[2026] JMCA Civ 17

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CIVIL APPEAL NO COA2023CV00072

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

Dr Lloyd Barnett and Miss Marshalee White instructed by White Graham White for the appellant

Miss Faith Hall and Miss Yvette Brown instructed by the Director of State Proceedings for the respondents

13, 14 November 2024 and 3 July 2026

Administrative law – Judicial review – The role of the appellate court in reviewing judgments on claims for judicial review – Whether public officers are entitled to the payment of increments – The circumstances under which the payment of increments may be withheld, deferred or suspended – The application of government policy in administering the payment or non-payment of increments – The application of government policy in assessing employee performance – Overview of the Performance Management and Appraisal System Guidelines – The appeal process where an employee is dissatisfied with performance appraisal – Whether there was procedural impropriety in the conduct of the appellant's performance appraisal and/or the appeal process – Bias – The right to a fair hearing – Legitimate expectation – Striking out of affidavit evidence – Whether the appellant entitled to orders of *mandamus*, declarations and damages

Constitutional law – Whether failure to adhere to government policy can result in a breach of the right to a fair hearing

Public Service Regulations, 1961, regulation 38 – Constitution of Jamaica, section 16(2)

MCDONALD-BISHOP P

[1] I have read, in draft, the judgment of my learned sister Straw JA. I agree with her reasoning and conclusion, and add only the following observations because of the importance of the issue concerning the payment of increments in the public service.

[2] In my view, the payment of an increment is not to be treated as a matter of unfettered discretion. The proper starting point is that an officer who is placed on an incremental salary scale has a presumptive entitlement to progress along that scale when the increment becomes due. That entitlement is not absolute. It may be displaced where the employer establishes both a lawful reason for doing so, and compliance with the procedure prescribed by regulation 38 of the Public Service Regulations, 1961. This, in my view, is the position which emerges from the language and structure of regulation 38.

[3] Regulation 38 is expressed in prohibitory terms. It provides that an increment shall not be suspended, deferred, or withheld except by the Governor-General acting upon the recommendation of the Public Service Commission. That formulation presupposes the existence of an increment which is otherwise payable. It is not language which confers a general discretion to pay or not to pay. Rather, it places limits on the circumstances in which the officer may be deprived of the increment and identifies the authority by whom, and the procedure by which, that deprivation may lawfully occur.

[4] It follows that where the employer seeks to disentitle an officer from the payment of an increment that has fallen due, the burden rests on the employer to show that the statutory conditions for doing so have been satisfied. The employer must demonstrate, first, that one of the recognised grounds exists, such as lack of efficiency, unsatisfactory service or conduct, or failure to satisfy a requisite condition; and, secondly, that the

procedure prescribed by regulation 38 has been followed. That procedure includes timely notice to the officer, the giving of reasons, and, where necessary, recourse to the Public Service Commission and the Governor-General acting on the Commission's recommendation.

[5] The Staff Orders and the Performance Management Appraisal System ('PMAS') Manual do not displace that statutory position. They provide an administrative framework for assessing performance and implementing the policy of performance management, but they must operate consistently with regulation 38. In so doing, they cannot convert a statutory entitlement into a matter of mere administrative discretion. Nor can delay, inaction, or failure to complete the appraisal process operate as an informal substitute for the procedure required by law.

[6] This is especially so because regulation 38 itself characterises deferment of the increment as a substantial fine and withholding it as a very serious penalty. Those descriptions confirm that the non-payment of an increment has financial consequences for the officer. They may affect future earnings, and, as the evidence in this case demonstrates, may also affect pension entitlements. Such consequences cannot lawfully and justly flow from silence or administrative default.

[7] Accordingly, where no timely notice is given, no reasons are communicated, no lawful suspension, deferment, or withholding is recommended, and no decision is made by the proper authority regarding any of those recommendations, the increment remains payable. The employer cannot rely on its own failure to initiate or complete the performance-management process as a reason for depriving the officer of the increment. To permit that would invert regulation 38 and place on the officer the burden of proving entitlement, when the regulation requires the employer to justify disentitlement. Essentially then, the non-payment of an increment cannot lawfully be brought about or justified by administrative omission, delay, or an incomplete performance-management process.

[8] On the available evidence, the appellant's increments were not paid for the relevant years. It was not for the appellant to bring evidence to show the reason for the non-payment of the increment. The appellant had established by undisputable evidence that the increments had not been paid. The reason for the non-payment would have to be proved as lawful by the respondents. Accordingly, the respondents must show lawful reasons for that failure to make the payments to which the appellant was presumptively entitled. There was no onus on the appellant to bring evidence that the increment was suspended, deferred or withheld. For this reason, I do not see it necessary to embark upon a discourse as to whether there was evidence to support one method or the other. It suffices to state there was no evidence from the respondents that the statutory procedure for withholding, suspending or deferring a payable increment was invoked, adhered to, or completed. In the absence of timely notice, communicated reasons, and recourse to the proper statutory authority by the Ministry and 4th respondent, the practical and legal effect of their conduct was that the increments that have fallen due as provided by law remain payable as the appellant's presumptive entitlement was not displaced.

[9] I would further add that, on these facts, the conclusion that there was procedural impropriety is also unavoidable for these brief reasons: the performance management process was the means by which the Ministry sought to give practical effect to regulation 38. Once that process was adopted, it had to be administered with reasonable fairness, consistency and expedition. The undisputed absence of agreed work plans, interim reviews, timely notice of alleged deficiencies, and timely resort to the appeal procedure meant that the appellant was deprived of the very safeguards by which an adverse assessment, and its financial consequences, could properly be justified.

[10] This was not a case of a minor departure from an internal administrative guide embodied in the PMAS Manual. The failures went to the substance of the process by which the appellant's entitlement to increments, grounded in regulation 38, was to be administered. In those circumstances, the inaction and delay on the part of the relevant state actors were not merely unfortunate administrative lapses; they amounted to

procedural impropriety or unfairness. Accordingly, the conclusion to the contrary arrived at in the court below is unsustainable.

[11] I, therefore, agree that the appeal should be allowed to the extent proposed by Straw JA, and that declarations and an order in the nature of *mandamus* are appropriate to vindicate the appellant's entitlement under regulation 38.

STRAW JA

Introduction

[12] This is an appeal against the decision of Wolfe-Reece J ('the learned judge') given on 27 July 2023, by which she refused the appellant's claim in judicial review against the respondents.

[13] The appellant is an attorney-at-law who was employed as a Legal Officer to the 1st respondent, the Ministry of Economic Growth and Job Creation ('the Ministry'). By her claim, she asserted that she assumed duties as a Senior Legal Officer in 2012. In that capacity, she had a direct reporting relationship with the Permanent Secretary of the Ministry, Ms Audrey Sewell, the 4th respondent. Between 2016 and 2021, the 4th respondent failed to engage the required processes under the Performance Management Appraisal System ('PMAS'), to facilitate the payment of the appellant's annual increments, in keeping with the Public Service Regulations, 1961 ('the PSR').

[14] The 2nd respondent, the Public Service Commission, was joined to the claim as the public body with responsibility for matters relating to appointment, removal, and exercise of disciplinary control over public officers, whereas, the 3rd respondent, the Attorney General of Jamaica, was joined pursuant to the Crown Proceedings Act and as the legal advisor to the Government.

[15] Arising from the 4th respondent's alleged failure to review the appellant's performance between 2016 and 2021, the appellant sought leave to apply for judicial review, which was granted on 19 October 2022. In an amended fixed date claim form,

filed on 16 December 2022, the appellant sought damages and the following orders against the respondents:

> "1. An order of Mandamus compelling the [1st respondent] to take the necessary steps to conclude or complete the review exercise of the Performance Management Appraisal System for the [appellant] in keeping with the relevant Government of Jamaica policy.
>
> 2. An order of Mandamus for the [1st respondent] to process the payment of increments and allowances duly and justly owed to the [appellant] and accrued from 2016 to 2021 as the [4th respondent] failed and/or neglected to observe due process and comply with regulation 38 of the Public Service Regulations, 1961 (preserved by section 2 of the Jamaica (Constitution) Order in Council, 1962) which prohibits the non-payment of annual increments to an officer public employees [sic] without first having notified the officer in the relevant year, 30 days in advance of the payment becoming due to the officer.
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> 3. A Declaration that the [appellant] is entitled to payment of all increments and allowances or any sum arising to the [appellant] by virtue of employment with the [1st respondent] in keeping with regulation 38 of the Public Service Regulations, 1961.
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> 4. A Declaration that the [appellant] is entitled to have the [2nd respondent] recommend to the Governor General the approval of the payment of a special increment in addition to the ordinary increment pursuant to regulation 38(7) of the Public Service Regulations, 1961.
>
> 5. A Declaration that the [4th respondent] failed and/or neglected to observe due process and comply with regulation 38 of the Public Service Regulations, 1961 which prohibits the Non-payment [sic] of annual increments to an officer public employees [sic] without first having notified the officer in the relevant year, 30 days in advance of the payment becoming due to the officer.
>
> 6. A declaration that the [respondents] have breached the [appellant's] right to a fair hearing pursuant to section 16(2) of the Constitution of Jamaica.

> 7. A declaration that the [respondents] have breached the [appellant's] right to a fair hearing within a reasonable time pursuant to section 16(2) of the Constitution of Jamaica.
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> 8. Damages for defamation, harassment and mental distress pursuant to its authority for joinder of claims under CPR 56.10(2).
>
> 9. Such further and/or other relief that this Honourable Court deems just.
>
> 10. Costs to be costs in the claim."

The affidavit evidence before the learned judge

[16] The appellant filed four affidavits in total. Two were filed in support of the claim and the other two were affidavits in response to the 4th respondent and the Public Service Commission, respectively. At the hearing of the claim, the respondents objected to certain portions of the appellant's 3rd and 4th affidavits on the basis that they were irrelevant. The learned judge agreed with the preliminary objection and struck out paras. 22, 26, 28, 29, 30 to 35, 43, and 44 of the appellant's 3rd affidavit and paras. 3 to 5 of the appellant's 4th affidavit, both sworn and filed on 19 January 2023. In detailing the affidavit evidence, account will be taken of that decision by the learned judge.

[17] By her first affidavit (sworn on 1 November 2022), the appellant deposed that she had been employed as a legal officer in the legal service unit of the Ministry since 2005 up to the date of the filing of the claim, save for a period between March 2021 and January 2022, where she worked at the Ministry of Housing, Urban Renewal, Environment, and Climate Change. It was her evidence that during her 17 years of service to the Ministry, she performed her duties satisfactorily. Despite this, between 2016 and 2020, no process was initiated between her and the 4th respondent to identify and agree on a work plan in accordance with the framework stipulated by the Performance Management and Appraisal System, Civil Service of Jamaica, Guideline System and Reference Manual ('the PMAS Manual'). Neither were there any quarterly meetings held with the 4th respondent to perform interim evaluations of the appellant's work, as suggested by the PMAS Manual.

[18] In 2021, she pursued the procedure for appraisal of her performance, with a view to receiving her increment payments that would have accrued between 2016 and 2020. The relevant documents were submitted to the 4th respondent in June and August 2021. The 4th respondent delayed completing her review of the appellant's performance, and despite follow-up emails sent by the appellant, the 4th respondent failed to respond. It was not until 5 November 2021 that a response was received from the 4th respondent, asserting that the appellant was "hounding" her to complete the appraisal. Further email correspondence flowed between the parties, which demonstrated the existence of hostility between the parties.

[19] Ultimately, the 4th respondent graded the appellant's performance between 2016 and 2020 as unsatisfactory. The appellant disputed the grades in writing and sought the intervention of the Ministry (through its Human Resources Division ('HRD')) and the Public Service Commission.

[20] With specific reference to the 4th respondent, the appellant expressed her belief that the 4th respondent acted toward her with bias, maligned her character, imputed negative motivations to the appellant, and was unreasonable in her assessment of the appellant. Several email correspondences were exhibited with a view to demonstrating the 4th respondent's alleged bias. The appellant reiterated that the 4th respondent never engaged with her in any PMAS review exercise or requested any work plan. As such, she continued to use the work plan that was last approved by the previous Permanent Secretary.

[21] It was her contention that the Ministry and the 4th respondent failed to act in accordance with the PSR and the framework provided for in the PMAS Manual. In particular, (1) the 4th respondent failed to provide notice in advance of the due date of the increment payment, of an intention to withhold, defer or suspend the payment; (2) the Ministry and the 4th respondent unduly withheld payment of the increments and allowances due to her; (3) the Ministry delayed in resolving the dispute between her and the 4th respondent, and failed to give her an opportunity to be heard in respect of the

dispute. In the result, she was directly and adversely affected by the delays and the withholding of her increments and allowances due to her. She pointed specifically to the effect on the calculation of her pension entitlements, as her pension would be calculated based on her last salary. She stated that, arising from the circumstances, she could no longer work with the Ministry and gave notice of her resignation on 10 August 2022.

[22] In her 2nd affidavit sworn on 16 December 2022, the appellant deposed to being the subject of repeated unfair accusations, belittling, and reprimand at the hands of the 4th respondent, which resulted in her experiencing mental distress and embarrassment. Further, the 4th respondent also excluded her from certain activities, for example, a senior management retreat held in 2019. All these things occurred whilst she performed her duties satisfactorily and in accordance with the directives of the 4th respondent. She exhibited email correspondence and memoranda between herself and the 4th respondent to demonstrate her assertions. She stated that the 4th respondent's actions impaired her ability to advance professionally within the public service.

[23] Of note, the appellant indicated that the 4th respondent chairs the Human Resources Executive Committee and that the Director of Corporate Services with responsibility for the supervision of the HRD, reports directly to the 4th respondent.

