



[2024] JMSC Civ. 96

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION**

CLAIM NO. SU2022CV02300

BETWEEN	DEBORAH PATRICK-GARDNER	CLAIMANT
AND	THE PUBLIC SERVICE COMMISSION	DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	INTERESTED PARTY

CONSOLIDATED WITH:

CLAIM NO. SU2022CV02474

BETWEEN	DEBORAH PATRICK-GARDNER	CLAIMANT
AND	THE PUBLIC SERVICE COMMISSION	DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	INTERESTED PARTY

IN CHAMBERS VIA VIDEO CONFERENCE

Mr. Harrington McDermott and Miss Giselle Campbell instructed by Patterson Mair Hamilton appeared for the Claimant

Miss Lisa White and Miss Kristina Whyte instructed by the Director of State Proceedings appeared for the Defendant and Interested Party.

Heard: 18th June and 31st July 2024

Civil Procedure – Disclosure – Specific Disclosure – Nature and Import of Pleadings – Criteria for Ordering Specific Disclosure – Whether documents requested are directly relevant to the issues in dispute – Whether documents requested are in the defendant’s possession or under its control – Whether an Order for specific disclosure is necessary in order to dispose of the claim fairly or to save costs – Civil Procedure Rules, 2002, Rule 28.1, 28.2, 28.6, 28.7 – Staff Orders for the Public Service, order 2.4(i)

Costs – Cost to the Claimant in Any Event – Who is the successful party – Whether the general rule for cost orders should be displaced – Civil Procedure Rules, 2002, Rule 64.6

T. HUTCHINSON SHELLY, J

INTRODUCTION

- [1] The Claimant, Mrs. Deborah Patrick-Gardner, is the Chief Technical Director, Labour at the Ministry of Labour and Social Security (“MLSS”). The Defendant, the Public Services Commission, is the statutory body that has oversight of the appointment, disciplinary and removal processes of public sector employees. The Attorney General of Jamaica is joined as an interested party in these proceedings, because they are the legal advisor to the Government and the nature of this claim is one which may financially affect the Government.
- [2] The Claimant has initiated proceedings for Constitutional Motion for damages for the breach of her right to equitable and human treatment and Judicial Review against the Defendant for its alleged malfeasance in, inter alia, not investigating the allegations of the Claimant in regard to the Permanent Secretary of the MLSS.
- [3] The Claimant now seeks an order for specific disclosure to “*substantiate the claim and quantify her damages.*”

BACKGROUND

- [4] The Claimant was granted leave to apply for Judicial Review, against the Defendant, on paper by Tie-Powell, J on the 27th day of July 2022. Consequent upon this decision, the Claimant filed an Amended Fixed Date Claim Form on the 10th day of August 2022 where she seeks the following reliefs:

(i) An Order of Mandamus directing the Defendant to deal with the complaints of misconduct lodged by the Claimant against Mrs. Collette Roberts Ridsen, Permanent Secretary in the Ministry of Labour and Social Security in accordance with The Public Service Regulations, 1961;

(ii) An Order of Certiorari quashing the decision of the Defendant contained in letters dated April 27, 2022 and April 29, 2022;

(iii) A Declaration that the Claimant is a permanent pensionable public officer appointed to the post of Chief Technical Director (CTD), Labour in the Ministry of Labour and Social Security;

(iv) A Declaration that the Claimant’s fundamental constitutional right to equitable and humane treatment guaranteed under Section 13(3)(h) of the

Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 has been infringed by the Defendant;

(v) An injunction restraining the Defendant or any other authority whether by themselves, their employees or agents, from taking any steps to remove the Claimant from the post of Chief Technical Director, Labour;

(vi) An injunction restraining the Defendant or any other person acting pursuant to the Public Service Regulations whether by themselves, their employees or agents, from taking any and/or any further steps, in any manner whatsoever, that adversely interferes with or affects the status of the Claimant as Chief Technical Director, Labour;

(vii) Damages including Constitutional/Vindictory damages;

(viii) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act;

(ix) Costs to the Claimant; and

(x) Such further and/or other relief as this Honourable Court deems fit.

- [5] The Defendant has not yet filed a Defence or Response to the above Claim.
- [6] The Claimant filed two (2) separate Notices of Application for Court Orders on the 31st day of July 2023. The Claimant sought orders for specific disclosure and to add and designate the Attorney General of Jamaica as an “Interested Party”. Both Notices of Application were fixed to be heard jointly on the 8th day of February 2024 at 10:00 am.
- [7] K. Anderson J, in chambers via video conference, on the 8th day of February 2024 considered the Applications and made an order that deemed the Attorney General of Jamaica an Interested Party to the claim. However, the hearing of the Notice of Application for Court Orders where the Claimant sought orders for specific disclosure was adjourned to the 1st hearing of the Fixed Date Claim Form on the 18th day of June 2024. This is the Application upon which the Court must now decide.
- [8] The Claimant seeks the following orders in her Notice of Application for Court Orders:
1. *An order for specific disclosure that the Public Service Commission to disclose to the Claimant documents containing the following information:*
 - (i) *All salary increments (whether anniversary or otherwise) that were paid to the Claimant since her appointment as*

Principal Executive Officer on 1 October 2011 to date, to include:

