

THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2016/0219

BETWEEN

PUBLIC SERVICE UNION

CLAIMANT

AND

PUBLIC SERVICE COMMISSION

DEFENDANT

Appearances:

Mr. Joseph Delves and with him, Ms. Heidi Badenock for the claimant. Mr. Jaundy Martin for the defendant.

2017: Jul. 31

Aug. 17

DECISION

BACKGROUND

[1] **Henry, J.:** The Public Service Union ('PSU') represents the interests of public officers employed by the Government of Saint Vincent and the Grenadines. It brought this claim against the Public Service Commission ('PSC'), as a court ordered representative claimant for five public servants - Joel Poyer, Elroy Boucher, Conroy Daniel, Agnes Llewellyn and Kejo Peters ('the public officers'). The PSU alleged that the promotion process within the service has been affected by unreasonable and unlawful delays and inconsistencies. It complained that in contravention of the PSC Regulations¹, the performance appraisal, and promotion regime administered by the PSC is inefficient, non-transparent and ineffective.

[2] The parties were ordered² to file and serve standard disclosure on or before 31st March, 2017. In its standard disclosure the PSC claimed a right to withhold disclosure and inspection of certain documents on the grounds of confidentiality and privilege. The PSU has applied³ for an order of specific disclosure of seniority lists, reports of vacancies, advertisements of vacancies, evaluations, letters of recommendations or special reports; specific recommendations of the Chief Personnel Officer, Permanent Secretaries or Heads of Department and special reports specified in the Public Service Regulations ('the PSR'), in relation to the public officers, Celena Mc Donald and Kenroy Boucher, their colleagues and other public officers.

[3] On the hearing date, the PSC represented to the court that it had no objection to disclosure of the seniority lists. Learned counsel Mr. Martin indicated that they were not disclosed because they were overlooked. An order for specific disclosure of the seniority lists was accordingly made. The PSC resisted the application in respect of the other documents. The determination of that aspect of the application is set out in this decision. The PSC is required to search for and disclose the specific documents requested by the PSU.

ISSUE

[4] The issue is whether the court should order specific disclosure of the referenced documents.

ANALYSIS

Issue - Should the court order specific disclosure of the referenced documents?

[5] In its standard disclosure⁴ the PSC claimed that any reports generated by Permanent Secretaries,

1 Public Service Commission Regulations, Cap. 10 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

2 By order dated 8th February, 2017.

3 By Amended Notice of Application filed on 22nd June, 2017.

4 Filed on 31st March, 2017.

Heads of Departments and senior officers are confidential and should not be disclosed. It alleged that any such documents are classified in the Public Service Commission Regulations 19 (3) (e) and 27 as 'confidential reports' and are treated as such.

[6] The PSC sought similar protection in respect of memoranda sent from senior supervisory officers and Heads of Departments to Permanent Secretaries. In this regard, it claimed that those documents are privileged because in practice, senior supervisory officers have an expectation of privacy of their communications regarding their assessments of public officers. For those reasons, the PSC stated that 'Confidentiality is claimed for the protection of the reporting officers against the potential hostile or other reactions of public officers.'

[7] The PSC specifically itemized a series of documents which it claimed fell within those 'confidential and privileged' categories, namely:

1. Memorandum dated December 24, 1991 from Director of Forestry to Chief Agricultural Officer;
2. Memorandum dated June 13, 2005 from Senior Forest Supervisor to Director of Forestry;
3. Memorandum dated October 20, 2005 from Senior Forest Supervisor to Director of Forestry;
4. Memorandum dated December 24, 1991 from Director of Forestry to Chief Agricultural Officer;
- f 5. Memorandum dated October 24, 2005 from Director of Forestry to PS Agriculture;
6. Memorandum dated November 3, 2005 from Senior Forest Supervisor to PS Agriculture;
7. Letter dated February 5, 2007 from National Sports Council to PS Agriculture;
8. Memorandum dated March 7, 2007 from Forestry Supervisor to Director of Forestry;
9. Memorandum dated July 2, 2007 from Director of Forestry to PS Agriculture;