[24] In an affidavit in response, sworn on 12 January 2023, the 4th respondent outlined the large portfolio covered by the Ministry, together with her responsibilities as the Permanent Secretary. She also outlined the procedure to be followed in carrying out performance appraisals under the PMAS framework. She denied refusing to meet with the appellant to discuss her work plan and complete her performance review. By contrast, she asserted that there were many occasions on which she attempted to engage the appellant with a view to completing her work plan, but was unable to do so as the appellant could not be located or was unavailable.

[25] It was her evidence that the appellant was responsible for preparing her work plan for discussion and completing her self-assessments for review. However, the appellant

failed to initiate the process until June 2021, when she submitted her reports for 2016 to 2020 in bulk, and thereafter, in September 2021, submitted her report for the period 2020 to 2021. The 4th respondent indicated that she was unable to review the appellant's reports at the point of their submissions due to the demands of her desk.

[26] She carried out her review in January 2022 and returned the reports to the appellant. The appellant disputed her review in February 2022 and indicated an intention to proceed to the next step of the process. It was the 4th respondent's expectation that the appellant would have returned to her to discuss her comments and ratings. However, the appellant never returned and instead sought to bypass her and go directly to the HRD. Additionally, the appellant's reports were incomplete as the Reviewing Officer's comments remained outstanding. The 4th respondent indicated that, as she was also the reviewing officer, and to avoid the appearance of conflict, the reports were sent through the HRD.

[27] The 4th respondent further asserted that she was advised by the HRD that the appellant was notified of the relevant process to move the matter forward. She referred to an email from an HR Officer sent on 8 March 2022, indicating that the supervisor and employee should try to resolve the issue, and notwithstanding, the appellant did not return to discuss the matter with her.

[28] She denied having any ill will or bias towards the appellant and maintained that her comments were fair and reasonable. She stated further that the issues raised by her on the appellant's performance were not new and had been communicated to the appellant previously and were noted in memoranda, which were exhibited. Despite discussions with the appellant, there was no improvement in her attendance or performance. Notwithstanding that, her ratings were not final, as they were not discussed with the appellant.

[29] The 4th respondent defended her actions as being legal, fair and in keeping with the PMAS Manual and the principles of natural justice. She stated that over the years,

she had extended understanding to the appellant, who expressed gratitude for her understanding and compassion. With respect to the allegation of excluding the appellant from the senior management retreat, she stated that, arising from the centralisation of legal services, the legal service unit fell under the Attorney-General's Chambers, and it was based on the Ministry's understanding of that new dispensation that resulted in the appellant not being invited. The 4th respondent further deposed that prior to centralisation, the appellant participated in all senior management retreats whilst under her supervision.

[30] A brief affidavit was sworn on behalf of the Public Service Commission by Jacqueline Mendez, the Chief Personnel Officer of the Office of the Services Commission ('OSC'). Ms Mendez indicated that personnel from the OSC spoke to the appellant and provided her with guidance for addressing disagreements under the PMAS framework. Further, that no process had been undertaken by the Public Service Commission to give effect to the granting of a special increment to the appellant.

[31] In responding to the affidavit evidence of the 4th respondent, the appellant denied being instructed to prepare a work plan or being invited to discuss the preparation of a work plan. She denied receiving the memorandum dated 17 January 2022 from the 4th respondent upon the return of the PMAS documents with the 4th respondent's comments. She also refuted seeking to bypass the PMAS procedure and contended that the 4th respondent failed to adhere to the timelines provided in section 2.10 of the PMAS Manual, and likewise that the HRD failed to follow the processes required by the PMAS Manual. The appellant also denied being instructed by HRD to go back to the 4th respondent. She maintained that the HRD largely ignored her communications and that she had to seek the intervention of her attorney-at-law in order to advance the matter.

[32] The appellant maintained that the 4th respondent was aware of her competence and exhibited her responses to the 4th respondent's memoranda, together with evidence of her work done generally.

[33] No further affidavits were filed on behalf of the respondents with respect to the appellant's further assertions.

Decision of the learned judge

[34] The learned judge considered the role of the court in judicial review matters and made her determination in respect of three issues as follows:

> "1. Whether the [Ministry] and 4th respondent acted in contravention of regulation 38 of the Public Service Regulations and public policy guidelines with the PMAS;
>
> 2. Whether the [Ministry] and 4th respondent breached the appellant's right to a fair hearing within a reasonable time under section 16(2) of the Constitution; and
>
> 3. Whether the remedies of mandamus, declarations and damages should be granted."

[35] With respect to issue one, the learned judge found that neither the Staff Orders for the Public Service nor regulation 38 of the PSR conferred on the appellant an absolute right or entitlement to the payment of increments on the anniversary of her appointment. The learned judge classified the payment of an increment as "a discretionary measure that can be implemented based on the prerequisite of a good performance review, which must be done annually to determine if the increment may become due" (see para. [28] of the judgment). It was her finding that there was no evidence that the 4th respondent sought to withhold, defer, or suspend any increment due to the appellant, and further that both the appellant and 4th respondent failed to complete the requirements of the PMAS Manual in order to facilitate the appellant's evaluation. As such, as there was no performance evaluation, there was no basis on which consideration could have been given for the payment of increments to the appellant.

[36] The learned judge considered the role of delay in the decision-making process and found that, arising from the dispute about the appellant's performance evaluation, there was a need for expediency on the part of the employer, given that there was already a delay in the completion of the assessments. She found that there was delay on the

appellant's part in submitting the reports, as well as on the 4th respondent's part in reviewing the reports. There was also a further delay of at least eight months between the submission of the reports and the adoption of the proper procedure for an appeal. The learned judge examined the appeals process set out in section 2.10 of the PMAS Manual and found that it was not followed.

[37] Despite these findings, the learned judge found on a balance of probabilities that it could not be concluded that the respondents acted unjustly or procedurally unfair toward the appellant.

[38] With respect to the question of whether there had been a breach of the appellant's right to a fair hearing within a reasonable time (the second issue), the learned judge found that section 16(2) of the Constitution of Jamaica ('the Constitution') did not contemplate performance evaluations as a determination of a person's "civil rights" and that the process under the PMAS framework could not be deemed as "legal proceedings". As such, no declaration could be granted that there was a breach of section 16(2) of the Constitution.

[39] Consideration was also given to the possibility of a breach of the right to a fair hearing on the premises of bias, illegality, and procedural impropriety/unfairness. After considering the authorities, the learned judge found that it was difficult to conclude that there was bias. Further, there was no indication on the evidence of an outright denial of the appellant's right to be heard and to respond to any allegations against her.

[40] The learned judge considered the nature of the delay and whether a fair hearing was still possible. She found that the appellant failed to demonstrate that she could not have a fair completion of the review process. In the round, the learned judge determined that the appellant did not establish that the respondents breached her right to a fair hearing or a fair hearing within a reasonable time as provided for by the Constitution.

[41] On the question of whether the appellant was entitled to an order of *mandamus*, the learned judge found that the appeals process under the PMAS framework had, in

March 2022, reached the third step, namely intervention by a Senior Human Resource Manager. However, the parties were at an impasse. The learned judge found that an order of *mandamus* for the completion of the review exercise under PMAS, was appropriate.

[42] On the question of damages, the learned judge found that as there was no pleaded claim for defamation or harassment, the appellant failed to establish a claim to damages. As for costs, the learned judge ordered that each party should bear their own costs.

Grounds of appeal

[43] In challenging the decision of the learned judge, 21 grounds of appeal were filed on behalf of the appellant, as follows:

> "(1) The learned Judge erred in law and in fact in holding that the sections of the [appellant's] Affidavit which Her Ladyship struck out were irrelevant to the determination of the issues before the Court.
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> (2) The learned Judge erred in fact in holding that there was no evidence that the 4th [respondent] sought to withhold, defer or suspend any increment due to the [appellant].
>
> (3) The learned Judge erred in law in failing to interpret the relevant Public Service Regulations as conferring a presumptive right to the prescribed increments which could only be denied after a proper inquiry and a legal decision adverse to the [appellant].
>
> (4) The learned Judge erred in law in holding that the payments [sic] of increments is a discretionary measure where the Public Service Regulations grant a prima facie right to the applicable increments which can only be denied on an adverse finding made after a properly conducted hearing.
>
> (5) The learned Judge erred in holding that the payment of increments is a discretionary measure that can be implemented based on the prerequisite of a good

performance review which must be done annually to determine if the increment may become due.

(6) The learned Judge erred in law and on the facts in holding that there was no basis on which consideration could be given for increments to be paid to the [appellant].

(7) The learned Judge erred in law and on the facts in holding that since self-evaluation is part of the evaluation process which the [appellant] failed to do for 2016 to 2021, it cannot be concluded that the actions or lack thereof by the [4th respondent] amounted to a withholding of the increment from the Claimant.

(8) The learned Judge erred in law and on the facts in holding that it cannot be concluded that the [respondents] acted with procedural unfairness or unjustly in relation to the [appellant] although among other things, the learned Judge correctly found that the [respondents] had not acted with the necessary expediency which was clearly to the [appellant's] detriment.

(9) The learned Judge erred in law in failing to apply the established test of the fair-minded observer in the light of the evidence that the 4th [respondent] had long harboured an unfavourable opinion with respect to the [appellant].

(10) The learned Judge erred in law and on the facts in holding that there was no indication on the evidence of an outright denial of the [appellant's] right to be heard and to respond to any allegation against her or to be legally represented although there were the clear consequences of the approach and action taken by the [respondents].

(11) The learned trial Judge erred in law and on the facts in in law [sic] in finding that the alleged bias asserted by the [appellant] was predicated on the role occupied by the 4th [respondent] as the chair of the Human Resources Committee.

(12) The learned trial Judge erred in law and/or on the facts in finding that there was no logical connection between the matter and the feared deviation from the course of deciding the case on the merits.

(13) The learned trial Judge erred in law and on the facts in holding that the [appellant] had not succeeded in establishing that the [respondents] breached her right to a fair hearing.

(14) The learned trial Judge erred in law in holding that there was no evidence to which consideration could have been given for increments to be paid to the [appellant], since the relevant Public Service Regulations confer an entitlement to the relevant increments unless some fault against the public officer has been properly alleged and proven.

(15) The learned trial Judge erred in law in holding that there was no basis in law for consideration to be given to the payment of increments to the [appellant].

(16) The learned trial Judge erred in law in failing to apply the principles and discretion relevant to declaratory relief.

(17) The learned trial Judge erred in law and on the facts in holding that it could not be concluded that the actions or lack thereof by the 4th [respondent] amounted to a withholding of increments from the [appellant].

(18) The learned trial Judge erred in law in failing to hold that the [appellant] had a legitimate expectation that in the absence of any relevant notification she was entitled to benefit from the recommendation, the special increment payable pursuant to regulation 38(7) of the Public Service Regulations 1961.

(19) The learned trial Judge erred in law in applying a test of 'outright' denial of the [appellant's] right to due process and a determination of relevant issues within a reasonable time.

(20) The learned trial Judge erred in law and on the facts in holding that an assessment of the entire proceedings does not demonstrate that the [appellant] has outright

been denied her substantive or legal right during the process, although the proper question is whether the true effect of the [respondents'] action or lack thereof was a denial or impairment of her right.

(21) The learned Judge erred in law in not awarding general damages to the [appellant] for the [respondents'] breach of the [appellant's] constitutional statutory and contractual rights."

Submissions

[44] In challenging the decision of the learned judge, Dr Barnett, for the appellant, submitted that the terms of the appellant's employment included the payment of annual increments. As such, based on regulation 38 of the PSR, in the absence of a decision by the Governor-General, acting on the advice of the Public Service Commission, any decision to withhold, suspend, or defer an increment is unconstitutional. Further, the non-payment of an increment is a substantive fine or serious penalty, which cannot lawfully be imposed without compliance with strict procedural rules.

[45] Counsel submitted that the responsibility to ensure the expeditious and fair completion of the appellant's evaluation and review process vested solely in the Ministry and the 4th respondent, as the appellant's employer and supervisor, respectively. Failure to follow and complete the assessment would delay and practically withhold the payment of increments. Additionally, as the Ministry and the 4th respondent failed to follow the requirements of the Constitution, the appellant was denied a fair assessment and the right to a fair hearing. Dr Barnett contended that the appropriate remedy for an unlawful refusal or failure by a public official is *mandamus*.

[46] In addressing the decision of the learned judge to strike out portions of the appellant's affidavits, it was submitted that the portions that were struck contained evidence to rebut the 4th respondent's evidence concerning deficiencies in the appellant's work, as well as evidence in elaboration on the question of fairness and procedural irregularity. It was not intended that the court should use the evidence to conduct its own assessment of the 4th respondent's review of the appellant.

[47] In contending that the 1st and 4th respondents failed to treat the appellant fairly, Dr Barnett submitted that it was clear that the 4th respondent harboured unfavourable assessments of the appellant's character and performance and thereby indirectly sought to justify withholding the increments. Likewise, on the issue of bias, it was submitted that the evidence supported actual bias and, in particular, the email correspondence of November 2021 demonstrated that the 4th respondent had a predisposition to give the appellant a negative assessment, even before reviewing the documents. In all the circumstances, the appellant was not afforded a fair hearing at all, or within a reasonable time, and was entitled to the remedies sought, including damages and costs. With specific reference to damages, Dr Barnett asserted that the injustice that occurred was such that an award for damages was necessary to show the court's disapproval of the treatment meted out to the appellant.

[48] On behalf of the respondents, Ms Hall submitted that the learned judge did not err in finding that the appellant was not entitled to increment payments, as neither the PMAS Manual, the Staff Orders, nor the PSR confer an automatic right to the payment of increments. It was contended that the question of the appellant's performance remains outstanding, and no decision has yet been taken regarding the payment of increments.

