

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2013- 01087**

**CV 2013 – 01089**

**CV 2013 – 01092**

**CV 2013 – 01111**

**CV 2013 - 02668**

**CV 2013 -01087**

**BETWEEN**

**SHERMA JAMES**

**CLAIMANT**

**AND**

**THE COMMISSIONER OF POLICE**

**DEFENDANT**

Appearances:

Claimant: Mr Kenneth Thompson

Defendant: Mr Seenath Jairam SC leading Mr Duncan Byam, Mr Lemuel Murphy, Mr Gerald Ramdeen, Mr Shankar Bidaissee instructed by Ms Lesley Almarales and Mr Javed R. Sajad

**CV 2013 – 01089**

**BETWEEN**

**LUCIEN FELIX FERGUSON**

**CLAIMANT**

**AND**

**THE COMMISSIONER OF POLICE**

**FIRST DEFENDANT**

**THE PROMOTION ADVISORY BOARD**

**SECOND DEFENDANT**

Appearances:

Claimant: Mr Nizam Mohammed and Ms Khadeen Sheryl Bocas

Defendants: Mr Seenath Jairam SC leading Mr Duncan Byam, Mr Lemuel Murphy, Mr Gerald Ramdeen, Mr Shankar Bidaissee instructed by Ms Lesley Almarales and Mr Javed R. Sajad

**CV 2013 – 01092**

BETWEEN

**ARNOLD LUTCHMAN**

**CLAIMANT**

AND

**THE COMMISSIONER OF POLICE**

**FIRST DEFENDANT**

**THE PROMOTION ADVISORY BOARD**

**SECOND DEFENDANT**

Appearances:

Claimant: Mr Nizam Mohammed and Ms Khadeen Sheryl Bocas

Defendants: Mr Seenath Jairam SC leading Mr Duncan Byam, Mr Lemuel Murphy, Mr Gerald Ramdeen, Mr Shankar Bidaissee instructed by Ms Lesley Almarales and Mr Javed R. Sajad

**CV 2013 – 01111**

BETWEEN

**MATHEW ANDREWS**

**CLAIMANT**

AND

**THE COMMISSIONER OF POLICE**

**DEFENDANT**

Appearances:

Claimant: Mr Kenneth Thompson

Defendant: Mr Seenath Jairam SC leading Mr Duncan Byam, Mr Lemuel Murphy, Mr Gerald Ramdeen, Mr Shankar Bidaissee instructed by Ms Lesley Almarales and Mr Javed R. Sajad

**CV 2013 – 02668**

BETWEEN

**AULDRIC NEPTUNE**

**APPLICANT/CLAIMANT**

AND

**THE COMMISSIONER OF POLICE**

**RESPONDENT**

Appearances:

Claimant: Mr Cedric Neptune

Defendant: Mr Seenath Jairam SC leading Mr Duncan Byam, Mr Lemuel Murphy, Mr Gerald Ramdeen, Mr Shankar Bidaissee instructed by Ms Lesley Almarales and Mr Javed R. Sajad

**Before the Honourable Mr Justice Ronnie Boodoosingh**

**Date: 2 April 2015**

## JUDGMENT

1. These five claims were heard together, although not consolidated. They concern matters which this court had decided on in a previous matter, **Wendell Lucas v Commissioner of Police and Others, CV 2013 – 00355**, delivered 30 October 2013. The parties to this claim sensibly allowed the Lucas matter to go forward since it was the most advanced at that stage of the litigation. They undertook to reconsider their positions after that matter was completed.
2. These claimants were all Sergeants of Police who were eligible to be considered for promotion to the rank of Inspector of Police.
3. In the **Wendell Lucas** case the court made the following order:

