

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. 2010/05005

BETWEEN

VERNON BARNETT

CLAIMANT

AND

THE COMMISSIONER OF POLICE

DEFENDANTS

BEFORE THE HONOURABLE MADAM JUSTICE DEAN-ARMORER

APPEARANCES

Mr. W. Campbell for the Claimant.

Mr. D. Byam for the Defendant.

JUDGMENT

Introduction

1. In this application for judicial review some forty four (44) Sergeants of Police have sought to impugn the decision of the Commissioner of Police to promote an officer who ranked below them on a 2008 Order of Merit List. In the course of this judgment, the court considered the doctrine of legitimate expectation and the duty which is carried by officers invested with statutory powers to be fair in the exercise of decision making. In particular, the court considered the obligations of the Commissioner of Police to act fairly in the exercise of powers conferred on him by s 123 A of the *Constitution*¹.

Procedural History

¹ The Constitution of Trinidad and Tobago Ch 1:01

1. On 19th October, 2010, the applicant Sgt. Vernon Barnett filed a Notice of Application seeking an order appointing him as representative of eleven other Sergeants. Sgt. Barnett also sought the court's leave to apply for judicial review together with an interim injunction against the Commissioner of Police. The application was supported by an affidavit sworn by the claimant on 19th October, 2010 and filed herein on the same day.
2. On 16th November, 2010, this Court appointed the applicant to be the representative of the eleven other Sergeants who were identified in Appendix A to the Notice of Motion. The Court also granted the applicant leave to apply for judicial review.
3. Meanwhile, Sgt. Phillip Taylor, on 6th December, 2010, also filed a Notice of Application. Sgt. Taylor also sought leave to apply for judicial review as well as an order that he be appointed to represent twenty-four other Sergeants of Police.
4. On 5th January, 2011, Sgt. Taylor was appointed by the Honourable Justice Rampersad to represent twenty-four (24) named Sergeants and on 18th January, 2011, this Court granted leave to Sgt. Taylor to apply for judicial review.
5. On 15th February, 2011, the Court granted an order by consent that the application of Sgt. Taylor be consolidated with that of Sgt. Barnett.
6. The Court heard and refused an application for an injunction. However, on the 1st of April, 2011, the defendant, through learned Counsel, Mr. Byam undertook to keep forty (40) positions at the rank of Inspector vacant until the hearing and determination of these proceedings.
7. The Court gave directions for the filing of affidavits and submissions. On 6th April, 2011, this Court varied the timetable for the filing of submissions and by consent added

eight (8) Sergeants to those, in respect of whom Sgt. Taylor had been appointed the representative.

8. The months rolled on. On the 2nd November, 2011, further extensions of time were granted. On 6th December, 2011, both representative applicants filed fresh applications for leave to apply for judicial review². The new applications were identical to the earlier ones in many respects. In the new proceedings however, the defendant was the Promotion Advisory Board and not the Commissioner of Police.
9. There was no order consolidating the first pair of judicial review proceedings with the later pair. Accordingly, in this judgment, this Court focussed its attention and sought to dispose of the first two consolidated applications for judicial review.

Facts

1. The facts in relation to the substantive application for judicial review are to be gleaned from the four (4) affidavits filed herein³:
 - Affidavit of Vernon Barnett filed on 19th October, 2010.
 - Supplemental affidavit of Vernon Barnett filed on 16th November, 2010.
 - Affidavit of Phillip Taylor filed on 6th December, 2010.
 - Affidavit of Stephen Williams filed on 16th August, 2011.
2. Both claimants in the consolidated matters hold the post of Sergeant of Police. Both claimants represent other named sergeants.
3. On 3rd March, 2008, an order of merit list was published under the hand of the Commissioner of Police by departmental order No. 37 of 2008⁴. Woman Sgt. Charmyn

² CV 2011- 4548
CV 2011-4632

³ Numerous other affidavits had been filed in respect of interlocutory application

⁴ Exhibited to the affidavit of Phillip Taylor filed on 25th January, 2011.

Bovell appeared at #328 on the Order of Merit List and occupied a rank lower than the claimants.