[49] With respect to procedural fairness, it was submitted that the performance review process was done in keeping with procedures laid down in the PMAS Manual, and there was no breach of procedural fairness. Reliance was placed on the case of **R v Secretary of State for the Home Department, ex parte Doody and others** [1993] 1 All ER 151 to assert that procedural fairness depends on the facts and circumstances of each case. Miss Hall alluded to sections 2.7, 2.8, and 2.10 of the PMAS Manual. It was contended that the appellant failed to adhere to the PMAS Manual, failed to submit her self-assessment until July 2021, and failed to comply with the steps required for the appeal process.

[50] Relating to the findings of the learned judge concerning the right to a fair hearing, it was submitted that the findings of the learned judge in this area were entirely accurate

and in keeping with established principles. The performance review process is not tantamount to legal or disciplinary proceedings, and there was no sanction or charge in relation to which the appellant could be said to have been in jeopardy. Therefore, the right to a fair hearing was not engaged. The appeals process under the PMAS framework also would not qualify as a court, tribunal or public authority. Concerning delay, it was submitted that the delay in the review of the appellant's reports was not unreasonable, and good reasons were proffered by the 4th respondent for the delay and by the Ministry in relation to the engagement of the appeal process. As a result, there was no breach of the reasonable time guarantee. It was argued that the grounds of appeal have no merit.

Issues that arise for consideration

[51] Based on the appellant's grounds of appeal, the following issues arise for determination:

1. Whether the learned judge erred by striking out portions of the appellant's affidavit as being irrelevant to the proceedings? (Ground 1)

2. Whether the learned judge erred in finding that the payment of increments under the PSR was discretionary as opposed to an entitlement which could only be denied after an inquiry and an adverse decision made against the appellant? (Grounds 3, 4, 5, 6, 14, and 15)

3. Whether the learned judge erred in holding that there was no evidence that the 4th respondent or the Ministry sought to withhold, defer, or suspend any increment due to the appellant? (Grounds 2, 7, and 17)

4. Whether the learned judge erred in concluding that the respondents' conduct did not amount to procedural impropriety or unfairness and that the appellant failed in establishing that the 4th respondent acted with bias? (Grounds 8, 9, 11, 12, and 20)

5. Whether the learned judge erred in finding that the appellant's right to a fair hearing was not breached? (Grounds 10, 13, and 19)

6. Whether the learned judge erred in failing to find that the appellant had a legitimate expectation to benefit from a recommendation for the payment of a special increment? (Ground 18)

7. Whether the learned judge erred in failing to apply the principles and discretion relevant to declaratory relief? (Ground 16)

8. Whether the learned judge erred in not awarding general damages to the appellant? (Ground 21)?

Discussion

[52] In reviewing the decision of the learned judge, I am mindful that the applicable standard of review is not only the test stated in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor**'), and which has been adopted by this court in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 (that is, whether the learned judge exercised her discretion based on a misunderstanding of the law or evidence; made inferences that are shown to be demonstrably wrong; or arrived at a decision that "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it"). But this was also a judgment on a claim for judicial review in which the learned judge evaluated the evidence before her and arrived at a decision on the basis of the evidence and the relevant legal principles. In such a case, the ordinary standard of review by an appellate court, as stipulated in the cases of **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 and **Thomas v Thomas** [1947] 1 All ER 582, is applicable. That is to say, as it relates to any factual finding made by the learned judge that is being challenged, this court will not lightly interfere unless it can be demonstrated that the learned judge was "plainly wrong" in concluding as she did. Furthermore, this court must examine the correctness of the legal principles expounded

by the learned judge, together with the application of those principles to the facts before her, in order to determine whether there was any error. This approach was adopted in the case of **National Bank of Anguilla (Private Banking and Trust) Ltd (in Administration) and another v Chief Minister of Anguilla and others (Anguilla)** [2025] UKPC 14 in which Lord Reed, writing for the Board, made the following statement at para. 84 of the judgment:

> "84. Deciding whether there is an arguable ground for judicial review is not an exercise of discretion. Accordingly, when the judge in the present proceedings refused leave to apply for judicial review on the ground that there was no arguable ground for judicial review with a realistic prospect of success…, he was not exercising a discretion. It follows that, on the appeal against his decision, the Court of Appeal was not reviewing an exercise of discretion. It should not, therefore, have confined itself to the limited grounds on which the exercise of discretion might be reviewed on appeal, but should have considered whether the judge had erred in concluding that there was no arguable ground for judicial review. If it concluded that he had, it should then have re-considered the matter for itself. …"

[53] Similarly, if this court concludes that the learned judge erred in her findings on any of the issues that arose for her consideration, it will be open to this court to reconsider the matter.

[54] The **Hadmor** principles would nevertheless be relevant to the areas of the learned judge's decision in which she exercised a discretion, and particularly as it relates to her decision to grant or refuse the relief sought.

Issue one: Whether the learned judge erred by striking out portions of the appellant's affidavit as being irrelevant to the proceedings? (Ground 1)

[55] In addressing the decision of the learned judge to strike out portions of the appellant's affidavits, it was submitted that the portions that were struck out contained evidence to rebut the 4th respondent's evidence concerning deficiencies in the appellant's work, as well as evidence in elaboration on the question of fairness and procedural

irregularity. It was not intended that the court should use the evidence to conduct its own assessment of the 4th respondent's review of the appellant.

[56] The portions of the appellant's affidavits that were struck out by the learned judge are indicated at para. [16] above. The learned judge, at para. [18] of her judgment, determined that the impugned paragraphs sought to provide evidence to challenge the veracity of the review done of her under PMAS by the 4th respondent. The learned judge described those portions as speaking to the extensive work done by the appellant.

[57] Having reviewed all the impugned paragraphs, I would agree with the assessment of the learned judge on this point. The relevant paragraphs mainly addressed the quality and extent of the work done by the appellant and sought to challenge the evaluations and complaints of the 4th respondent. Some of the paragraphs also spoke to complaints about the working environment, including poor ventilation, which were not matters in issue before the court. Paras. 28 and 35 of the appellant's 3rd affidavit were direct responses to memoranda that were exhibited to the 4th respondent's affidavit addressing the performance of the legal services unit. Nothing in the claim turned on this evidence. The impugned paragraphs were not mere evidentiary elaborations on fairness and procedural impropriety. The learned judge had sufficient material before her on the issues of fairness and procedural impropriety involved in the case, without the impugned material. The impugned material may have been relevant to the appeal process (where the performance evaluations would have to be considered). The learned judge could not have made any legal determinations in relation to the evidence set out in those paragraphs by the appellant.

[58] Ground of appeal one, therefore, fails.

Issue two: Whether the learned judge erred in finding that the payment of increments under the PSR was discretionary as opposed to an entitlement which could only be denied after an inquiry and an adverse decision made against the appellant? (Grounds 3, 4, 5, 6, 14, and 15)

[59] In assessing this issue, it is necessary to detail the relevant provisions of the PSR, the Staff Orders for the Public Service, 2004 ('the Staff Orders'), and the PMAS Manual.

The PSR

[60] The PSR indicates (above the title) that the regulations were made under the Constitution of Jamaica ('the Constitution'):

> "(Made under section 81 of the Jamaica (Constitution) Order in Council, 1959, **preserved by section 2 of the Jamaica (Constitution) Order in Council, 1962**)" (Emphasis supplied)

[61] Regulation 38 falls under part 5 of the PSR, which is entitled "Discipline". Regulation 38 provides:

> "38.- (1) Subject to the provisions of this regulation an increment shall not be suspended, deferred or withheld except by the Governor-General acting upon the recommendation of the Commission.
>
> (2) The grant of an increment may be prejudiced by -
>
> (a) lack of efficiency;
>
> (b) unsatisfactory service or conduct; or
>
> (c) failure to pass a requisite examination conditional to the grant of the officer's increment.
>
> (3) Where a Permanent Secretary or Head of Department considers that for any of the reasons specified in sub-paragraph (a) or (b) of paragraph (2) an officer's increment ought not to be granted he shall –
>
> (a) **notify the officer in writing at least one month before the date on which the increment**

is due of the reasons for which he considers that the increment ought not to be granted; or

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

(4) Where a Permanent Secretary or Head of Department has notified an officer in accordance with sub-paragraph (a) of paragraph (3) he may suspend for a period not exceeding three months the payment to that officer of the increment to which the notification relates, and shall at the end of the period of suspension –

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

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

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

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

(b) 'deferment' is **a substantial fine**; and

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

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

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

[62] The reference to the "Commission" in the PSR is a reference to the Public Service Commission (see regulation 2).

The Staff Orders

[63] Para. 1 of the introduction to the Staff Orders provides:

> "1) The Staff Orders of the Public Service of Jamaica **governs the Conditions of Service for Public Officers**. **It comprises provisions from relevant legislation, regulations, policies, directives and the results of collective bargaining agreements between the Government and the respective unions and staff associations**. ..." (Emphasis supplied)

[64] Chapter 6 of the Staff Orders addresses "Compensation". The definition section of that chapter provides, in relation to increments:

> "**6.2.11 Salary Scale/Scaler Salary**
>
> The salary attached to a grade beginning with a minimum and advancing by an incremental rate to a maximum.
>
> **6.2.13 Increments**
>
> A sum of money within a salary scale by which salary is **increased annually**." (Emphasis supplied)

[65] In relation to the payment of increments, section 6.4 of chapter 6 stipulates:

> "**PAYMENT OF INCREMENTS**
>
> **6.4.1 Anniversary of Appointment**

i) **Increments are normally paid on the anniversary date of appointment**, to permanent employees who demonstrate fully satisfactory performance on the job during the previous year.

ii) …;

iii) **Increments may be withheld as a result of unsatisfactory job performance or as a penalty following a disciplinary procedure**;

iv) **Where increments are to be withheld, notification must be made to the employee(s) and to the Auditor General at least two (2) months before the increments fall due**. Departments that are non-self accounting must also notify the Accountant General." (Emphasis supplied)

[66] As it relates to the withholding of increments as a disciplinary mechanism, section 10.6 of chapter 10 provides:

"**10.6 PENALTIES**

i) Where an infraction is felt to be serious, it may be necessary for the Governor General or any appropriate authority with delegated functions to establish a committee of inquiry, with clear terms of reference specific to the case. … Where, based on the outcome of an investigation or the findings of a committee of inquiry, an infraction is found to have occurred, the penalty imposed should be consistent with the nature and gravity of the infraction and should be progressive.

ii) The following progression may be considered:

a) Verbal warning

b) Written reprimand

c) A fine

d) Deferment or withholding of increment

e) Suspension without pay for a period not exceeding three (3) months

f) Reduction in rank

g) Dismissal" (Emphasis supplied)

The PMAS Manual

[67] The introduction to the PMAS Manual indicates that it was "… created to ensure that a common set of fundamental principles is applied to the Performance Management and Appraisal System implemented in all Ministries and Departments of the Government of Jamaica". It states further:

> "Nothing in this Manual is intended to replace the regulations as set out in the Staff Orders and the Public Service Regulations."

[68] Sections 3.1, 3.3, and 3.4 explain when an increment is payable, what constitutes poor performance, and applicable sanctions for employees who perform below the required level:

> "**3.1 PAYMENT OF INCREMENT AND NON-FINANCIAL REWARDS**
>
> An increment is payable when an employee has achieved an overall score of at least seventy-five percent (75%), based on targets and competencies agreed. An employee may be eligible for other rewards when he/she has exceeded this level of performance (i.e. achieved an overall score of 80% or more [sic]. These rewards should be in keeping with the established Recognition and Reward framework.
>
> …
>
> **3.3 POOR PERFORMANCE**
>
> Executives, managers and supervisors are expected to monitor the performance of their staff against agreed targets throughout the year. They are also expected to provide the assistance and guidance necessary to facilitate optimum performance of their staff, while ensuring that work plans remain relevant to organisational priorities and resources. **If this has been done and at the time of the year end appraisal the overall score achieved by an employee is below 50%, this** will be considered poor performance.

> **3.4 SANCTIONS**
>
> **An increment will not be paid to an employee who performs below the agreed level to qualify for an increment**. Other relevant sanctions may be applied as necessary, in keeping with the regulations and guidelines governing human resource management in the Public Service."

[69] This important reminder is set out at section 2 of the PMAS Manual on page 16:

> "**IMPORTANT REMINDER**
>
> At the time of the final performance evaluation, **an employee should not be rated below the minimum standard unless**, at the time of the previous interim evaluation(s), the employee was formally notified of the need to improve performance, and an improvement plan developed and implemented." (Emphasis supplied)

Analysis

[70] From a review of the PSR, Staff Orders, and PMAS Manual, it is seen that these documents contain relevant material in relation to policies and procedures applied within the public service, and particularly as it relates to the payment of increments. However, they do not each carry the same force and effect.

[71] The PSR, having been made under the Constitution, is properly categorised as subsidiary legislation, the provisions of which have force of law, once in conformity with the Constitution, being the supreme law.

[72] Regulations are provided for by sections 29 to 32 of the Interpretation Act. Section 3 of the Interpretation Act defines regulations as including "rules, by-laws, proclamations, orders, schemes, notifications, directions, notices and forms". Regulations are made under an Act or other lawful authority and are published in the Gazette (see section 31 of the Interpretation Act).