“I would declare that the decision of the Commissioner of Police and/or the Promotion Advisory Board not to award the claimants 35 points for the examination component of the promotion assessment process from Sergeants to Inspectors was unreasonable and unfair. I would also direct that the Promotion Advisory Board should compile and submit to the Commissioner of Police a revised Order of Merit List to reflect the proper ranking of the claimants. This must be published in a Departmental Order as required by Regulation 20 of the Police Service Regulations.”
4. What gave rise to these matters was fully set out in the judgment in **Wendell Lucas**. That judgment was not appealed by any of the parties. It is unnecessary to repeat the facts and issues, but suffice it to say, persons were promoted from Sergeants to Inspector based on an Order of Merit List. That Merit List was arrived at by a particular process which included the allocation of points in lieu of an examination component of the assessment which was required by the relevant legislation. The court found the process

adopted in allocating points for the examination component (there being no examination as required by the regulations) was flawed and unreasonable and unfair in all the circumstances. The court's order therefore was that a new Merit List should be prepared. Having considered all of the factors, that was the remedy considered to be the most appropriate.

5. A new Order of Merit List was, commendably, promptly prepared by the Acting Commissioner of Police, Mr Stephen Williams, after the decision in Lucas. This was published in Departmental Order No. 188 dated 20 December 2013. It was revised as Departmental Order 74 dated 14 May 2014 to reflect the proper position of two other officers who had not been properly placed. This information was put before this court by affidavit of the Acting Commissioner of Police, Mr Stephen Williams, filed on 12 June 2014. As of that date, therefore, it was clear what the accurate position was in terms of compliance with the court's order.
6. The decision in **Lucas** can be said to have been complied with as of 20 December 2013. This List would have accurately reflected the position that these 5 applicants in this matter should have been at.
7. In the Acting Commissioner's affidavit of 12 June 2014, which has not been challenged, he stated in relation to comments made in the **Lucas** decision:

“3. An increase in strength of any rank of the Trinidad and Tobago Police Service would only be effected with a view to improving the Organizational Structure of the Service and not to conduct promotions. Positions are only created to bring value to the Structure.

4. Presently, promotions are being conducted in accordance with the current Order of Merit List as vacancies arise, so the Claimant will be promoted when his name is next on the list for promotion. He cannot be immediately promoted. As Commissioner of Police I do not have the authority to create a post in the police service. This is a matter for the executive.
5. There are no more vacancies to facilitate a retroactive promotion to 19 December 2012.”
8. The claims of these parties are not different from the claimants in the Lucas matter as far as the reliefs go. The court in that matter gave the relief that it could have given. It would be pointless to make any further declaratory relief at this time. I would essentially be making the same orders which were made and complied with in the **Lucas** matter. Judicial review remedies are discretionary and a court is entitled to decline to make an order where subsequent events have shown that it would be unnecessary or academic to do so.
9. The real question here is whether the claimants may be entitled to any kind of compensation for the loss of a chance at being promoted. That has to be decided in all the circumstances. In the **Lucas** case the court declined to give any such compensation.
10. What is important to appreciate is that if each officer who was entitled to be considered for promotion was awarded the maximum 35 points for the examination component of the police assessment, this would have impacted on all of these applicants as it would have impacted on the applicants in the **Lucas** matter as it would have impacted on officers who did not bring claims before the court. The scores of those who were not given the maximum 35 points would have increased after **Lucas**. What is also critical to consider is that the scores of many others would also have increased. This could therefore affect an officer’s promotion prospects for the better or for worse.

11. The true point, therefore, is not whether an officer who was given say 25 or 30 points got an additional 10 or 5 points respectively, thus pushing up his or her score. That is only half of the question. The other half is how would adding 10 or 5 points to ALL those who had scored 25 or 30 out of the “examination” score of 35 would have affected them and how this would have affected their ranking on the Merit List in relation to all of their colleagues.
  
