[2022] JMSC Civ. 55

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2021 CV 00504

BETWEEN	**DALE AUSTIN**	**CLAIMANT**
AND	**THE PUBLIC SERVICE COMMISSION**	**FIRST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**SECOND RESPONDENT**
AND	**MARLENE ALDRED**	**THIRD RESPONDENT**

IN CHAMBERS VIA ZOOM

Mr Hugh Wildman and Miss Indira Patmore instructed by Hugh Wildman and Company for the Applicant.

Mr Garth Mc Bean QC and Miss Dian Johnson instructed by Garth McBean and Co. for the first respondent.

Mr Allan Wood QC and Miss Analeise Minott instructed by Livingston Alexander and Levy for the second and third respondents.

Application for leave to apply for judicial review - Constitutionality of delegation instrument – Accountability Agreement - Regulation 17(1) of the Public Service Regulations – Bias – Legitimate expectation – Right to a hearing – obligation to give reasons for decision.

Heard: February 23, April 4, and April 29, 2022

PETTIGREW COLLINS J

THE APPLICATION AND BACKGROUND

[1] The applicant filed a Notice of Application for Court Orders on October 4, 2021, seeking leave to apply for judicial review as well as constitutional motion. The orders and declarations that the applicant is seeking leave to apply for are many and the grounds are numerous. I do not propose to set them out.

[2] The first respondent is the body responsible for among other functions, making recommendations with respect to the appointment and removal of public officers. The second respondent is in the circumstances of this application, sued as a substantive party and not pursuant the Crown Proceedings Act. The third respondent is the Solicitor General of Jamaica.

[3] The applicant was employed in the capacity of Assistant Crown Counsel in the Attorney General's Chambers in 2011. He stated that he was effectively appointed to the position of Assistant Crown Counsel on September 1, 2012. He claims that he has not been promoted during the period of his employment. He also claims that of the persons assigned to the litigation department, he is assigned the largest number of cases. He said that he has undergone five performance evaluations which disclosed that he had met and exceeded the requirements between 2011 and 2019, yet he has not been promoted.

[4] He asserts that the Public Service Commission (also referred to as the Commission or the PSC) has failed to carry out its public duty to continuously consider him for promotion as higher posts became available. He contends that between 2011 and 2021 some 63 posts became available in the Attorney General's Department for which he ought to have been considered. He said that he has brought his plight to the attention of the Solicitor General, but received no response. He says that he is the only legal officer in the public service since 1962 who has never been promoted after 10 years in the LO-2 post. He says other more recently appointed legal officers have been promoted on a non-competitive basis.

[5] According to the applicant, the treatment meted out to him over the past ten years has been characterized by a pattern of victimization, punitive measures, threat,

reprisals and outright bias. He says that the Solicitor General (also referred to as the SG) and the Director of State Proceedings are the officers who are most affected by bias against him but they are the officers who have been consistently and directly involved in the process of determining whether he should be promoted. He claims that he has been the victim of defamation and of constitutional abuses by the Public Service Commission and the Attorney General and that the Supreme Court found both respondents liable in defamation and for constitutional abuses.

[6] He asserts as evidence of bias against him on the part of the Solicitor General and the Director of State Proceedings, their alleged refusal for more than a year to ensure that payment of judgment debts and costs are made to him and their refusal to communicate with his attorneys at law regarding the matter.

[7] He further asserts that being tainted by bias, the said two public officers were directly involved in the process of deciding whether he should be promoted. He complains further that the Solicitor General was one of four persons who interviewed him on January 14, 2021 for the post of Assistant Attorney General for which he had applied. He contends that the other three members of the interviewing panel are individuals who effectively report to the Solicitor General.

[8] He said he was advised in April 2021 through a letter from the Solicitor General that he would not be promoted to the position he had applied for because he had scored lower than the other candidates on a test that was administered on November 2, 2020 in which he had in fact participated.

[9] The applicant continues that he was advised of the right to place an appeal to the Public Service Commission. He said that his appeal was summarily dismissed when the Commission met on the 20th of May 2021. Among the grievances with the handling of his matter by the PSC, is that no reason was provided for the decision to dismiss his appeal.

[10] I shall consider the evidence of the respondents to the extent that I find it necessary to deal with the issues. I am grateful to counsel in this matter for their very helpful submissions. I will reproduce only those aspects of the submissions of each party as I find convenient in explaining the reasons for my decision.

PRELIMINARY OBJECTION

[11] The respondents to the application filed notices of preliminary objection in relation to the applicant's affidavits in response to those of the first and third respondents. The reason for the objection in each instance was that in large measure, each contained arguments and matters of law. There was no resistance from Mr Wildman regarding the offending paragraphs. Consequently, the greater portion of each of those two affidavits was struck out.

THE LAW

[12] Rule 56.2(1) of the Civil Procedure Rules (CPR) permits an application for judicial review by any person, group or body, with sufficient interest in the subject matter.

[13] Rule 56.3 directs that an applicant for judicial review should first seek leave to apply for judicial review. The burden of proof rests with the applicant to satisfy the court on a balance of probabilities that leave should be granted.

[14] At the leave stage, the court is concerned with whether the threshold is met. The court is not concerned with the merits of the claim and there is really no need to delve into the details of the case. A significant portion of the information is contained in letters and documents exhibited by the parties in connection with a series of events which took place leading up to this application.

[15] The applicant is the person adversely affected by the decisions he seeks to review. There is no assertion of lack of promptness or that the applicant has any alternative remedies so this application will proceed on the basis that he has filed the claim in a timely manner and that he has no alternative remedies.

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

[17] The primary role of the court at this stage, is to ensure that actions which are frivolous and vexatious are sifted out and eliminated, so that leave is not granted where an action is without any arguable ground, having a realistic prospect of success. The seminal case of **Sharma v Brown-Antoine and Others** (2006) 69 WIR 379, a decision of the Judicial Committee of the Privy Council, sets out the test for granting leave to apply for judicial review. Lords Bingham and Walker expounded at page 387 J of the judgment:

> ***"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy… Arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region)*** *[2005] EWCA Civ. 1605, [2006] QB 468****, at para 62 in a passage applicable mutatis mutandis to arguability:***
>
> ***…the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a Court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.***
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> ***It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen; Matalulu v The Director of Public Prosecutions*** *[2003] 4 LRC 712 at 733****.***

[18] In **Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al**, unreported case bearing claim number 2010 HCV 00474, Mangatal J. in explaining the concept of 'arguable ground with a realistic prospect of success', had the following to say:

> ***"It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be***

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

[19] In relation to the concept of lawfulness, I adopt the excerpt from Halsbury's Laws of England Volume 61 A, (2018) paragraph 11:

> ***"The courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. Such a body will not act lawfully if it acts ultra vires or outside the limits of its jurisdiction. The term 'jurisdiction' has been used by the courts in different senses. A body will lack jurisdiction in the narrow sense if it has no power to adjudicate upon the dispute, or to make the kind of decision or order, in question; it will lack jurisdiction in the wide sense if, having power to adjudicate upon the dispute, it abuses its power, acts in a matter which is procedurally irregular, or, in a Wednesbury sense, unreasonable, or commits any other error of law. In certain exceptional cases, the distinction between errors of law which go to jurisdiction in the narrow sense and other errors of law remain important.***
>
> ***A body which acts without jurisdiction in the narrow or wide sense may also be described as acting outside its powers or ultra vires. If a body arrives at a decision which is within its jurisdiction in the narrow sense, and does not commit any of the errors which go to jurisdiction in the wide sense, the court will not quash its decision on an application for judicial review, even if it considers the decision to be wrong."***

[20] In **Linton Allen v His Excellency the Right Honourable Sir Patrick Allen and the Public Service Commission**, [2017] JMSC Civ. 24, Straw J at paragraph 66 of the judgment said:

> ***"The process of judicial review is the basis on which courts exercise supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi judicial functions or making administrative decisions affecting the public. It is trite that judicial review is concerned only with the decision making process of a tribunal and not with the decision itself. Lord Hailsham of St. Marylebone L.C. expressed in Chief Constable of the North Wales Police v Evans*** *[1982] 1 WLR 1155 at page 1161a* ***that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which***

is correct in the eyes of the court. Lord Diplock in Council of Civil Service Unions v Minister for the Civil Services *[1985] AC 374 at page 410 F-H****, discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:***

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

ii. ***24 - By 'irrationality' I mean what can now be succinctly referred to as — Wednesbury unreasonableness (Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** *[1948] 1 KB 223****). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.***

iii. ***I have described the third head as — procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involves any denial of natural justice.***

[21] Based on the plethora of grounds advanced by the applicant, and the submissions made, I will address the issues which they appear to raise under the following headings.