[73] The Staff Orders, on the other hand, although bearing the name "order", does not indicate that it is an order made under any Act or particular authority. There is nothing

in the Staff Orders to suggest that it has the force of legislation or statutory authority, as in the case of Acts and regulations. Rather, the Staff Orders indicates that it is a compendium of the provisions and policy directives that govern the conditions of service for public officers. This is stated in the document itself, which indicates that "[i]t **comprises** provisions from relevant legislation, **regulations**, policies, directives and the results of collective bargaining agreements between the Government and the respective unions and staff associations" (emphasis supplied). This was also observed in the case of **Bryan Sykes v The Minister of National Security and Justice and The Attorney-General; Legal Officers Staff Association v The Minister of National Security and Justice and The Attorney-General** (1993) 30 JLR 76, where Patterson JA (Ag), writing on behalf of this court, stated at page 91:

> "I agree with the submission that the provisions of the Staff Orders for the Public Service do not constitute a contract between the Crown and its servants, but it is true to say that public officers consider them binding. **The Staff Orders embody the conditions of service of public officers, policy provisions and operational procedures and practices.** The Orders apply to all public officers and they are enjoined to familiarise themselves with them." (Emphasis supplied)

[74] The PSR would be among the regulations captured in the Staff Orders. As such, the Staff Orders are subordinate to the PSR.

[75] The PMAS Manual is in the nature of a policy document and addresses the discrete issue of managing the performance of public officers. Quite properly, it is expressed as being subordinate to the PSR and Staff Orders.

[76] Also notable from these three documents is that they are effectively on one accord with respect to the operation of the payment of increments to public officers and the circumstances under which an increment may be suspended, deferred, or withheld.

[77] The PSR provides the basic framework concerning the payment of increments, whereas the Staff Orders and the PMAS Manual both provide additional details for giving

effect to the PSR. With this framework in mind, the first question to be determined, therefore, is whether regulation 38 of the PSR provides public officers with an entitlement to the payment of annual increments, or whether the payment of increments is discretionary.

[78] For convenience, regulation 38(1) is reproduced here. It states:

> "Subject to the provisions of this regulation an increment **shall not** be suspended, deferred or withheld except by the Governor-General acting upon the recommendation of the Commission." (Emphasis supplied)

[79] Regulation 38(1) is framed in the negative. It sets out a prohibition that stipulates that an increment shall not be suspended, deferred or withheld, unless done so by the Governor-General acting on the recommendation of the Public Service Commission. Regulation 38(2) describes the situations that "may" prejudice the grant of an increment, and subsection (3) specifically addresses what is required where a Permanent Secretary or Head of Department considers that, arising from lack of efficiency or unsatisfactory service or conduct, an officer's increment ought not be granted.

[80] Taking regulation 38 as a whole, the principal position is that an officer ought to be granted an increment on the date that it becomes due unless he or she has been notified in writing at least one month before the due date of the reasons for which it is considered that the increment ought not be granted (that is, lack of efficiency, or unsatisfactory service or conduct); or in the case of an inability to notify the officer, the matter is reported to the Public Service Commission for their recommendation to the Governor-General.

[81] Furthermore, even where notice is given, the increment should only be suspended for a maximum period of three months, at the end of which it should be granted and paid from the original due date, unless a recommendation is made for the Public Service Commission to consider deferring or withholding it. Even in the case of a deferment, this should be for no more than six months, including any period of suspension, and the

increment is paid from the date it is restored. In the most severe case where the increment is withheld, the regulation makes provision for consideration to be given to the payment of a "special increment" in addition to the ordinary increment. The PSR describes a deferment as a "substantial fine" and a withholding as a "very serious penalty"

[82] Based on the foregoing, it is seen that in the absence of suspension, deferment, or withholding after following the prescribed procedure, an increment should be paid. The entire thrust of regulation 38 is that an officer should be granted an increment unless there is a good reason to penalise the officer for inefficiency, unsatisfactory service, or misconduct. Even when a penalty is imposed, it should be for a limited time frame and subject to periodic review. There is nothing in the wording of regulation 38 to denote that the grant of an increment is discretionary. The wording of regulation 38(1) presupposes an understanding that there is an entitlement to an increment that can only be interfered with as provided for by the PSR.

[83] The Staff Orders confirm this position and expand on it. They explain the concept of a salary scale, which is essentially the salary attached to a grade that begins at a minimum sum and increases by an incremental rate to a maximum sum. The Staff Orders then define an increment as a sum of money within a salary scale by which salary is increased annually. They stipulate when increments are normally paid, that is, on the anniversary of an officer's appointment (see section 6.4.1 of the Staff Orders), and confirm that increments may be withheld or deferred as a result of unsatisfactory job performance or as a penalty for misconduct. The Staff Orders set an even higher standard for notice in the event of the withholding of increments, that is, an officer must be notified at least two months in advance of the due date. The very fact of a due date for the payment of an increment also suggests that it is an entitlement. Therefore, although the Staff Orders indicate that "[i]ncrements are normally paid on the anniversary date of appointment, to permanent employees who demonstrate fully satisfactory performance on the job during the previous year", this alone would not be sufficient to conclude that the payment of an increment is discretionary.

[84] The PMAS Manual also confirms the requirements of the PSR. The PMAS Manual provides a detailed system by which performance may be measured and sets a benchmark for what constitutes satisfactory performance. The system is geared toward ensuring that an officer is aware of the targets to be met and has a clear roadmap to achieve those targets. It provides for regular review of performance, from interim appraisals to final evaluations, in order to facilitate modification to targets, where necessary, and also to assess whether an officer is properly equipped to meet the targets. It gives an important reminder that an officer cannot be rated below the minimum standard unless previously notified. Although it does not give an explicit percentage for what constitutes the minimum standard, within the entire context, it is fair to conclude that the minimum standard at which it is agreed that an officer should perform is 75%. The PMAS Manual indicates that an increment will not be paid to an employee who performs below the agreed level to qualify for an increment. This is set out under the heading "Sanctions" (see section 3.4). However, the application of any such sanction must conform to the process set out in regulation 38 of the PSR (see para. [61] above).

[85] Neither the Staff Orders nor the PMAS Manual, taken as a whole, supports the position that the payment of an increment is discretionary. These documents affirm the position that increments may only be withheld in specified circumstances. The drafters of the PSR, Staff Orders, and PMAS Manual clearly recognise that the decision to defer, or withhold an increment constitutes a serious sanction, the result of which is to cause economic loss to a public officer, which Permanent Secretaries and Heads of Departments should be loath to do except in the most serious circumstances. Even where this occurs, the PSR seeks to provide a form of relief by way of a recommendation for a special increment.

[86] In the circumstances, the learned judge erred in concluding that the payment of an increment was a discretionary measure that could be implemented in the event of a good performance review. To the contrary, based on regulation 38 of the PSR, an increment should only be suspended, deferred, or withheld in the event of poor performance or misconduct. I also agree with Dr Barnett's submissions that suspension,

deferment, or withholding could only occur after a proper enquiry or assessment of an officer's performance or conduct. This is what is contemplated by the PMAS Manual.

[87] Grounds of appeal 3, 4, 5, 6, 14, and 15, therefore, succeed.

Issue three: Whether the learned judge erred in holding that there was no evidence that the 4th respondent or the Ministry sought to withhold, defer, or suspend any increment due to the appellant? (Grounds 2, 7, and 17)

[88] Based on regulation 38, both suspension and deferment of increment are temporary measures. In the case of a suspension, this is for a maximum period of three months, after which the increment is paid from the date it was due, that is, retroactively, unless a recommendation is made for the consideration of the Public Service Commission that the increment be either deferred or withheld (see regulation 38(4)). In the case of deferment, this is for a maximum period of six months, inclusive of any period of suspension (see regulation 38(6)). The evidence before the learned judge showed that the appellant did not receive any increments between 2016 and 2021. It is undisputed that no notice was sent to the appellant, pursuant to regulation 38 concerning suspension; nor was any notification sent to the Chief Personnel Officer for the Commission's recommendation to the Governor-General as to whether any increment ought to be paid to the appellant on the due dates. As such, the learned judge would have been correct to find that there was no evidence of suspension or deferment of increments. The question, therefore, is whether the learned judge was correct to find that there was no evidence that the Ministry or the 4th respondent sought to withhold the appellant's increments. The learned judge reasoned as follows:

> "[34] There is however no evidence that the 4th [respondent] sought to withhold, defer or suspend any increment due to the [appellant]. The Court is not of the view that it can be inferred from the evidence either as both the [appellant] and the 4th [respondent] failed to complete requirements under PMAS to facilitate an evaluation of the [appellant]. The 4th [respondent] did not dispute that no notice pursuant to regulation 38 was sent to the [appellant], nor did she dispute that no notification was sent to the Chief Personnel Officer for

> the Commission's recommendation to the Governor General as to whether the payment of the increment ought to be paid to the [appellant] when it became due.
>
> [35] The Court concludes that in the instant case there was no performance evaluation therefore there was no basis on which consideration could be given for increments to be paid to the [appellant]. There also is no evidence that the 4th [respondent] withheld any increment from the [appellant]. Further, the Court finds that based on PMAS procedure, self - evaluation is a part of the evaluation process, which the Claimant failed to do for 2016-2021, it cannot be concluded that the actions or lack thereof by the 4th [respondent] amounted to withholding the increment from the [appellant].
>
> [36] The [appellant], not having satisfied the Court that she has a legal right or entitlement to payment of increments, there is no basis on which the Court could grant orders 3 and 4 of declarations sought in the Amended Fixed Date Claim Form.
>
> **Role of delay in the decision making process**
>
> [37] In her affidavit evidence in response, the 4th [respondent] did not dispute the delay between 2016 and 2020 in conducting the [appellant's] evaluation. The 4th [respondent] agreed that there was delay but that it was partially attributable to the [appellant], as the [appellant] herself failed to initiate her work plan and send to the 4th [respondent] until June 2021. In her affidavit she stated:
>
> > 'The Claimant had a duty to prepare the work plan for discussion as well as completing her self-assessment in the OMAS [sic] report however she never initiated this process prior to June 2021. It was not till around June 4, 2021 that the Claimant submitted in bulk her PMAS reports for the years 2016-2017, 2017-2018 and 2018-2019. PMAS report for [the years 2019-2020] and 2020-2021 were submitted September 2, 2021.'"

[89] Based on the learned judge's conclusion, it is necessary to examine the relevant requirements of the PMAS Manual to determine the roles and responsibilities of the parties in the assessment process.

[90] Section 1.3 of the PMAS Manual shows what is titled "The Performance Management and Appraisal Cycle". It is set out in the form of a chart and indicates the timelines for certain things to be done as follows:

> "**1.3 THE PERFORMANCE MANAGEMENT AND APPRAISAL CYCLE**
>
> Step 1: March/April
> Supervisor & Employee develop & agree on performance objectives/targets for the next [Financial Year]
>
> Step 2: June/July
> Review performance in relation to targets & agree appropriate adjustments/action
>
> Step 3: September/October
> Review performance in relation to targets & agree appropriate adjustments/action
>
> Step 4: December/January
> Review performance in relation to targets & agree appropriate adjustments/action
>
> Step 5: March/April
> Formal Appraisal and identification of learning and development needs and appropriate decisions." (Underline as in the original)

[91] Section 2.3 of the PMAS Manual addresses the work plan:

> "**2.3 GUIDELINES FOR DEVELOPING A WORK PLAN**
>
> **WORK PLAN DEFINED**
>
> A Work Plan is an important tool in the process of managing performance. The drafting of work plans fosters a culture of focusing on outputs and how they are achieved. They also provide the basis for continuous communication between the individual and the supervisor.
>
> **The work plan should seek to:**
>
> 1. Align work activities to meet the strategic goals of the organization

2. State clearly the outputs expected from an individual employee

3. Promote quality work

The work plan should be:

1. Developed in consultation between supervisors and, employees with objectives to be achieved agreed and prioritized for the next period.

2. Flexible, that is, it can be adjusted as agreed, to accommodate changes in priorities and resources.

3. Written in clearly stated terms [sic]

In the [sic] developing the work plan, an updated output focused job description should be used as a reference document, as it provides in details [sic] the main objectives and key outputs of the job."

[92] From these extracts of the PMAS Manual, it is apparent that collaboration is expected to take place between employees and supervisors in determining performance targets and objectives and in executing same. However, the primary responsibility for managing employee performance rests with the Ministry and the supervisor. This is so, as the Ministry and supervisor would be apprised of the organisation's strategic goals and be able to determine the duties to be carried out by the employee in helping to achieve those goals. It would, therefore, be the Ministry's and the supervisor's responsibility to initiate and maintain the management and appraisal cycle.

[93] The learned judge found that the appellant failed to conduct her self-assessments, which was a requirement under the PMAS. Section 2.7 of the PMAS Manual sets out the guidance for conducting the formal appraisal, and it speaks specifically to self-assessments:

"**Self-Assessment**

Many organizations find it **helpful** to encourage individuals to prepare for their performance review by completing a self-

> assessment of achievements in relation to their work plans. Some advantages of self-assessment are listed below:
>
> 1. It helps to generate less inhibited and more positive discussion;
>
> 2. It involves appraisees actively in the process;
>
> 3. It is likely to reduce defensive behaviour;
>
> 4. It reduces the 'top down' approach to traditional performance appraisals." (Emphasis supplied)

[94] Section 2.8 provides guidance on the completion of the performance review form. It gives a suggested approach:

> "**Suggested approach:** Have the employee do a self-assessment first and then discuss the ratings with their manager or supervisor." (Emphasis as in the original)

[95] Based on this, it is my considered view that the carrying out of a self-assessment is not mandatory under the PMAS framework. Further, where the self-assessment method is being utilised, the self-assessment could only take place once the process for appraisal has been initiated by the Ministry or supervisor, and the employee is instructed to do a self-assessment. This is seen from the words "[h]ave the employee…". As such, it is not that the conduct of the self-assessment triggers the commencement of the appraisal process, and it could not be expected that an employee would be required to initiate the appraisal process by submitting a self-assessment without first being instructed to do so. In the circumstances, I am unable to agree with the learned judge's conclusion that a self-assessment forms part of the requirements of the PMAS.