- a. *the type of increment to which the Claimant had become entitled;*
 - b. *the dollar amount of the increment to which the Claimant had become entitled;*
 - c. *the actual dollar amount of any increment paid;*
 - d. *the time period for which each paid increment relates; and*
 - e. *the date of payment*
- (ii) *Any increment due to the Claimant by virtue of her eligibility and/or entitlement that has been withheld or remain outstanding, which information must include:*
- a. *the type and dollar amount of the increment withheld or that remain outstanding;*
 - b. *the time period to which such increment relates and the reason if any, for the increment being withheld or remain outstanding.*
2. *An order that the Claimant's complete personnel files held at the Ministry of Labour & Social Security, the Ministry of Justice and the Court Administration Division be specifically disclosed to her and that she be permitted access to same.*
 3. *Costs of the Application to the Claimant in any event.*
 4. *Such further or other relief as this Honourable Court deems just in the circumstances.*

[9] The ground on which these orders are sought are:

1. *Pursuant to Rule 56.13(2)(iii) the judge at a First Hearing of an administrative claim may make orders for disclosure of documents.*
2. *The order for specific disclosure sought herein seeks the disclosure of documents that are directly relevant to one or more matter in issue in the proceedings, as provided by Rule 28.6(5).*
3. *Specific disclosure of the documents sought herein is necessary in order to dispose fairly of the claim, as provided by Rule 28.7(1).*
4. *The documents in respect of which specific disclosure is sought are or have been in the control of the Defendant within the meaning of Rule 28.2(2)(b) and (c).*
5. *The Claimant's claim seeks a declaration that her fundamental right to equitable and humane treatment under the Charter of Rights has been breached and she seeks Damages, including Constitutional and Vindictory Damages. The information requested, and withheld, is necessary for the Claimant to substantiate the claim and quantify her*

damages; and to enable the Court to assess damages should it find that the Claimant's rights were breached.

[10] The Fourth Affidavit of Deborah Patrick Gardner, filed on the 10th day of July 2023, predates the filed Application for specific disclosure but is the Affidavit which outlines information related to the reasons for the Application. I will not endeavour to reduce the contents of that Affidavit here, but will mention portions of that Affidavit, as is necessary, in the latter portions of the judgment.

SUBMISSIONS

[11] The Claimant proffered skeleton submissions filed on 7th day of February 2024 and further elaborated on same, orally, on the date of the hearing of this Application. The Defendant filed written submissions opposing the Application on the 6th day of February 2024 and further argued points therein, orally, on the date of the hearing. The submissions of the Parties are summarized accordingly, and no disrespect is intended in reducing the arguments of Counsel.

The Claimant's Submissions

[12] Counsel for the Claimant argued that the Claimant is empowered to make an Application by virtue of Rule 28.6(5) of the CPR. Counsel submitted that the documents for which specific disclosure is being sought are directly relevant to the proceedings and as such the Claimant can seek an order requesting specific disclosure of same. Counsel relied on Rule 28.1(4) of the CPR and the case of **Miguel Gonzales and Suzette Saunders v Leroy Edwards** [2017] JMCA Civ 5 as being instructive in the circumstances.

[13] Counsel submitted that the documents for which specific disclosure is sought are directly relevant to the Claimant's substantive claim in that the information will allow:

- (i) The Claimant to substantiate her claim;
- (ii) The Claimant to quantify her damages; and
- (iii) The Court to assess damages should it find that the Claimant's rights have been breach.

[14] Counsel further submitted that the Defendant has not filed any Defence or Response to the Claim or this Application which would disclose that the documents sought are not directly relevant or that if an order for specific disclosure is made, it would be unable to comply with same.

[15] It was argued by Counsel that the documents for which specific disclosure is sought are or have been in control of the Defendant within the meaning of Rule 28.2(2)(b) and (c) of the CPR. Counsel noted that the functions of the Defendant would enable them to provide the documents as they have or have had the right of possession to the documents being sought by specific disclosure. Counsel further argued that specific disclosure would be necessary in the circumstances to dispose fairly of the claim and save costs.

The Defendant's Submissions

[16] Counsel for the Defendant submitted that the documents for which specific disclosure is sought are not documents which the Defendant has or had control of within the meaning of Rule 28.2(2)(b) of the CPR. Counsel argued that the Claimant has failed to show the basis upon which the Defendant has a right of possession to the documents. In any event, Counsel argued, the information was already provided by the Claimant's current employer, MLSS. It was further advanced by Counsel that the response by MLSS has made the Application before the Court otiose, especially in circumstances where the Claimant is unable to prove the need for disclosure of documents relating to salary increments at any time before her current assignment to the MLSS.

[17] Counsel relied on Regulation 38 of the Public Service Regulations to buttress their position that once a public officer is at the end of their salary scale, they are no longer entitled to increments. It was argued that the Claimant in her own Affidavit admits that by 2015 she was at the end of her salary scale. This, Counsel contended, shows that there is no evidence or assertion which suggests that the Defendant has authorized or purported to authorize withholding of any increments due to the Claimant.

[18] Counsel further submitted that in the context of the claim, the Claimant has failed to show that the documents requested are directly relevant pursuant to Rule 28.1(4) of the CPR. Counsel argued that the documents sought do not assist in the ventilation of any of the issues before the Court and further, that the Claimant has failed to prove the contrary. Counsel also relied on the case of **Miguel Gonzales and Suzette Saunders v Leroy Edwards** *supra* to lend credence to their submissions that the documents are not directly relevant.