10. Memorandum dated November 17, 1998 from Superintendent of Prisons to Solicitor General regarding Conroy Daniel, Prison Officer;

11. Memorandum dated May 8, 1998 from Director of Forestry to Chief Agricultural Officer;

12. Memorandum dated October 25, 2005 from Director of Forestry to PS Agriculture;

13. Memorandum dated March 22, 2015 from Senior Forest Supervisor to PS Agriculture. No details about the contents were supplied.

[8] The PSU contended that the PSC Regulations provide for certain documentation to be maintained by the PSC, including reports and advertisements of vacancies under regulations 15 and 18 respectively; performance evaluations, letters of recommendations, specific recommendations for filling of posts and special reports under regulation 19. The PSU claimed that the PSC disclosed none of those documents.

[9] It contended further that the central issues in the case relate specifically to whether seniority lists and proper assessment of public officers guide and assist the promotion process; or whether promotions are carried out in a uniform, transparent and consistent manner. The PSU argued that none of the documents disclosed by the PSC address those matters.

[10] The PSU contended that those documents would assist it in the efficient preparation of its case and aid the court in fairly determining the issues at hand and in disposing of the claim. It argued that the material sought is likely to be highly admissible and relevant to the issues, is in the public interest and will further the overriding objective of the court to deal justly with and fairly dispose of the case. It alleged that while the public officers can see and access their personnel files with supervision, they do not have control over them.

[11] Regulation 15 imposes an obligation on the Permanent Secretary {'P.S.'} to report a vacancy to the PSC. It provides in part:

'When a vacancy occurs, or it is known that a vacancy will occur in any public office in any department or ministry, the Permanent Secretary shall report the fact to the Commission

[12] Regulation 18 provides for the advertising of vacancies by the Chief Personnel Officer {'CPO'}. Sub-regulation (1) of regulation 18 states:

'The Chief Personnel Officer shall, when directed by the Commission, by circular or by publication in the *Gazette*, give notice of vacancies and any officer may make application in the prescribed form for appointment to any such vacancy. Such application shall be forwarded to the Chief Personnel officer through the head of department and Permanent Secretary under whose authority the applicant is serving.'

[13] Provision is made in regulation 19 (3) (e), (n and (i) for evaluation of public officers' performance; preparation of letters of commendation or special reports in respect of work done

by public officers and special recommendations by the CPO, P.S. or head of department for filling specific posts. Those provisions provide respectively:

'In the performance of its functions under sub-regulations (1) and (2), the Commission shall take into account as respects each officer

(a)...

(b)...

(e) the evaluation of his overall performance as reflected in annual confidential reports by any Permanent Secretary, head of department or other senior officer under whom the officer worked during his service;

(f) any letters of commendation or special reports in respect of any special work done by the officer;

(g) ...

(h) ...

(i) any specific recommendation of the Chief Personnel Officer, Permanent Secretary or head of department for filling the particular post;'

[14] The PSU's application was supported by affidavit⁵ testimony of Lanique Lewis, a legal clerk in Joseph Delves' law chambers. Ms. Lewis deposed that the parties were required to disclose all documents in their control; on which they intend to rely; which adversely affect their case or tend to support the other party's case. She averred that the PSC disclosed no documents which address the central issues in the case, such as assessments of the public officers.

[15] Ms. Lewis testified that Mr. Conroy Daniel has worked at the Prisons; Mr. Elroy Boucher at the Ministry of Health; Mr. Peters at the Ministry of Health and Customs; Mr. Joel Poyer at Forestry;

Ms. Agnes Llewellyn at Customs, the Ministries of Agriculture and National Mobilisation, Ms. Mc

⁵ Filed on 7th June, 2017.

