

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-02527

BETWEEN

- 1. POLICE CORPORAL #14321 RICARDO MORRIS**
 - 2. POLICE CORPORAL #12163 RICHARD HOOD**
 - 3. POLICE CORPORAL #14332 RICHARD SMITH**
- Claimants**

AND

THE COMMISSIONER OF POLICE

AND

THE PROMOTION ADVISORY BOARD

Defendants

BEFORE THE HONOURABLE MADAM JUSTICE DEAN-ARMORER

APPEARANCES

Mr. Brent D. Winter, Attorney-at-Law for the Claimant

Ms. Monica Smith and Ms. Avaria Niles, Attorneys-at-Law for the Defendants

REASONS

Introduction

1. The Claimants, as Corporals of Police applied, unsuccessfully to be promoted to the rank of sergeant. It was their contention that they were denied the benefit of a regular practice by which maximum point, were awarded to all officers, who had previously been successful in the qualifying examinations.

2. The Claimants have initiated judicial review proceedings, claiming *inter alia*, that they had conceived a legitimate expectation which had been frustrated by the Defendants.
3. On the March, 2018, I found in their favour. My reasons for so doing are set out below.

Procedural History

4. On the 20th July, 2016, the applicants applied pursuant to Part 56:3 of **CPR**¹ for leave to institute judicial review proceedings.
5. On 30th September 2016, I granted permission to the Claimants to apply for judicial review and to seek these orders:

“3.3. An order of certiorari to remove into this Honourable Court and quash the decision of the Commissioner and/or the PAB not to award the Applicants/Intended Claimants the maximum 35 points for the EXAMINATION MARK of the promotion assessment process to the rank of Sergeant.

3.4. A declaration that the decision of the Commissioner and/or the PAB not to award the Applicants/Intended Claimants the maximum 35 points for the examination mark was unreasonable, irregular or improper exercise of discretion, contrary to section 5(3)(e) of the Judicial Review Act Ch. 7:08 (‘JRA’)

3.5. A declaration that the Commissioner and/or the PAB, in making the decision not to award the Applicants/Intended Claimants the maximum 35 points for the EXAMINATION MARK:

¹ Civil Proceedings Rules 1998

(a) acted in breach of the principles of natural justice and procedural fairness, contrary to section 5(3)(d) and section 20 of the JRA; and

(b) deprived the Applicants/Intended Claimants of a legitimate expectation, contrary to section 5(3)(m) of the JRA.

3.6. A declaration that the decision of the Commissioner and/or the PAB not to award the Applicants/Intended Claimants the maximum 35 points for the EXAMINATION MARK contravened their right to equality of treatment from a public authority in exercise of its functions, contrary to section 4(d) of the Constitution.

3.7. An order of mandamus to direct the Commissioner and/or the PAB that the Applicants/Intended Claimants be given the maximum of 35 points for the EXAMINATION MARK.

3.8. A declaration that the decision of the Commissioner and/or the PAB to exempt officers who held a Bachelor of Laws Degree from writing the qualifying examination for promotion to the rank of Sergeant and to award them the maximum 35 points for the EXAMINATION MARK was unreasonable, unfair and ultra vires section 20(1) of the Police Service Act, Ch. 15:01

3.9. A declaration that the decision of the Commissioner to the effect promotions to the rank of Sergeant on the 22nd day of April, 2016, without first publishing the OML as a Departmental Order in sufficient time in

advancing of the making of said promotions was illegal, irrational, unreasonable, unfair and/or contrary to regulation 20(6) of the Police Service regulations 2007, and also in contravention of spirit of section 19(5) of the Police Service Act, and intended to deprive the Applicants/Intended Claimants of the opportunity to be heard.

3.10. An order mandamus to direct the PAB to compile and submit to the Commissioner a revised OML for promotion to the rank of Sergeant to reflect the proper ranking of the Applicants/Intended Claimants and for it to be published as a Departmental Order.

3.11. An order of mandamus to direct the Commissioner to make such appointments to the rank of Sergeant in compliance with the said OML.

3.12. Cost.

3.13. Such further or other, directions, or writs as this Honourable Court considers just and as the circumstances warrant.

6. On 30th September, 2016, I also granted permission to the Claimants, to amend their application to seek an injunction restraining the Commissioner of Police from publishing and or considering the results of an imminent qualifying examination². After considering written submissions on the issue, I refused the application for an interim injunction.³

7. A few days later, on 18th November, 2016, the Claimant applied for an order for disclosure of documents. An order was made on 1st December, 2016 granting the application for disclosure

² Notice of Application filed on 25th July, 2016

³ Order refusing the injunction on 11th November, 2016

of documents. Pursuant to this Order, the documents were produced by way of two affidavits of attorney-at-law Avaria Niles: the affidavit filed on 8th December, 2016 and the Supplemental affidavit filed on 9th December, 2016.⁴

8. On the 12th January, 2017, I gave directions for the filing and service of affidavits in the substantive application. In compliance with my direction, the following affidavits were filed:

I. The affidavit of Stephen Williams, Acting Commissioner of Police filed on the 15th March, 2017 in opposition to the application. By his affidavit, Acting Commissioner Williams referred to and relied on the affidavit of ACP Harold Phillip, filed on 7th October, 2016.