4. By departmental Order No. 171 dated the 13th September, 2010, and published under the hand of the Commissioner of Police, the claimants and those whom they represent became aware that W.Sgt. Charmyn Bovell had been promoted to the rank of Inspector.
5. It was conceded by the Commissioner of Police that in a letter dated the 4th October, 2010, addressed to Mr. Wilston Campbell, that the original 2008 departmental order had been amended in 2010 to elevate Sgt. Bovell from #328 on the Order of Merit List to #180. The amendment was published in departmental order No. 160 of 2010.
6. In his letter of the 4th October, 2010 the Commissioner of Police also conceded that the very departmental order of 2008 had been rescinded. Its rescission was published in departmental order #100 of 2009. In respect of the rescission, the Commissioner of Police stated:

“However subsequent to the rescinding of the list ... legal advice was sought and obtained in relation to promoting officers from the said Merit List and it was suggested that notwithstanding the rescinding of the Merit List ... the present administration may lawfully proceed to promote officers on the Merit List ...”⁵

7. The letter of the Commissioner of Police was exhibited to the supplemental affidavit of Sgt. Barnett. In his affidavit of the 16th August, 2011, ACP Stephen Williams made no reference to this letter. Its authenticity was never disputed.

⁵ The Court therefore regarded the contents of the letter as having been admitted. In particular, the following statements must be regarded as having been established as facts in these proceedings.

8. The Court therefore regarded the contents of the letter as having been admitted.

In particular, the following statements must be regarded as having been established as fact in these proceedings:

- W/Sgt. Bovell though ranking lower than the claimants was promoted to the rank of inspector on 13th September, 2010.
- The original order of Merit List had been rescinded since 2009. It was nonetheless amended in September, 2010 and the amendment published in departmental order No. 10 of 2010.
- Sgt. Bovell was promoted on the basis of the amended 2008 Merit List.
- The elevation of W/Sgt. Bovell came about as a result of two letters which she wrote on 18th January, 2008 and 11th December, 2008 respectively. Although the letters were written and placed on Ms. Bovell's file in 2008, they bore no fruit until 2010.

9. A.C.P. Stephen Williams testified that on the 19th of May, 2011, there existed fifty-nine (59) vacancies at the rank of inspector. There were several promotions, leaving fifty-six vacancies at the rank of inspector. The claimants were among Sergeants who were acting in the position of inspector.

10. A.C.P. Williams also deposed that between September and December, 2010, twelve offices at the rank of inspector became vacant and that the Commissioner of Police decided to fill them from the Order of Merit List of 2008. Promotions were actually made on 31st May, 2011, and these included some of the claimants in this matter. According to A.C.P. Williams the May, 2011 promotions were made pursuant to the 2008 Merit List.

11. A.C.P. Williams also alluded to a practice whereby all vacancies are filled from an existing Order of Merit List “*up to the point when the assessment process to produce a new list is started ...*”

12. The fact that promotions had been made pursuant to the 2008 list was alluded to by the claimant Sgt. Barnett, where he said at paragraph 6 of his affidavit⁶:

*“The publication of the said list dated the 3rd March, 2008 was made by Departmental Order No. 37 ... and promotions based on the said list were made by the Defendant in order of merit ...”*⁷

13. Sgt. Barnett deposed that the claimants shared a legitimate expectation:

“As a result of those promotions we the Applicants shared the legitimate expectation that we wouldbe promoted in like manner by the defendant ...”.

Law

1. *The Judicial Review Act 2000*⁸

“3. The grounds upon which the Court may grant relief to a person who filed an application for judicial review includes the following

- a. that the decision was in any way unauthorised or contrary to law;*
- b. excess of jurisdiction;*
- c. failure to satisfy or observe conditions or procedures required by law;*
- d. breach of the principles of natural justice;*
- e. unreasonable, irregular or improper exercise of discretion;*
- f. abuse of power;*

⁶ See paragraph 10 of the affidavit of Stephen Williams filed herein on 16th August, 2011.