[19] Counsel argued that, in any event, the Claimant has not proved that she utilized the appropriate avenue to view her personnel file held at the Court Administration Division (“CAD”), formerly Court Management Services. Further, the Claimant in her own Affidavit admits that she was allowed to view her personnel files at the Ministry of Justice (“MOJ”) and MLSS. Therefore, the information sought was already provided.

[20] Counsel submitted that the Claimant’s failure to prove that the documents requested are directly relevant is synonymous with the specific disclosure of said documents not being beneficial. Counsel also noted that the costs that would be associated with producing the documents requested would far outweigh the likely benefits. Counsel argued that it would not be *“fiscally responsible of the financial uses of the Government of Jamaica to assist the Claimant in a fishing expedition.”* Counsel asserted that the Claimant has failed to satisfy the criteria stipulated in Rule 28.7 of the CPR that specific disclosure of the documents is necessary to fairly dispose of the claim in the circumstances.

ISSUES

[21] The primary issue to be determined is whether the Court should make an order for specific disclosure of the documents requested. With respect to this issue, the following sub-issues arise:

- (i) Whether the documents requested are directly relevant to one or more matters in issue in the proceedings; and

- (ii) Whether the documents requested are or have been in the control of the Defendant.

LAW AND ANALYSIS

[22] In the case of **Jamaica Association of Composers Authors and Publishers Limited v KLAS Sports Radio Limited** [2021] JMSC Civ 112, A. Nembhard J helpfully outlined an understanding of what the law contemplates in relation to disclosure and specific disclosure. The following portions of her judgment provide useful guidance:

Disclosure

[11] *Disclosure is the procedure by which one party to an action must disclose to the other party, by means of a list, the existence of all documents which are or have been in his control and which are directly relevant to one or more of the issues that arise for the court's determination.*

[12] *The primary purpose of disclosure is that it will often reveal documents that are critical to a party's prospects of success in the litigation; it enables the parties to evaluate more accurately the strengths and weaknesses of their cases; and it enables the narrowing of issues, which encourages settlements, with the resultant saving of time and expense.*

Specific disclosure

[13] *An order for specific disclosure requires the party to whom the order is addressed to disclose only those documents or classes of documents specified in the order.*

[14] *In deciding whether to order specific disclosure the court must consider whether such disclosure is necessary in order to dispose of the claim fairly or to save costs, having regard to the likely benefits and costs of the disclosure and whether the party against whom the order is proposed to be made has the financial resources to comply.*

[15] *Part 28 of the CPR governs the disclosure and inspection of documents and endows the court with the power to make an order for specific disclosure on or without an application.*

[16] *Rule 28.2(1) of the CPR provides that a party has a duty to disclose documents which are or have been in his control. For the purposes of part 28 of the CPR, a party has or has had control of a document*

if it is or was in the physical possession of that party; that party has or has had a right to possession of it; or that party has or has had a right to inspect or take copies of it.

[23] From the above, it is made clear that the starting point for analyzing the issues is Part 28 of the CPR, the relevant portions of which have been reflected as thus –

Scope of this Part

28.1 ...

(4) For the purposes of this Part a document is "directly relevant" only if –

- (a) the party with control of the document intends to rely on it;*
- (b) it tends to adversely affect that party's case; or*
- (c) it tends to support another party's case.*

Duty of disclosure limited to documents which are or have been in party's control

28.2 *(1) A party's duty to disclose documents is limited to documents which are or have been in the control of that party.*

(2) For this purpose a party has or has had control of a document if

- (a) it is or was in the physical possession of that party;*
- (b) that party has or has had a right to possession of it; or*
- (c) that party has or has had a right to inspect or take copies of it.*

Specific disclosure

28.6 *(1) An order for specific disclosure is an order that a party must do one or more of the following things –*

- (a) disclose documents or classes of documents specified in the order; or*
- (b) carry out a search for documents to the extent stated in the order and disclose any documents located as a result of that search.*

(2) An order for specific disclosure may be made on or without an application.

(3) An application for specific disclosure may be made without notice at a case management conference.

(4) An application for specific disclosure may identify documents –

- (a) by describing the class to which they belong; or*
- (b) in any other manner.*

(5) An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.

Criteria for ordering specific disclosure

28.7 (1) *When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.*

(2) *It must have regard to –*

- (a) *the likely benefits of specific disclosure;*
- (b) *the likely cost of specific disclosure; and*
- (c) *whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.*

(3) *Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order for specific disclosure, it may however make such an order on terms that the party seeking that order must pay the other party's costs of such disclosure in any event.*

[24] Having identified the rules which relate to the Application, the Court must look at the Application in the context of the Claimant's case. This will require an examination of the pleadings of the Claimant.

Nature and Import of Claimant's Pleadings

[25] Pleadings are important to proceedings in court. Its purpose is to define and delineate with clarity and precision the real issues between the parties (see: **Grace Kennedy Remittance Services Limited v Paymaster (Jamaica) Limited and Paul Lowe** (unreported) Court of Appeal of Jamaica, SCCA No. 5/2009 judgment delivered 2 July 2009 at paragraphs 28 to 31). Pleadings have a dual purpose as they inform each Party of the other's case and informs the Court of those issues that will be the subject of interlocutory proceedings and that the Court will have to determine at trial (see: **Bullen and Leake and Jacob's Precedents of Pleadings**, 12th edition, at page 3).