II. The affidavit of Richard Smith on behalf of all the applicants in reply.

Facts

9. On 22nd April 2016, the Acting Commissioner of Police Stephen Williams presided over a ceremony for the promotion of 460 officers to the rank of Sergeant of Police.

10. The Claimants in these proceedings had participated in the promotion process but were not among those promoted. In setting out the allegations, in support of their application for judicial review, the Claimants begin their narrative from the year 2005. At that time, promotions were based on a number of criteria including qualifications, performance and general fitness, as well as examinations consisting of four papers: English Language, Police Duties, Law I and Law II. The Claimants, then Constables, were successful at their attempt of the qualifying examination to the rank of Sergeant.

⁴ The supplemental affidavit of Avaria Niles was filed on 9th December, 2016

11. From 2006, there were alterations to the structure of the qualifying examinations. Following the year 2006, the number of papers was reduced to three: English Language, Police Duties and Law. Candidates were exempted from writing the English Paper, if they held a passing grade in English at CXC or GCE O' Levels.
12. Further changes were made to the structure of the promotion process. These were engendered by the ***Police Service Amendment Act No 13 of 2007*** and the ***Police Service Regulations 2007***.⁵
13. Departmental Orders were issued under the hand of the Commissioner of Police, setting out the details of the new promotion procedures. Accordingly Departmental order 211 of 2007 informed the Police Service of the formation of the Promotion Advisory Board, in accordance with the Police Service Act as amended by Act 13 of 2007. The Departmental Order set out three criteria for promotion, in respect of which candidates would receive points. The maximum of 40 points could be attained under the heading of performance appraisal, while 25 points could be attained at the interview and 35 points for the examination.
14. Departmental Order 211 of 2007 exempted altogether holders of an LLB degree from the requirement of an examination. Accordingly, paragraph 3:9:1 provided:

“An officer who is the holder of a Bachelor of Laws Degree.....shall be exempted from writing the qualifying examination for promotion.....and shall be awarded thirty-five (35) points.”

⁵ See paragraph 9 of the Supporting affidavit of the Claimant, filed on 25th July, 2016

15. Departmental Order 211 of 2007 also provided a conversion system for the conversion of marks to points, in respect of persons who had been successful in the qualifying examination prior 2006. The Departmental Order set out three tables showing the points which would be awarded for marks, which had been obtained. The first table converted to points, those marks in English earned at GCE O'Level, CXC or Police English Exam. The second table converted non-English scores achieved before 2006 and the third table converted non-English scores achieved after 2006.
16. Departmental order 211 of 2007 was amended by Departmental order 213 of 2007 also issued under the hand of the Commissioner of Police. Paragraph 3:8:1 of the Amended Order made this provision:

“Officers in the Second Division who have successfully passed the qualifying examination in English Language or who have been exempted from writing the qualifying examination in English Language shall be awarded 35 points”

17. On 17th October, 2008, Acting Commissioner of Police, James Philbert in response to an application under the ***Freedom of Information Act*** wrote to Attorney at Law Ms. Cindy Bhagwande in these terms:

“I have read your letter dated the 15th September, 2008 and perused the attached documents. I am to inform you that as part of the review and monitoring process, the Commissioner of Police in the interest of fairness to all officers eligible for assessment to the rank of Sergeant....took decision to award all officers maximum points.”

This letter was exhibited in judicial review proceedings between **Roger Ghool v. Commissioner of Police**⁶. Acting Commissioner Williams, confirmed that in or around October, 2008, Commissioner Philbert James awarded a maximum of 35 points to all officers in the examination component to the rank of Sergeant⁷.

18. **Ghool**⁸ came up for hearing before the Honourable Justice Boodoosingh. Orders were made by consent in respect of the decision to award officers maximum points, for persons who had passed the examination in English.
19. Ultimately, an order by consent was entered in **Ghool**⁹ before the Honourable Justice Boodoosingh. The consent order was in these terms:

“... IT IS HEREBY ORDERED BY CONSENT that:

- 1. An order of certiorari to remove into this Honourable Court and quash the policy and or decision of the COP contained in a letter dated the 17th day of October, 2008 (received by the Claimant on the 18th day of November, 2008) to award the maximum of 35 points to all police officers eligible for assessment for promotion to the rank of Sergeant “the said decision” regardless of their score in the qualifying examination or grade in English Language at CXC or GCE O’ Level.*
- 2. A declaration that the said policy or decision is unreasonable, irrational and illegal.*
- 3. A declaration that the said policy or decision is in breach of Regulation 20 of the Police Service Regulations 2007.*