[96] Also to be noted is that the self-assessment is to be done with reference to the work plan. The evidence before the court was that there was no collaboration between the appellant and the 4th respondent in agreeing a target in keeping with the organisational objectives and the preparation of a work plan to achieve those agreed targets. Furthermore, there were no quarterly meetings. The learned judge did not

indicate whether she accepted the disputed evidence of the 4th respondent that she made various attempts to meet with the appellant in order to prepare a work plan.

[97] As indicated by the PMAS Manual, the work plan is a tool for managing performance and must align with the goals of the organisation. It is the work plan that allows for continuous communication between the employee and supervisor. Hence, the reason it is done in consultation between supervisor and employee, and should be flexible. The absence of a work plan may have hampered the appellant in carrying out self-assessments. It was ultimately the appellant's evidence that she continued utilising the work plan that had been created whilst under the supervision of the previous Permanent Secretary.

[98] In any event, and as indicated previously, the PMAS Manual cannot take precedence over the PSR that gives an entitlement to an increment. In the result, it is the responsibility of the Ministry, through its Permanent Secretary, to give effect to that entitlement. Based on the Staff Orders, an increment is paid annually, normally on the anniversary date of appointment. Effectively, it may be said that there is a due date for the payment of an increment.

[99] In the circumstances of this case, the undisputed evidence before the learned judge was that; (1) the requirements of the PSR, Staff Orders, and the PMAS Manual were not followed, (2) the appellant was not assessed for the periods between 2016 to 2021 until January 2022 and (3) no increment was paid at all for those years. No evidence was provided by either party as to the date of the appellant's appointment or when her increment fell due. However, in respect of the assessment periods between 2016 and 2020, more than a year passed without the appellant being assessed or receiving the increment to which she was entitled. The affidavit evidence of the 4th respondent with various memoranda and communications attached indicates that the 4th respondent had complaints about the efficiency and work-related attitudes of the appellant. However, whether or not the appellant was dilatory in respect of her tasks or assignments, the 4th respondent had a duty to facilitate the appraisal process for each year. As such, I agree

with counsel for the appellant that the practical effect of non-payment for those years is that the appellant's increments were withheld, not on the basis of the process set out in regulation 38, but by default. I am fortified in this view based on the definition of the word "withhold", which means "to refuse to give something or to keep back something" (see the Cambridge Academic Content Dictionary, 1st edition). The word was also defined in the Black's Law Dictionary, Definition of the Terms and Phrases of American and English Jurisprudence, Revised Fourth Edition, as:

> "To retain in one's possession that which belongs to or is claimed or sought by another. Fitzpatrick v. Garver, 253 Mo. 189, 161 S.W. 714, 715. To omit to disclose upon request; as, to withhold information. State v. Sharp, 121 Minn. 381, 141 N.W. 526, 527, 528. **To refrain from paying that which is due**. Dupuy v. Board of Education of City and County of San Francisco, 106 Cal.App. 533, 289 P. 689, 691." (Emphasis supplied)

[100] The fact that the appellant subsequently took steps to have her performance assessed with a view to regularising the situation, does not negate the fact that the increments were withheld for those years, as the due date for payment had then passed by more than a year.

[101] With respect to the period 2020 to 2021, a year had not elapsed before the appellant resigned. Steps were taken by her to pursue the appeal process, during which time she resigned. It is necessary to consider the manner in which the appeal segment of the PMAS process was conducted to determine whether the appellant's increment for this period was also withheld by default.

[102] Section 2.10 of the PMAS Manual addresses the appeal process where an employee disagrees with the appraisal given. It is necessary to set out this section in full:

> "**2.10 THE PERFORMANCE MANAGEMENT APPEALS PROCESS**
>
> To begin the Performance Management Appeals Process, the following should have been done:

1. The problem and basis for disagreement must have been defined

2. Existing records, including interventions designed to improve performance in specific areas identified as problematic, must have been reviewed with the employee

An Overview of the Performance Management Appeals Process

Step 1: The Employee & Direct Supervisor should try to resolve the issue

Step 2: The Employee, Direct Supervisor & Reviewing Manager should try to resolve the issue

Step 3: The intervention of the Senior Human Resource Manager should be sought

Step 4: If there is still no resolution, a Panel will be appointed to **adjudicate** the appeal

Step 5: The recommendation of the Panel will be presented to the Permanent Secretary for a final ruling.

Legal action may be pursued if there is a point of Law in question.

1. After completing Steps 1 and 2, if the Aggrieved Party is still dissatisfied with the overall performance rating received, he/she may submit a written Appeal to the HR Division, within 5 days of receiving the copy of the completed Performance Appraisal, signed by all required parties.

2. The HR Division must issue a written acknowledgement of receipt of the Appeal to the Aggrieved Party and other relevant parties, including the Head of Division and/or the Reviewing Manager, within 5 days of receiving the Appeal. The HR Division will manage and monitor the different stages of the Performance Management Appeals Process and ensure confidentiality and security of all relevant documents.

3. The appropriate senior officer from the HR Division is required to meet with the employee, supervisor and reviewing manager within 10 days of the date of the written acknowledgement of the grievance by the HR Division.

4. Having met with the relevant parties and reviewed the existing records, including interventions designed to improve performance in specific areas identified, the senior officer must then prepare a written recommendation within 10 days. The recommendation must be placed on the Employee's Personal file and communicated to each party involved at this stage.

5. If the Aggrieved Party is not satisfied with the recommendation, he/she has the right to request (in writing) that the HR Division proceed to the next stage. This should be done within 5 days of receipt of the recommendation.

6. If the Aggrieved Party accepts the recommendation the Appeal should be considered closed.

7. The next step of the Performance Management Appeals Process will be adjudicated by a Panel comprising 5 members appointed by the Permanent Secretary/Head of Department. No member of the Panel should be from the Aggrieved Party's Division.

8. The Panel is expected to meet within 10 days of receiving the request. The Panel will determine what information is needed and all relevant parties will be required to submit the requested documentation. The information must be submitted to the HR Division within 15 days of the Panel requesting it. The HR Division will provide each party with the documentation received. The HR Division will be responsible for scheduling the Panel meeting(s) and informing the relevant parties of the meeting date(s).

9. The Aggrieved Party has the right of representation by person(s) of his/her choice. If a Civil Servant is selected as a representative, he/she should not have any unexpired disciplinary action. All parties must seek approval in advance to have witnesses appear before the Panel. Minutes of each meeting of the Panel must be taken.

10. The Panel must review all the information provided within 10 days, and by majority vote decide the recommendation to the Permanent Secretary/Head of Department. The Panel must ensure that its recommendation is consistent with the relevant regulations.

> 11. The Permanent Secretary/Head of Department can accept, reject or modify the Panel's recommendation. The Permanent Secretary/Head of Department will submit the written decision to the Aggrieved Party and all other related parties within 10 days of receiving the Panel's recommendation.
>
> 12. The decision of the Permanent Secretary/Head of Department shall be considered final.
>
> 13. Should the Aggrieved Party be dissatisfied with the decision on a point of law, he/she may pursue legal action.
>
> **IMPORTANT TO NOTE**
>
> The timelines recommended in the Performance Management Appeals Process is [sic] intended to reflect the maximum timeframes anticipated for each step. Closure of the Appeals Process should be sought as soon as is possible, while ensuring that transparency, integrity and fairness is [sic] upheld at all times."

[103] The evidence before the learned judge was that the appellant, upon receiving the completed appraisals from the 4th respondent, disputed the 4th respondent's comments both on the appraisal documents and in a memorandum. The 4th respondent gave a handwritten response on the appellant's memorandum, maintaining her ratings. The appellant then wrote another memorandum and requested to proceed to the next step of the appraisal process. The 4th respondent instructed the appellant to proceed to the next step. The appellant then sought the intervention of the HRD in February 2022, and several pieces of correspondence passed between the appellant and the HRD. On 13 May 2022, Ms Felicia Robinson, the Director for Organization and Development in the Human Resource Management and Development Branch at the Ministry, by email, notified the appellant of certain factual circumstances. This included the fact that the PMAS appeal steps, as outlined, would not have been able to entirely guide the process of the appellant's case. This was because the Ministry was unable to facilitate an intervention by the Senior Human Resource Manager, as there was none at the Ministry since February 2022. Ms Robinson indicated ultimately that contact would be made with the Office of the Services Commissions and that the appellant would be provided with feedback.

[104] No update having been provided and no intervention having been arranged, by letter dated 4 July 2022, Ms Analisa Chapman, attorney-at-law for the appellant, wrote to the HRD of the Ministry requesting that urgent steps be taken to organise and schedule the required intervention. By email correspondence dated 25 August 2022, the appellant wrote to Mr Shaun Lee, then the acting Senior Director for HRD at the Ministry and indicated that she was advised by Mr Lee that he was convening a panel as the next step in the process of resolving the impasse between herself and the 4th respondent, and that her attorney would be notified of the next step by 29 August 2022. Further email correspondence was sent by the appellant's attorney, ending in correspondence on 14 September 2022, to Mr Lee, noting that by way of telephone conversation, steps were still being taken to convene a suitable panel. Ultimately, no panel was convened. The time between when the appellant was instructed by the 4th respondent to proceed to the next step in the PMAS procedure and sought the intervention of the HRD (late February 2022) and when it was indicated by an officer from the HRD that a panel would be convened to facilitate a resolution of the dispute (25 August 2022), was six months. Based on section 2.10 of the PMAS Manual, this period of delay was inordinate. The appellant stated in her affidavit that she gave notice of her resignation on 10 August 2022.

[105] The appellant initiated her claim on 1 November 2022. Judgment was delivered on 27 July 2023, and it was ordered that the Ministry should take all necessary steps to conclude the review exercise under PMAS within three months of the court's order. The amended notice of appeal was filed on 22 September 2023. There is no evidence that the process was completed up to that point. Given the lengthy delay in the completion of the review exercise, without good reason, I conclude that the appellant's increment for the period between 2020 and 2021 has also been withheld by default.

[106] The Ministry and the 4th respondent bore the burden of ensuring that the PMAS process was engaged and carried out. They have not provided a good reason for failing to satisfy the obligations of the Ministry in paying the appellant's increments and in failing to adhere to the various procedures outlined in the PMAS Manual. I am of the view, therefore, that the lack of timely action both by the Ministry and the 4th respondent

effectively resulted in a withholding of the appellant's increments for the relevant periods. However, it is difficult to conclude that the 4th respondent "sought to" withhold those increments as the words "sought to" suggest a deliberate intent on the part of the 4th respondent, for which no evidential basis has been supplied. As such, the learned judge was correct to find that there was no deliberate or intentional withholding of increment. In any event, it was the responsibility of the Ministry and 4th respondent to provide evidence of a basis either to suspend, defer, or withhold the incremental payments to the appellant. This was not done, therefore, the increments for each relevant year ought to have been paid on the due dates.

[107] In the premises, ground of appeal 2, therefore, fails. Grounds 7 and 17 succeed.

Issue four: Whether the learned judge erred in concluding that the respondents' conduct did not amount to procedural impropriety or unfairness, and that the appellant failed in establishing that the 4th respondent acted with bias? (Grounds 8, 9, 11, 12, and 20)

Procedural impropriety or unfairness

[108] The concept of procedural impropriety or procedural unfairness was described by Lord Diplock in the case of **Council of Civil Service Unions and others v Minister for the Civil Service** [1985] AC 375 ('the **CCSU** case'), as one of three classical grounds upon which administrative action is subject to judicial review (see page 410 D-E). His Lordship stated that procedural impropriety is more than a failure to observe basic rules of natural justice or a failure to act with procedural fairness towards the person who will be affected by the decision. This is because procedural impropriety "covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice".

[109] The PSR is subsidiary legislation, and encapsulated within the laws of Jamaica pursuant to the Constitution. The PMAS Manual, on the other hand, as the learned judge concluded, is not subsidiary legislation and, therefore, lacks the legislative authority with which the PSR is applied and enforced. Also, the PMAS Manual is not concerned with the

proceedings of an administrative tribunal. Notwithstanding this, the PMAS Manual forms part of the policies and procedures which have been instituted by the Government and adopted by the Ministry to give effect to the PSR and, in particular, regulation 38. That being said, the issue is whether a failure on the part of the respondents to adhere to the requirements of the PMAS Manual, could give rise to a breach of procedural fairness.