[26] In the case of **McPhilemy v Times Newspapers Ltd and others** [1993] 3 All ER 775, Lord Woolf MR, at page 778, opined that –

The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for

*particulars in order to avoid being taken by surprise. **This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.** This is true both under the old rules and the new rules. The Practice Direction CPR 16, paragraph 9.3 requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required. (emphasis added)*

- [27] Therefore, the rule is that pleadings should reveal all the allegations and factual arguments on which a Party relies to either make their case or mount their defence.
- [28] The gravamen of the Claimant's case is that her assignment to MLSS has resulted in issues regarding her employment status. Further, the treatment by the Permanent Secretary at MLSS as evidenced in her various affidavits, compounded by, inter alia, the failure of the Defendant to deal with her complaint, has breached her right to equal and humane treatment. These are the basis upon which the Claimant has approached the Court for constitutional/vindictory damages and Judicial Review.
- [29] There is some dispute surrounding the period for which the Claimant has brought this claim before the Court. Counsel for the Defendant is of the view that the Claimant's claim, that is her claim for Judicial Review and constitutional and/or vindictory damages, is limited to issues arising or surrounding her transfer to MLSS and subsequent alleged ill-treatment during or around that time, which is from 2018 up until, at least, the date of the filing of the claim in 2022.
- [30] Counsel for the Claimant has not made any submissions with respect to the period for which the claim is grounded. However, from their submissions and from the pleadings of the Claimant, the Court understands that the Claimant's position is that the claim for Judicial Review is limited to issues arising between the Claimant and the Defendant in 2018 until at least, the date of the filing of the Claim in 2022. Further, that the constitutional motion predates issues arising in 2018 and starts as early as 2015

when the Claimant was deprived, as she puts it, from purchasing her government assigned motor vehicle when she became eligible to do so.

- [31] The Parties are united on the period for which the claim for Judicial Review is being sought. The issue is the period for which the constitutional motion is being brought. Therefore, the parameters of the claim before the Court is a necessary issue to be addressed in the disposition of this Application as it will assist the Court in determining the direct relevance of the documents being sought on specific disclosure.
- [32] In the context of the Orders being sought in the Amended Fixed Date Claim Form, it appears that the breach to her right of equal and humane treatment was limited to the issues arising at her current employment with MLSS and the actions or inactions of the Defendant in relation to same. This is further supported by the “*details and nature of the claim*” and the “*Particulars of Contravention of Section 13(3)(h) of the Charter of Fundamental Rights and Freedom*” as elaborated in the Amended Fixed Date Claim Form.
- [33] However, the Court notes that at paragraph 4.4 of the Claimant’s Amended Fixed Date Claim Form it is advanced that the Claimant relies on “[s]uch further grounds and/or particulars as disclosed in the Claimant’s supporting affidavits.” However, it is not until the Supplemental Affidavit of Deborah Patrick Gardner filed on the 31st day of May 2023 that the Claimant indicates any actions or inactions of the Defendant prior to the year 2018. The Claimant made reference to this affidavit in addressing the instances prior to 2018 when her rights were breached in the Fourth Affidavit of Deborah Patrick Gardner filed the 10th day of July 2023.
- [34] The Court is mindful that it must not engage itself in a mini trial of the issues at this stage and indeed it has sought not to do so. It appears however that the phrase “*such further and other grounds and/or particulars as disclosed in the Claimant’s supporting affidavits*” is a catch all phrase. This view is grounded in the fact that it would

essentially allow the Claimant to file multiple affidavits that may disclose new facts which could conceivably widen the scope of her pleadings.

[35] On the face of it, it appears that the Claimant is utilizing her Supplemental Affidavit and Fourth Affidavit to expand the parameters of the Claim which has already been set by her Amended Fixed Date Claim and the Affidavit in Support. This is not the proper procedure by which this should be done. While the subsequent Affidavits may be considered as pleadings, the contents of same should be in accordance with the context of the Claim as outlined by the Amended Fixed Date Claim and the Affidavit in Support.

[36] The Court is strongly of the view that the claim for Judicial Review and constitutional motion have specifically been limited to the allegations surrounding the time of the Claimant's assignment to MLSS, that is the year 2018 to 2022. Accordingly, the documents being requested from the CAD and MOJ would not be relevant to the proceedings as they are not directly relevant to the issues in the claim since the years to which they relate fall outside of the parameters of this claim.

Whether the Documents Are Directly Relevant to the Issues

[37] Documents being sought on an application for specific disclosure must be directly relevant to the issues which exist in the claim. This is a pre-requisite for specific disclosure. This means that if there is a finding that the documents are not directly relevant, then the Court need not consider this Application by the Claimant any further.

[38] F. Williams JA at paragraph [22] in the case of **Miguel Gonzales and Suzette Saunders v Leroy Edwards** *supra* expounded on what the term 'directly relevant' means. He stated as follows –

“By these provisions, a pre-requisite for disclosure is a finding that a document is, not just relevant in the usual layman's sense, but "directly relevant" within the meaning of the rule. The rule uses the phrase "only if" in delimiting the matters to be considered in deciding whether a document satisfies the definition. This means that a finding that a document is directly relevant can only be made in the three circumstances outlined in the rule.”

For the avoidance of doubt, the rule being mentioned by F. Williams JA at this portion of his judgment is rule 28.1(4) of the CPR which outlines the criteria to be met for a document to be directly relevant.