⁶ Roger Ghool v Commissioner of Police CV 2008 - 04661

⁷ See the affidavit of Stephen Williams at paragraph 20

⁸ Ibid

⁹ Roger Ghool v Commissioner of Police CV 2008 - 04661

4. A declaration that the said policy or decision violated and or contravened the legitimate expectation of the Claimant that he would be assessed for promotion in accordance with and applying the criteria specified in Regulation 20 and or Departmental Orders no. 211 and 213 dated 20th day of November, 2007 and 29th day of November, 2007 respectively

IT IS HEREBY FURTHER ORDERED that costs to be assessed by the court on the 11th day of December, 2009 at 12:00p.m. in Court Room SF09, Supreme Court, San Fernando ”¹⁰

20. In a subsequent decision, ***Wendell Lucas et al v. The Commissioner of Police & the Promotion Advisory Board***¹¹, Boodoosingh J, considered and commented on the effect of this consent order. It was his view that the consent order was binding on the parties only.
21. In 2015, the Commissioner of Police indicated by advertisement that there would be promotions to the rank of Corporal¹².
22. The Claimants attended a briefing on the promotion process. This was chaired by Ann-Marie Alleyne-Daly, DCP Chairman of the Promotion Advisory Board. At the briefing on the promotion process candidates asked DCP Ann-Marie Alleyne-Daly about the graded point system for qualifying examinations which were passed prior to 2007¹³.
23. The Claimant alleged that DCP Alleyne-Daly indicated that the Commissioner was aware of concerns and that he had not yet made a decision as to how, the points for the Examination Mark were to be computed.

¹⁰ See the affidavit of Harold Philip, exhibit “H.P.3”, consent order entered by the Honourable Justice Boodoosingh.

¹¹ CV2013-00355

¹² See paragraph 20 of the Supporting affidavit filed 25th July, 2016

¹³ Ibid paragraph 21

24. Acting Commissioner of Police, Harold Phillip, on behalf of the Defendants, did not refute the allegations of the Claimants but deposed that he spoke to DCP Alleyne-Daly who indicated that she made no promise express or implied that a maximum of 35 points would be awarded as the examination mark. Accordingly, I accepted that DCP Alleyne-Daly made no promise. I accepted as well that DCP Alleyne-Daly indicated that the Commissioner of Police was aware of concerns and that he had not made any decision.
25. The Claimants attended interviews during the period December, 2015 to January, 2015. On 22nd April, 2016, the Acting Commissioner, Stephen Williams presided over a ceremony for the promotion of 460 officers to the rank of Sergeant. Later that day, the Commissioner published an order of merit list, showing the Claimants had been received these placements: Richard Hood No. 552, Ricardo Morris No. 613 and Ricardo smith No. 722. By his affidavit, Acting Commissioner of Police Stephen Williams, indicated that the Order of Merit List was published and available from the 21st April, 2016. I am prepared to accept this as a fact.
26. By her affidavits of the 8th and 9th December, 2016 respectively, Avaria Niles, Attorney at Law for the Defendants produced documents from the Commissioner of Police. In letters dated 4th October, 2016 to each Claimant the Commissioner of Police set out the scores received in each of the three categories.

27. The scores of Richard Smith were:

Performance Appraisal	40.00 (Maximum)
Examination	28.75
Interview	16.60

28. Those of Ricardo Morris were:

Performance Appraisal	40.00 (Maximum)
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Examination	27.50
Interview	17.00

29. Those of Richard Hood were:

Performance Appraisal	40.00 (Maximum)
Examination	25.00
Interview	16.60

30. It was therefore clear that the Claimants had not received 35 points under the heading “Examination”. Acting Commissioner of Police, Stephen William admitted that in error, Richard Smith received 25 and not 35 points for the English component of the examination.¹⁴

31. By a letter dated 6th December, 2016 to Ms. Niles, the Commissioner set out the marks attained by each applicant in examinations held in 2002 and 2005:

		English	Police Duties	Law I	Laws II
Corporal Richard Hood	2002	NIL	NIL	NIL	NIL
	2005	Exempt	50	58	62
Corporal Ricardo Morris	2002	Exempt	56	47	50
	2005	Exempt	Previously passed	50	Previously passed
Corporal Ricardo Smith	2002	51	44	43	53
	2005	Previously passed	Previously passed	59	97

¹⁴ See the affidavit of Stephen Williams of the 10th March, 2016.

Law

The Judicial Review Act Ch 7:08

“(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;*
- (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 reasonably 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.”