Donald at the House of Assembly and department of Forestry, and Mr. Kenroy Boucher at the Immigration Department and Ministry of National Mobilisation. These details were outlined and confirmed in affidavits filed previously by the public officers with several notable variations. Ms. Llewellyn averred that she had been employed in the Ministry of Education not the Ministry of Agriculture as stated by Ms. Lewis. For his part, Mr. Elroy Boucher indicated that he was employed within the Ministry of Education as a teacher from 1988 to 1998.

[16] Mr. Peters deposed that he was initially employed in the Ministry of Health, subsequently transferred to the Audit Department, and had a stint in the Ministry of Health before being assigned to the Customs Department. Mr. Kenroy Boucher stated that he was first worked as a police officer from June 1990 and was transferred to the Immigration Department in 2006. I note that police officers are not public officers. It was not clear whether the PSU is placing reliance on Mr. Boucher's policing work.

[17] Mr. Poyer averred that he was seconded to the National Sports Council for 9 months in 2007. That period is not significant enough to be likely to affect either party's representations. It is however noted. Ms. Mc Donald indicated that she also worked at the Ministry of Legal Affairs and the Ministry of Mobilisation and Forestry Department. I accept the public officers' accounts. Ms. Lewis testified further that disclosure of the requested documentation would assist the PSU to prepare its case and help the court to dispose of the issues in the claim. Ms. Lewis did not refer to the employment history the public officers' colleagues or any other public officers. The PSU does not appear in this matter as a representative claimant on Mr. Kenroy Boucher's and Ms. Celena Mc Donald's behalf. Their evidence is disregarded.

Reports and advertisements of vacancies

[18] Ms. Lewis indicated that the public officers do not have control of their personnel files but may access them with supervision. She indicated that the order sought would not affect the October 10th 2017 trial date. The PSC provided no evidence in response and filed no written submissions. Learned counsel Mr. Jaundy Martin made oral submissions.

[19] The PSU argued that the court must take into account that the main issue in this dispute is whether the promotion regime prescribed by the PSC Regulations is executed in a transparent manner in keeping with modern personnel management principles and democratic ideals. It contended that it is also pertinent that the public officers are unable to produce the documents which are under the PSC's control.

[20] The PSU contended that the court may make an order for specific disclosure of documents which are directly relevant to one or more matters in issue. It argued that the court must consider whether such an order is necessary in order to dispose fairly of the claim or save costs; have regard to the likely benefits and cost of specific disclosure and take into account whether the defendant's financial resources are likely to be sufficient to enable compliance with the order. The PSU submitted that the court must strive to give effect to the overriding objective. It relied on dicta from the case of **QVT Fund V LP et al v China Zenix Auto International Group Ltd et al 6** in support.

[21] The PSC accepted that a party involved in a matter concerning constitutional law issues has a duty of candor in relation to disclosure of documents. It argued that it is precluded by regulation 10 of the PSC Regulations from disclosing documents. That provision provides:

'No member of the Commission, nor any public officer, shall publish or disclose to any person **otherwise than in the exercise of his official functions** the contents of any document,

communication or information whatsoever which has come to his notice in the course of his duties.' (bold added)

[22] The PSU did not respond to this assertion. I note that the PSU disclosed a number of documents in its standard disclosure. Conceivably, this might suggest that it did so in recognition that it was legally bound to do so as part of its official functions, in the absence of a court order or other legal authority to act otherwise. In any event, its belated reliance on the referenced provision to preclude disclosure in the present proceedings is without merit for a number of reasons.

[23] The PSU did not rely on that statutory provision when it filed its list of documents. It was required to indicate which documents it claimed a right to withhold and state the grounds. It did not claim a right to withhold in respect of the reports and advertisements of vacancies; performance evaluations, letters of commendation, special reports and special recommendations by the CPO,

6 BVIHCV 2014/0026.

Permanent Secretary and/or head(s) of department, except to the extent that the 13 documents listed in it consist of such records.

