

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2018 – 00848

Between

JUNE ALVAREZ

Claimant

And

THE COMMISSIONER OF POLICE

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Kenneth Thompson for the Claimant

Ms Nadine Nabbie and Mr Andre Cole instructed by Ms Savi Ramhit for the
Defendant

Date: 21 November 2018

JUDGMENT

1. The claimant is a police officer of the rank of Corporal. She was promoted to this rank in April 2010. There were many vacancies to the next rank of Sergeant in 2015. The claimant, along with others of her rank, were invited to apply. She, however, had been on periods of sick and injury leave resulting from falls from horses which she sustained as a mounted police officer. She was therefore injured in the course of her duties.
2. Having undergone the process for promotion, including assessments and an interview, she was placed on an Order of Merit List at number 408. She was later moved down the list in 2017 to No. 453 after a court matter pushed certain other police officers higher up. By an Order dated 22 April 2016 the Commissioner of Police (the Commissioner) promoted 462 Corporals to the rank of Sergeant. These included persons below her on the Merit List. She was given no reason for this. She asked for reasons. She was not given any. In 2017 she filed a claim for judicial review to be provided with reasons. The claim was fixed for hearing on 15 December 2017. By letter of 14 December 2017 reasons were given. The reason given was that to be promoted an officer had to be qualified for promotion and fit and available for the performance of duty. Since she had been on sick leave she was not fit and available for promotion.
3. The claimant filed her claim for judicial review. She says the Commissioner's decision was unreasonable and contrary to law. She had a legitimate expectation to be promoted in keeping with the Order of Merit List because

she was called for an interview. She said she was denied equality of treatment because another police officer, PC Gomes, had been promoted in 2010 while on injury leave and she was not fit and available for promotion then.

4. In her evidence she also noted that other police officers on pre-retirement leave had been promoted in the past. Thus, those persons were not available for duty even if they may have been fit.

5. The claimant's contention is that there is a process by which promotions are made. These are set out in Regulation 20 of the **Police Service Regulations 2007**. In the case of **Lovell Romain v The Police Service Commission [2014] UKPC 32** it was held that the Regulations were meant to provide a self-contained, comprehensive code governing promotions within the police service. The Commissioner cannot therefore rely on any practice or policy outside of that Code to deny promotion to someone on the Order of Merit List. Further, the Commissioner has not even pointed to any written policy on this. As far as the claimant is therefore concerned, this rationale comes out of a hat.

6. It seems settled that in the past promotions have been made in accordance with the Merit List published as a Departmental Order from time to time. This list is valid for 12 months but can be extended by the Commissioner. A person not promoted within the time that the list is valid must do over the process the next time promotions are being made. All of this is included in the Regulations.

7. The Commissioner's main response is to rely on the claimant not being fit and available for promotion given the fact that she has been on extensive injury leave. The argument is that while she is on the Merit List, she can only be promoted when she is fit and available for duty.

8. The defendant points to **Regulation 21** of the **Police Service Regulations 2007** which provides that an officer who is promoted is to serve a 12 month probationary period in the office to which she is promoted.

9. This Regulation states:

21. (1) An officer who is promoted to an office shall serve a probationary period of twelve months in the office to which he is promoted.

(2) Where an officer is promoted to an office in which he has performed the duties, whether in an acting or temporary capacity, for a period of equal or longer duration than the prescribed period of probation, immediately preceding the promotion, the officer shall not be required to serve the probationary period.

(3) Where an officer is promoted to an office in which immediately preceding the promotion he has acted for a period less than twelve months, the period of acting service shall be offset against the prescribed period of probation.

(4) Where an officer is promoted before he has completed the period of probation in his former office, the unserved portion of that period

of probation shall be waived and the officer is deemed to have been confirmed in that appointment.

10. Since the claimant cannot be put on probation, the defendant says she cannot be promoted. They further rely on the decision of M. Mohammed J in **Burnell Lloyd v The Commissioner of Police CV 2017 – 03332** where this conclusion seems to have been arrived at.

11. The **Police Service Regulations 2007** does provide a comprehensive code to govern promotions. As indicated in **Lovell**, following the Code is part of having a level and fair playing field.

12. The real issue is whether the position adopted by the Commissioner can be seen to be unreasonable in all of the circumstances. The Regulations for one do not contain any such restriction on promotions. The words “fit and available” are not used in the Regulations. This therefore is a formulation outside of the ambit of the Regulations. The Regulations provide for an Order of Merit List. It is accepted that save in certain cases promotions are made in keeping with this list.

13. One notable reservation is that police officers who are suspended having been charged with a criminal offence or who are on disciplinary charges, apparently, would not be promoted while those charges are pending. An injury received in the course of duty is, however, not a like circumstance. These two circumstances are of a fundamentally different nature. Even the nature of the

disciplinary charge may make a difference depending on the relative seriousness. Such a blanket policy may cause unfairness. This is especially so because of the length of time it may take to deal with some charges.

