting to make decisions to decline to consider or deny Mr. Austin any opportunities for promotions for years;*
- e) *Refusing and/or declining to carry out their constitutional functions in accordance with the Constitution and the Public Service Regulations of considering the Claimant Mr. Dale Austin for promotions even though at all material times, he remained in the employ of the GoJ's civil service;*
- f) *Acting irrationally in the Wednesbury sense in deciding to subject the Claimant Mr. Dale Austin to regular appraisals and performance reports which contained the markings and comments of superior officers under whom he would have worked over the course of his tenure in the service, yet failing to take the said markings and*

⁴⁶ [2018] JMFC Full 3

comments and the contents of the said performance reports into account when considering the question of the Claimant's promotion;

- g) Subjecting the Claimant Mr. Dale Austin to hearings which effectively and automatically resulted in the imposition of the penalty of the withholding or deferral of his future annual salary increments until he was promoted without giving him an opportunity to be heard;*
- h) Unlawfully denying or declining to permit Mr. Austin recourse to the appeal process enshrined in the Constitution at section 127(4);*
- i) Failing to give any reasons for their decisions on May 20, 2021, or June 21, 2021, even when asked to do so, which further deprived the Claimant Mr. Dale Austin of an opportunity, if possible, to secure a modification or reversal of the decision not to promote him after ten (10) years of service;*
- j) Giving due consideration to other legal officers in a timely way as vacancies arose within the department over the course of the Claimant's tenure, yet failing to accord the same consideration to the Claimant Mr. Dale Austin over the course of ten (10) years, and only considering the question of the Mr. Austin's promotion once, and only after he repeatedly sought clarity about the fair process of consideration for his promotion;*
- k) Denying the Claimant Mr. Dale Austin's entitlement to a legitimate expectation that he has a fundamental right to be treated fairly and his legitimate expectation that he is entitled to be continuously and fairly considered in respect of opportunities for promotion pursuant to Public Service Regulation 17(1);*
- l) Failing to give the Claimant Mr. Dale Austin an opportunity to apprise himself of the documentation in their possession and to thereafter make representations to defendants before making their decisions, including at the hearings before the Public Service Commission on May 20, 2021, or July 21, 2021.*
- m) Unlawfully confining the decision-making process of whether the Claimant should be promoted to a restricted group of functionaries for ten (10) years, instead of passing the relevant recommendations to the Governor General that Mr. Austin ought not to be considered for promotion during this time, and leaving His Excellency to make the decision, or subsequently leaving it to his Delegate to make the decision;*
- n) Unlawfully failing to consider the Claimant Mr. Austin for promotion between 2012 to 2015, even though at all material times Mr. Austin remained in the God's employ during this period and there was no rule of law prohibiting the PSC from considering him for promotion*

on any of the purported bases that the PSC were seeking to use to justify their refusal to consider his promotion including on the basis of unresolved litigation;

- o) Unlawfully failing to consider the Claimant Mr. Austin for promotion between 2015 to 2018 on the unlawful basis that the PSC's authority and constitutional functions pursuant to section 125 of the Constitution and Public Service Regulation 17 were now fettered and/or altered by virtue of a new scheme of regulations known as the Accountability Agreement;*
- p) Unlawfully failing to consider the Claimant Mr. Austin for promotion between 2018 to 2021 on the purported basis that the PSC's jurisdiction to do so had been altered in law and that they were now constituted as a monitoring and appeals body and the other functionaries who were now purportedly responsible for considering his promotion declined to do so, until Mr. Austin repeatedly wrote to them seeking clarity on the issue;*

[145] The Court notes that these instances of alleged unequal treatment were also used as grounds for the substantive Judicial Review Application.