Police Service Act as amended No. 13 of 2007

“18. (1) For the purpose of conducting promotion in the Second Division, there is established a Promotion Advisory Board which shall comprise five members as follows:

(a) a Deputy Commissioner of Police, who shall be the chairman;

(b) an Assistant Commissioner of Police;

(c) the Director Human Resources of the Police Service;

(d) a senior officer, who is not a police officer, from the Ministry of National Security, selected by the Minister; and

(e) an independent management consultant, appointed by the Commissioner.

(2) The Commissioner shall engage a person who is not a police officer as Secretary to the Board.

(3) The appropriate recognised association may nominate a representative to be present as an observer at sittings of the Board.

(4) The Secretary to the Board shall keep a record of the ratings given to every police officer who appears before the Board.

19. (1) The Board shall sit as often as it thinks necessary, but at least once every three months, to consider promotions and notice of each sitting shall be given in a timely manner to the representative referred to in section 18(3).

(2) The Board shall make recommendations to the Commissioner in relation to his functions under section 123A(2)(a) of the Constitution.

(3) At the conclusion of each sitting of the Board, the Chairman shall submit to the Commissioner the Board's recommendations in the form of an Order of Merit List.

(4) The Commissioner may discuss with the Board any recommendation made under subsection (3).

(5) A police officer is entitled to apply to the Board to be informed in writing of his ratings.

(6) A sitting of the Board shall not be limited to one day.

20. (1) To be eligible for promotion to the rank of Corporal through to Inspector, a police officer from the rank of Constable through to Sergeant is required to pass a qualifying examination.

(2) In considering the suitability for promotion of a police officer from the rank of Constable through to Sergeant, the

Board shall conduct an interview and take into account the criteria prescribed.

(3) In considering the suitability for promotion of a police officer from the rank of Constable through to Sergeant, the Commissioner shall take into account the criteria prescribed."

Police Service Regulations 2007

“20. (1) Subject to subregulation (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:

Maximum Points

<i>Performance appraisal</i>	40
<i>Interview</i>	25
<i>Examination mark</i>	35
<i>(6) The Board shall submit the Order of Merit List to the Commissioner, who shall cause it to be published in a Departmental Order.”</i>	

Issues

32. This application for Judicial Review challenges the decision of the Defendant not to award thirty-five (35) points in respect of the police qualifying examinations to the rank of Sergeant of Police. The issues which arose in respect of that decision were whether it was irrational, procedurally unfair and in breach of the legitimate expectations of the Claimants.
33. Further ancillary issues arose. The first was whether the decision not to award the Claimant’s maximum points in the examination contravened their rights under section 4(d) of the *Constitution*¹⁵ to equality of treatment by a public authority.
34. An ancillary issue also arose in respect of the publication of the Order of Merit List 2016 and whether it had been published sufficiently in advance of the promotions.
35. A third ancillary issue was whether the decision of the Defendants to extend to holders of the L.L.B. degree an exemption from examinations was unfair and ultra vires: section 20(1) *Police Service Act*¹⁶.

¹⁵ Ch 1:01

¹⁶ Ch 15:01

Discussion

The expectation of full marks in the Examination component

36. The concept of the legitimate expectation was defined by Lord Diplock in ***Council of Civil Service Unions v. Minister for the Civil Service***¹⁷ in these words “*A 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*”¹⁸.

Paponette v. Attorney General (2010) 78 WIR 474

37. Many years later, the Privy Council considered the circumstances in which a court will find the incidence of a legitimate expectation.
38. In ***Paponette*** supra, the members of the Maxi-Taxi association alleged that they held a legitimate expectation, when Government proposed to relocate their taxi-stand to City Gate, lands owned by the Public Transport Service Commission (PTSC). The members of the Maxi-Taxi Association were reluctant to move but did so after being assured by the Minister of Works, that they would not come under the control of the PTSC.
39. After two years, Government reneged on its promise by introducing subsidiary legislation which gave PTSC power to charge for the use of City Gate, so that from 2001, the members of the Association were required to pay a fee.
40. In holding that the appellants had suffered a breach of their legitimate expectation, their Lordships formulated the test in this way:

¹⁷ [1984] 3 All ER 935

¹⁸ Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 at page 944

*“(2) Where the court considered that a lawful promise or practice had induced a legitimate expectation of a substantive, rather than simply procedural, benefit, the court would decide whether to frustrate the expectation was so unfair that to take a new and different course would amount to an abuse of power. The critical question was whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise. The initial burden lay on an applicant to prove the legitimacy of his expectation; in a claim based on a promise, the applicant had to prove the promise and that it was clear and unambiguous and devoid of relevant qualification. However, once those elements had been proved by the applicant, the onus shifted to the authority to justify the frustration of the legitimate expectation.”*¹⁹

41. In *United Policy Holders Group & Others v. Attorney General*²⁰, their Lordships again considered whether the appellants held a substantive legitimate expectation. At paragraph 37 of the judgment, Lord Neuberger set out the relevant principles in these words:

“37. In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts...”