1) Whether the application is premature;

2) Constitutionality of the delegation instrument and validity of the accountability agreement;

3) Irrationality and unreasonableness, having regard to the alleged failure to take into account Regulation 17 (1) provisions when considering the applicant

for promotion and the alleged failure to consider him for promotion over a ten years' period;

4) Inequality of treatment;

5) Legitimate expectation;

6) Bias;

7) Right to a hearing; Obligation to give reasons for decision.

WHETHER THE APPLICATION IS PREMATURE

[22] Mr Mc Bean has argued that this application is premature. He relies on the **decision of Dale Austin v the Solicitor General and the Permanent Secretary of the Ministry of Justice** 2018 JMSC Civ. 1. where Sykes J as he was then, determined that the filing of an application for leave to apply for judicial review of the recommendation of the then Solicitor General to the Permanent Secretary that the applicant be deployed to another office within the public service pending the resolution of his claim against The PSC and the AG, was premature. The circumstances of that case are distinguishable. In that case, it was merely a recommendation which had been made. No decision had been taken as has happened in this case. The decisions in this instance are that of the Solicitor General refusing to recommend the applicant for promotion and that of the Public Service Commission sitting as an appeals body deciding that the decision of the Solicitor General would stand; in other words, refusing to set aside or in any way impugn the decision of the Solicitor General. It is therefore incorrect to say that this application is premature.

CONSTITUTIONALITY OF DELEGATION INSTRUMENT AND VALIDITY OF THE ACCOUNTABILITY AGREEMENT

[23] One question is whether there is a viable argument with a realistic prospect of success that the responsibility was solely that of the PSC to advice whether the applicant was to be promoted and whether the PSC failed to carry out its responsibility in that regard. The court must also consider whether the Solicitor General was properly invested with the authority to consider the applicant for

promotion. The grounds embodying allegations touching and concerning the issues raised under this heading give rise primarily to considerations of illegality and acting outside the scope of one's authority.

[24] It may be appropriate to start with the relevant provisions of the Constitution. Section 125 (1) of the Constitution of Jamaica provides as follows:

> ***"Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary controls 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."***

[25] Section 127 provides:

> ***(1)The Governor General acting on the advice of the advice of the Public Service Commission, made 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.***
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> ***(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.***
>
> ***(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 so referred to the Privy Council, and there upon the action of the foresaid person or authority.***

[26] Regulation 14(2) of The Public Service Regulations of 1961 states as follows:

> ***"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."***

[27] The delegation of functions (Public Service Order 1963) Order 3 provides that subject to the provisions of Section 127 of the Constitution of Jamaica and of the Public Service Regulations, 1961, the powers of the Governor General specified in the schedule shall be exercisable by the appropriate authority in relation to the respective offices and officers specified in that schedule.

[28] In the schedule, under item 10, in respect of pensionable offices other than those held by heads of departments, the power to make acting appointments under Regulation 18(2) of the Public Service Regulation, 1961 is delegated to the chief personnel officer in the appropriate ministry.

[29] The Delegation of Functions (Public Service) (Specified Ministry) 2015 Orders 3 and 4 state as follows:

> ***(3) Subject to the provisions of section 127(4) of the Constitution of Jamaica, and of the Public Service Regulations, 1961, the powers of the Governor General specified in the schedule to this order shall, in relation to the respective offices and officers in the ministry so specified be exercisable by the appropriate authority so specified with effect from September 1, 2015.***
>
> ***(4) The powers referred to in paragraph 3 shall be exercised in accordance with the provisions of the Public Service Regulations, 1961.***

[30] In the schedule, the offices and officers concerned are all offices in the Attorney General's Chamber except the office of the Solicitor General and all officers except the Solicitor General. The powers which are delegated are, those of appointment and removal. Those powers are delegated to the Permanent Secretary of the Minister of Justice.

[31] Based on the above provisions, a number of points may be made. The power to appoint public servants such as the applicant resides with the Governor General. This is so based on section 125 of the Constitution. The Governor General can delegate those functions based on section 127(1) of the Constitution. The governor General has delegated those functions by virtue of The Delegation of Functions

(Public Service) (Specified Ministry) Order 2015. The Permanent Secretary (in the Ministry of Justice) is the relevant officer for our purposes, to whom the power to appoint was delegated.

[32] It was argued on behalf of the second and third respondents that the instrument made pursuant to section 127(1) of the Constitution to delegate the Governor General's power to make appointments can set out conditions attaching to the exercise of that power by the delegate. Mr Wood QC also contended that the conditions attaching to the exercise of the power need not require the delegate to take advise from the Public Service Commission. Mr Wood says that by virtue of Section 127(3), it is only where the Governor General himself exercises the power he has to take advice from the relevant Service Commission. He commended the decision of **Lackston Robinson v Daisy Coke et al and the Attorney General** [2009] UKPC 14.

[33] In **Lackstan Robinson**, the Judicial Committee of the Privy Council in dealing with the powers of delegation under the 1963 Order, had the following to say:

> ***" 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. Whether there was reasonable cause was, 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."

[34] Ms Mendez' evidence was that "as at September 1 2015, considerations for promotion of officers within the Attorney General's Chambers no longer remained within the purview of the First Respondent's responsibility. The role of the first respondent for those entities to which functions were delegated is in the form of monitoring…" The correctness of this assertion is dependent on the proper interpretation of the relevant provisions.

[35] The applicant has challenged the constitutionality of this Regulation 14(2). I understand Mr Wildman's submission to be that section 14(2) of the Public Service Regulations is in conflict with the provisions of section 125 and 127 of the Constitution to the extent that the provision fetters the right of the Commission to make recommendations regarding the functions that have been delegated by the Governor General because the Public Service Commission is not able to do so unless the Governor General so requests. Whether it is a matter of making appointments to public offices or removing or exercising disciplinary control over persons holding public office, the Governor General carries out these functions on the advice of the Commission. Based on section 125 of the Constitution, the Governor General he argued, cannot delegate the advisory function of the Commission but only his own functions. Since the Commission by virtue of the Constitution retains that role, the argument goes, it means that the Commission performing the role of advising ought not to be contingent on the Governor General requesting of the Commission that it makes recommendation, as Regulation 14 (2) purports to dictate. Subsidiary legislation he correctly noted, cannot effectively change a constitutional provision. I agree that the GG cannot delegate the advisory functions.

[36] It may reasonably be argued based on the wording of section 127(1) and (4) of the Constitution, that where the Governor General delegates his powers, the person or authority to whom that power is delegated, is not required to act on the advice of the Public Service Commission. It is not by virtue of the provisions of Regulation 14(2) why I take the view that the person or body to whom the Governor General delegates his functions may not be required to act on the advice of the PSC,

but rather on the textual content of section 127 itself. One may ask though, what is the purpose of regulation 14(2). I raise that question because why then would it be necessary for Regulation 14(2) of the Public Service Regulations of 1961 to provide that the Commission shall not (unless so requested by the Governor General) make any recommendation in relation to a function which has been delegated to an authorized officer unless the governor General requests that it does, if the view was taken that the Constitution itself already made such provision.

[37] I do not believe that the particular provision necessarily bears great relevance to this case based on my preferred interpretation of section 127 (1) of the Constitution. It appears to me that Regulation 14(2) would only be necessary in a context where one places an interpretation akin to that contended for by Mr Wildman on the provisions of section 127 (1). It is to that extent I say that Mr Wildman's interpretation is perhaps not wholly untenable.

[38] While I accept that a judge exercising her jurisdiction in hearing an application for leave to apply for judicial review of an administrative decision is equally placed as a judge hearing the claim for judicial review in interpreting a legal provision, I decline to make a definitive finding as to Mr Wildman's interpretation of Section 127(4) as it is not imperative that I do so in order to resolve the question of whether leave should be granted. It is an interpretation to which further consideration may be given. If his interpretation is accepted, it would mean that the Commission's authority to act in its advisory capacity when the functions of the Governor General are delegated has been fettered by the provisions of Regulation 14(2).

[39] The applicant has not challenged the constitutionality of the 2015 Regulation which delegates the power to the Permanent Secretary. It means that for the purposes of this case, it must be taken that the power is properly delegated to the Permanent Secretary of the Ministry of Justice to appoint and by extension promote the applicant.