[110] The Halsbury's Law of England (Volume 61A (2023)) at para. 26 gives a general overview of the concept of procedural fairness:

> "Procedural fairness, or the duty to act fairly, are the terms now generally used to describe **the range of procedural standards which are applied to the administrative decision-making process.** They encompass both specific statutory requirements as to consultation, notice or hearings, and the requirements of natural justice derived from common law. …
>
> It is now impossible to regard these 'process rights' as 'mere' procedures. In each situation the requirements of procedural fairness exist in order to have a direct impact on the quality of the decision-making process. ... The concept of fairness is necessarily a flexible one, and the requirements which it imposes will differ depending on the circumstances which prevail." (Emphasis supplied)

[111] Further, at para. 27, it is stated:

> " … The consequences of a failure to comply with a statutory procedure are now said to depend not on prior classification of the statutory provision as either mandatory or directory, but on an analysis of what Parliament had intended those consequences to be, and in particular whether Parliament can be taken to have intended the outcome of non-compliance to be total invalidity. Courts determine the consequences of non-compliance as an ordinary question of statutory interpretation.
>
> In determining the consequences of breach of a requirement, the court must look to the words and objects of the statute in which the requirement appears, the purpose of the requirement and its relationship with the scheme, the degree

> and seriousness of the non-compliance, and its actual or possible effect on the parties. The court must attempt to assess the importance attached to the requirement by Parliament. If, in the opinion of the court, a procedural code laid down by a statute is intended to be exhaustive and strictly enforced, its provisions will be regarded as invalidating an action taken in breach, but even a mandatory procedural requirement may be held to be susceptible of waiver by a person having an interest in securing strict compliance. Courts have asked whether the statutory requirement can be fulfilled by substantial compliance and, if so, whether on the facts there has been substantial compliance even if not strict compliance. Under some statutes non-compliance with procedural requirements accompanying the exercise of a statutory power directly affecting individual rights is expressly declared to have no vitiating effect unless a person aggrieved is substantially prejudiced thereby. …"

[112] The case of **Charles (Herbert) v Judicial and Legal Service Commission and Another** (2002) 61 WIR 471 also explains the approach of the courts. Tipping J, writing on behalf of the Board, explained as follows:

> "[9] … Some five years earlier the New Zealand Court of Appeal had taken much the same approach in *New Zealand Institute of Agriculture Science Inc v Ellesmere County* [1976] 1 NZLR 630. Cooke J (now Lord Cooke of Thorndon) speaking for the court said (at p 636):
>
> > 'Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or Regulations and the degree and seriousness of the non-compliance.'
>
> [10] The approach evidenced by these cases was a development of earlier authority and was not in itself new. It can be traced back at least as far as the judgment of Lord Campbell, sitting as Lord Chancellor in *Liverpool Borough Bank v Turner* (1860) 29 LJ Ch 827, in which he said, in relation to the issue of implied nullification for disobedience of a statute, that **the duty of the courts was 'to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be**

construed'. And in the well-known case, *Howard v Bodington* (1877) 2 PD 203 at 210, Lord Penzance observed that he was not sure that the language of mandatory and directory was the most fortunate language that could have been adopted to express the idea that it was intended to convey. He continued:

> 'Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the court to be of that material importance to the subject matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end.'

And a little later (at p 211), after citing from *Liverpool Borough Bank v Turner*, Lord Penzance said:

> '… in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.'" (Emphasis supplied)

[113] In contending that there was procedural unfairness, the appellant took issue with three main failings that she alleged on the part of the respondents. Specifically, failure to: (1) give effect to the PMAS requirements relating to the creation of a work plan, and the conduct of quarterly evaluations; (2) adhere to the procedural requirements of the PSR where an increment is suspended, deferred, or withheld; and (3) act with expediency, to the appellant's detriment.

Failure to adhere to the PMAS requirements

[114] As already indicated, the PMAS provisions are not of statutory force. However, having been adopted by the Ministry, they serve the role of seeking to ensure fairness

and effectiveness in the assessment of employee performance, with a view to giving effect to the requirements of regulation 38 of the PSR. As such, non-compliance with the procedures laid out therein has potential for direct impact on the entitlement to increments provided for by regulation 38. In this case, it was undisputed that no work plan was created for the appellant, although the 4th respondent asserted that attempts to meet with the appellant to create a work plan were effectively futile. It was also undisputed that there were no quarterly evaluations of the appellant's performance. The absence of a work plan, of itself, meant that there would be no clear performance targets or benchmarks by which the appellant's performance could be assessed. The PMAS Manual is clear in stating that executives, managers, and supervisors are to monitor staff performance throughout the year, and where this is not done, an employee should not be rated below the minimum standard (see the "Important reminder" at para. [69] above). In the present case, there was no evidence of regular assessments of the appellant's performance throughout the year and no formal notices of the need to improve. Failure to adhere to these requirements could, in the circumstances of this case, be considered to have resulted in procedural impropriety.

Failure to adhere to the procedural requirements of the PSR

[115] As for the alleged failure of the Ministry and 4th respondent to comply with the requirements of the PSR where an increment is suspended, deferred, or withheld, I have already found that there was no suspension or deferment of increments. However, as the increments were effectively withheld by default, it also stands to reason that the procedural requirements for the withholding of increments, as stated by regulation 38, were not followed. Given the importance of increments as underscored by regulation 38, failing to adhere to procedural requirements for giving notice, along with reasons why an increment ought not be granted, would constitute a breach of procedural fairness. This is especially so, having regard to the obvious prejudice to an employee in the event of non-payment of an increment.

Failure to act with expediency

[116] The evidence before the court was that the appellant submitted her performance evaluations to the 4th respondent in June and September 2021, and the 4th respondent returned them in January 2022. The appellant initiated the appeals process in February 2022. Based on section 2.10 of the PMAS Manual, there were specific maximum timelines for the completion of the various steps in the appeal process, with the further indication that the appeal process should be completed as soon as possible (see para. [102] above). A review of the section indicates that if these timelines are adhered to, the appeals process could be completed within four to six months after the aggrieved employee submits a written appeal. The evidence before the learned judge was that up to September 2022, the appeal process had not moved beyond the appellant's appeal submission.

[117] The case of **Bell v DPP** (1985) 32 WIR 317, offers some useful guidance in assessing this issue of delay or failure to act with due expedition. The Board had to consider section 16(2) of the Constitution dealing with the right to a fair hearing within a reasonable time. In assessing what would amount to unreasonable delay, the Board accepted the methodology of the assessment of four factors employed by the Supreme Court of the United States of America in **Barker v Wingo** 407 US 514 (1972) when determining whether the constitutional right to a speedy and public trial by an impartial jury had been breached, namely, (1) the length of the delay; (2) the reasons given for the delay; (3) the responsibility of the complainant to assert his rights; and (4) prejudice to the complainant. Although these factors relate to the right to a fair hearing within a reasonable time (which will be explored below), it is expedient to consider them in examining the circumstances of the case at bar.

[118] Notwithstanding that I have determined that the appellant was not responsible under the PMAS Manual to initiate the evaluation process, there was no indication that she had made any enquiries of the 4th respondent between 2016 and 2020 concerning the conduct of her evaluation or in relation to the non-payment of the annual increment.

She must, therefore, be assessed as having some responsibility for the failure to assert her rights. However, ultimately, it was the responsibility of the 4th respondent and the Ministry to initiate the process promptly between 2016 and 2020, and then for the year 2021. The 4th respondent explained the delay between the time she received the relevant documents from the appellant and when she returned them to the appellant. The delay, however, was still unacceptable, having regard to the responsibilities of the 4th respondent and the requirements under the PMAS Manual.

[119] In any event, the delay did not end there, as the Ministry failed to act promptly with the request by the appellant to proceed to the appeal process. The reason for the delay appeared to have been the absence of an appropriate director within the HRD. Having previously concluded that these reasons as advanced could not constitute a good reason for the failure to observe the timelines as set out in the PMAS Manual, this conclusion remains valid.

[120] Concerning the prejudice to the appellant, this is undeniable. She complained (this has not been disputed), that she was directly and adversely affected by the delays and the withholding of her increments and allowances due to her. Specifically, she spoke to the effect on the calculation of her pension entitlement as the pension would be calculated based on her salary. Further, that she had to retain counsel in the matter due to the lack of response from the Ministry, and as a result of these circumstances, gave notice of her resignation on 10 August 2022.

[121] The learned judge considered both the delay leading up to the completion of the appraisals and the delay, subsequently, in the commencement of the appeal proceedings. She was correct in noting that account should have been taken of the delay pre-appraisal, in seeking to arrange the appeal proceedings expeditiously. The history of the matter up to the point of appeal called for a prompt response. Whilst it is not my view that every failure to adhere to the stated timelines for the appeals process could give rise to procedural impropriety, the extensive delay (completion of appraisals and subsequently) coupled with the failure to follow the process set out in the PSR regarding the non-

payment of increments, had that effect. The non-compliance with these procedural requirements did result in a breach of procedural fairness.

Bias

[122] The learned judge considered the issue of bias within the context of whether the appellant's right to a fair hearing was breached. She noted that the appellant's allegation of bias related to the failure by the HRD to follow the appeals procedure outlined in the PMAS Manual. Further, that the appellant raised the issue of conflict of interest or apparent bias, arising from the fact that the 4th respondent chaired the Human Resources Executive Committee ('HREC') and that the Director of Corporate Services, having supervisory role of the HRD, reported directly to the 4th respondent. The learned judge also set out what she considered to be relevant portions of the affidavit evidence of the appellant and the 4th respondent concerning bias at paras. [69] to [71] of her judgment:

> "[69] The [appellant] pointed to further evidence of bias or lack of fairness in the process at paragraph 18 of her second affidavit in support of the Fixed Date Claim Form. She stated that: -
>
> > 'I queried the reason for the exclusion of the intervention as the next step and also how the panel findings would be treated as the process is that the findings are to be sent to the 4th [respondent] for her review as Permanent Secretary but that would be a conflict in the case involving her and I. This query was in addition to that previously communicated by me to the Human Resources Unit. I will rely on previously exhibited emails and memorandum to show that the [Ministry] unduly delayed the convening of the relevant hearing and/or processing of the dispute involving the 4th [respondent] and I. Also that the 4th [respondent] failed and/or neglected to ensure that the requisite process for disputes was implemented given her knowledge of the Human Resources requirements of the [Ministry] and her responsibilities having delegated duties from the [PSC].'
>
> [70] The 4th [respondent] in her affidavit in response, denied having any malice, ill-intent or bias towards the [appellant].

> The 4th [respondent] stated at paragraph 13 of her affidavit that: -
>
> > 'I have no ill will or bias towards the [appellant]. I am not aware of the [appellant] making any prior complaints that I was biased or unfair towards her. My comments on her PMAS report were fair and reasonable based on my assessment of her performance over the relevant period. Nevertheless, the comments and ratings are not final as there was never a discussion with the [appellant] as stipulated by PMAS Guidelines. The issues raised in my comments about the [appellant's] performance were not new and would have been communicated previously to the [appellant] in our many meetings over the years as well as noted in several memoranda.'
>
> [71] The 4th [respondent] stated further that: -
>
> > 'The issue of the [appellant's] absenteeism from work and lack of performance has been a constant issue while she was under my supervision. I would meet with the [appellant] to discuss same as well as complaints received from both internal and external constituents. It was pointed out to the [appellant] the deficiencies in her performance and identified areas for improvement. The [appellant] in those meetings would explain certain challenges she was facing which affected her performance and as her supervisor, I was sympathetic and extended leniency. There was no improvement in attendance or performance. Therefore, the [appellant] should not have been taken by [surprise] by the comments and scores. My concerns were noted in several memoranda to the [appellant] over the years…'"

[123] Before this court, the appellant's grounds of appeal and submissions took issue with the approach of the learned judge in predicating the issue of bias on the conflict of interest raised regarding the 4th respondent's role on the HREC. Further, that the learned judge failed to apply the test for bias in light of the appellant's evidence that the 4th respondent had long harboured an unfavourable opinion of the appellant, and the learned judge erred in finding that there was no logical connection between the matter and the feared deviation from the course of deciding the case on the merits.

[124] Dr Barnett made specific reference to memoranda from the 4th respondent to the appellant dated 6 September 2016, 28 November 2016, and 12 December 2018, as well as email correspondence between the 4th respondent and the appellant between 5 and 6 November 2021. It was Dr Barnett's contention that these memoranda and correspondence demonstrated that there was actual bias. He submitted, more specifically, that the documents showed that the 4th respondent had a predisposition to give the appellant a negative assessment, even before reviewing the PMAS documents.

[125] It is not necessary to set out the full contents of these documents, save to comment on them generally. The memorandum of 12 December 2018 enclosed correspondence received by the Ministry, which the 4th respondent expressed as demonstrating another instance of "inefficiency, unprofessionalism and dismal conduct within the Legal Services Division". The appellant was instructed to investigate the matter and address it. The September 2018 memorandum was addressed to the appellant and also copied to the Chief Technical Director of the Ministry. In it, the 4th respondent raised a concern about inefficient handling of certain matters by the Ministry and requested that the appellant inform her of what was being contemplated to be done, to address the inefficiency. The November 2016 memo was stamped as "CONFIDENTIAL" and the subject was "Concerns re Performance of Duties". It raised concerns about the appellant's absence from work, supervision of the department, and turnaround time for matters. It also spoke to a specific date that the appellant was absent from work whilst assigned to work at the Office of the Prime Minister. The 4th respondent concluded the memorandum by stating: "[p]lease note that the situation is of grave concern, and I am asking that you make some radical changes to your work attitude and attendance".

[126] The email correspondence between 5 and 6 November 2021 concerned the appellant's follow-up on the completion of her assessment for the years 2016 to 2021. As the appellant has put significant weight to the responses received from the 4th respondent, the responses will be set out. On 5 November 2021, the 4th respondent stated:

> "Miss Dryden
>
> It is interesting how you are hounding me to complete the PMAS in your time when in times past, you were never available to discuss with me when I needed to do so because of your several unexplained absence [sic] from work.
>
> AVS"

[127] On the same date, the appellant gave a lengthy response denying the allegations and reiterating the satisfactory performance of her duties. To this, the 4th respondent retorted on 6 November 2021:

> "Be assured Miss Dryden that the web that you are spinning was anxiously anticipated. I have no intention to respond to and counter your lies in this forum. Know though that my facts and your contrived perspective on your performance are diametrically different. I too have documented."

[128] In commenting on this response, the 4th respondent, in her affidavit evidence (at para. 8), indicated that:

> "… In response to the [appellant's] many emails following up on the completion of the PMAS reports, I sent email dated November 05, 2021, highlighting that in times past she was not available to meet to which the [appellant] disputed by email on the same date. It was against that background that the email dated November 06 2021 was sent as I felt that the [appellant] was trying to paint a picture which did not reflect the true state of affairs. …"

[129] There is no specific indication from the reasons of the learned judge, that she took account of these documents or evidence in her analysis of the question of bias, or otherwise. However, the issue is whether, in the particular circumstances of this case, there was sufficient basis for the learned judge to conclude that there was actual bias or apparent bias on the part of the 4th respondent.