⁷ *ibid.*

⁸ Judicial Review Act Ch 7:08

- g. fraud, bad faith, improper purpose or irrelevant consideration;*
- h. acting on instructions from an unauthorised person;*
- i. conflict with the policy of an Act;*
- j. error of law, whether or not apparent on the face of the record;*
- k. absence of evidence on which a finding or assumption of fact could reasonable be based;*
- l. breach of or omission to perform a duty;*
- m. deprivation of a legitimate expectation;*
- n. a defect in form or a technical irregularity resulting in a substantial wrong or miscarriage of justice; or*
- o an exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power.”⁹*

Section 8 of the *Act*¹⁰ provides:

- “1. On an application for judicial review, the Court may grant the following forms of relief:*
- a. an order of mandamus, prohibition or certiorari;*
 - b. a declaration or injunction;*
 - c. an injunction under section 19; or*
 - d. such other orders, directions or writs as it considers just and as the circumstances warrant.”¹¹*

⁹ Judicial Review Act Ch 7:08

¹⁰ *ibid*

¹¹ Judicial Review Act Ch 7:08

2. ***Police Service Regulations 2007¹²***

Regulation 20 identifies the officers who are eligible to be interviewed by the Promotion Advisory Board.

“1 Subject to sub regulation (2), the Promotion Advisory Board shall interview

a. an officer who has passed the qualifying examination for promotion and is recommended for promotion by the officer in charge of his Division or Branch;

b. an officer who was allocated fifty or more points at the previous interview; and

c. an officer who is eligible under subregulation (3).

2 An officer shall not be interviewed by the Board unless he has been allocated forty or more points by the Board based on the criteria, other than the interview, listed in subregulation (5).

3 Subject to subregulation (2), an officer who is allocated less than sixty points is eligible to be interviewed at the next sitting of the Board.

4 Every officer considered for promotion shall be rated according to the criteria specified in subregulation (5) and each officer who is allocated sixty or more points shall be placed on an Order of Merit List.

5. The criteria mentioned in subregulation (4) shall be as follows:

	<i>Maximum Points</i>
<i>Performance appraisal</i>	<i>40</i>
<i>Interview</i>	<i>25</i>
<i>Examination mark</i>	<i>35</i>

¹² Police Service Regulations Ch 15:01

6. *The Board shall submit the Order of Merit List to the Commissioner, who shall cause it to be published in a Departmental Order.*¹³

The Constitution¹⁴

S. 123A of the ***Constitution***¹⁵ provides:

“(1) Subject to section 123(1), the Commissioner of Police shall have the complete power to manage the Police Service and is required to ensure that the human, financial and material resources available to the service are used in an efficient and effective manner.

(2) The Commissioner of Police shall have the power to

(a) appoint persons to hold or act in an office in the Police Service, other than an officer referred to in section 123(1) (a), including the power to make appointments on promotion and to confirm appointments;

(b) transfer any police officer; and

(c) remove from office and exercise disciplinary control over police officers, other than an officer referred to in section 123(1)(a).

(3) The functions of the Commissioner of Police under this section may be exercised by him or through any police officer above the rank of Superintendent acting under and in accordance with his general or special instructions.

*(4) In the performance of his functions under this section the Commissioner of Police shall act in accordance with the Police Service Act, 2006 and the regulations made thereunder.*¹⁶

¹³ Police Service Regulations Ch 15:01

¹⁴ The Constitution of Trinidad and Tobago Ch 1:01

¹⁵ *ibid*

Reasoning and Decision

1. In this consolidated application for judicial review, the claimants and those whom they represent impugn two decisions:
 - the decision of the defendant/Commissioner of Police to promote W/Sgt. Bovell to the rank of inspector.
 - the decision of the defendant to require the attendance of the claimant and those whom they represent before a new Promotion Advisory Board.
2. The grounds in support of the application essentially allege that the Commissioner of Police had been unfair in the following ways:
 - a. The defendant did not act fairly with the Applicants when on the 13th day of September, 2010 he promoted W/Sgt. Charmyn Bovell, Reg. No: 1166 to Inspector ahead of them who was lower placed on the Order of Merit List.
 - b. The defendant did not act fairly with the applicants when he failed and or neglected and refused to fill all the vacancies in the rank of inspector which existed at the time of the said promotions.
 - c. The defendant did not act fairly with the applicants by not exhausting the said Order of Merit List and then requiring them to again face a new Probation Advisory Board when they had been recommended for such promotions by a previous promotion Advisory Board.
 - d. The defendant did not act fairly with the applicants, who belong to the second division of the Police Service, or treat them with equality by not exhausting the said Order of Merit List in relation to them as they did with the Order of Merit List in