12. Some examples will illustrate. In December 2012, 51 officers were promoted. Wendell Lucas appeared at No. 153 on the Merit List. On the revised Merit List in December 2013, he was at No. 8. Thus given that 51 were promoted in December 2012, he ought to have been among that number. Intikhab Mohammed was at No. 5 on the December 2012 list. He placed No. 1 on the December 2013 List. Thus in any event he would have been promoted in December 2012. Clint Arthur moved from No. 3 to No. 39. He too would have been promoted in any event. There were also a few instances well where persons who were in the top 51 in December 2012 went down to below 51 in December 2013. They ought not to have been promoted, but they were. It is clear that many persons were affected.
  
13. The claimant, Aldric Neptune, helpfully put in as one of his exhibits the first Order of Merit List with the scores awarded in the examination component and the overall total.
  
14. The following table demonstrates how the parties to these claims would have been impacted by the increase in their scores as against others who were also entitled to an increase in their “examination” component scores and those whose scores remained the same. The table shows their positions on the December 2012 List as against their positions on the May 2014 List.

<u>Name</u>	<u>December 2012 List</u>	<u>May 2014 List</u>
Mathew Andrews	114	126
Auldric Neptune	82	79
Arnold Lutchman	258	198
Lucien Ferguson	177	229
Sherma James	221	76

15. Both Mr Mathews and Mr Ferguson would have been worse off after the revised list and the other claimants would have been better off. None of them, however, would have made the top 51 to be promoted in December 2012, unlike Mr Lucas and others.

16. What the Commissioner has done since then is to systematically promote the officers as and when vacancies arise in accordance with the Revised Merit Lists of December 2013/May 2014.

17. I accept the Acting Commissioner's evidence that that is all he can do given the constraints on his powers. It really is a matter for the government to decide if and when an increase to the organisational strength of the police service is feasible and warranted. One expects, however, that the Commissioner and the Police Service Commission would have some say at least in terms of recommendations being made. But that is beside the point.

18. The Commissioner cannot take back the promotions of those who were promoted in December 2012. He also cannot promote those who were entitled to be promoted until



their turn comes for promotion in accordance with the revised Merit List and the available vacancies.

19. I am informed that some officers, such as Ms James, had been given acting appointments before their promotions. This would have alleviated to some extent the negative effect of the wrong placement of the officers on the Merit List regarding their salaries. But it would not have done so completely.

20. Many police officers were affected by the issues surrounding the wrong list. However, not all of those deleterious effects can be put right by the court. This remains unfortunate but that is how it is. There will always be some fallout when things are not done right at first.

21. Sympathy for the officers adversely affected cannot lead the court to create remedies which cannot be justified in law or on the basis of the evidence. In my view, the claimants here have not shown any entitlement to be paid compensation on account of any effects resulting from the Commissioner's December 2012 Merit list.

22. In **Larry Marshall and Others v The Deputy Governor of Bermuda and Others** [2010] UKPC 9 Lord Phillips at para 29 had this to say concerning a claimant's obligation to provide evidence in support of his or her claim in public law cases:

“29. Each of the cases in which Lord Donaldson made these statements involved a decision taken by a public authority that related to and adversely affected an individual. Care must be taken when applying Lord Donaldson's statements to judicial review proceedings in relation to acts of public authorities that do not involve any exercise of discretion. Furthermore those statements apply to the situation where it is not possible for the court to assess the merits of an issue that has been raised unless the public authority against whom the claim is brought furnishes the court with

information which it alone is in a position to provide. They should not be relied upon to transfer to the respondent the onus of proving matters which a claimant is under a duty and in a position to prove.”

23. Further, in **Romauld James v The Attorney General of Trinidad and Tobago [2010] UKPC 23** Lord Kerr at paragraph 22 said in relation to errors made regarding an exemption granted regarding promotion:

“22. It is an interesting and – for reasons that will appear – relevant aspect of this case that the right which the appellant has asserted is not one which, absent the erroneous grant of the exemption to other officers, would have been available to him. He has been treated unequally only because others have been treated better than he (and better than they ought to have been) due to an administrative error. If the rules had been properly applied to all, neither the appellant nor those to whom he has compared himself in order to demonstrate unequal treatment would have received the exemption.”