[40] The applicant takes issue with what he sees as the further purported delegation of the power of appointment by the Permanent Secretary. This brings into focus the Accountability Agreement. It is by virtue of this agreement that the Solicitor General was purportedly invested with the authority to recommend whether

or not the applicant should be promoted. It is in effect incorrect to say that the power of appointment was delegated. It was the authority to **select and recommend** which was delegated. I say so because the Solicitor General was clear in her letter that she was declining to **recommend** the applicant for promotion. Strictly speaking it cannot be said that the Accountability Agreement by its terms delegated the Permanent Secretary's functions of appointment which includes recruitment, first appointment, **promotion,** transfer and assignments.

[41] For practical purposes though, the Solicitor General was the one who effectively decided the question of whether or not the applicant was to be promoted. Although her functions are coined as making recommendations in this regard. Her letter dated April 13, 2021 advising the applicant that he was not recommended for promotion was for all practical purposes, conveying to him the decision that he would not be promoted to the position he had applied for. As in the case of **Deborah Patrick Gardener v Jacqueline Mendez and the Public Service Commission** [2018] JMFC Full 2, it is a recommendation which barring some wholly out of the norm occurrence, would have been followed. It is true as the first respondent contends, that the Permanent Secretary has not been joined as a party to this application. Nothing in my view turns on that fact. There is nothing in the evidence from any of the respondents to suggest in any way that the Permanent Secretary had any input whatsoever in the decision not to recommend the promotion. The communication from the PSC made it quite apparent that the decision was that of the Solicitor General.

[42] Ms Mendez deposed that the Accountability Agreement was made on July 31, 2015 between the Public Service Commission and the Permanent Secretary in the Ministry of Justice pursuant to the Delegation of Functions (Public Service) Specified Department) Order 2015. Exhibited to Ms Mendez's affidavit, is a document referred to as "Delegation of Functions – Public Service Regulations (1961) Guidelines". In an introductory paragraph, it reads:

> ***"The governor General acting on the advice of the Public Service Commissions, has agreed to delegate most of the functions under the Public Service Regulations 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"

[43] Mr Wood QC argued that there was no need for the gazetting of the Accountability Agreement as it does not fall within the ambit of regulations which are documents that must be gazetted. It was also advanced that this Agreement between the Permanent Secretary, Ministry of Justice and the Public Service Commission was made pursuant to the 2015 Order which was gazetted.

[44] He pointed out that the Agreement sets out an agreed administrative process to deal with applications for appointment to posts and did not have legislative effect. In arriving at this conclusion the respondents looked at the sections 3 and 31 of the Interpretation Act. The essence of these sections is that regulations include by laws, rules, proclamations, orders, schemes, notifications, directions, notices and forms, and that regulations are to be gazetted. The argument continued that the Agreement is not a regulation within the meaning of these sections.

[45] It is arguable that the Agreement ought to have been gazetted. When one examines the Agreement, it sets out a comprehensive scheme of arrangement for among other things, selection, employment, appointment, transfer and promotion of public servants and in an oblique way, vests authority in various Heads of Departments. It also confers the authority as an appeals body on the Public Service Commission. To my mind, a document with legislative effect is required to confer such authority.

[46] It is to be observed that Regulation 17(2) (which will be more fully addressed below), requires that the Commission takes into account "markings and comments made in confidential reports by any Permanent Secretary or other senior officer under whom the officer worked during his service" when considering an officer for promotion. That is but one factor that is to be taken into account. It cannot properly be argued therefore that based on that particular provision, a Head of Department such as the Solicitor General was entitled to carry out the process of appraisal, so that in the event the Accountability Agreement needed to be gazetted, it could be

said that the Solicitor General was nevertheless empowered to make the recommendation. The legitimacy of the scheme of arrangement is questionable partly on account of the fact that the Accountability Agreement has not been gazetted and is in my view, subject to judicial review on the ground of illegality.

[47] Harinath Ramoutar v Commissioner of Prisons and Public Service Commission, [2012] UKPC 29, is of some assistance. In that case, the applicant was a prison officer who applied for an acting position of promotion when a vacancy arose. This was a temporary vacancy. By virtue of the regulations governing appointments of prison officers, there was a rule that appointment on a temporary basis that was not a prelude to permanent appointment should as a general rule, be done on the basis of seniority. The specific regulation did not import any threshold condition as to eligibility in terms of educational qualification. However, there was a document known as the Job Specification and Description for the Office of Chief Prison Welfare Officer, the latter named position being the one the applicant had applied for. It was in this document that the requirement for a degree for the position was stated. The document in question was agreed on between the Permanent Secretary of the relevant ministry and the Chief Personnel Officer of the Prison Service and Prison Officers Association. The Judicial Committee of the Privy Council found that that document had no statutory status but was a government document agreed with the relevant professional association for the prison services and therefore could not define the criteria for eligibility and could not bind the Public Service Commission to treat it as a statement of the criteria for threshold eligibility.

[48] There is a viable argument that the Accountability Agreement stands in no better position than the Job Specification Description in Mr Ramoutar's case. This is so notwithstanding the incantation outlined at paragraph 38 which formulation was evidently intended to confer status to its origins and basis.

[49] Although the constitutionality of the delegation under the 2015 instrument was not challenged and is therefore accepted as lawful, the divesting of the Constitutional responsibility of the Governor General to the Permanent Secretary is already sufficiently concerning. The issue is not with the fact of the responsibility being delegated, since the Constitution itself by virtue of section 127(4) permits delegation. The issue is with the functionary to whom the responsibility has been delegated.

This is complicated with the present position created by the Accountability Agreement. There is a good argument to be made on the ground that the Solicitor General lacked authority because that authority was conferred on her by the ungazetted Accountability Agreement**.**

[50] It must readily be observed that the Solicitor General in the present case does not stand in the same shoes as the Chief Personnel Officer in **Lackston Robinson** because under the 1963 Orders, the functions of the Governor General were delegated to the Chief Personnel Officer and so it was either on the assumption of the constitutionality of regulation 14(2) or by virtue of the interpretation contended for by the respondents which is also my preferred interpretation of section 127 (4) of the Constitution, that the Judicial Committee of the Privy Council would have been entitled to determine that she was constituted the sole judge. Regulation 14 (2) it may be observed, was never mentioned in that case. It may be noted also that no issue was there taken with the interpretation of section 127(4) with regard to whether the PSC retains its advisory functions towards the delegate of the Governor General.

[51] A question which looms large is this: based on the present configuration, having regard to Regulation 14(2), Regulation 15 and the Accountability Agreement (assuming, as I will explain, that the Public Service Commission is not properly constituted as an appeal body) what is the role of the Public Service Commission today? The applicant submitted that the Public Service Commission was constituted in order to remove the decision making authority on appointments, removals and disciplinary control from the Executive which may well be susceptible to pressure from the political interference and other influences. The Public Service Commission was intended to be a second layer in the decision making process. The framers created a constitutional structure to insulate and provide a level of independence separate from the internal dynamics of a department. It appears to me that the present arrangements by virtue of the Accountability Agreement, presents a conundrum.

[52] In paragraph 5 of **Lackston Robinson,** it was explained that:

> ***…Section 127(4) goes on to provide that where, by virtue of an instrument undersection 127(1), the power to exercise disciplinary control has been so exercised by a person 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 of Jamaica and thereupon the action of such person shall cease to have effect pending a reference to the Privy Council.***

[53] It seems clear enough from the constitution itself and the position was confirmed by the Judicial Committee of the Privy Council that an appeal lies to the local Privy Council. Thus by virtue of the Accountability Agreement, the Service Commission has wrongly assumed the role of an appeals body.

[54] I am mindful of the provisions of Regulations 20 which allows for the appointment of Selection Boards to assist with the selection of candidates for appointments to the Public Service and that the composition of any such panel is left to the Public Service Commission. It is reasonable to say that the selection panel in this instance was not such a selection board for the obvious reason that in this instance, the Public Service Commission had no input as the selection was being made pursuant to the arrangement via the Accountability Agreement, hence the Public Service Commission had been divested of any responsibility in this regard.

[55] Both the 1963 and the 2015 Regulations arguably somewhat eroded that safeguard by the delegation of the functions of the Governor General to functionaries within a government Ministry. Depending on the interpretation of section 127 (1) that is accepted, Regulation 14(2) also has the same effect. It is my view that there is a good argument to be made that the Accountability Agreement has effectively further eroded the safeguards that the Constitutional arrangement was intended to give by divesting a portfolio which by virtue of the relevant constitutional provision, was primarily that of the Service Commission. Even if I do not agree that the Public Service Commission retains its duty to advice and that it has been wrongfully divested of that responsibility, or has abdicated its role, it is a plausible argument made by the applicant that the Solicitor General acted unlawfully and ultra vires the Constitution. Further even though it is not strictly correct to say that she purported to exercise the powers delegated to the Permanent Secretary of the Ministry of Justice, there is a basis for arguing that she was not properly authorized to act in the capacity she did.