[24] The PSC was also at liberty to apply for an order permitting it to withhold such documents. It did not. Further, the regulations do not restrict disclosure of documents for the official purpose of defending or bringing court proceedings. In addition, no legal authority has been supplied to the court which supports the interpretation contended for by the PSC. Moreover, it submitted that it has already complied with the requirement to disclose the documents. This latter contention conflicts with its claim to exemption from the disclosure requirements. It does not appear that the documents listed in its standard disclosure consist of the records sought by the PSU.

[25] The PSC argued that Ms. Lewis made no particular references to specific advertisements or vacancies regarding which the request is being made. It submitted that in the absence of such specificity it is confusing as to what the PSU seeks disclosure in relation to regulations 15 and 18.

[26] The court is empowered to make an order directing a party to disclose documents or a class of documents to another party.⁷ The court must consider the likely benefits and cost of specific disclosure; whether the defendant has financial resources which are likely to be sufficient to enable it to comply with the order⁸. Significantly, the court must determine if specific disclosure is necessary in order to fairly dispose of the claim and save costs.⁷ In exercising its discretion, the court must give effect to the overriding objective to act justly. The PSU correctly extracted and elucidated the applicable principles from the **QVT case**.

[27] Where a defendant opposes an application for specific disclosure, it would be expected to identify the documents or parts to which it is claiming a right to withhold and give evidence outlining the basis of the right and the grounds on which the right is claimed. In my view, this appears to be the inescapable inference to be drawn from the provisions rule 28.14 of the Civil

Procedure Rules 2000 ('CPR'). Although that rule addresses frontally a situation where a party seeks to withhold disclosure on the ground that it would damage the public interest, it seems to me that the

7 CPR 28.5.

8 CPR28.6.

considerations enumerated there would be equally as applicable in any other case where disclosure is being resisted.

[28] In the absence of affidavit testimony from the PSC, the court might be unable to comprehend or assess the merits of its claims of lack of specificity. However, based on the available material I will seek to set out the respective parties' positions. The PSU has identified the government departments within which public officers Kenroy Boucher, Elroy Boucher, Kejo Peters, Agnes Llewellyn, Conroy Daniel, Celena Mc Donald and Joel Poyer have been engaged during the course of their careers.

[29] The PSU expressly sought an order that the PSC give 'specific disclosure of the following documents or class of documents in relation to public officers Kenroy Boucher, Elroy Boucher, Kejo Peters, Agnes Llewellyn, Conroy Daniel, Celena Mc Donald and Joel Poyer and their colleagues or other public officers in those respective departments:

(i) ...

(ii) reports of vacancies under regulation 15;

(iii) advertisements of vacancies under regulations 18.'

[30] The PSU has articulated that it wishes to have disclosed the respective reports of vacancies and *job* advertisements which have arisen in those departments during the currency of the public officers' tenure within those respective department.s

[31] It seems to me therefore that in respect of regulations 15 and 18, the PSU is seeking to obtain all:

1. reports of vacancies which occurred at; and

2. related advertisements of vacancies within the:

a. Prisons which covered the period of Mr. Kejo Peters';

b. Ministry of Health which covered the period of Mr. Elroy Boucher's;

c. Forestry Department which covered the period of Mr. Joel Payer's;

d. Customs department and the Ministries of Agriculture and National Mobilisation which covered the period of Ms. Agnes Llewellyn's;

e. Immigration Department and Ministry of National Mobilisation which covered the period of Mr. Kenroy Boucher's;

employment, at that Ministry/department.

[32] It does not appear from its submissions that the PSC is seeking to withhold any report of vacancy or advertisements in relation to those government departments for the relevant periods. In view of the pleadings and affidavit testimony filed by the parties and summarized earlier, the main claim would necessitate an examination of the promotion regime in light of the applicable legislative framework.