The relevant legal principles on bias

[130] As far as apparent bias is concerned, was there evidence that "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [4th respondent] was biased" (see para. [103] of **Magill v Porter**). Further, was there clear evidence of actual bias by the 4th respondent as submitted by Dr Barnett?

[131] The proof of actual bias is very difficult. F Williams JA, writing on behalf of this court in **Larkland Latouche v June Chung and others** [2023] JMCA Civ 25 ('**Latouche**'), considered authorities dealing both with apparent bias and actual bias. At para. [26] of that judgment, he discussed the case of **Locabail (UK) Ltd v Bayfield Properties Ltd & another; Locabail (UK) Ltd and another v Waldorf Investment Corp and others; Timmins v Gormley; Williams v HM Inspector of Taxes and others; R v Bristol Betting and Gaming Licensing Committee, ex parte O'Callaghan** [2000] 1 All ER 65 ('**Locabail**'). The extract is lengthy but expedient:

> "[26] There are several authorities dealing with the concept of actual bias and bias generally. For example, the case of **Locabail (UK) Ltd v Bayfield Properties Ltd & Anor** … is most helpful, as it succinctly sets out some of the more important principles that are applicable to the issues in this case. Of particular relevance are some general statements of principle set out at paras. 2 to 4 and 7 to 8 of that case, which read as follows:
>
> > '2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention on Human Rights, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.

3. Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

4. There is, however, one situation in which, on proof of the requisite facts, the existence of bias is effectively presumed, and in such cases it gives rise to what has been called automatic disqualification. That is where the judge is shown to have an interest in the outcome of the case which he is to decide or has decided. The principle was briefly and authoritatively stated by Lord Campbell in Dimes v. The Proprietors of the Grand Junction Canal (1852) 3 HL Cas 759 at 793…

…

7. The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice (see Dimes above, in the passage quoted, and R. v. Gough [1993] AC 646 at 661, per Lord Goff of Chieveley).

> 8. In the context of automatic disqualification the question is not whether the judge has some link with a party involved in a cause before the judge but whether the outcome of that cause could, realistically, affect the judge's interest.' (Emphasis added)"

[132] And at para. [27], F Williams JA quoted McLaughlin CJ in the case of **Wewaykum Indian Band v Canada** [2004] 2 LRC 692, who adopted the definition of bias or prejudice as "a leaning, inclination, bent or predisposition towards one side or another or a particular result".

[133] Based on the **Locabail** case, actual bias arises firstly, where a judge's decision has in fact been influenced by partiality, prejudice, or an improper interest. Secondly, if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause, whether the outcome of that cause could realistically affect the judge's interest. As expressed by F Williams JA in **Latouche** at para. [28], it is the party alleging bias on whom lies the burden of proving that allegation.

[134] I am not of the view that the appellant has discharged the burden in relation to apparent or actual bias. This is because, in her capacity as the appellant's supervisor, the 4th respondent was not adjudicating, acting as a legal arbiter or resolving any dispute between parties. Instead, she was engaged in the process of assessing the appellant's performance and rating it. This was one of her functions. The 4th respondent's view of the appellant's work had been formed over the years of working with the appellant and would not have arisen for the first time when she was then putting pen to paper in completing the assessment forms. The evidence as set out in the memoranda and email correspondence give some insight into what the 4th respondent's view was of the appellant's performance. The fact alone that those views were negative, is insufficient to support an assertion of bias. Nothing in those documents suggests that the 4th respondent took account of extraneous matters, outside of work, in coming to her assessment. It appears, from the various communication that a level of hostility had developed between the appellant and 4th respondent. At times, strong language was used by the 4th respondent. However, based on the circumstances, that would not be sufficient to

demonstrate bias, given the nature of the relationship between the parties (supervisor and employee).

[135] The supervising officer is usually one of a superior rank evaluating the performance of an officer of lower rank in the organisation. Until the appeal process takes place, disagreement between the appellant and the 4th respondent concerning alleged deficiencies in the appellant's performance does not easily lend itself to proof of actual bias. McDonald-Bishop JA (as she then was), in assessing the issue of bias in **Jamaican Redevelopment Foundation, Inc v Clive Banton and another** [2019] JMCA Civ 12 at para. [52], stated that there must be some basis to conclude that there would be a deviation from deciding the case on the merits. She referred to the case of **RBTT Trust Limited v Flowers** (2012) 80 WIR 139 from the Court of Appeal of Belize, where the *dicta* of Gleeson CJ, McHugh, Gummow and Haynes JJ in **Ebner v Official Trustee in Bankruptcy** [2001] 2 LRC 369 was cited on this point.

[136] While there was strong disagreement on the performance of the appellant, the difficulty that she faces to prove bias lies in the context. After the 4th respondent gave her assessment, the process from that point should have included the parties coming together to discuss the report before a final evaluation took place. This did not take place. The 4th respondent, for all intents and purposes, played no further role either as direct supervisor or as chair of the HRD, as the appeal process, although requested, was never engaged. In those circumstances, there was no evidence to sustain any complaint of partiality or prejudice on the part of the 4th respondent, or that the 4th respondent had any personal interest in the outcome of the process, which would be demonstrative of actual or apparent bias.

[137] In relation to the issue of procedural fairness grounds 8, and 20, therefore, succeed; grounds 9, 11, and 12, relating to bias, fail.

Issue five: Whether the learned judge erred in finding that the appellant's right to a fair hearing was not breached? (Grounds 10, 13, and 19)

[138] I have already concluded that there was procedural unfairness because of the failure to follow the procedures outlined in the PMAS Manual, including the relevant timelines in giving effect to the appeal process. However, I am of the view, as was the learned judge, that there was no breach of the constitutional right to a fair hearing pursuant to section 16(2) of the Constitution. Notably, a fair hearing does not mean it must be a "hearing according to what would be required in a court of law. … [I]t means an opportunity to put one's side of a case before a decision is reached" (see Commonwealth Caribbean, Public Law, Third Edition by Albert Fiadjoe at page 239). No decision was reached in this matter concerning the payment of the appellant's increments. However, Dr Barnett asked this court to grant a declaration concerning such a constitutional breach, so a consideration of section 16(2) of the Constitution is relevant. It provides:

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

[139] Ascertaining the definition of specific terms within section 16(2) is an essential starting point, particularly the terms "civil rights" and "legal proceedings". In order for the appellant to be successful on this issue, it must be shown that the circumstances of the case satisfy the test of being a determination of her civil rights or a determination of legal proceedings capable of resulting in a decision adverse to her interests.

[140] According to the text Words and Phrases Legally Defined, "legal proceedings" means:

> "any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes
>
> (a) an arbitration;

> (b) an application to, or an inquiry or other proceeding before, the Solicitors Disciplinary Tribunal or any body exercising functions in relation to solicitors in Scotland or Northern Ireland corresponding to the functions of that Tribunal; and
>
> (c) an investigation, consideration or determination of a complaint by a member of the panel of ombudsmen for the purposes of the ombudsman scheme within the meaning of the Financial Services and Markets Act 2000."

[141] Counsel for the respondents submitted that the PMAS procedure is not tantamount to legal or disciplinary proceedings "as there was no sanction or charge in relation to which the appellant could be said to have been in jeopardy". Also, that the appeals process under the PMAS framework would not qualify as a court, tribunal, or public authority. Therefore, the right to a fair hearing or the reasonable time guarantee under section 16(2) of the Constitution was not engaged.

[142] However, "civil rights" may include a wider concept than "legal proceedings". The case of **Regina (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions; Regina (Holding & Barnes plc) v Secretary of State for the Environment, Transport and the Regions; Secretary of State for the Environment, Transport and the Regions v Legal and General Assurance Society Ltd** [2001] 2 WLR 1389 ('**Alconbury**') decided by the House of Lords, provides some insight into an understanding of the term "civil rights". The case concerned three appeals which raised broadly the question of whether certain decision-making processes of the Secretary of State for the Environment, Transport and the Regions, were compatible with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') as incorporated in the Human Rights Act 1998. Article 6(1) of the ECHR is worded in similar terms to section 16(2) of the Constitution and was referred to by the learned judge at para. [53] of her judgment. It provides:

> "Right to a fair trial

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[143] Lord Slynn of Hadley, at para. [27] of **Alconbury**, touched on the question of "civil rights", where he stated:

> "27 A preliminary question has arisen as to whether a dispute over administrative law matters of the present kind involved the determination of 'civil rights'. …. In *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, para 94, however, the court said:
>
> > **'For article 6(1) to be applicable to a case ('contestation') it is not necessary that both parties to the proceedings should be private persons,** which is the view of the majority of the Commission and of the Government. **The wording of article 6(1) is far wider; the French expression 'contestations sur [des] droits et obligations de caractère civil' covers all proceedings the result of which is decisive for private rights and obligations.** The English text, 'determination of … civil rights and obligations', confirms this interpretation. **The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc) are therefore of little consequence.**'" (Emphasis supplied)

[144] Lord Hoffman also discussed the meaning of the phrase:

> "78 As a matter of history it seems likely that the phrase 'civil rights and obligations' was intended by the framers of the Convention to refer to rights created by private rather than by public law. In other words, it excluded even the right to a decision as to whether a public body had acted lawfully, which English law, … would treat as part of the civil rights of the individual. …

79 … the European court has not restricted article 6(1) to the determination of rights in private law. The probable original meaning, which Judge Wiarda said in König's case, at p 205, was the 'classical meaning' of the term 'civil rights' in a civilian system of law, is nevertheless important. It explains the process of reasoning, … by which the European court has arrived at the conclusion **that article 6(1) can have application to administrative decisions**. The court has not simply said, … that one can have a 'civil right' to a lawful decision by an administrator. **Instead, the court has accepted that 'civil rights' means only rights in private law and has applied article 6(1) to administrative decisions on the ground that they can determine or affect rights in private law.**

80 The seminal case is *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455. This concerned an Austrian statute which required transfers of agricultural land to be approved by a District Land Transactions Commission with a right of appeal to a Regional Commission. In the absence of approval, the contract of sale was void. The purpose of the law was to keep agricultural land in the hands of farmers of small and medium holdings and the District Commission was required to refuse consent to a transfer which appeared to violate this policy. **This was a classic regulatory power exercisable by an administrative body. The court nevertheless held that article 6(1) was applicable to its decision on the ground that it was 'decisive' for the enforceability of the private law contract for the sale of land. Thus, a decision on a question of public law by an administrative body could attract article 6(1) by virtue of its effect on private law rights.** On the facts, the court held that article 6(1) had been satisfied because the Regional Commission was an independent and impartial tribunal.

81 The full implications of *Ringeisen* were not examined by the court until some years later. It led in *König v Germany* 2 EHRR 170 to a sharp disagreement between those members of the court who saw it as a means of enforcing minimum standards of judicial review of administrative and domestic tribunals and those who regarded it as a potential Pandora's box and wanted to confine it as narrowly as possible. Dr König was a surgeon charged with unprofessional conduct before a specialist medical tribunal attached to the Frankfurt Administrative Court. It withdrew his right to practice and run

a clinic. He appealed to an administrative Court of Appeal and there followed lengthy and complicated proceedings. **His complaint to the European court under article 6(1) was that he had been denied the right to a decision 'within a reasonable time'. But this raised the question of whether, in principle, article 6(1) applied to disciplinary proceedings before an administrative court. By a majority, the court held that it did. On the *Ringeisen* principle, it affected private law rights such as his goodwill and his right to sell his services to members of the public.**" (Emphasis supplied)

[145] Lord Clyde also expounded on the point. He stated:

"148 **The scope of article 6 accordingly extends to administrative determinations as well as judicial determinations. But, putting aside criminal proceedings with which we are not here concerned, the article also requires that the determination should be of a person's civil rights and obligations. The concept of civil rights in article 6(1) is an autonomous one: *König v Federal Republic of Germany* (1978) 2 EHRR 170. In *H v France* (1989) 12 EHRR 74, para 47 the court stated:**

> **'It is clear from the court's established case law that the concept of 'civil rights and obligations' is not to be interpreted solely by reference to the respondent state's domestic law and that article 6(1) applies irrespective of the parties' status, be it public or private, and of the nature of the legislation which governs the manner in which the dispute is to be determined; it is sufficient that the outcome of the proceedings should be 'decisive for private rights and obligations'.'**

It relates to rights and obligations 'which can be said, at least on arguable grounds, to be recognised under domestic law': *James v United Kingdom* (1986) 8 EHRR 123, para 81. The rights with which the present appeals are concerned are the rights of property which are affected by development or acquisition. Those clearly fall within the scope of 'civil rights'.

But there is no issue about the existence of these rights and no determination of the rights in any strict sense is raised.

149 **The opening words of article 6(1) are: 'In the determination of his civil rights and obligations or of any criminal charge against him …' Here again a broad interpretation is called for. The decision need not formally be a decision on the rights. Article 6 will still apply if the effect of the decision is directly to affect civil rights and obligations.** In Le Compte, Van Leuven and De Meyere 4 EHRR 1, para 46 the court observed: 'it must be shown that the 'contestation' (dispute) related to 'civil rights and obligations', in other words that the 'result of the proceedings' was 'decisive' for such a right.' The dispute may relate to the existence of a right, and the scope or manner in which it may be exercised (Le Compte, at para 49, also Balmer-Schafroth v Switzerland (1997) 25 EHRR 598. But it must have a direct effect of deciding rights or obligations. The court continued, at para 47:

> 'As regards the question whether the dispute related to the above-mentioned right, the court considers that a tenuous connection or remote consequences do not suffice for article 6(1), in either of its official versions ('contestation sur'; 'determination of'): civil rights and obligations must be the object—or one of the objects—of the 'contestation' (dispute); the result of the proceedings must be directly decisive for such a right.'