14. Being thrown off a horse is a real risk for a mounted police officer. Other substantial risks for a police officer include being shot while in the course of duty. A traffic police officer may be knocked down while directing traffic at a busy intersection or a school. A selfless police officer may find herself being shot or injured while defending a child or while pursuing a suspect. It would seem at very least unreasonable that such a police officer, who risks her life to defend a child and is shot and injured, could be denied a meritorious promotion on the basis that she was unfit and unavailable to take up duty.

15. An enlightened approach may allow an injured police officer to be trained and to serve in a different capacity such as investigating fraud cases from a desk or monitoring phone conversations under a judicial warrant. Potentially a highly trained and intelligent police officer may be able, notwithstanding a work related injury, to rise to the position of Police Commissioner. A police officer who becomes disabled in the course of duty should not be denied promotional opportunities once she can continue doing some aspect of police work. An injured police officer should not necessarily be denied their ranking in relation to other police officers through work injuries. Further she should not have to go over the promotion process after the Merit List expires. That is a substantial adverse consequence of this unwritten practice.

16. It is well known in the public service that there is a distinction between receiving an appointment and assuming duty. A person can be appointed to a position but she may not be in a position to assume duty immediately. Similarly a person may be promoted but unable to assume duty immediately.

17. A person on duty may also receive certain types of remuneration, such as a travelling allowance, that someone who is not on duty may not receive. There are therefore certain aspects of income that such a person can reasonably not be paid. Again, this does not negate whether the person can be promoted but relates to what remuneration they can properly receive.

18. The nub of the defendant's argument appears to be that the claimant would be unable to serve her probationary period. Of significance this was not included in the reasons given to her for non-promotion. Nonetheless it is a real issue since the claimant cannot begin this period until she reports for duty.

19. First, promotion is different from probation. The promotion comes first, then the probation. During this period of probation the decision to promote can conceivably be revoked if there has been some egregious breach of duty. It does not change the fact that the person has in fact been promoted. Put another way the promotion is confirmed after the successful completion of probation after a performance appraisal is supposed to be done. The officer is then confirmed as of the date of her appointment.

20. Second, what happens if, for example, a person is promoted and then is injured or falls ill during the period of the probation and cannot complete it? Logically, what this means is that the officer cannot be confirmed in the position. This does not affect the date or the fact of promotion having taken place on the date of appointment.
21. Third, there is evidence from the claimant, which has not been refuted, that persons on vacation and pre-retirement leave have been promoted. If they are on leave this suggests they are not available immediately for duty unless called out in an emergency. But, moreover, such persons will not be able to serve the probationary period. This does not, however, take away from their being promoted.
22. Thus, there are different circumstances which show that the completion of the probationary period does not affect the prior fact of promotion. The suggestion of the defendant is that vacation leave is earned and therefore different from a promotion. A promotion is earned by past work and successful completion of the required assessments and being qualified. Probation is a consequence of promotion, not a condition.
23. The claimant satisfied all of the criteria set out in the Police Service Regulations and was able to satisfactorily complete the entire process to be ranked on the Merit List. There was no suggestion throughout this process that the claimant would not be considered suitable for promotion.

24. I note in the affidavit of Mr Clint Arthur on behalf of the defendant that he says at paragraph 24 that there is a practice that promotion is based on an officer being fit and available for the performance of duty. However, what is not stated include: when this practice started, how it started, by whom it was started, what record there is of this practice, how many times it has been applied, have there been exceptions, whether officers are informed of this practice. This really is too vague an assertion to be given any proper credence. Before the court can even approach the issue of an add on to the Regulations a requirement not contained in a “self-contained code” there must be a clear conclusion that a practice of the type called in aid by the Commissioner is actually established, well known and reasonable. No such conclusion can be drawn here as the existence of the practice has not been established. Such cannot be established by an assertion, without evidence, that it exists. That is the height of arbitrariness. The defendant is seeking to rely on a practice that is not part of the comprehensive code but provides no evidence of material facts that could prove the existence of such a practice.

25. There is also no specific denial by the defendant that PC Gomes was not promoted while on injury leave. Her letter of promotion was made effective on a date during which time she was on leave. There was also an assertion that she was on a much shorter period of leave. That is not relevant to the question of whether she was promoted. The position taken with the claimant can be seen to be unreasonable in light of this as well.

26. The evidence does suggest that the claimant has spent a considerable time off the job. She was allowed to pursue educational courses. She has been on sick and injury leave. All of these have, however, been sanctioned by the

Commissioner. These matters, therefore, cannot be held against her. These probably were matters which ought to have been considered during the promotion process. Notwithstanding these matters, she was still considered suitable to be ranked at the position she was.

27. I also note that in the defendant's affidavit it was accepted that a person on sick leave or injury leave or when suspended is paid their substantive salary. The only difference therefore with a person who is promoted is the denial of the increased salary consistent with the new position while that person remains on leave. If the person is being paid the existing salary there is nothing in principle which prevents the new salary being paid. I return to my example of someone who is injured after promotion but while the probation period is subsisting. Such a person will not revert to the salary in the previous post held, but would be paid the new salary that obtained after promotion. That person would however be on the same categorisation of injury leave. But two regimes would apply because one was on duty on the date promotions were made. That does not appear to me to be right.