[33] An indispensable element of that exercise would be an assessment of the practices adopted by the PSC in relation to the named public officers. It would be impossible to attempt to do so in a vacuum and without reference to actual examples. In this regard, I am satisfied that specific disclosure of the reports and advertisements of vacancies would be very helpful to the court in resolving the issues.

[34] The PSC is a creature of statute. It is established pursuant to section 77 of the Constitution. Its operations are funded by the government through monies appropriated for that purpose. In this regard, adequate provision must be made by the requisite authorities for the PSC's many and varied obligations. I infer that the PSC has been appropriately funded. I therefore harbor no doubt that the PSC is in a position to comfortably meet the costs associated with compiling and making the subject records available.

[35] Without the specific disclosure of those records the PSU might not be able to substantially advance its claim. The PSC would thereby have defeated the PSU's case by, without lawful excuse, merely retaining documents which it has a duty to maintain. This would, in my opinion, be inequitable and unjust. Moreover, I perceive of no prejudice which would be occasioned to the PSC by such disclosure and none has been advanced.

[36] In the circumstances, I am of the considered view that the PSC should be ordered to disclose the said records. It is therefore ordered that the PSC shall on or before 31st August, 2017, search for and disclose to the PSU, all reports of vacancies and the related advertisements of vacancies which occurred at the respective Ministry and/or Department, namely the:

1. Ministries of Health and departments of Audit and Customs during the period of Mr. Kejo Peters' employment;
2. Ministries of Education and Health during the period of Mr. Elroy Boucher's employment;
3. Forestry Department during the period of Mr. Joel Payer's employment;

4. Customs department and the Ministries of Education and National Mobilisation during the period of Ms. Agnes Llewellyn's employment; ,

5. Prison department during the period of Mr. Conroy Daniel's employment.

Performance Appraisals, Letters of Commendation, Special Reports and Recommendations

[37] The PSC contended that correspondences between various Heads of Departments and Permanent Secretaries to the PSC under regulation 19 (3) (e) are confidential and accordingly privileged. It submitted that the PSU could have made a specific request for disclosure of documents on the public officers' personnel files. It argued that the present application makes a general reference to the regulations and not to specific documents. The PSC reasoned that this vagueness seeks to create an obligation for it to go and search for those documents. This latter submission suggests that perhaps the PSC has not conducted an exhaustive review of the pertinent files and other records. It has provided no testimony that such a review has either taken place or has not taken place. I would prefer to infer that it has done so in accordance with its disclosure obligations.

[38] The PSC's withholding claim relates to 13 documents described in its list of documents. The PSC expressly claimed that they should not be disclosed because they are confidential and privileged. They contended that disclosure could potentially expose the reporting officers to hostile or other reactions of public officers. No evidence was supplied from which the court could infer that such hostility is reasonably apprehended. No details of the other possible feared 'reactions' were provided. Suffice it to say, that these are bare assertions with no evidentiary bases. The court is being invited to speculate on this score and refrains from so doing. There is no basis for concluding that disclosure could or would result in such hostility. I make no such finding.

[39] Learned counsel Mr. Jaundy Martin submitted that the PSC has nothing to hide. He contended that if the court considers that those documents should be disclosed they are available. The CPR imposes an obligation on a party who makes a claim to withhold disclosure to do so in writing:

1. either in their list of documents or otherwise; and
2. by stating the grounds on which such claim is made.⁹

⁹ CPR 28.14 .

[40] The PSC did not indicate which of the referenced documents consist of reports prescribed by regulation 19 (3) (e). It made no submissions in respect of the application for disclosure of letters of commendation and special reports under regulation 19 (3) (D or disclosure of specific recommendations of the CPO, Permanent Secretaries or heads of department under sub regulation (i) of regulation 19 (3).