[39] In the case of **The Attorney General of Jamaica v BRL Limited and Village Resorts Limited** [2021] JMCA Civ 14, McDonald-Bishop JA concurred with the interpretation by F. Williams JA, emphasizing that for documents to be disclosed, they must meet the criterion of being 'directly relevant' within the meaning of rule 28.1(4) of the CPR. At paragraph [103] of her judgment, McDonald-Bishop JA opined that –

“[t]he fact that the documents “may” be relevant, or merely “relate” to an issue in dispute is not sufficient to render them specifically disclosable within the ambit of the CPR; they must be ‘directly relevant’ as defined by the CPR.”

[40] Therefore, if the document is not relevant to the proceedings it need not be disclosed. In order to find that a document is directly relevant, it must meet one of the three criteria outlined at Rule 28.1(4) of the CPR. To determine whether any of the three criteria are met in relation to the documents sought, the Court is required to examine the pleadings filed in the case thus far.

[41] As previously stated, the duty of the Court at this stage is not to engage itself in a mini trial of issues, but rather to determine in the context of the case, based on what has been filed, the direct relevance of the documents being sought. It is unfortunate that the Court does not have sight of any pleadings for the Defendant, as no Defence or response has been filed up to the point of this hearing.

[42] As outlined in her Notice of Application for Court Orders, these are the documents that the Claimant wishes to have specifically disclosed to her –

- (i) *All salary increments (whether anniversary or otherwise) that were paid to the Claimant since her appointment as Principal Executive Officer on 1 October 2011 to date, to include:*
 - a. *the type of increment to which the Claimant had become entitled;*

- b. *the dollar amount of the increment to which the Claimant had become entitled;*
 - c. *the actual dollar amount of any increment paid;*
 - d. *the time period for which each paid increment relates;*
and
 - e. *the date of payment*
- (ii) *Any increment due to the Claimant by virtue of her eligibility and/or entitlement that has been withheld or remain outstanding, which information must include:*
- a. *the type and dollar amount of the increment withheld or that remain outstanding;*
 - b. *the time period to which such increment relates and the reason if any, for the increment being withheld or remain outstanding.*
- (iii) *... the Claimant's complete personnel files held at the Ministry of Labour & Social Security, the Ministry of Justice and the Court Administration Division be specifically disclosed to her and that she be permitted access to same.*

[43] Having thoroughly examined the pleadings of the Claimant and having regard to the submissions of Counsel for the Claimant, these are the allegations on which the Court believes the Claimant has placed reliance to necessitate an order for specific disclosure of the above documents:

- (i) The Defendant's actions and/or inactions stripped the Claimant of her status as a permanently assigned public service officer;
- (ii) The Defendant has no regard for the Claimant's permanent pensionable status and has taken a cavalier approach to the issue.
- (iii) There are outstanding and unpaid increments which are due to the Claimant resulting in a decrease to her emoluments.
- (iv) The Claimant is receiving a lower salary than that to which she is or was entitled.

[44] The Court accepts that personnel files may include:

- Resume and Application Letter
- Record of employee's performance in the selection process
- Birth Certificate
- Marital status
- Academic qualifications and other certificates

- Report of medical examination
- Reference Checks
- Letter of Appointment
- Personal information (next of kin, emergency contacts etc.)
- Leave application and permission letters
- Copies of Training and Development Plans
- Record of changes in salary, benefits and allowances
- Copies of any disciplinary actions against the employee

[45] The personnel files may, however, also contain various documents, some of which may not be directly relevant (or even merely relevant) to the issues in the claim. Interestingly enough, the Claimant has not specified what documents are required save and except for the salary increment records which form part of the personnel file.

[46] The Court is mindful that an order for specific disclosure of the entirety of the Claimant's personnel file may facilitate a fishing expedition and does not endeavor to support such exercises. In light of this, and having regard to the issues of the case, the Court is of the view that the only documents from the personnel file held by MLSS which may be relevant to the Claim (and potentially directly relevant in relation to Rule 28.1(4) of the CPR) are:

- (i) Letters of Appointments – to include letters in relation to transfers or reassignment
- (ii) Records of change of salary, benefits and allowances – which should also include information related to salary increments.
- (iii) Service Records

[47] At this juncture, the Court is confronted with the submission of Counsel for the Defendant that the issues in the claim do not reveal a need for the salary increment information. On this point, Counsel submitted, firstly, that the Claimant did not obtain leave in respect of any decision to withhold allowances or salary increments. Secondly, that the issue of increments does not arise for consideration on the constitutional motion. Thirdly, that the Defendant could not be ordered to pay any alleged increment withheld as the Defendant is not the Claimant's employer and has

no power over the payment of her emoluments. Lastly, the information or documents requested were already provided by MLSS to the Claimant. In view of these submissions, Counsel argued that the Application is otiose.

[48] In assessing the submissions of Counsel for the Defendant, the Court finds that it is arguable that the application for specific disclosure of salary increment documents arises for consideration on the constitutional motion for which damages are being sought. It arises in circumstances where it is being alleged that increments were withheld from the Claimant where such increments are only to be withheld as a disciplinary action and the Claimant has not been the subject of any such action.