¹⁶ The Constitution of Trinidad and Tobago Ch 1:01

- relation to the officers in the First Division and those in the Second Division all of whom, on their Order of Merit List, were promoted to rank of sergeants.
- e. The defendant made the said promotions on the 13th day of September, 2010, however by Departmental Order No: 100 dated the 29th day of June, 2010 the defendant purported to rescind the said Order of Merit List, which rescission if valid would have removed the legal basis upon which such promotions are to be made.
 - f. A new Promotion Advisory Board has been established in order to recommend Sergeants for promotion however there are many sergeants including the applicant who have already been recommended for such promotions by the previous Promotion Advisory Board on the Order of Merit List.
3. Although there was no application for an amendment of the grounds as required by the *Judicial Review Act*¹⁷ the claimants allege in their respective supporting affidavits¹⁸ that the decision to promote W/Sgt Bovell was:
- a. contrary to law.*
 - b. in excess of jurisdiction.*
 - c. a failure to satisfy ... conditions or procedures required by law.*
 - d. breach of the principles of natural justice.*
 - e. in conflict with the policies of the Police Service Act*
 - f. a deprivation of a legitimate expectation”¹⁹*
4. The claimants both in their application for leave and in the Notice of Motion filed pursuant to the application for leave failed to identify the relief which they sought.

¹⁷ Judicial Review Act Ch 7:08

¹⁸ See paragraph 16 of the affidavit of Sgt. Barnett

¹⁹ See paragraph 18 the affidavit of Sgt. Phillip Taylor filed on 25th January, 2011.

5. The legislation which governs the promotion of officers of the second division of the Police Service is clear. By virtue of section 123A of the *Constitution*²⁰, the plenitude of power is vested in the Commissioner of Police in respect of appointment promotions, removal and discipline of police officers. The powers of the Commissioner of Police extend through all the ranks of the police service with the exception of the offices of Commissioner and Deputy Commissioner. In respect of these offices, power is reserved by section 123(1) of the *Constitution*²¹ to be exercised by the Police Service Commission. In the exercise of his power, the Commissioner is required to act in accordance with the *Police Service Act*²² and the *Police Service Commission Regulations*²³.
6. The *Police Service Act*²⁴ as amended by Act No. 13 of 2007 provides for the establishment of a Promotion Advisory Board, which is mandated to sit as often as it thinks necessary, but at least once every three months.
7. At the conclusion of each sitting the Board is required to do the following:
*“... the Chairman shall submit to the Commissioner the Board’s recommendations in the form of an Order of Merit List ...”*²⁵
8. By section 20²⁶, persons from the ranks Constable through to Sergeant are required to pass a qualifying examination, to be eligible for promotion to the rank of Corporal through to inspector.

²⁰ The Constitution of Trinidad and Tobago Ch 1:01

²¹ Ibid

²² Police Service Act Ch 15:01

²³ The Police Service Commission Regulations, s129 The Constitution of Trinidad and Tobago Ch 1:01

²⁴ Police Service Act Ch 15:01

²⁵ Ibid s 19 (3)

²⁶ Section 20 Police Service Act Ch 15:01

9. In my view, the legislation is clear. The Promotion Advisory Board, having conducted interviews makes its recommendations for promotions. In so far as the regulations require that the recommendations be made “*in the form of an Order of Merit List*” it is clear that by assigning numbers to various officers on the list, the Promotion Advisory Board not only compiles a list according to merit, but expresses its opinion as to the order in which officers ought to be promoted.
10. It is also equally clear that the Promotion Advisory Board is authorised to make nothing but submissions to the Commissioner of Police. It is the Commissioner of Police however who is invested with the ultimate power and may within the boundaries of his lawful authority depart from any recommendation made by the Promotion Advisory Board.
11. There appears to be no machinery for an appeal in respect of the recommendation of the Promotion Advisory Board and there is no legislative provision conferring on an aggrieved officer any right to be heard in respect of the Commissioner’s decision.
12. Natural justice has however, long placed upon any one who decides anything a duty to act in good faith and fairly listen to both sides; see *Board of Education v Rice*²⁷. The common law imposes minimum standards of fairness, formerly referred to as natural justice or the right to be heard along with the right against bias²⁸.