[41] The PSU submitted that in the exercise of its discretion, the court does not simply accept a party's claims that a document is privileged but instead places a duty on that party to prove such a claim. It cited the English case of **Waugh v British Railway Board**¹⁰ in which Lord Edmund-Davies said:

'...we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than by suppression. For, as it was put in the Grant v Downs majority judgment... "... the privilege ... detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise".¹¹

[42] The PSU argued that documents are not protected merely because they are confidential. It submitted that it is established in law, that if the documents are necessary for the fair disposition of the issues, then disclosure will be ordered, as decided in the case of **Wallace Smith Trust Co (In Liquidation) v Deloitte Haskins Sells (A Firm)** ¹². The PSU submitted further that disclosure must be ordered if it will be advantageous to one of the litigants and if the information is not otherwise available.

[43] The PSU quoted heavily from the judgment rendered by Neill L. J. where he rehearsed the applicable principles as follows:

'The general principles underlying discovery remain those contained in the judgment of the Court of Appeal in the Peruvian Guano case, 11 Q.B.D. 55.... In a case, ... where the court is asked to make an order for the production of documents for inspection it is clear

¹⁰ [1980] AC 521.

¹¹ At page 543.

that an order is not to be made unless the court "is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."¹³

[44] Neill L. J. explained further:

'It is for the party making the application for production to satisfy the court that the test of necessity is satisfied: see Parker L.J. in *Ventouris v. Mountain* (1991] 1 W.L.R. 607.... In considering the application the court should bear in mind the words of Sir Thomas Bingham M.R. in *Taylor v. Anderson* (1995) 1 W.L.R. 447, 462 that "the purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as the result of a document not being produced for inspection."

[45] He added:

'In addition the court is entitled to take into account whether the documents are confidential and, if so, whether the necessary information could be obtained by some other means. In *Science Research Council v. Nasse*' [1980] A.G. 1028 ... Lord Wilberforce said, at pp. 1065-1066:

"there is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence... the ultimate test ... is whether discovery is necessary for disposing fairly of the proceedings. If it is, then discovery must be ordered notwithstanding confidentiality. But where the court is impressed with the need to preserve confidentiality in a particular case, it will consider carefully whether the necessary information has been or can be obtained by other means, not involving a breach of confidence... in order to reach a conclusion whether discovery is necessary notwithstanding confidentiality the tribunal should inspect the documents. It will naturally consider whether justice can be done by special measures such as a 'covering up' [or] substituting anonymous reference for specific names, or, in rare cases, hearing in camera."

... As Bingham L.J. explained in *Ventouris v. Mountain* [1990] 1 W/UR/ 607, 622: "While the court's ultimate concern must be to ensure the fair disposal of the cause or matter, it need not be unmindful of other legitimate concerns nor is it powerless to control the terms upon which production and inspection may be ordered."

[46] Neill L. J. stated further:

"The court should examine the facts of the individual case and in particular should consider:

{a) the central issues in the action; the nature of the documents; and {c) the information which the documents are likely to contain. ... the court will need to inspect the documents where relevance is admitted but it is asserted that the documents are confidential. Similarly, inspection is likely to be the only safe course where it seems probable that the documents contain a version of events given soon after their occurrence and at a time when the recollection of the witness would have been fresh.'

[47] The PSU contended that there is no principle of public interest immunity protecting documents from disclosure by reason of confidentiality alone. In this regard, they relied on the decision of the House of Lords in **Science Research Council v Nasse; Leyland Cars (BL Cars Ltd) v Vyas 14** . In that case Lord Wilberforce said:

"There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of this discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence. In the employment field, the tribunal may have regard to the sensitivity of particular types of confidential information, to the extent to which the interests of third parties {including their employees on whom confidential reports have been made, as well as persons reporting) may be affected by disclosure, to the interest which both employees and employers may

14 [1980] AC 1028.