[56] On the basis of the above discussion, several of the proposed grounds are arguable with a realistic prospect of success. These include the grounds impugning the validity of the Accountability Agreement, those alleging that the Solicitor General acted ultra vires the Constitution, and thus indicate the likelihood of the granting of order seeking to quash her decision in a claim for judicial review.

IRRATIONALITY AND UNREASONABLENESS IN THE SELECTION PROCESS - REGULATION 17 (1)

[57] On the ground of irrationality, the applicant has raised and argued the issues of whether the Solicitor General and or the Public Service Commission took into account irrelevant considerations or failed to take into account relevant considerations in refusing to promote him over the course of 10 years and in refusing to promote him or recommend him for promotion for the position of Assistant Attorney General.

[58] The applicant contends that the PSC (and the Solicitor General, in unlawfully purporting to exercise the functions of the PSC), fettered its own discretion by failing to take into account relevant considerations laid down by law.

[59] Public Service Regulations 17 provides:

> *(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.*
>
> *(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;*

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 recommendation 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;*

k. *Any special reports for which the Commission may call.*

[60] The contention is that the Solicitor General in conducting the selection process, and the Public Service Commission in considering his appeal, did not address all of the relevant considerations but instead confined their focus by their own admission to only four matters; namely, the applicant's educational qualifications, his interview scores and ratings assigned to him the job description and the advertisement for the post.

[61] Mr Wood on behalf of the second and third respondents, argued that the post to which the applicant sought promotion in the Attorney General's office was a senior post which required a high degree of responsibility and initiative wherein merit and ability of the candidate for the position was a matter to be given greater weight over seniority and length of service, and was not a post where work of a routine nature is required. It was also argued that the Regulation and Guidelines were scrupulously followed in the selection process.

[62] Mr Wood asked the court to have regard to how each interviewer arrived at her scores. He also asked the court to have regard to paragraph 25 of the Solicitor General's affidavit.

[63] At paragraph 25 of her affidavit, Mrs Aldred made reference to the fact that a written assessment was done and the applicant received a low score but he was included in the list of candidates because he was an internal candidate. Further, that she took into account his number of years as a lawyer in the Chambers.

[64] A detailed examination of documents exhibited to Mrs Aldred's affidavit as Documents 12, and 12 A to D reveals that it is arguably not accurate to say that the SG confined her focus to only four matters. The interview rating sheet of each interviewer shows the various competencies that were assessed. The SG explained the applicant's performance in her report dated May 10, 2021. This assessment was done against the background of the contents of the circular advertising the particular position of Assistant Attorney General. There is not in my view any good argument to be made that relevant matters were not considered as it relates to the particular position. Mr Wood also pointed out that the applicant did not disclose any letters of recommendation in respect of any special work done by him or any special course of training that he may have undergone whether at the expense of the government or otherwise or any evidence of the existence of any other factor the he is saying the Solicitor General failed to consider.

[65] It is noteworthy that the applicant has exhibited 4 performance evaluation reports in respect of evaluations conducted for the periods October 2011 to June 2012, 2012 to 2013, 2013 to 2014 and May 2016 to February 2019. In the first report he was assessed as performing well and was said to be a valuable member of the Chambers. In the second evaluation, he was said to be a consistent performer and has shown significant strength in job knowledge and in oral and written communication. In the report for the period 2013 to 2014, he was said to have steadily improved and was said to be weakest in the assessed category "other contributions to the Chambers. Demonstrated interest in professional development" where a scored 3.8 out of a possible 5. In the last mentioned evaluation, it was said that he had done very well with regard to the high standard of written work submitted and he also did well with oral presentations. In all four reports, he was assessed as

exceeding the requirements. Having regard to Regulation 17(1) provisions, although annual performance reports were not specifically mentioned, they are documents which assessed relevant qualities and competencies and have the potential to more accurately reflect the qualities and competencies than a one off test and interview. These assessments do not of course speak to his performance relative to the other persons who were assessed and all were as far as can be discerned, judged by the same standard.

[66] Of greater concern, is the Solicitor General's and Mrs Mendez's explanation that the applicant was not considered for promotion because between March 2012 and November 2018, there was pending litigation concerning his employment status which prohibited any appointment and/or promotion until the matter was determined by the court. There is no contest that litigant was ongoing during the period. The fact is, as it turned out, the claimant was reinstated with effect from March 5, 2012 based on a decision of the Supreme Court. The applicant had retained his position within the department based on a stay of execution of the decision of the Public Service Commission to terminate his employment. This stay was granted consequent on the grant of leave to apply for judicial review of that decision. In those circumstances, he remained in the employ of the GOJ.

[67] It is in my view an arguable ground that once he remained in the department, the Commission ought to have considered his eligibility for promotion from time to time as vacancies occurred, taking into account all the factors enumerated in Regulation 17(1), the evaluations were documents to be taken into consideration in considering whether he was to be promoted. The performance evaluation reports are of greater relevance as it relates to the ongoing evaluation that the PSC or the body to whom the function was delegated was required to take into account

[68] There is therefore an arguable basis for a declaration that the first respondent acted contrary to Public Service Regulation 17 (1) over a 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.

INEQUALITY OF TREATMENT

[69] Mr Wood QC in his submissions succinctly sets out the relevant law in this area.

[70] In **Bhagwandeen v The Attorney General of Trinidad and Tobago** [2004] UKPC 21, 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 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 relevant circumstances in one case are the same, or not or materially different in the other."***

Bhagwandeen was applied in **Sean W. Harvey v Board of Management of Moneague College et al**. [2018] JMSC Full 3.

[71] Mr Wood QC submitted that the evidence before the court discloses that the applicant was treated in the same manner as all the other candidates who applied for and were interviewed for the LO4 position of Assistant Attorney General. I do not believe that in the circumstances of this case, the complaint should be looked at in the limited context of the application for the LO4 position.

[72] The applicant has asserted that his rights under section 13 (3) (g) of the Constitution have been breached. Without devoting too much time to the evidence which raises question of inequality of treatment, it appears to me that the applicant has not put forward sufficiently detailed evidence that would support the view that he has been treated differently from persons who were similarly circumstanced. He has raised generalized evidence to the effect that he is the only legal officer in the public service since 1962 who has never been promoted after 10 years in the LO-2 post and that other more recently appointed legal officers have been promoted on a non-competitive basis. He also spoke of the number of positions that have become available over time for which he felt that he should or could have been considered. To my mind, evidence of a more specific nature would be required. In any event

there is no basis for a detailed discussion of this issue, as the applicant does not require the leave of the court to pursue this aspect of his claim.

LEGITIMATE EXPECTATION

[73] Mr Wood addressed the question of legitimate expectation. He referenced paragraphs 71 to 73 of the case of **Salada Foods Jamaica Limited v Jamaica Agricultural Commodities Regulatory Authority** [2020] JMSC Civ 198 where Nembhard J summarized the relevant principles as here reproduced:

> ***The concept of a legitimate expectation arose in the case of Council of Civil Service Union and Ors v Minister of the Civil Service. Lord Fraser opined that a legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority of from the existence of a regular practice which a claimant can reasonably expect to continue.***
>
> ***[72] In the broadest terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. The principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty. Neither can there be a legitimate expectation which is contrary to law and which the authority has no power to grant.***
>
> ***[73] The Court accepts that, in order to make out a case for legitimate expectation, there must be a clear and unambiguous promise or representation made which is within the power of the Authority to grant. In the instant case, there is no power stated in the Act or in the Regulations which enables the Authority to waive the requirements of Regulation 19(1) of the Regulations.***

[74] This ground too may be briefly addressed. Mr Wood submitted that the applicant has not presented before this court any evidence of any representation made to him, whether by word or by conduct regarding any prospect of promotion.

[75] The applicant raised the question of legitimate expectation in relation to his belief that he would be reasonably and fairly assessed when opportunities arose for promotion and that he would be treated fairly. As such, based on my assessment as

to his prospect of success on the question of the alleged failure to consider him for promotion over a ten years' period, his reliance on the doctrine of legitimate expectation is not unfounded.

BIAS

[76] The complaint of bias is intricately connected with procedural fairness, as a finding of bias infringes on fairness of proceedings. I will nevertheless deal with this matter as a separate issue.