[49] In the Affidavit of Deborah Patrick Gardner in Support of the Fixed Date Claim Form filed the 9th day of August 2022, at paragraph 18, the Claimant indicates that she reviewed her personnel file from MLSS on or around February 2020. The Claimant also provides the exhibited document DG-6 which is a 2nd complaint to the Defendant wherein the Claimant further confirms this, save that the date of reviewing the personnel file was indicated as the 30th day of January 2020 in the exhibited document.

[50] In the Fourth Affidavit of Deborah Patrick Gardner filed on the 10th day of July 2023, at paragraph 12, the Claimant indicated that she requested information on salary increments from MLSS, MOJ and CAD. However, at paragraph 13, she noted that she was only responded to by MLSS and exhibited DG-6, which indicates that the Claimant's request was fulfilled by MLSS.

[51] Exhibit DG-6 indicates that as at the Claimant's reassignment to MLSS on the 7th day of May 2018:

- (a) no salary increments were paid to her by MLSS and that at the time of her reassignment she was at the top of her scale;
- (b) based on their records no increment has been withheld;

- (c) MLSS has stopped paying out automatic increments since the 1st day of April 2021;
- (d) The service records of the Claimant from MOJ and CAD would be helpful in determining the Claimant's eligibility for increments.

MLSS also attached the necessary salary documents and other documents in support of their position.

[52] In the context of the submissions of Counsel for the Claimant, the Claimant has approached the Court for assistance with getting the information and documents because her efforts at soliciting same from MLSS, MOJ and CAD have been fruitless. Indeed, the Claimant said so herself in her Fourth Affidavit. Further, the Claimant indicates that access to her personnel file from MLSS was prior to the claim being brought and that she faced difficulties since the institution of the proceedings to view her personnel records at the entities. The Court understands the Claimant to be saying that MLSS, MOJ and CAD have not been forthcoming with providing the requested information because of the claim.

[53] The Court is of the view MLSS has been forthcoming with information and had provided the Claimant with access to her personnel file prior to the institution of proceedings. They also provided a response to the Claimant's request for information on salary increments. This view is premised upon what the Claimant herself has admitted of the conduct of MLSS in treating with and facilitating her requests.

[54] In addressing the response from MLSS, Counsel for the Claimant submitted that it does not address the increments received. Further that these documents along with the personnel files are directly relevant because if the Claimant is not treated as a permanent pensionable employee then it will affect the benefits she is entitled to. The Court does not agree with Counsel's submissions on this point. It is obvious to the Court, having carefully scrutinized the document, that every aspect of the Claimant's request was addressed by MLSS. They indicated that since her reassignment to

MLSS she has not received any increments. They also provided the reason for this. It follows in those circumstances that nothing was withheld.

[55] Curiously, the Claimant has not provided any evidence to show what increments if any were due to her upon her reassignment to MLSS given that she has not denied that she was at the top of the scale. Further she has not identified what increments, if any, to include the type, months or years would have been due to her and were not paid out to her or were withheld by CAD, MOJ and/or MLSS.

[56] Similarly, the Claimant has not identified what benefits have been or may be affected by any alleged action or inaction by the Defendant, referencing her employment status as 'assigned'. The Claimant has merely indicated that she did not receive a new motor vehicle which she would have been entitled to at her previous post and that there were delays in facilitating her purchase of the last government owned vehicle to which she is entitled under the Government's motor vehicle policy. The Claimant has not shown a refusal by the Government, more specifically the Defendant, to recognize those entitlements because of the status of "assigned".

[57] Further, the Court agrees with the submissions of Counsel for the Defendant that there is no evidence provided by the Claimant that she followed the standard protocol to view her personnel file at MLSS, since the institution of proceedings, in order to obtain the material requested. Simply put, the Claimant has not shown that there was a renewed request to view her personnel file at this entity since the claim.

[58] Order 2.4(i) of the Staff Orders for the Public Service provides that public officers have a right to view their personnel file. It is expected that Government Agencies/Ministries would act in tandem with this provision and facilitate such requests as the directive is that access to one's personnel file is a right.

[59] The Court finds useful the following words of Denning LJ in the case of **Air Canada et al v Secretary for Trade** [1983] 2 AC 394 ("**Air Canada**"), in particular, those at page 441 –

“The due administration of justice does not always depend on eliciting the truth. It often depends on the burden of proof. Many times it requires the complainant to prove his case without any discovery from the other side.

...

If the plaintiff fails to prove his case - for want of any admission by the defendant - no injustice is done to him. Even though the truth may not have been ascertained, no injustice is done. In these cases, all that justice requires is that there should be a fair determination of the case whatever the real truth may be. Likewise, when a plaintiff alleges that the defendant has done him some wrong but has no evidence whatever to support it. He seeks to obtain it by making a ‘fishing expedition’. He asks to see all the documents of the other side so as to see if he can get some evidence out of them. The court invariably refuses. It refuses because ‘justice’ requires that he should have some material to go upon before he goes ‘fishing’.

I hold that when we speak of the administration of justice this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, a party must prove his case without any help from the other side. He must do it without discovery and without putting the other side into the witness box to answer questions.”

The Court shares the views elucidated above.

[60] In consideration of the above, the Court notes that the Claimant did not approach this application with any specificity regarding the documents that she seeks. In respect of her request for the salary increment documentation, she provided no evidence, documentary or otherwise, to show that by virtue of her appointment sums had been payable at a particular time and at a particular rate and that payments should have been made for a specific period and were not. What she has sought to do instead is ask the Defendant to provide her with information which may be relevant to her general grievance against the Ministries named but may not be directly relevant to the quantification of damages which she hopes to receive. While it may be argued that this may assist the Court to know the extent of the financial benefits of which she was deprived, this view would be speculative at best, as the wording of the request shows it to be more akin to a fishing expedition to later decide what useful information, if any, can be found in the

material disclosed. This approach is contrary to the standard required in the authorities reviewed on this point.