42. At paragraph 37, Lord Neuberger identified those points which were plain, in this way:

“First, in order to found a claim based on the principle, it is clear that the statement in question must be “clear, unambiguous and devoid of relevant qualification...”

¹⁹ (2010) 78 WIR 474

²⁰ [2016] UKPC 17

43. Lord Neuberger proceeded to identify the restriction on the legitimate expectation stating:

“..the principle cannot be invoked if, or to the extent that, it would interfere with the public body’s statutory duty...”²¹

44. As the third principle, Lord Neuberger said at paragraph 38:

“...however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement...”

45. At paragraph 39, Lord Neuberger alluded to the distinction between the procedural and the substantive legitimate expectation. Lord Neuberger had this to say:

“It is, for instance, clear that legitimate expectation can be invoked in relation to most, if not all, statements as to procedure to be adopted in a particular context...”

46. In respect of the substantive legitimate expectation, however, Lord Neuberger observed that it was quite unclear how far it could be applied in relation to statements, which were made in the macro-political or macro-economic field. See paragraph 39.

47. In relation to the substantive legitimate expectation, Lord Neuberger cited a number of authorities, ending with the decision of their Lordships in ***Paponette v. Attorney General of Trinidad and Tobago***²², an authority referred to and relied upon by the Claimants.

48. In a concurring judgment, Lord Carnwarth traced the history of the concept of legitimate expectation, beginning with the decision of Lord Denning in ***Schmidt v. Secretary of State***²³

²¹ [2016] UKPC At paragraph 38 of the judgment

²² [2010] UKPC 32

²³ [1969] 2 Ch 149

and ultimately, Lord Carnwath then traced the post *Coughlan*²⁴ cases and the limitation on the *Coughlan*²⁵ doctrine.

49. Ultimately, Lord Carnwath referred to *Paponette*²⁶. At paragraph of his judgment, Lord Carnwath noted that the critical question was:

“...whether there was a sufficient public interest to override the legitimate expectation”.

50. At paragraph 10, Lord Carnwath set out the principle in this way:

“The initial burden lay on an applicant to prove the legitimacy of his expectation, so far as necessary in reliance on his promise. But once these elements had been proved, the onus shifted onto the authority to justify the frustration and to identify any overriding interest on which it relied.. It was then for the Court to weigh the requirements of fairness against that interest...”

51. At paragraph 121, Lord Carnwath summarised the trend of modern authority:

“ In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is “clear, unambiguous and devoid of relevant qualification”, has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging

²⁴ R v. North and East Devon Health Authority ex p Coughlan [2001] QB 213

²⁵ Ibid

²⁶ [2010] UKPC 32

proportionality the court will take into account any conflict with wider policy issues, particularly those of a “macro-economic” or “macro-political” kind. By that test, for the reasons given by Lord Neuberger, the present appeal must fail.”

52. In both *United Policy Holders*²⁷ and *Paponette*²⁸, their Lordships considered a legitimate expectations which were based on promises by the respective public authorities. In *Pearson Leacock v. Attorney General*²⁹, Sir David Simmonds, CJ, sitting in the High Court of Barbados, found that the applicant had conceived a substantive legitimate expectation by reason of the long standing practice of the Commissioner of Police, to grant study leave to police officers for the purpose of pursuing the Legal Education Certificate at the Hugh Wooding Law School.
53. *Pearson*³⁰ was of course not binding on this Court. It was also decided before *Paponette*³¹ and *United Policy Holders*³² and the learned CJ Simmonds did not have the benefit of learning as to the elements of substantive legitimate expectation.
54. Nonetheless, I relied on *Pearson* supra as an example of a legitimate expectation, which had been based on a regular practice as opposed to an express promise.
55. Having reviewed the authorities, it was my view that a legitimate expectation may present itself in four situations. It may arise either by an express promise or by regular practice. Either of these may give rise to an expectation of a procedural benefit, that is to say that the holder of the legitimate expectation would expect to be afforded an opportunity to be heard, before the public authority acts in breach of the expectation. An expectation may also entitle

²⁷ [2016] UKPC 17

²⁸ [2010] UKPC 32

²⁹ [2005] 68 WIR 181

³⁰ Ibid

³¹ [2010] UKPC 32

³² [2016] UKPC 17

its holder to receive the substantive benefit, if reneging on the promise or regular practice would amount to an abuse of power on the part of the relevant public authority.