²⁷ Board of Education v Rice [1911] A.C 179 at 182

²⁸ Fordham, Judicial Review Handbook (4th ed.) paragraph 60:1.

13. I turn therefore to consider whether the two impugned decisions of the defendant were unfair and in particular whether they were made without due regard to the legitimate expectations of the claimants.
14. Learned Counsel, Mr. Byam cited and relied on the definition formulated by Lord Fraser of legitimate expectation in *CCSU v Minister for the Civil Service*²⁹ that a legitimate expectation ought to be based on either an express promise or a regular practice. Learned Counsel has argued that neither factor is present in this case.
15. I considered the evidence which was before this court, both on behalf of the claimant and by way of admissions made on behalf of the defendant in the letter of the 4th October, 2010. In my view, the claimants have provided evidence that promotions had been made on the basis of the 2008 Order of Merit List. This was a practice which had obtained at least since 2008 and is buttressed by the fact that the promotion of Sgt. Bovell in 2010 was made according to the 2008 list as amended and promotions which were made in May, 2011 were all according to the 2008 list.
16. Moreover the reliance of the defendant on the Order of Merit List was clear in that the defendant took the step of amending the 2008 list prior to promoting W/Sgt. Bovell. This step was taken notwithstanding the provisions of section 123A of the *Constitution*³⁰ which invests in the Commissioner the unfettered power to make promotions. By virtue of section 123A, of the *Constitution*³¹, the Commissioner of Police was not limited by the Order of Merit List and was not required to amend it prior to making a promotion.

²⁹ *CCSU v Minister for the Civil Service* [1984] 3 All ER 935 at 944a-b

³⁰ The Constitution of Trinidad and Tobago Ch 1:01

³¹ *ibid*

Notwithstanding his unfettered and constitutionally conferred powers, the Commissioner nonetheless considered and acted upon the 2008 Merit List.

17. In my view, the Court may infer from this uncontroverted fact that there existed a practice, which was observed by the Commissioner of Police in making promotions according to the Order of Merit List.
16. It is my view therefore and I hold that there existed a practice of making promotions according to the published Order of Merit List, and the claimants were justified in conceiving a legitimate expectation that they would be promoted in this order.
17. In the event that the defendant in his discretion found it necessary to make promotions contrary to this practice, he could do so lawfully pursuant to the power vested in him by section 123A of the *Constitution*³². However, in so far as the claimants held a legitimate expectation, fairness required that they be afforded an opportunity to be heard before action was taken against their expectations.
18. In my view therefore, it was unfair simply to promote W/Sgt. Bovell with no regard for the legitimate expectation of the claimants. The unfairness was compounded by the opaque procedure by which the Order of Merit List was amended causing Sgt. Bovell virtually to leap-frog over those who ranked above her in the Order of Merit List.
19. I turn now to consider whether it would be unfair to require the claimants to submit to a second process of interviews before the Promotion Advisory Board.
20. ACP Williams in his affidavit alluded to a practice of filling all vacancies from an existing Order of Merit List up to the point when the assessment process to produce a new list is started.

³² *ibid*

21. It is beyond doubt in this case that the 2008 Order of Merit List has not been superseded by any other since it was not only used in the promotion of W/Sgt Bovell but also in promotions in May, 2011. In my view the claimants are entitled to conceive a legitimate expectation on the basis of this practice and to expect that promotions will be based on the existing list. Should the defendant deem it fit to depart from this practice he must be fair to the claimants and give them an opportunity to be heard.

Relief

22. It was a cause for regret that no items of relief were claimed in this matter. The court relied on the provisions of s 8 (1) (d) of the *Judicial Review Act*³³, which empowers the court to grant orders as it considers just and if the circumstances warrant.

23. The court will therefore grant declaratory relief in the hope that those who are invested with the requisite authority will act upon them.

Declaration

24. It is hereby adjudged and declared:

- (i) that the defendant acted unfairly and in breach of the legitimate expectation of the claimants by promoting W/Sgt Bovell prior to those who ranked ahead of her on the Order of Merit List 2008;
- (ii) that the defendant acted unfairly in seeking to re-interview the claimants while the 2008 Order of Merit List was active and being used as a basis for promotion.

Dated this 11th day of June, 2012.

M. Dean-Armorer
Judge

³³ Judicial Review Act Ch 7:08