- [61]** The same observation is made in respect of the request for the entire personnel file. Although this request was modified, in oral submissions, to relate to the period since the inception of the claim against CAD to the date of the hearing, the Claimant still failed to pinpoint what documents if any were directly relevant to the orders sought in her pleadings. While the Court accepts that there may or may not be documents on the file which could impact this issue, the Claimant's request appears to be more in keeping with a fishing expedition.
- [62]** The Court is of the view that the requested documents, as laid out in the Notice of Application, would serve no other purpose than to open a "train of enquiry" for the Claimant to secure various documents to see whether there is support for her case regarding her allegations against the Defendant. This lack of precision as to direct relevance is, to the Court's mind, the main reason why there cannot be a finding that the documents requested fall within this category. Further, the Claimant has not shown how the disclosure of these documents would support her case or undermine the Defendant's case.
- [63]** Additionally, the Court agrees with Counsel for the Defendant that the response from MLSS to the Claimant's request makes the Application otiose in relation to the documents related to salary increment information held by them.
- [64]** The Court notes that even in the absence of any disclosure from the Defendant the Claimant has access to her pay slips which could substantiate her claim and assists in quantifying her damages. The Claimant would also have access to the salary scales of public officers, including those holding comparable positions, which are published in the establishment orders and on the Ministry of Finance website. The Court accepts that this information would enable her to prove whether there were increments due that were not paid out to her.

[65] The legal principle, “*he who asserts must prove*,” remains true. The Claimant has brought this Application before this Court and indeed also the Claim. Therefore, it is Claimant who must be able to, at the very least, show the basis upon which the documents sought fall to be disclosed. The Claimant has failed to do this.

Whether the documents which predate 2018 are specifically disclosable

[66] Before concluding my remarks on the above issue, the Court wishes to briefly consider whether the documents which predate 2018 are specifically disclosable.

[67] Firstly, to reiterate, the documents which predate 2018 are not directly relevant because they do not fall within the context of the claim. This has been the Court’s position. However, if this assessment is wrong, the Court is nonetheless of the view that in the context of its discourse at paragraphs [37] to [65] herein, the documents being sought which predates 2018 would also not be directly relevant.

[68] In the Fourth Affidavit of Deborah Patrick Gardner, at paragraph 8, the Claimant indicates that she reviewed her personnel file, or ‘*whatever remained thereof*’ as she described, at MOJ on the 2nd day of December 2022. She indicated that the file was “*scant*” and that she was informed that this file contained all documents which remained at MOJ for her as her personnel file was sent back to CAD.

[69] In the same affidavit she indicates as well that she made attempts to view her personnel file at CAD, but those attempts were futile as she was never accommodated by CAD so the file could be viewed.

[70] The Court is not in a position to state whether or not what was shown was truly the extent of what was in the possession of MOJ, but what is important is that she was given an opportunity to view those documents in accordance with her right under the Staff Orders. It is also important to note that this opportunity was given after the institution of proceedings. Therefore, the viewing of her personnel file at MOJ, however scant, since initiating proceedings would have afforded her access to the very personnel file she now seeks, thereby making such a request otiose.

[71] Nonetheless, MOJ has not provided a response to the request for salary increment information and documentation. Further, CAD has not been forthcoming with information as they have neither provided a response to the Claimant's request for salary increment information and documentation nor facilitated the Claimant in viewing her personnel file that is within their possession. What should the Court make of this?

[72] The Court's position is that the failure of one Party to answer a request for information or documents from the other Party may make an application for specific disclosure necessary. However, for the application to be granted, the document must be directly relevant. Indeed, this is where the Claimant has fallen short.

[73] The Court shares the same assessment of these documents and how they are sought on this Application as it does of those documents relating to 2018 – 2022 (see: paragraphs [60] – [65] herein). Therefore, the Court finds that the disclosure of salary increments documents, generally, as at 2015 and disclosure of the entire personnel file at MOJ and CAD would undoubtedly also result in a fishing expedition. The Claimant has failed to indicate to the Court the specific document(s) from the personnel files and the specific salary increment documentation(s) she requires. She has also failed to show how these documents, though unspecified, would support her case or dismantle the Defendant's case.

[74] Accordingly, the Court finds that the documents, for which the Claimant seeks specific disclosure as laid out in her Notice of Application, are not directly relevant to the issues in the claim. Having found as such, the Court is unable to agree with the position that granting specific disclosure would dispose fairly of the Claim and accordingly the Claimant's Application for specific disclosure must be refused.

Whether the Documents are in the Defendant's Control

[75] The Court having found that the pre-requisite was not met, need not go further to consider whether the documents are in the Defendant's control pursuant to Rule

28.2 of the CPR. However, for completeness and based on the discourse of Counsel in the matter, this question will be addressed.