have in preserving the confidentiality of personal reports, and to any wider interest which may be seen to exist in preserving the confidentiality of systems of personal assessments. As a corollary to the above, it should be added that relevance alone, through a necessary ingredient, does not provide an automatic sufficient test for ordering discovery. The tribunal always has a discretion.¹⁵

[48] Lord Wilberforce added:

'No authority is needed for the negative proposition that confidentiality alone is no ground for protection: ... English law as to discovery is extremely far reaching; parties can be compelled to produce private diaries; confidences, except between lawyer and client, may have to be broken however intimate they may be. But there are many examples of cases where the courts have recognised that confidences, particularly those of third persons, ought, if possible, in the interests of justice, to be respected: ... the process is to consider fairly the strength and value of the interest in preserving confidentiality and the damage which may be achieved without doing so, and only in a last resort to order discovery, subject if need be to protective measures.'

[49] The PSU maintained that its application satisfies the various tests set out in the authorities. In this regard, it submitted that the documents are relevant and are absolutely necessary for the fair disposal of the issues in the case. It contended that refusal of the order would give the PSC an unfair advantage. It argued that if the PSC faithfully complied with the regulations and promoted officers based on assessments and reports, the documentary material would assist the court and may vindicate the PSC. The PSU submitted that there is no evidence that disclosure would be financially onerous to the PSC, or that there will be negative consequences to it or third parties as a result.

[50] It is important to note that the PSC has not raised a public interest immunity objection to disclosure of the documents. In any event, the PSU has quite accurately outlined the applicable principles which guide the court in the exercise of its discretion when considering an application for specific

¹⁵ Science Research Council v Nasse; Leyland Cars (BL Cars Ltd) v Vyas at pg.1065.

disclosure. I accept that the PSU's case largely concerns its perception and assertions that the promotion regime administered by the PSC is flawed and operated contrary to established regulatory norms. In this regard, the PSU has alleged that the PSC has not complied with the requirements of regulation 19 (3) (e), (n and (i) by ensuring that the requisite performance appraisals and special reports and recommendations be completed. The PSC insists that they have been diligently prepared, that the regulations have been complied with and the resultant reports are confidential and privileged.

[51] I recognize that a claim of confidentiality is not a bar to disclosure. I remain mindful also that the court has a duty to give due weight to any such claim. In doing so, the court should endeavour to ascertain whether it can fairly dispose of the case without disclosure of all, some or

part of the documents. The PSC has indicated that it fears hostile reactions from public officers if the reports are disclosed. This might be a reasonable concern, but I do not know if this is so, because the PSC did not adduce any evidence to this effect. In the event that it is fair to expect such a reaction, and if the court is minded to order specific disclosure, it would be necessary to decide whether the feared response can be ameliorated by partial disclosure where portions of the documents are redacted. The PSC did not address the court on that possibility.

[52] I am satisfied that the court would be better placed to determine the issues between the parties if specific disclosure of the referenced materials is ordered than if no such order is made. Indeed, without disclosure, the PSU very likely would have a difficult task to establish aspects of its case. Disclosure of the materials could also potentially bring the claim to an early resolution in the PSC's favour.

[53] The PSC submitted that England does not have a written Constitution. It thereby implied that the cases relied on by the PSU have little or no bearing on the legal position in Saint Vincent and the Grenadines. The PSC did not advance any legal proposition or authority or identify any constitutional provision which renders the legal principles inapplicable. That submission is therefore without merit.

[54] I harbor grave doubt that the PSU would be able to adequately prepare and present their claim without the requested materials. Based on the evidence of the public officers, the number of relevant promotions does not appear to exceed 20. The related reports and performance appraisals would be commensurate with that figure. Undoubtedly, the PSC as an organ of the State has the means to identify and disclose those documents. Similarly, the PSC and its legal practitioners would conceivably have already reviewed those documents and be in a position to flag any areas which should be redacted as a protective measure.