56. In the proceedings before me, the Applicants relied not on an express promise, but on a regular practice. It was their contention that officers who were seeking promotion to the rank of sergeant and who had written examinations before 2006, when there had been a change in the structure of the promotion process, were awarded full marks under the examination component, as long as they had been successful in the examination in English, when they had written the examination.
57. In support of their allegation, the applicants relied on the statement of the Commissioner of Police, who confirmed the practice of the award of maximum points to all officers. See the response of the Commissioner on the 17th October, 2009, to the request of attorney-at-law Cindy Bhagwandeem under the **FOIA**³³.
58. The statement of the Commissioner of Police was made in an official capacity in the context of proceedings before the High Court. It would undoubtedly have come to the attention of the entire police service, as well as to the Claimants,
59. The statement of the Commissioner was followed by a consent order in the high court action **Roger Ghool v. Commissioner of Police**³⁴. By the consent order, the Honourable Boodoosingh, J declared the practice to be illegal. Justice Boodoosingh also granted an order of certiorari to question the policy of awarding the maximum 35 points to all officers eligible for assessment for promotion to the rank of sergeant.
60. Once again, it is without doubt that the order of the Honourable Boodoosingh J would have come to the attention of the entire police service.

³³ Exhibited ass RM RHRS 2 to the supporting affidavit of the Claimants

³⁴ Roger Ghool v Commissioner of Police CV 2008 - 04661

61. *Ghool*³⁵ was not however the final word. The Honourable Boodoosingh J had an opportunity to revisit and to comment on the *Ghool*³⁶ order in a later case, involving promotions from the rank of sergeant to that of Inspector. In *Wendell Lucas et al v. The Commissioner of Police & the Promotion Advisory Board*³⁷ Justice Boodoosingh held that the consent order was only binding on the parties in that specific claim and that no rights could accrue to anyone else on the basis of the consent order³⁸.
62. Accordingly, when the Claimants attended the 2015 briefing on the promotion process, they were uncertain as to whether or not the policy was still in existence. It was uncertain whether *Ghool* had quashed the policy or whether *Ghool* itself was quashed by *Wendell Lucas et al*³⁹.
63. The Claimants sought to allay their uncertainty by seeking clarification from Mrs. Daly-Alleyne, the Chairman of the Promotion Advisory Board. Mrs. Daly-Alleyne made no promises. The Chairman also did nothing to shed light on the uncertainty. Her response was to confirm that there were concerns of which the Commissioner was aware , but in respect of which, the Commissioner had not yet made a decision.
64. In this factual context, it was my view that it was reasonable for the Court and for the Claimants to infer that the practice had not yet received the attention of the Commissioner and certainly had not yet been discontinued.

³⁵ Ibid

³⁶ Ibid

³⁷ CV2013-00355

³⁸ See CV2013-0355

³⁹ CV2013-00355

65. Accordingly, it was my view that at the time when the Claimants submitted to the promotion process, there was a continuing regular practice that officers who were eligible for promotion to the rank of the Sergeant would be awarded 35 points under the head of examinations.
66. Legitimate expectation is inextricably bound up with natural justice⁴⁰. The holder of a legitimate expectation would be entitled, at least, to an opportunity to be heard as to why he should not be deprived of the benefit in respect of which he holds a legitimate expectation.
67. In the context of these proceedings an opportunity to be heard would have been critical. It would have enabled the Claimants to ask specific questions as to the effect, if any, of *Ghool*, and as to the effect of *Wendell Lucas et al* on *Ghool* supra.
68. An opportunity to be heard would have allowed the Claimants to put forward their view as to the inherent unfairness of the change from marks to points and to outline how they stood to suffer resultant detriment. It would also have given them an opportunity to see the need to cut their losses and to resit the examination.
69. I considered whether there was a substantive legitimate expectation. In order to do so, I considered whether the frustration of the Claimant's legitimate expectation amounted to an abuse of power.
70. It was my view that an examination of the history of this matter reflects some negligent inadvertence on the part of the Defendants. Between *Ghool* and *Wendell Lucas et al*, they were aware of concerns and planned, at some time, to address them.
71. In this Claim, however, the evidence does not suggest the callous evil eye associated with abuse of power. Accordingly, it was my view that there was no substantive legitimate expectation but that the Claimants were entitled at least to be consulted if the Defendants

⁴⁰ Attorney General v. KC Confectionery Ltd (1985) 34 WIR 387

were minded to frustrate their expectation. They were therefore entitled to an order of certiorari quashing the decision to withhold the maximum mark from them, contrary to their expectation.

Section 4(d) Constitution Ch 1:01

72. I proceeded to consider the ancillary issues. Section 4(d) of the ***Constitution*** guarantees the right of equality of treatment by a public authority. I was of the view that the Claimants could not succeed on this issue for the reasons which are set out below.
73. I agreed with learned Counsel for the Claimants that the correct approach to a claim under section 4(d) was set out by Lady Hale in ***Annisa Webster and Other v. Attorney General of Trinidad and Tobago*** [2015] UKPC 10:

“24. The current approach to section 4(d) of the Constitution of Trinidad and Tobago may therefore be summarised as follows: (1) The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment. (2) Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment. (3) To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. (4) Weighty reasons will be required to justify differences in treatment based upon the personal characteristics mentioned at the outset of section 4: race, origin, colour, religion or sex. (5) It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged). 25. It must, however, be acknowledged that there is a considerable overlap between the

“sameness” question at (1) above and the justification question at (3). This is because the question of whether a difference between the two situations is material will to some extent at least depend upon whether it is sufficient to explain and justify the difference in treatment.”