…

150 **It is thus clear that article 6(1) is engaged where the decision which is to be given is of an administrative character, that is to say one given in an exercise of a discretionary power, as well as a dispute in a court of law regarding the private rights of the citizen, provided that it directly affects civil rights and obligations and is of a genuine and serious nature.** It applies then to the various exercises of discretion which are raised in the present appeals. But, while the scope of the article extends to cover such discretionary decisions, the particular character of such decisions cannot be disregarded. And that particular factor has important consequences for the application of the article in such cases." (Emphasis supplied)

[146] Ultimately, in **Alconbury**, the House of Lords accepted that the administrative decisions in question involved the determination of "civil rights". Further, although the Secretary of State was not an independent and impartial tribunal, article 6 was not breached because the decisions were predominantly policy decisions subject to adequate judicial review by independent courts, and the statutory regime preserved sufficient judicial control over legality and procedure. As such, the engagement of civil rights does not automatically require that the primary decision-maker be an independent tribunal. What matters is whether the legal system as a whole provides adequate judicial determination of disputes about those rights.

[147] It is possible, therefore, that certain administrative decisions may involve the determination of "civil rights" by virtue of their effect on private law rights. But the particular character of such decisions must be properly scrutinised by the court. The circumstances of the present case could not attract such an application. There are distinctions that exist between the authorities considered above and the present case. In **Alconbury**, final determinations were being made or to be made by the Secretary of State. In **König v Federal Republic of Germany** (1978) 2 EHRR 170 ('**Konig**') (referred to in **Alconbury**), the issue was whether article 6(1) applied to disciplinary proceedings before an administrative court. It was decided that the scope of article 6(1) extended to administrative determinations as well as judicial determinations, the understanding being that article 6(1) can still apply if the effect of the decision directly affects civil rights obligations. The result must be decisive of those rights.

[148] In the case at bar, it is evident that no decision has been made that can be described as decisive of the appellant's rights. She was also, not engaged in any disciplinary process that effected such rights. An interim evaluation of the appellant by the 4th respondent was required under the PMAS. It was also open to her to rate the appellant below the minimum standard once she satisfied the requirements for a work plan and quarterly reviews. The procedure allows for the increment to be withheld for a limited period of time while the review and ultimately the appeal process takes place. In such circumstances, this court should be careful in extending an understanding of "civil

rights" at this stage to the PMAS process. The concern in **Konig**, that such a pandora's box should be narrowly confined is apt in this scenario.

[149] The learned judge concluded that failure to adhere to the provisions in PMAS is a breach of the inherent rights that can be legitimately expected by employees, subject to the PSR, but does not qualify as a breach of constitutional rights guaranteed pursuant to section 16(2) of the Constitution.

[150] As far as a breach of section 16(2) is concerned, therefore, I agree with the learned judge that no such breach took place.

[151] Grounds of appeal 10, 13 and 19, therefore, fail.

Issue six: Whether the learned judge erred in failing to find that the appellant had a legitimate expectation to benefit from a recommendation for the payment of a special increment? (Ground 18)

[152] Regulation 38(7) of the PSR addresses the issue of a special increment, as follows:

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

[153] I have found that in the overall circumstances of the case, the appellant's increments over the relevant period were withheld by default. Regulation 38(7) clearly speaks to the Governor-General exercising his discretion regarding a special increment based on the Public Service Commission's recommendation. The consideration of a special increment would not, therefore, have arisen in the circumstances. The learned judge referred to such an understanding in referring to the case of **Latoya Harriott v University of Technology Jamaica** [2022] JMCA Civ 2 at para. [84] of her judgment:

> "In deciding whether to grant the order of mandamus for failure to act, the Court must consider whether the duty in question is one that must be exercised because of a mandatory duty under the statute. A duty may be mandatory

> but the manner of exercising the duty is discretionary. Brooks P in **Latoya Harriott** briefly discussed the issue with granting a mandatory order where the duty imposed on the decision-maker involves the exercise of a discretion. His Lordship stated at paragraph 21 of the judgment:
>
> 'That principle was applied in **Medical Council of Guyana v Dr Muhammad Mustapha Hafiz (2010) 77 WIR 277** at page 283, where the court said, in part:
>
> > 'A clear and settled principle of law is that the person compelled to the performance of an act by an order of mandamus must have a clear duty imposed on him as opposed to a mere discretion.'"

[154] Regulation 38(7) does not mandate that a special increment must be paid once an increment has been withheld. It is a matter for the discretion of the Governor-General, acting on the recommendation of the Public Service Commission.

[155] Lord Diplock in the **CCSU** case stated at page 401 that:

> "Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

[156] Likewise, Halsbury's Laws of England, Volume 61A (2023) at para. 50 explains the concept of legitimate expectation as follows:

> "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice or policy. In all instances the expectation arises by reason of the conduct of the decision-maker, and is protected by the courts on the basis that principles of fairness, predictability and certainty in administration should not be disregarded and that a legitimate expectation should not be disappointed."

[157] Based on the foregoing, the learned judge was correct in refusing to find that the appellant had a legitimate expectation to benefit from the recommendation of the payment of a special increment. There was no evidence of any promise or practice to ground such an expectation. Further, she has not adduced evidence of such a "consistent past practice or policy" by the relevant parties.

[158] Ground of appeal 18, therefore, fails.

Issue seven: Whether the learned judge erred in failing to apply the principles and discretion relevant to declaratory relief? (Ground 16)

[159] The principles accompanying declaratory orders were discussed by this court in **Attorney General of Jamaica and another v Machel Smith** [2020] JMCA Civ 67. Edwards JA, writing on behalf of the panel, stated that, in principle, there is no obstacle to the court making a suitable declaration where there is an appropriate remedy to grant (see para. [50]); further, that a declaration must serve some useful purpose, or affect other cases, or lay down a ruling for the future which would have some practical effect (see para. [53]). Based on my findings above, the learned judge erred by failing to grant declaratory relief regarding the appellant's entitlement to all increments and allowances arising pursuant to regulation 38 of the PSR. A declaration ought also to have been granted that the Ministry and 4th respondent neglected to observe due process in complying with regulation 38. This regulation prohibits the non-payment of annual increments to a public officer without first having notified the officer in the relevant year, 30 days in advance of the payment becoming due. These orders were among the orders requested in the amended fixed date claim form and would have met the justice due to the appellant in the circumstances of this case.

[160] In that regard, there is merit in ground 16.

Issue eight: Whether the learned judge erred in not awarding general damages to the appellant? (Ground 21)?

[161] The learned judge found that the appellant had not established any legal basis for damages to be awarded for defamation, or mental distress, as averred in paragraph 8 of

the amended fixed date claim form. She concluded that the appellant's claim was void of pleadings that set out the factual circumstances of defamation or harassment.

[162] Rules 56.10(1) and (2)(a) of the Civil Procedure Rules, 2002 allow for joinder of a claim for damages in an application for an administrative claim. The learned judge was, however, correct in her conclusions on this issue. The affidavit evidence of the appellant and the 4th respondent revealed deepening tension and hostility (as evidenced by various email threads and other written communications) between these parties relevant to the PMAS evaluation. They disagreed concerning her work performance. The appellant disputed the 4th respondent's grading of her performance for the periods between 2016 and 2021. She believed that the 4th respondent acted with bias toward her, was unreasonable in her assessment and imputed negative motivations and maligned her character. However, these complaints were not grounded in any legal basis for an award of damages to be made.

[163] Dr Barnett has also submitted that the appellant should receive an award of damages for breach of her constitutional rights. Having regard to my conclusion that there was no breach of the right to a fair hearing as guaranteed by section 16(2) of the Constitution, there would be no basis for an award of damages.

[164] Ground of appeal 21, therefore, fails.

Conclusion

[165] Having considered this appeal, I have determined that there is merit in the appeal, to the extent that the appellant has demonstrated that the learned judge erred in her conclusion that there was no entitlement to increments under regulation 38 of the PSR, and that the payment of increments was discretionary in the circumstances of this case. Further, the appellant was correct in asserting that arising from the non-payment of increments for the periods 2016 to 2021, the payment of her increments were, by default, withheld, contrary to the procedural requirements outlined in the PSR. The appellant has also succeeded in demonstrating procedural impropriety arising from the failure of the 4th

respondent to follow the procedural requirements required under PMAS as well as the delay by the Ministry in giving effect to the appeal process under PMAS. The appellant has not succeeded, however, in relation to the correctness of the decision to strike out certain paragraphs of her affidavit evidence or in proving bias on the part of the 4th respondent or breach of her right to a fair hearing under section 16(2) of the Constitution. The learned judge was also correct in refusing to order that a recommendation be made for the payment of a special increment, and in not making an award for damages. Further, based on these findings, it was not necessary or appropriate for the learned judge to have ordered *mandamus* to compel the completion of the review exercise in the circumstances that existed. Such an order would not meet the justice required at this stage.

[166] The learned judge ought to have granted an order of *mandamus* (or any like order) compelling the payment of the increments to which the applicant was entitled from 2016 to 2021 and up to her resignation. Declarations should also have been made concerning the appellant's entitlement to increments and the failure of the Ministry to observe regulation 38 of the PSR. In light of the above, I propose that the appeal be allowed in part and the following orders made as part of the final order of the court affirming the aspects of the learned judge's decision that have not been disturbed and setting aside those orders that have been:

1. The appeal is allowed, in part.

2. It is declared that the 1st respondent and 4th respondent failed and/or neglected to observe due process and comply with regulation 38 of the Public Service Regulations, 1961, which prohibits the non-payment of annual increments to a public officer without first notifying the officer in the relevant year, 30 days in advance of the payment becoming due.

3. It is declared that the appellant is entitled to the payment of all increments and allowances or any sum due to her by virtue of her employment with the 1st

respondent, for the period 2016 to her resignation in 2022, in keeping with regulation 38 of the Public Service Regulations, 1961.

4. It is ordered by way of *mandamus* that the 1st respondent process and make the payment of increments, and any other consequential payments to the appellant for the period between 2016 and her resignation in 2022, including any consequential entitlements relating to her pension, and otherwise.

5. The appellant is awarded interest at a rate of 3% per annum on each outstanding increment payment from the due date of payment to the date of judgment on 27 July 2023. Thereafter, the interest payable on the recovery of a debt pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act shall accrue for payment from the date of judgment until payment.

6. 75% of the costs in the Supreme Court and of the appeal to the appellant to be paid by the 3rd respondent on behalf of the 1st and 4th respondents and to be agreed or taxed, unless the 3rd respondent, within 14 days of the date of this order, files and serves written submissions for a different order to be made in relation to costs. The appellant shall file written submissions in response to the 3rd respondent's submissions within seven days of service upon them of those submissions. The court will thereafter consider and rule on the written submissions.

7. If no submissions are made within the time specified in order 6 above for different costs orders to be made, the orders made herein as to costs shall stand as the final order of the court.

D FRASER JA

[167] I, too, have read, in draft, the judgment of Straw JA. I agree and I have nothing else to add.

MCDONALD-BISHOP P

ORDER

1. The appeal is allowed, in part.

2. The following orders of the learned judge are affirmed:

   (a) striking out of paras. 22, 26, 28, 29, 30 to 35, 43, and 44 of the appellant's 3rd affidavit and paras. 3 to 5 of the appellant's 4th affidavit;

   (b) refusing to declare that the appellant was entitled to a recommendation for the payment of a special increment;

   (c) refusing to grant declarations that the appellant's right to a fair hearing and right to a fair hearing within a reasonable time pursuant to section 16 (2) of the Constitution were breached; and

   (d) refusing to award damages for defamation, harassment and mental distress.

3. The following orders of the learned judge are set aside:

   (a) granting *mandamus* compelling the 1st respondent to conclude the review exercise under the PMAS;

   (b) refusing *mandamus* to compel the 1st respondent to process the payment of increments owed to the appellant for the period between 2016 and 2021;

   (c) refusing to declare that the appellant was entitled to the payment of all increments in keeping with regulation 38 of the Public Service Regulations, 1961;

   (d) refusing to declare that the 4th respondent failed to observe due process in relation to regulation 38 of the Public Service Regulations, 1961; and

(e) ordering each party to bear their own costs.

4. The following orders are substituted for the orders of the learned judge that have been set aside at para. 3 above:

   (a) It is declared that the 1st respondent and 4th respondent failed and/or neglected to observe due process and comply with regulation 38 of the Public Service Regulations, 1961, which prohibits the non-payment of annual increments to a public officer without first notifying the officer in the relevant year, 30 days in advance of the payment becoming due.

   (b) It is declared that the appellant is entitled to the payment of all increments and allowances or any sum due to her by virtue of her employment with the 1st respondent, for the period 2016 to her resignation in 2022, in keeping with regulation 38 of the Public Service Regulations, 1961.

   (c) It is ordered by way of *mandamus* that the 1st respondent process and make the payment of increments, and any other consequential payments to the appellant for the period between 2016 and her resignation in 2022, including any consequential entitlements relating to her pension, and otherwise.

   (d) The appellant is awarded interest at a rate of 3% per annum on each outstanding increment payment from the due date of payment to the date of judgment on 27 July 2023. Thereafter, the interest payable on the recovery of a debt pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act shall accrue for payment from the date of judgment until payment.

5. 75% of the costs in the Supreme Court and of the appeal to the appellant to be paid by the 3rd respondent on behalf of the 1st and 4th respondents, and to be

agreed or taxed, unless the 3rd respondent, within 14 days of the date of this order, files and serves written submissions for a different order to be made in relation to costs. The appellant shall file written submissions in response to the 3rd respondent's submissions within seven days of service upon them of those submissions. The court will thereafter consider and rule on the written submissions.

6. If no submissions are made within the time specified in order 5 above for different costs orders to be made, the orders made herein as to costs shall stand as the final order of the court.