24. These two extracts are especially relevant to this case. The claimants have to prove they were wronged. Some of them were in terms of their placement on the first Merit List. Some were not. They must also show that they suffered injury for which an award of compensation is justifiable. This, in my respectful view, they have not shown. None of them would have been in the top 51 to be promoted in December 2012.

25. The court must also act consistently. In the Wendell Lucas claim, where 18 claimants were concerned, the court declined to award compensation. Some of the claimants in that claim would have been better placed than these claimants to receive compensation.

26. A specific claim of these applicants, and for which the court is sympathetic but can offer no additional relief, is that they complain that officers who were wrongly promoted in December 2012 got priority over them to be promoted ahead of them to the next rank of

Assistant Superintendent of Police. Thus, if those officers were allowed to take part in the promotions assessment for Assistant Superintendent of Police these claimants and many of their colleagues would then have been twice wronged.

27. The court's solution to that problem was to grant interim relief in the form of an injunction to stop all officers promoted on December 20, 2012 and thereafter from Sergeant to Inspector from taking part in the assessment process until completion of these matters. While not a perfect solution, it would have gone some way to allow promotions to take place in accordance with the December 2013/May 2014 Merit Lists from Sergeant to Inspector. Those who were then promoted could compete with those for the ASP assessment along with all those promoted on 20 December 2012 and following. Of course, this would have also affected those who were rightly promoted in December 2012. As indicated this did not pose a perfect solution. Hopefully, however, all officers promoted on or after 20 December 2012 will now be in a position to compete on an equal footing for the higher rank of ASP.
  
28. For completeness, and without in any way being disrespectful in relation to the submissions of the defendant on the procedural matters raised, I do not think it is necessary in these circumstances to address them. My decision on the substantive issues sufficiently disposes of these claims.
  
29. It goes without saying that promotions affect all persons who aspire to hold a higher position. Those who are promoted must feel they were rightly promoted and those who were not must feel there was a fair, open and transparent process. There can be no substitute for a merit based system which is fair, open and transparent.

30. These claims have taken some time to be finally determined. The court was always prepared to give priority to the hearing of these claims. For various reasons advanced by all sides the matter proceeded slower than expected. Nonetheless it is hoped that all of the interested parties appreciate better now the value of appropriate consultation and reform to ensure a proper system for assessment is followed in future if only to avoid the disappointment and anguish that many police officers must have felt by what took place. The court is also mindful that the situation would have caused some discomfort among colleagues given that some felt they ought to have been promoted ahead of some who were. Again, however, the relief the court has previously granted is all that can realistically be given.

31. These 5 claims are accordingly dismissed. The injunction previously granted in the Mathew Andrews claim which prevented promotions from the holding of assessments from Inspector to Assistant Superintendent of Police is discharged immediately. In my view, sufficient time has passed to allow as many promotions as possible from Sergeant to Inspector to be made in accordance with the December 2013/ May 2014 Revised Merit Lists to allow assessments for the next rank to now proceed.

32. In accordance with the submissions on costs, the claimants are entitled to their costs of the claim up to the 12 June 2014 to be assessed in default of agreement by a Registrar. This was the date on which the position was made clear by the filing of the Commissioner's affidavit in these matters. After that date it ought to have become clear that these claims ought not to be advanced further. I do not propose to make any costs order in favour of the defendants after that date of 12 June 2014. The defendants had the option of asking the court at that stage to dispose of the claims.

33. In any event, the hearing and determination of these issues, has hopefully added clarity to all the matters arising from the December 2012 Merit List. It is the court's hope that this

will bring closure to the issue even though the claimants have not gotten exactly what they would have wanted from their claims. Each party will bear their own costs incurred after 12 June 2014. I must record thanks, in particular, to Mr Ramdeen for his helpful oral submissions in the circumstances where Mr Jairam SC was unavailable on the date of the trial.

Ronnie Boodoosingh

Judge