[77] The applicant in his affidavit has made allegations of actual bias. Where such bias is alleged, the applicant is required to prove same to the requisite standard. Mr Mc Bean made reference to an excerpt from **Sharma v Brown-Antoine and Others** (supra) which was reproduced in **George Flowers v Minister of Justice (Delroy Chuck), Director of Public Prosecutions and Commissioner of Correctional Services** [2017] JMSC Civ 52, and which was highlighted in paragraph 15 above to the effect that the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities.

[78] The third respondent has set out in her affidavit her response to much of what has been alleged against her. This court need not assess that evidence. Suffice it to say that the applicant would be hard pressed to establish that the Solicitor General had some financial or proprietary interest in the outcome of his application for promotion and therefore would be automatically disqualified from sitting on the interview panel. Without attempting to make any detailed assessment of the question of personal bias, the applicant has not really put forward much in the way of tangible evidence in this regard. His assertion that the Solicitor General has displayed antipathy and patent disfavour towards him and that such perceived feeling of aversion has manifested in a refusal for over a year to carry out her public duty towards him in order to ensure that he is paid his judgment debt and costs is a clear example of wide and sweeping assertion without any tangible evidence in support of same. He has put forward no basis for saying that she has refused to act. Given that where bias is alleged there is no need to prove actual bias if one can establish

apparent bias, I will for the most part, confine my further consideration of the question of bias to the allegations that potentially give rise to apparent bias.

[79] In Porter v Magill [2002] UKHL 67, the test for apparent bias has been settled. The test is now whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. In the case of **Carol Ann Lawrence Austin v The Director of Public Prosecutions** [2020] JMCA Civ 47, the court of Appeal reproduced an extract from the case of **Helow v Secretary of State for the Home Department and Another** [2008] 1 WLR 2416, where Lord Hope delineated the characteristics of the fair minded and informed observer:

> *"1 **…. The fair-minded and informed Observer is relatively new, among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man, whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain.***
>
> ***2. The observer who is fair-minded is the sort of person who always reserves judgement on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J. in Johnson v Johnson (2000) 201 CLR 488, 509 para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done are associations that they have formed may make it difficult for them to judge the case before them impartially.***
>
> ***3. Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to***

> ***inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."***

[80] In that same case, reference was made to **In re Medicaments and Related Classes of Goods (No 2)** [2001] 1WLR 700 where the approach to be taken when dealing with allegations of bias was set out.

> ***"1. If a judge is shown to have been influenced by actual bias, his decision must be set aside.***
>
> ***2. Where actual bias has not been established, the personal impartiality of the judge is to be presumed.***
>
> ***3. The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. IF they do the decision of the judge must be set aside.***
>
> ***4. The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court.***
>
> ***5. An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice."***

[81] Mr Wood QC on behalf of the second and third respondent has sought to examine in detail the process by which the interview and determination that the applicant would not be promoted was undertaken. While that evidence might be demonstrative of the absence of any ostensible impropriety in the actual process, it does not fully answer the applicant's complaints. Counsel also advanced a number of other factors surrounding the circumstances of the allegations of bias. These include firstly, an assertion that the applicant failed to disclose relevant matters such as the fact that the Solicitor General was not involved in the dismissal of the applicant in 2012, that she was appointed to the post in 2019 and played no role in the litigation involving the applicant, that no member of the interviewing panel or anyone who graded the written test was involved in any way in the litigation, that the applicant's tenure in the Attorney General's Department had been uncertain during

the period 2012 to 2018 because of the ongoing litigation and the view that he could not be considered for promotion during that period, that it was in 2018 that his employment was confirmed, and importantly that the applicant voiced no objection to the involvement of the Solicitor General in the interview process and that he has not made any allegation of bias against any other member of the interviewing panel nor against the Senior Assistant Attorney General who graded the written test which it is said that the applicant had failed.

[82] In **Meerabux v Attorney General Belize** [2005] UKPC 12 which was cited by Mr Wood, the question was whether the Chairman of the tribunal hearing the complaint that the appellant, a judge of the Supreme Court of Belize, misbehaved while performing duties, ought to be disqualified because he was also a member of the Bar Association of Belize which had made the majority of the complaints against the appellant. The chairman was not a member of the Committee of the Bar Association involved in bringing the complaint. He was a member of the Bar Association simply because he was an attorney at law and membership in the association was in his case compulsory. The chairman gave an affidavit in which he outlined that he did not attend or participate in any Bar Association meeting where a resolution was passed against the appellant. He learnt of the specifics of the complaint against him was when the question of the enquiry into removal was referred to the tribunal.

[83] The Judicial Committee of the Privy Council considered whether by virtue of the Chairman's membership in the association, he could be identified in some way with the prosecution of the complaints that the association was presenting to the tribunal, so that it could be said that he was in effect acting as a judge in his own cause. The Board determined that in this case, that was not the scenario. The Board considered that the normal approach to automatic disqualification is that mere membership of an association by which proceedings are brought does not disqualify but active involvement in the institution of the particular proceedings does. The Board went on to consider matters that the fair minded observer would take into account, which included the factors which put the Chairman's membership in the Bar Association in its proper context. Those factors included among others, the qualifications which a person was required to possess in order to be Chairman.

There was also another factor in this case. It was said to be necessity. The Chairman had no choice but to perform his constitutional function. By virtue of the constitution, the holder of the position was required to be an attorney at law and membership in the Bar Association was compulsory for all attorneys at law. It was further opined that it must be taken to have been within the contemplation of the framers of the constitution that the Chairman who would preside over a case such as this one would be a member of the Bar Association.

[84] In **Gillies v Secretary of State for Works and Pensions** [2006] UKHL 2, it was alleged that there was a reasonable apprehension of bias regarding the medical member of a disability appeal tribunal who was also a member of the Panel of Examining Medical Practitioners whose report was being contested. During the course of the judgment the following was observed:

> ***The question then is whether there were grounds for thinking that Dr. Armstrong was likely to be unconsciously biased when she was examining the medical evidence because of a predisposition to prefer the EMP report as against any contrary evidence due simply to her current involvement in providing reports as an EMP. Doctors holding current engagements to provide these reports can be assumed, to no doubt, to have a special interest and experience in this kind of work. The group of doctors to which they belong can also be distinguished from NHS doctors generally, as was pointed out by the Tribunal of Commissioners. But why should these facts be said to lead to the conclusion that there was a real possibility that she was biased in favour of the views expressed by the EMP?***
>
> ***The weakness of the argument that this was a real possibility is exposed as soon as the task that Dr. Armstrong was performing as an EMP is compared with the task which she was performing on the Tribunal. In each of these two roles, she was being called upon to exercise an independent profession judgement, drawing upon her medical knowledge and her experience. The fair-minded observer would understand that there is a crucial difference between approaching the issues which the Tribunal had to decide with a predisposition in favour of the views of the EMP, and drawing upon her medical knowledge and experience when testing those views against the other evidence. He would appreciate, looking at the matter objectively, that her knowledge and experience could cut both ways as she would be just as well placed to spot weaknesses in these reports as to spot their strengths. He would have no reason to think, in the absence of***

> ***any other facts indicating the contrary, that she would not apply her medical knowledge and experience in just the same impartial way when she was sitting as a Tribunal member as she would when she was acting as an EMP.***

[85] Later on at paragraph 23, the court observed that:

> ***… the bringing of experience to bear when examining evidence and reaching a decision upon it has nothing whatever to do with bias. The purpose of disqualification on the ground of apparent bias is to preserve the administration of justice from anything that might detract from the basic rules of fairness. One guiding principle is to be found in the concept of independence. No one can be judged in his own cause. That principle is, of course, applied much more widely today than a literal interpretation of these words might suggest. It is not confined to cases where the judge is a party to the proceedings. It applies also to cases where he has even the slightest personal or pecuniary interest in their outcome… The other principle is to be found in the concept of impartiality- that justice must not only be done: it must be seen to be done. This too at its heart, the need to maintain public confidence in the integrity of the Administration of Justice. Impartiality consists in the absence of a predisposition to favour the interests of either side in the dispute. Therein lies the integrity of the adjudication system. But its integrity is not compromised by the use of specialist knowledge or experience when the judge or Tribunal member is examining the evidence.***

[86] In **Carol Ann Lawrence Austin v The Director of Public Prosecutions,** the court considered among other factors that the learned judge was formerly employed to the respondent's office, that she had held a senior position there, the matter commenced in the respondent's office when the learned judge had still been employed in that office, the learned judge indicated that the specific matter had not been brought to her attention and that the learned judge had said that she was relying on her judicial oath that she had taken. One major area of distinction in that case was the fact that the learned judge had not yet embarked on the trial and the court of appeal thought that in the circumstances, it was prudent that the precautionary approach be exercised and in that regard, may be distinguished from the instant case.