It was therefore authoritatively decided in **Webster** that proof of mala fides on the part of the public authority was not necessary. This constituted a final departure from the first authority, **Smith v. L.J Williams**⁴¹ which for many years had been regarded as the *locus classicus* on the issue of section 4(d).

74. However, the law continues to require evidence of a comparator. I agreed with learned Counsel that evidence of co-comparator was adduced in respect of the other officers who had sat the examination pre-2006. See for example paragraph 16 of the supporting affidavit⁴². It was my view that this evidence was objectionable on the ground that it constituted inadmissible hearsay. No objection was taken however, and the claim proceeded to finality with this evidence in tact.
75. It was my view however, that it was not possible for the Claimants in the context of this application for judicial review to obtain relief under section 4 of the **Constitution**⁴³. I was of the view that the application for constitutional relief in judicial review proceedings would lead to procedural confusion, of the kind identified by their Lordships in **Antonio Webster v. AG**⁴⁴. The originating process which is prescribed for judicial review differs from that prescribed for the claims under section 14 of the **Constitution**⁴⁵. In judicial review

⁴¹ Smith v .J. Williams (1982) 32 WIR 395

⁴² Joint Affidavit of Ricardo Morris, Richard Hood and Richard Smith.

⁴³ Ch 1:01

⁴⁴ Antonio Webster v. AG [2011] UKPC 22

⁴⁵ Ibid

proceedings, the Claimant is first required to obtain the Court's leave⁴⁶. In approaching the Court for leave, the Claimant has, even pre-CPR, been required to surmount a very low threshold. Nonetheless, there is no analogous requirement for leave, in applications under section 14⁴⁷. Applications under section 14 are as of right.

76. It was my view that the procedural confusion was compounded by the requirement to be found at Rule 56.10(2) **CPR**, that the Claimant who seeks relief under section 14 must first serve the proceedings on the Attorney General⁴⁸. There is no analogous requirement for relief sought in judicial review. Learned Counsel relied on *Dennis Graham v. Police Service Commission and the Attorney General of Trinidad & Tobago*⁴⁹. The Attorney General, being a party to those proceedings must have been served. It was therefore my view that the Claimants were wrong to seek constitutional relief in this judicial review application and I refused to grant the declaration under section 4(d).

The Order of Merit List

77. Learned Counsel for the Claimants contended that the Order of Merit List (OML) had not been published sufficiently in advance of the promotions, and that this, in effect, violated the Claimants right to be heard.
78. The Claimants alleged that the OML had been published on the afternoon of the 22nd April, 2016, the day of the actual promotions, while the Defendants allege that the OML had been available the day before. I was prepared to accept the Defendants' version.

⁴⁶ Rule 56.3(1) Civil Proceedings Rules 1998: "56.3 (1) No application for judicial review may be made unless the court gives leave."

⁴⁷ In respect of procedural confusion between actions at common law and constitutional motions see Antonio Webster v. AG [2011] UKPC 22 at paragraph 7

⁴⁸ Rule 56.10(2) Civil Proceedings Rules 1998

⁴⁹ [2011] UKPC 46

79. It was my view however that the Claimants were entitled to a reasonable time, prior to the actual promotion date, to enable them to become aware of their placement on the merit list and to make enquiries as to why the placement may have been erroneous and as to why it ought to be changed.
80. In my view, such adequate notice is in keeping with the general rules as to fairness. Such rules have been reflected in *Chief Immigration Officer of British Virgin Islands v. Burnett*⁵⁰. Chief Justice Floissac considered the appeal from the Chief Immigration Officer against an order of certiorari quashing her decision to refuse permission to Burnett to enter and to remain in the territory of the British Virgin Islands. The learned Chief justice, in the course of his judgment, alluded to formalities which facilitated natural justice. One of these formalities was the provision of adequate notice of charges which a person may be called upon to answer.
81. The learned Chief Justice formulated the principle in this way:

“According to the audi alteram partem rule, where any authority (person or body of persons) intends to exercise a constitutional, statutory or prerogative power and thereby to make or take a judicial, quasi-judicial or administrative decision or action which will adversely affect the status, rights, interests or legitimate expectations of any other person (the complainant), the authority is under a common-law duty (and may also be under a constitutional or statutory duty) to observe certain formalities and the complainant has a correlative common-law right (and may also have a correlative constitutional or statutory right) to the observance of those formalities before such a decision or action is made or taken. Those formalities may include notice to the