[55] In light of the foregoing, the PSU has established that specific disclosure is desirable and should be ordered in respect of the:

1. performance evaluations, letters of commendation and special reports in respect of work done by the five named public officers; and
2. special recommendations by the CPO, P.S.'s and/or head(s) of department in respect of positions filled in the departments and ministries to which the five named public officers have been assigned, during the period of such assignment;

prescribed by regulation 19 (3) (e) and (n and (i) respectively.

[56] It would be beneficial to afford the PSC an opportunity to make representations to the court regarding any portions of those documents which it considers should be redacted as a protective measure. The PSC is therefore invited to make any such representations in writing to the court on or before 21st August, 2017 for consideration and approval.

[57] It is ordered that the PSC shall on or before 21st August, 2017:

1. search for all:

(a) performance evaluations, letters of commendation and special reports in respect of work done by the five named public officers; and

(b) special recommendations by the CPO, Permanent Secretaries and/or head(s) of department in respect of positions filled in the departments and ministries to which the five named public officers have been assigned, during the periodsof such assignment; which are prescribed by regulation 19 (3) (e) and (n and (i) respectively.

2. submit to the court on or before 22nd August 2017 for approval, any of those documents which it considers should be redacted as a protective measure; each such extract to be appropriately marked or labeled to indicate the portions the PSC considers should be omitted and the reasons for such proposal, accompanied by a summary of the applicable law and legal authority in each case.

3. disclose to the PSU on or before 31st August, 2017 all documents described in sub-paragraph 1 of this paragraph, subject to any redactions approved by the court pursuant to sub paragraph 2 of this paragraph.

[58] The PSU is entitled to costs to be assessed pursuant to CPR 28.6 and 65.11. The PSC shall pay to the PSU assessed costs to be determined on application to be filed and served by the PSU on or before 15th September, 2017.

ORDER

[59] It is ordered:

1. The Public Service Commission shall on or before 31st August, 2017 search for and disclose to the PSU, the following documents or classes of documents:- all reports of vacancies and the related advertisements of vacancies which occurred within the respective Ministry and/or Department during:

(a) Mr. Kejo Peters' employment at the Ministry of Health and department of Audit and Customs¹⁶;

(b) Mr. Elroy Boucher's employment at the Ministries of Education and Health;

(c) Mr. Joel Payer's employment at the Forestry Department;

(d) Ms. Agnes Llewellyn's employment at the Customs department and the Ministries of Education and National Mobilisation;

(e) Mr. Conroy Daniel's¹⁶ employment at the Prison department ¹⁶ .

2. The Public Service Commission shall on or before 21st August, 2017 search for all:

(a) performance evaluations, letters of commendation and special reports in respect of work done by the five named public officers; and 15 Inadvertently, the name of the public officer, Ministries and departments were incorrectly entered and were immediately corrected pursuant to CPR 42.10 to correspond with paragraph [36] of the decision.

(b) special recommendations by the CPO, Permanent Secretary and/or head(s) of department in respect of positions filled in the departments and ministries to which the five named public officers have been assigned, during the period of such assignment;

as prescribed by regulation 19 (3) (e) and (n and (i) respectively.

(c) submit to the court on or before 22nd August 2017 for approval, any of those documents which it considers should be redacted as a protective measure; each such proposed redaction to be appropriately marked or labeled to indicate which portions the PSC considers should be omitted and the reasons for such proposal, accompanied by a summary of the applicable law and legal authority in each case.

(d) disclose to the PSU on or before 31st August, 2017 all documents described in sub paragraphs (a) and (b) of this paragraph, minus any redactions approved by the court pursuant to sub-paragraph (c) of this paragraph.

3. The Public Service Commission shall pursuant to CPR 28.6 and 65.11, pay assessed costs to the Public Service Union on application to be filed and served on or before 15th September, 2017.

[60] I wish to thank counsel for their written and oral submissions.

Esco L. Henry

HIGH COURT JUDGE

By the Court

Registrar