[87] Mr Wood says that the case of **Carol Ann Lawrence Austin** is entirely distinguishable from the present case in that in this instance, the litigation was

brought by the applicant against the Attorney General long before the present Solicitor General assumed her position and that he even received his judgment before. Further, that the litigation did not arise out of anything done by her department, but as a consequence of his termination by the Public Service Commission. He also says essentially that the Solicitor General acted out of necessity in that by virtue of Regulation 17(1) (i), her views could not be excluded since she is the Head of Department.

[88] The fact that the Solicitor General was not involved in the dismissal of the applicant in 2012, that she was appointed to the post in 2019 and played no role in the litigation involving the applicant and that no member of the interviewing panel or anyone who graded the written test was involved in any way in the litigation, are factors that would be more relevant to the question of automatic disqualification on the ground of bias and less so to the question of apparent bias.

[89] In light of the manner in which the court assessed the process by which the fair minded and informed observer would undertake the task of examining whether there is apparent bias, I make the observation that in **Gillies**, the medical doctor Armstrong was assessing the case in her trained professional capacity. She was a trained medical doctor who would have taken the Hippocratic Oath to carry out her professional responsibilities based on ethical standards. In the instant case, the Solicitor General was not acting within her trained professional capacity. She was carrying out personnel functions. I am not suggesting that much would turn on that fact since the Solicitor General is a professional with considerable years of experience and assumptions of bias should not be lightly made. Just as in the case of a judge or tribunal, the personal impartiality of the Solicitor General is to be presumed in the absence of proof of actual bias.

[90] There is no argument to be made that the Solicitor General was acting out of any constitutional duty. As I have indicated elsewhere, it is highly questionable that she was acting out of necessity based on any legal duty that she has. Her input as Head of Department would be only one aspect of several factors to be taken into consideration based on Regulation 17 (2) and is distinct from her role and function assumed in this particular case. If this position is correct, then she could not rely on necessity as the Public Service Commission is said to have acted in **Exp Re**

Robinson JM 2007 SC 84**.** In that case, the Permanent Secretary had directed the applicant to go on leave and recommended his early retirement. The applicant alleged that the Public Service Commission had an interest in the outcome of the application and had shown bias for the reason that firstly, the members of the Public Service Commission were parties to the first case brought by him which was before the Privy Council, the behaviour of the Public Service Commission was in issue in that case, the Commission had secured his retirement although the appeal process had not been completed. The court found that where the circumstances justified a finding that the rule against bias had been breached but it was necessary for the decision maker to act, that ground of challenge would fail because the doctrine of necessity created an exception.

[91] Ultimately, the question is whether a reasonable and fair-minded observer would entertain a reasonable suspicion that the applicant could not be reasonably and fairly assessed by a panel headed by the third respondent for the purposes of deciding whether he should be promoted. The fair-minded observer would be alert to the fact that the Solicitor General in this case had a long period of association with the Attorney General department and was there employed during the entire period of the litigation. The fair minded observer would also be mindful that she is still employed to the Attorney General Chambers in a very senior capacity and that the applicant had been involved in protracted litigation with the Attorney General and not the Solicitor General. He would also be acutely attuned to the fact that it was never suggested that the Solicitor General was in any way involved in the litigation. Further he would consider that the applicant was interviewed by a panel of individuals and contrary to the assertions of the applicant, it could not properly be said that these were all persons under her direction and control. The fair- minded observer would also consider the uncontested evidence of the Solicitor General that although the applicant had scored lower than the other applicants on the test administered prior to the interview process, she had included him for the interview because of his senior years in the department.

[92] In **Meerabux,** the Chairman's membership in the bar association was not by choice. In this instance although the Solicitor General may be said to have chosen her employment, for practical purposes the situation is no different. Thus the same

question may be asked in this case as was considered in **Meerabux.** That question was, whether simply because of his membership in the bar association**,** he could be identified in some way with the prosecution of the appellant. It may also be asked if simply because the Solicitor General is a senior employee of the chambers of the Attorney General with which the application has been involved in protracted litigation, there is apparent bias. The answer in **Meerabux** was no. I would also consider that the answer should be no in this instance. The fact of her employment in the chambers does not in my view connect her in any meaningful way so that a case of apparent bias is necessarily made out, in this instance. I say that being mindful of the fact of her very senior position in the chambers and the knowledge that the applicant has made allegations of personal bias against him on her part.

[93] The concept of bias embraces (as seen from **Re Medicaments)** circumstances where there is a predisposition (actual bias) or reasonable apprehension that there might be a predisposition to decide an issue in one way or another so that the individual's mind is closed to being persuaded to another view. There must however be clear evidence that such circumstances exist. The applicant no doubt would put forward the matters he alleges constitute actual bias as proof that the Solicitor General desired a particular outcome, that is, that he not be promoted. I have already indicated that his basis for asserting actual bias seems to stand on frail footing.

[94] In the instant case, the complaint regarding bias did not arise until after the learned Solicitor General had carried out the task of interviewing the applicant and determining that he would not be promoted and the applicant had launched his appeal and was unsuccessful. I cannot say in all the circumstances, that the applicant has made out an arguable case with a realistic prospect of success on the ground of apparent bias.

[95] In the circumstances it is not strictly necessary to discuss the matter of waiver, but since it was raised by Mr Wood I will address it. The issue was discussed in the cases of **Foote v The General Legal Council** and **Winston Finzi v JMMB Merchant Bank Limited** [2015] JMCA App.32 In the former case, Mr Dabdoub argued before the Court of Appeal that the Chairman of the Disciplinary Committee of the General Legal Council had a personal bias against the appellant and ought to

have recused himself from the hearing. The court in part found that it would have been open to the appellant to raise the issue of bias when the question was asked by the Chairman of the other two participants in the proceedings whether they had any issue with his participation, and that although there was a failure on the part of the Chairman to raise the question with the appellant, the complaint was not objectively justified in the circumstances of the case.

[96] In **Winston Finzi**, the principle of waiver was discussed. Morrison P at paragraph 16 said:

> ***In Millar v Dickson (Procurator Fiscal, Elgin) and other appeals2 (a decision of the Privy Council on appeal from the Scottish High Court of Justiciary), Lord Bingham of Cornhill said that "[i]n most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise"3. And further 4, that "the more obvious and notorious it is that a point is available to be taken, the more readily may it be inferred that failure to take it represented a deliberate intention not to take it".***

[97] He also considered dicta from in the case of **Auckland Casino Ltd v Casino Control Authority** [1995] 1 NZLR 142. At paragraph 19 of the judgment, made the following pronouncement on the matter:

> ***In my view, these authoritative statements make it clear that an objection to a court or judge hearing a matter on the ground of apparent bias can validly be waived by a litigant, provided that his decision to do so is voluntary, informed and unequivocal.***

[98] I note Mr Wood's observations that the facts on which the applicant relies in support of the allegations of bias were known to him at the time of the interview for the position of Assistant Attorney General and so if he had any objections to the participation of the Solicitor General, he ought to have voiced them before and should not after his non selection, be allowed to rely on bias. One cannot say however at what point the applicant became aware as to who the panellists would have been but the opportunity to take issue with her participation would have presented itself upon his attendance at the interview. However, the question of his ongoing assessment was not a matter in relation to which it can be said that he could or should have objected to her involvement, or to the involvement of any other

member or members of the chambers. It should not readily be said therefore that the applicant had waived any right to have her not participate.

[99] The allegations of bias against the first respondent in my view do not stand on firm grounds on account of sparsity of evidence. In paragraph 15 of his affidavit in support of the application, the applicant alleges as follows: The respondents' treatment of the undersigned affiant has been characterized over the past 10 years by a pattern of victimization, punitive measures, threats and reprisals and outright bias. I have been the victim of defamation by the said respondents as well as the victim of constitutional abuses, and the Supreme Court in 2018 and in 2019 found both respondents liable in defamation and for constitutional breaches against me in two separate proceedings. Mr Mc Bean on behalf of the first respondent placed before the court the circumstances under which the PSC had been sued for defamation.