- [76]** It was submitted by Counsel for the Defendant that these documents would be in the possession or control of the Ministries or Agencies to which the Claimant is or was employed and whom are not Parties to the claim. Counsel further submitted that the Claimant has failed to prove that the Defendant exercises a right of possession of the documents requested and as such cannot expect the burden to be placed on the Defendant to provide such documents.
- [77]** The Claimant argued that the Defendant has control over the documents as they are the statutory body with oversight of all public service officers and the processes related to the appointment, removal and discipline of the officers. Accordingly, the Defendant exercises a right of possession of the documents.
- [78]** The Court agrees with the submissions of the Claimant. It would be paradoxical if the Defendant has supervisory jurisdiction over appointment, removal and discipline processes (which are all human resource processes) of public officers and does not have a right of possession over the documents which the Claimant is seeking an order for specific disclosure. The said documents would undoubtedly fall within or under the human resource processes to which the Defendant has oversight of.
- [79]** Even though the request to obtain access to these documents must be made through the specific Government Ministry or Agency to which a public officer is employed, they are accessible to and by the Defendant. Therefore, the documents for which specific disclosure is sought were or are within the control of the Defendant and had the documents been directly relevant, the Court could rightly make an order for the Defendant to disclose them.

[80] In arriving at this decision, the Court considered the framework of the Office of the Services Commission (“OSC”). The OSC is a consolidation of various commissions which includes the Defendant. The OSC is known to keep copies of documents related to the employment and salary of public officers. The Court notes however, that this does not mean that the Defendant would have every single document in relation to the Claimant, but simply that the Defendant would be in a position to obtain such documents.

COSTS

[81] The Claimant also prayed for costs to be awarded to her “*in any event*”. This means that the Claimant is of the view that regardless of the outcome of the Application, costs should be awarded to her.

[82] The general rule elucidated at 64.6(1) of the CPR is that “costs follow the event.” This means that if costs are to be ordered, then the Court must order the unsuccessful party to pay the successful party’s costs. There are exceptions to every general rule, and the application of the rules must have regard to the overriding objective of the CPR to deal with the cases justly.

[83] In order for the general rule to be displaced, the Court must have regard to all the circumstances when deciding the order to be made in relation to costs. This encompasses relevant factors such as the behavior of the parties both prior to and during the proceedings; whether a party has prevailed on specific issues (even if not in the entirety of the proceedings); the reasonableness of a party pursuing a particular allegation or issue and the approach a party has taken in pursuing a particular allegation or issue (see: rules 64.6(3) and 64.6(4)(a), (b), (d) and (e) (ii) and (iii) of the CPR).

[84] Although the Defendant has succeeded on the substantive Application, in relation to the issue of control, the Claimant was correct. There are no allegations and/or evidence which suggests that the factual circumstances that gave rise to this

Application was due to any action or inaction of the Defendant. As such, there is no further evidence that any of the factors which would cause the Court to consider displacing the general rule exists. In light of this, the Court will not use its discretion to award costs to the Claimant in circumstances where the Claimant is the losing Party.

COMMENTARY

- [85]** Before leaving the issues presented in this Application, the Court wishes to make it clear that all rights of public officers under law must be recognized. This includes their right to access their personnel files and salary information. Such rights are not only to be weighed in light of order 2.4(i) of the Staff Orders, but also the Data Protection Act and the rights that employees may have thereunder.
- [86]** In light of this, the Court emphasizes that its ruling on this Application does not affect or fetter the right of the Claimant or any other public officer to request documents related to their employment from previous or past employers in the public service. These public service employers must do their best to fulfill and facilitate such requests. They must also err on the side of caution and ensure that such requests are not unreasonably delayed through any action or inaction on their part whether by any failure to answer such requests or any tactic to delay the fulfillment of these requests.
- [87]** The Court is mindful that the CAD, MOJ and MLSS are not parties before this Court. In view of this, the following recommendations are made based on an assessment of certain allegations made explicitly or implicitly in this Application:
1. The CAD, MOJ and MLSS should give effect to the right of the Claimant under order 2.4(i) of the Staff Orders and allow the Claimant to view her personnel records.
 2. The Claimant's request to CAD and MOJ about salary increments should be acknowledged and answered promptly.

3. CAD, MOJ and MLSS should maintain transparency and cooperation with the Claimant at all times to prevent an exacerbation of the issues which are already before the court.

ORDERS

[88] Having regard to the foregoing, the Court makes the following orders:

1. The Claimant's Notice of Application for Court Orders filed the 31st day of July 2023 is refused.
2. Leave to appeal is refused.
3. The ruling on costs of this Application is reserved to the 25th day of October 2024.
4. The hearing of the Amended Fixed Date Claim Form is scheduled for the 17th to 18th of December 2024 at 10:00am before the Full Court.
5. The Defendant is granted a final extension of time to file their Affidavits by the 30th day of September 2024.
6. The Claimant is to file and serve an Affidavit in Response (if necessary) by the 30th day of October 2024.
7. If the Defendant fails to comply with Order#5, they will not be permitted to rely on any evidence at the hearing.
8. The Claimant is to file and serve her submissions on costs by the 16th day of September 2024.
9. The Defendant and Interested Party are to file and serve their submissions in response by the 7th day of October 2024.
10. The ruling is reserved on costs only to the 25th day of October 2024 at 9:30am for 30 minutes.
11. The Claimant is to file a Core Bundle and serve Index by the 30th day of October 2024.
12. The parties are to file and exchange Skeleton Arguments and Lists of Authorities by the 29th day of November 2024.
13. The Claimant's Attorney-at-Law to prepare, file and serve the Orders herein.