[146] The authorities make it clear that to demonstrate inequality of treatment pursuant to section 13(3)(g) of the Charter of Fundamental Rights and Freedoms one must prove that they were treated different from others in similar circumstances or engaged in similar behaviour. To establish a valid comparison, the individuals must be truly comparable, meaning their circumstances are either identical or not materially different (see: **Rural Transit Association Limited v Jamaica Urban Transit Company Limited, The Commissioner of Police and The Attorney General**⁴⁷)

[147] The Court is not of the view that there is any evidence which suggests that there was inequality in the treatment of Mr. Austin in the selection process for the post of Assistant Attorney General. In fact, the evidence is that Mr. Austin has been treated favourably in the process as despite having a failing grade on the assessment he was advanced to the interview stage. All candidates were

⁴⁷ [2016] JMFC Full 04 at paragraph 101

subjected to an assessment and all candidates were judged using the same metrics in the interview. Further, no other unsuccessful candidate made representations after the interview and no other candidate received any documentation upon which a decision would be made to review. There is no evidence which indicates that any candidate including the one ultimately selected for the post was treated any differently from Mr. Austin.

[148] Similarly, there is no evidence to persuade this Court that Mr. Austin was treated unequally in the appeal process. He did not advance any evidence to suggest that anyone else would have been treated differently or better than he was on the appeal of a decision to the 1st Defendant. In the absence of this evidence, the Court is unable to conclude, on a balance of probabilities, that Mr. Austin was not treated equally in the appeal process.

[149] Mr. Austin further indicated that he was treated unequally at work, especially when one considers the length of time for which he has been a LO2 at AGC and has not been promoted. Although the status of Mr. Austin is unfortunate, the Court is satisfied that it was due in large part to the pending litigation and not to unequal treatment.

[150] It is apparent that the practice of the AGC is to have their employees apply for higher positions. Mr. Austin sought to argue that there was evidence that this was not so by naming several past or present employees of AGC who he alleged were not promoted competitively from LO2 to LO3. The 3rd Defendant was able to disclose evidence which rebutted this and showed that save and except for one such individual, all the others had been competitively promoted. The one individual who was appointed/promoted without an application had acted in the higher post for successive periods, a situation which is markedly different from that of Mr. Austin. Mr. Austin has also failed to show, on this issue, that he was treated unequally.

[151] Mr. Austin also alleged that certain actions which were required of the Defendants following the initial litigation were not forthcoming. In response to this position, the Defendants disclosed several items of correspondence which indicated that the necessary and prompt actions were taken including but not limited to:

- (i) appointing Mr. Austin in his post,
- (ii) arranging for the payments for his seniority allowance and increments and
- (iii) the provision for the payments of judgment debts outstanding to him.

[152] Having reviewed this evidence and the competing submissions on the point, the Court does not believe that a delay in doing one thing means that there is a refusal or failure to act. Mr. Austin has also failed on this limb.

[153] Mr. Austin made other assertions of unequal treatment. However, these were mere assertions with no evidence to ground same. In any event, on a holistic review of these complaints the Court finds that there was no unequal treatment proved by him.

Issue 7: Whether Mr. Austin is entitled to Damages/Constitutional Damages?

[154] The ventilation of this issue is predicated upon a finding that there was a breach to Mr. Austin's right at section 13(3)(g) of the Charter of Fundamental Rights and Freedom. Since no such determination was made, it logically follows that Mr. Austin is not entitled to any damages.

COSTS

[155] Typically, in cases such as these where administrative orders are sought, costs are not awarded unless there is a perception that Mr. Austin has behaved unreasonably in initiating or pursuing the claim. CPR 56.15(5) indicates:

"The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the

applicant has acted unreasonably in making the application or in the conduct of the application.”

[156] In the judgment of Pettigrew-Collins J, it was indicated that Mr. Austin’s case was not “wholly untenable.” Despite our adverse ruling, the Court is of the view that Mr. Austin did not act unreasonably. As such, we do not find that there is any reason to depart from the general rule. Accordingly, there will be no orders for costs.

CONCLUSION

[157] After a careful consideration of the evidence and the submissions advanced by all the parties it is our determination that Mr. Austin has failed to satisfy this Court that he is entitled to the orders sought in his fixed date claim form filed on May 12, 2022.

CARR, J

[158] I have read the judgment of Hutchinson Shelly J, and I concur with her findings.

ORDERS

1. The orders sought on the fixed date claim form filed on the 12th day of May 2022 are refused.
2. No order made as to costs.
3. Claimant’s Attorney-at-Law to prepare file and serve the orders herein.