[100] The applicant alleges in paragraph 28 of his affidavit that prior to making its decision, the first respondent treated with adverse information and assertions made about him and that he was never given any opportunity to make representations in relation to any of the adverse assertions and information communicated about him. The applicant did not set out the bases of the claims in relation to which judgments were given in his favour against the first respondent in particular. Mr Mc Bean has sought to provide the court with some background information and with the specific orders that were made. It is difficult for this court to assess the arguability of the grounds related to the claim of bias of the first respondent. Rule 56. 3 (4) of the CPR requires the application to be verified by affidavit evidence which must include a short statement of all the facts relied on. The only fact asserted is that he was a claimant who obtained two judgments against the first and second respondents. Given that these the first respondent is an entity rather than an individual, more needed to be said. It is on that basis I say that he has not made out an arguable ground on this point in relation to the first respondent.

RIGHT TO A HEARING – OBLIGATION TO GIVE REASONS FOR DECISION

[101] The grounds of complaint which may be subsumed under this heading give rise to considerations under the three basic grounds for judicial review contemplated

in **Council of Civil Service Unions (CCSU) v Minister of State for the Civil Service** (supra). It is accepted that in order to achieve fairness, in certain instances, an aggrieved party ought to be afforded a hearing and may be entitled to be given reasons for a decision which is unfavourable to him. The cases will vary and each must be treated with, based on its own the peculiarities.

[102] Mr Wildman submitted that the applicant was entitled to be heard before the review tribunal could properly have arrived at a finding adverse to him. He relied on the case of **Aston Reddie v the Firearm Licensing Authority,** unreported Supreme Court Claim no. HCV 01681 and **Regina v Board of Visitors of Hull Prison ex parte St Germain and Others (No.2)** [1979 1WLR 140 He contends also that the Public Service Commission could not in any event properly have heard the appeal. He said the Commission embarked on the course it did because it did not appreciate that it has an advisory role as it relates to the applicant's appointment.

[103] He submitted that had the applicant been afforded a hearing, he would have had the opportunity to point out that all the factors to be considered by virtue of Regulation 17(1) which had not been considered. He also contended that the case of **Joseph v Attorney general of Grenada** is distinguishable from the instant case. He also attacked both the decision of the Solicitor General not to promote the applicant and the dismissal of the applicant's appeal on the ground of failure by both respondents to give reasons for their decisions. The third basis is that of the alleged bias on the part of the Commission and the Solicitor General. I have already addressed the question of bias. My examination of the complaints that fall to be considered under this heading is to be seen in the light of my views already stated regarding the unlawfulness of the action of the Solicitor General and the Commission having regard to the source of their purported authority to act in the capacity that they did.

[104] It was the submission of Mr Mc Bean QC that there is no provision in the Public Service Regulations or any other relevant statute which required the Commission to provide reasons and this position is applicable to the appeals process. He also submitted that in this case, there was no need for reasons to be provided, given the limited scope of the appeal. He relied on the evidence of Miss Mendez in this regard. He cited the case of **Linton Allen v His Excellency the**

Right Honourable Sir Patrick Allen and the Public Service Commission [2017] JMSC Civ 24 in support of this contention.

[105] In **Senneth Martin Joseph v The Public Service Commission** Claim No. GDAHCV 2019/0592, it was determined that the Public Service Commission of Grenada had no need to afford Mr Joseph an opportunity to be heard on his eligibility for promotion as he was not facing any disciplinary action nor was there any negative reports or comments about him by his superiors. The Honourable Madame Justice Agnes Actie went on to say that:

> ***"it would be an onerous task for the commission given its volume of work and extensive duties, to provide each public officer with an audience to make representations before its deliberation on whether or not to permanently appoint him or her. This would certainly infringe on the constitutional duty placed on the Commission to make appointments at its discretion and to carry out its business without interference and delay."***

[106] The court also opined that even if Mr Joseph had been afforded a hearing, the Commission would not have been bound by his representations or by recommendations by the Permanent Secretary or any head of Department, as the decision rested solely with the Commission. (See paragraphs 40,41 and 42 of the judgment).

[107] In the case of **Aston Reddie v the Firearm Licensing Authority and Others**, McDonald-Bishop J (as she was then) concluded at paragraphs 39 to 40 of the judgment having looked at the scheme of the Firearms Act pertaining to revocation of a firearm licence, that the relevant provision did not expressly impose any obligation or duty on the Authority to conduct a hearing or to act in a quasi-judicial manner. What it did she observed, was to leave it to the Authority, in its absolute discretion, to determine the steps it would take and the procedure it would adopt in seeking to carry out its functions under the Act. She also opined that it appeared that if the Authority formed the view that it would be necessary and expedient for a hearing to be conducted, then it could do so by virtue of section 26B(2)(c) but it was not obliged to do so on the express terms of the statute before it revoked a firearm user's licence. She concluded that it was upon the revocation of a licence that there was a procedural regime in place for the hearing and reception of

evidence. This was not at the stage of the Authority but at the stage of the review. Parliament expressly provided she noted, for a hearing at that level and without expressly doing so at the level of the Authority, Parliament must be taken to have intended not to cast a legal duty or obligation on the Authority to conduct a hearing before revocation of a licence.

[108] In **Regina v Board of Visitors of Hull Prison ex parte St Germain and Others (No.2**) the applicants were charged with violations of disciplinary rules after a prison riot. During the hearing, the chairman of the board in exercising his authority to control the proceedings, ruled that certain witnesses that a prisoner had requested should not be called and he also allowed hearsay evidence. The applicants were found guilty of offences against prison discipline and were sentenced to loss of remission and other punishments. The issue was whether the proceedings were conducted in a manner contrary to the rules of natural justice. It was held that since the applicants had been charged with serious disciplinary offences which if established would result in a substantial loss of liberty, the rules of natural justice required that they should have the opportunity of calling evidence which was likely to assist in establishing the vital facts at issue; that the Chairman of the board had a discretion to disallow witnesses to be called but that discretion had to be exercised reasonably and in good faith, and therefore, a discretion exercised on the basis that there was ample evidence against a prisoner or on a mistaken understanding of the prisoner's defence or on the basis of considerable administrative inconvenience would be an improper exercise of the discretion and contrary t the rules of natural justice.

[109] In **Symbiote Investments Limited v Minister of Technology** [2019] JMCA App 8, in addressing the complaint that the Minister had failed to give the appellant a fair opportunity to convince him that he ought not to have revoked the licence of the appellant, which complaint was based on the fact that the Minister only considered written representations, Brook JA expressed at paragraph 73 to 77 of the judgment as follows:

> ***73. There is no dispute between learned counsel for the parties on the relevant principle involved in the analysis of this ground. Taylor LJ, in R v Army Board of Defence Council, set out the principle at page 387 of the report. He said in part:***

> ***"(2) This does not mean that, whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing. Even when such a hearing is necessary, it may only require one or two witnesses to be called and cross-examined." (Emphasis supplied)***
>
> ***74. The House of Lords took a similar stance in Regina v Parole Board. Lord Bingham of Cornhill, in delivering their Lordships' judgment, re-affirmed that the common law duty of procedural fairness did not require an oral hearing in every case. He went on to state, however, that there are some instances in which oral hearings are beneficial, in order for the tribunal to be able to communicate its concerns to the party likely to be affected by its decision.***
>
> ***75. Guidance may also be gleaned from another decision of the Privy Council, namely, Narayansingh (Barl) v The Commissioner of Police*** *[2004] 64 WIR 392; [2004] UKPC 20*. ***Their Lordships, in stressing the requirement for fairness in the procedure adopted by the tribunal that is tasked with an administrative power, accepted Lord Mustill's opinion in R v Secretary of State for the Home Department, ex parte Doody*** *[1994] 1 AC 531*. ***Lord Mustill, at page 560, said that "[t]he principles of fairness are not to be applied by rote identically in every situation" (paragraph 16 of Narayansingh). Their Lordships further accepted as a principle that the demands of fairness "is dependent on the context of the decision, and this is to be taken into account in all its aspects" (paragraph 16 of Narayansingh). They found in the circumstances of that case, that a fair procedure demanded that further inquiries should have been made before the tribunal made its decision."***

[110] In **Linton Allen v His Excellency the Right Honourable Sir Patrick Allen and the Public Service Commission** Straw J at paragraphs 141 to 144 of the judgment made the following observations:

> ***[141] Albert Fiadjoe in Commonwealth Caribbean Public Law, 3rd edn., at page 52, points out that ... the courts have been reluctant to provide a general duty to give reasons, it is recognized more and more that the giving of reasons is an aspect of natural justice and that the failure to do so may be controlled by the ultra vires doctrine.' (emphasis supplied)***

> ***[142] Fiadjoe examined the UK approach and stated that the question whether there is a duty to give reasons for administrative decisions is fraught with raging controversy. The learned author also referred to Evans et al in their text, Administrative Law, 1995, at pages 479-82, where the authors provide evidence of the balance between the two sides of the argument by offering eight arguments for and against the duty to give reasons. Fiadjoe admits, at page 53, that while the position at common law is that an administrator need not give reasons for his decisions, there has been serious inroads into this common law position although he has reported that ... English law is still at the recommendation stage, as the proposals of the Justice-All Souls Review Committee and recent case law show.'***
>
> ***[143] Also at pages 53 to 54, the learned author opines that in the Caribbean today, a failure to state reasons for administrative decisions ought to be regarded as wrongful in law for the fact of the constitutional prescription of fairness which natural justice now imports in Caribbean public law in the context of fundamental rights infringements. Thus far, Caribbean courts have tended to favour the error approach' and to hold that failure to give reasons amounts per se to an error in law.***

[111] The applicant has not made any substantive argument or provided any real basis for saying that he was entitled to a hearing before the Solicitor General made the decision not to recommend his promotion.