⁵⁰ (1995) 50 WIR 153

complainant of the specific allegations made against him and a fair and reasonable opportunity for the complainant to answer or rebut those allegations and to make representations in regard to the intended decision or action.”⁵¹

82. In these proceedings, there were no charges to be answered by the Claimants. It was my view however, that the principle, as explained by Floissac CJ was relevant in that it is based on a recognition that the right to be heard could be rendered useless, unless the holder of the right is supplied with information necessary for the exercise of that right. It was my view that the adequacy of the information depended as well, on whether it was supplied at such a time as to enable the Claimants to assimilate it, check it and formulate a response.
83. It was my view that the principle was applicable to the Claim before me in that the Claimants were entitled to adequate notice of their results and their places, so as to enable them to make the representation which they would have been entitled to make in the exercise of their right to be heard.
84. It was my view that this would have entitled them to the order of certiorari, which I had already granted.

Exceptions to Holder of the L.L.B. Degree

85. By Departmental Order No. 211 of 2007, the Commissioner of Police extended an exemption to holders of an L.L.B. degree in these words:

“ 3.9 Exemption

3.9.1. An officer who is the holder of a Bachelor of Laws Degree (L.L.B.) from an institution recognised by the Accreditation Council of Trinidad and Tobago shall

⁵¹ (1995) 50 WIR 153 at page 161 e-g

be exempted from writing the qualifying examination for promotion...and shall be awarded 35 points.”

86. The Claimants contended that this exemption was illegal, unreasonable, unfair and ultra vires. Section 20(1) of the ***Police Service Act*** which provides:

“To be eligible for promotion to the rank of Corporal to Inspector a police officer from the rank of Constable through to sergeant is required to pass a qualifying examination...”

The term qualifying examination was not defined.

87. The details of the promotion process are prescribed by Regulation 19 of the ***Police Service Regulations***. Regulation 19(5) provides:

“The promotion assessment process shall comprise of two stages as follows:

(a)stage one shall require every qualifying officer to write a qualifying examination from which only the top performing candidates shall proceed to stage two; and

(b)stage two shall be a suitability assessment process..”

88. An examination of the ***Police Service Act***⁵² and ***Police Service Regulations***⁵³(“the Regulations”) reveals that some provisions refer to “a” qualifying examination while others refer to “the” qualifying examination.

89. Accordingly, Regulation 16 enables any officer to sit “the qualifying examination”. This is set by an examination board appointed the Commissioner. The officer who applies under 16(1) and was successful in “the qualifying examination” may be considered for promotion.

⁵² Ch 15:01

⁵³ The Police Service Regulations, 2007

90. In my view these provisions are to be contrasted with section 20(1) of the *Police Service Act*⁵⁴ Regulation 19(1) of the Regulations which do not provide the details of the promotion process, but the general requirements for an officer applying for promotion. There, one finds reference to “a” qualifying examination and not “the” qualifying examination. The article “a”, preceding qualifying examination suggested, in my view, that it was within the discretion of the Commissioner and the Promotion Advisory Board to fix qualifying examinations. That discretion necessarily implied that they were empowered to decide that the holders of certain degrees could be treated as having passed a qualifying examination leading to their exemption.
91. It was my view that the exemption could not be regarded as unfair and was the result of the very exercise of discretion which led to the practice of awarding 35 points to officers who had sat examinations prior to 2006.
92. It was also my view that the exemption could not be classified as irrational for the purpose of judicial review, and could not be described as “*being so outrageous in its defiance of logic and accepted moral standard that no reasonable man would take it.*”⁵⁵
93. Accordingly, the following orders were made:
- “1. There shall be Judgment for the Claimants.*
 - 2. An Order of Certiorari is granted to remove into this Honourable Court and quash the decision of the Commissioner and/or the Promotion Advisory Board not to award the Claimants the maximum thirty-five (35) points for the EXAMINATION MARK of the promotion assessment process to the rank of Sergeant and the computation of the marks of the Claimants to be remitted*

⁵⁴ Ch 15:01

⁵⁵ Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 per Lord Diplock at page 951

forthwith to the Commissioner of Police and the Promotion Advisory Board for their immediate re-consideration and necessary action.

IT IS DECLARED that the Commissioner and/or the Promotion Advisory Board, in making the decision not to award the Claimants the maximum thirty-five (35) points for the EXAMINATION MARK:

(a) acted in breach of the principles of natural justice and procedural fairness, contrary to Section 5(3)(d) and Section 20 of the Judicial Review Act; and

(b) deprived the Claimants of a legitimate expectation, contrary to Section 5(3)(m) of the Judicial Review Act.

IT IS ALSO ORDERED that costs to be quantified by the Registrar of the Supreme Court.”

Dated this 18th day of October, 2018.

M. Dean-Armorer
Judge