[112] In advising the applicant that he had not been successful in the interview, the Solicitor General did in fact give him a reason as to why he was not being promoted. That reason was that in both the practical exercise (the test) that had been administered and the interview, he had scored lower than the other candidates. I am not of the view that the applicant was entitled to a hearing before the SG made her decision.

[113] The relevant provisions in the Accountability Agreement confers no right to be heard. The Commission argue that the Public Service regulations govern the Public Service Commission in its assumed capacity as an appeals tribunal. The applicant's position with which I agree, is that an appeal function is not properly that of the PSC,

an argument this not unreasonable. I nevertheless address the relevant matters arising since the Commission did in fact assume the role.

[114] It is by virtue of the Guidelines embodied in the Accountability Agreement that the Public Service Commission assumes the role of an appeals body. Under the heading RECOURSE AND REDRESS, and subheading specific provision, it is stated that "Employees may appeal to the Public Service Commission and ultimately will continue to enjoy the right of appeal to the Privy Council." I need not restate my view on the constitutionality of such arrangement except to add that the relevant Constitutional provision is section 127 (4). Based on that provision, the Privy Council is the properly constituted body.

[115] The relevant part of the Accountability Agreement dealing with appeals is section 3.1.19. and is headed "selection appeals" There under it is stated,

(i) "Candidates in a selection exercise who have reason to believe that they were assessed unfairly may appeal the decision of the Selection Panel, in writing, to the Public Service Commission within 10 working days of notification of the decision.

(ii) Appeals made to the Public Service Commission will be dealt with within 30 working days

(iii) An appellant has the right of representation by person/persons of his/her choice.

(iv) If there is an appeal, no appointment will be made until the appeal has been heard

(v) …

(vi) …"

[116] I am not of the view that the applicant was entitled to an oral hearing before the Public Service Commission made its decision. It cannot be said that he did not receive a hearing as far as the appeal was concerned, to the extent that he had set

out his case in writing. The circumstances were such that his written representations would have been sufficient.

[117] As was observed in **Symbiote**, (supra) a hearing does not necessarily have to be an oral hearing in all instances. It has been said that decision making bodies other than courts and bodies whose procedures are laid down by statute can regulate their own procedure. What is important is that fairness is applied to the task. In this instance there could not be said that there were substantial questions of fact in dispute that needed to be resolved, so that an oral hearing was necessary. As was explained in **Senneth Martin Joseph v The Public Service Commission,** (supra) **t**his was not a case where adverse allegations had been made about the applicant. Neither did he stand to be punished as in **Regina v Board of Visitors of Hull Prison ex parte St Germain and Others (No.2**), so that it could be said that because of the likelihood of the imposition of some punitive sanction, he had a right to be heard orally. The matter involved a review of the decision of the solicitor general. In those circumstances, it would have been necessary to review the documents upon which the Solicitor General relied, as well as the test results and the interview scores as well as determine if the considerations enumerated in Regulation 17 (2) were taken into account.

[118] Based on a perusal of the cases, an administrative tribunal is not required to give reasons for its decision where the relevant statute or regulation governing the tribunal does not require it to do so, but the overriding consideration is fairness.

[119] The remaining substantial question is whether the applicant was entitled to be given reasons for the conclusion reached not to overturn the decision not to promote him. In judicial review jargon, the complaint gives rise to considerations of. Irrationality and unreasonableness.

[120] In setting out the basis on which he was launching the appeal, the applicant made a fulsome and comprehensive explanation as to why he thought the process was unfair and the decision not to promote him unreasonable. The substance of the complaint was that the process was tainted by bias and an inherent conflict of interest on the part of the individual who headed the interview team, and that the process was unfair in that there was no need for a competitive recruiting process to

fill the vacancy for which he had applied. He also disputed the scores as being reflective of his performance in the testing and interview process. He also requested that he be reassessed by an entirely independent panel. In fact, the very arguments and grounds of his claim for judicial review were for the most part, put forth in his appeal.

[121] After the fact (for the purposes of these proceedings), much information was disclosed which makes it apparent on the face of it that the decision not to promote was not an irrational one but was based on what appeared to be a comprehensive process of evaluation which seemed to have taken into consideration the various criteria or at least, most of those set out in Regulation 17. Of course the question of bias according to the applicant would have tainted the decision. I have already dealt with that matter.

[122] Ultimately, the question also arises as to whether the failure of the PSC to give reasons for its decision necessarily means that the process of making the decision was irrational or was in any way illegal. In paragraphs 17, 20 and 22 of her affidavit Ms Mendez explained that the Public Service Commission requested an explanation from the Solicitor General and that the Solicitor General provided the report and other documents to include the interview score sheet with the comments of the panellists, the applicant's educational qualifications, the job description and the advertisement for the post. It was her evidence that the Public Service Commission gave due consideration to the documents received from the Solicitor General and the grounds of appeal filed by the applicant. It is also noteworthy that the Commission confined itself to reassessing the applicant's performance in the selection process as it was mandated to do based on the Accountability Agreement.

[123] The response from the Chief Personnel Officer of the Public Service Commission was a terse one merely advising him that his appeal was considered by the Commission at its meeting held on the 21st July 2021 and that the decision of the Solicitor General stands. In light of the detailed reasons and bases the applicant placed on the table as to why he was seeking a review of the decision, notwithstanding the reasons given by the Solicitor General, the applicant deserved a fuller understanding as to the process of consideration that was engaged and some reason why the Commission was of the view that the Solicitor General's decision

was reasonable and or correct in the circumstances. The Public Service Commission is a body with which the applicant had been embroiled in litigation over an extended period. He has had two successful judgments against that body. The Commission would have felt obliged to consider the applicant's appeal as a matter of necessary based on a role it assumed. One is not overlooking the onerous responsibility that would devolve on the Commission if it were in fact to afford a hearing to every public servant under its portfolio who is aggrieved at not being promoted but this was not the usual case. In the interest of transparency, it might have been prudent that the applicant be afforded reasons.

[124] The general rule pursuant to 64.6(1) of the Civil Procedure Rules is that costs follow the event and the successful party is therefore entitled to costs. Under rule 56.15, the general rule is that no order for costs may be made against an unsuccessful applicant unless the court takes the view that the applicant has acted unreasonably. The applicant is the successful party and is ordinarily entitled to his costs. I am mindful of the interlocutory nature of the proceedings and therefore of the likelihood that either the applicant or the respondents could be successful upon the hearing of the claim for judicial review. Nevertheless, I award the costs of this application to the applicant to be taxed if not agreed.

CONCLUSION

[125] In the final analysis, although I am not of the view that the applicant has arguable grounds with a realistic prospect of success with regard to all the declarations he wishes to seek, he has raised sufficient doubt in relation to the validity of the Accountability Agreement and the constitutionality of the present arrangement for employment and promotion for public servants. The present arrangement arguably, has divested the Public Service Commission of its intended role and purpose as well as bestowed upon it a role that is within the purview of the Privy Council. There are also concerns as to whether the Public Service Commission ought to have considered the applicant's eligibility for promotion from time to time as vacancies occurred, taking into account all the factors enumerated in Regulation 17(1), notwithstanding the extant litigation regarding the propriety of the purported dismissal. Further it is arguable that he should have been given a reason for the decision not to promote him.

[126] On the above analysis, the applicant has made out his case for a grant of leave to apply for judicial review. In the circumstances, I make the following orders:

1. Leave to apply for judicial review is granted to the applicant.

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

3. The first hearing of the Fixed Date Claim Form for Judicial Review is scheduled for June 28, 2022 at 10:00 am for 30 minutes.

4. The parties will be heard on the question of costs on Friday, May 6, 2022 at 10:00 am.

A. Pettigrew-Collins
Puisne Judge