28. To the extent that this analysis puts me at odds with the learned Judge in the Lloyd case I would respectfully have to disagree with the decision there.

29. In light of there being no provision in the Regulations stating that a person on injury or sick leave cannot be promoted and for the other reasons set out above, I conclude that the Commissioner's failure to promote the claimant in this instance can be seen to be unreasonable in the Wednesbury sense.

30. It is unnecessary to consider in detail the legitimate expectation point which has been raised. However, I would comment that the fact that the claimant was invited to apply and was called to an interview did not give her an expectation within the law that she would be promoted. It did however give her an expectation that she would be considered for promotion in a fair process that was not arbitrary. The evidence is that she was considered and in fact ranked on the Merit List. Having been ranked she was entitled to expect that she would be promoted once there were vacancies except for a reason which was reasonable in all the circumstances. The fact that she was on injury leave was not reasonable in these circumstances.

31. The claimant has sustained a loss of income from the date when the promotion was due. As indicated before, she is being paid her salary as a Corporal of Police. The only real difference between her present position and her position if she had been promoted is that there would have been a difference in salary. Put another way, if because of the length of her time away from work she was now reduced to half pay or no pay, then what she would have been entitled to is half pay or no pay in the promoted position.

32. Before ending there is one matter raised which bears some comment. It was submitted by the defendant that there was no duty to give reasons to the claimant for her non-promotion. The claimant as indicated above was placed on a Merit List. Persons below her were promoted ahead of her. While it is true as contended by the defendant that the **Police Service Regulations** does not provide for the giving of reasons that is not the end of the matter. Most pieces of legislation or regulations will not specifically provide for the giving of reasons. The duty to give reasons has been developed over time in the case

law and has been codified in the **Judicial Review Act**. The duty to give reasons stands as an independent obligation separate from the Regulations.

33. Section 16 of the **Judicial Review Act, Chapter 7:08** states:

16. (1) Where a person is adversely affected by a decision to which this Act applies, he may request from the decision-maker a statement of the reasons for the decision.

(2) Where a person makes a request under subsection (1), he shall make the request—

(a) on the date of the giving of the decision or of the notification to him thereof; or

(b) within twenty-eight clear days after that date, whichever is later, and in writing.

(3) Where the decision-maker fails to comply with a request under subsection (1), the Court may, upon granting leave under section 5 or 6, make an order to compel such compliance upon such terms and conditions as it thinks just.

34. The decision not to promote the claimant, who was placed higher than persons who were promoted, must be seen to be a decision which adversely affected her. In addition, it called for an explanation. The fact that a reason was given on the day before the trial of her judicial review claim (albeit over a year and a half later) to be given reasons for the decision was also a tacit acknowledgement of both the fairness and reasonableness of her being provided with reasons for being bypassed.

35. Gone are the days where public functionaries and bodies can simply make decisions affecting the rights of citizens and remain silent when called upon to account. The instances in the law where there is an express ouster of the need for giving reasons are few and far apart and, where they exist, they are construed in a narrow way to limit the extent of the ouster. This was an apt case that the claimant ought to have been provided promptly with a clear statement of the reasons the Commissioner had for not promoting her. If the Commissioner was bypassing her, he must have known why that was so. And he ought to have been able to say what the reason was. Either the reasons would stand up to scrutiny and justify the decision or not.
36. Decision makers must also not be afraid to provide reasons for their decisions. This allows persons affected to scrutinise them and to decide if they would be motivated to challenge the decision. That is their legal right. At very least, it allows them to appreciate that the decision was not arbitrary or discriminatory but was made in good faith following a defined and transparent process. This is especially important in a country like ours where suspicions and perceptions of favoured treatment abound.
37. These reasons need not themselves be “elaborate or lengthy”. They should tell the person in broad terms why the decision was reached: see **Stefan v General Medical Council [1999] 1 WLR 1293 per Lord Clyde at 1303 G**. In cases like this a few sentences may suffice to give the explanation. The giving of reasons is an indispensable component of a transparent and fair process especially when a person is adversely affected by a decision.
38. In light of my decision in the judicial review aspect of this claim, I considered it not necessary to consider whether there was a breach of the equality of

treatment provision of section 4 (d) of the Constitution. However, the claimant can be said to have been treated differently from an officer who was promoted while on injury leave.

39. I find that there was no breach of the protection of law clause in section 4 (b) of the Constitution. The claimant has not in any way been denied the protection of the law.

40. The order I make is as follows. The decision of the Commissioner of Police communicated to the claimant by letter of 14 December 2017 to not promote the claimant to the rank of Sergeant of the Trinidad and Tobago Police Service on the ground that the claimant was not fit and available for the performance of duty was unreasonable in all of the circumstances.

41. This matter is remitted to the Commissioner of Police to promote the claimant to the rank of Sergeant of Police effective 22 April 2016.

42. The claimant is to be paid as monetary compensation the difference between the salary of a Corporal of Police and a Sergeant of Police less statutory deductions and allowances payable to a serving police officer on duty for the period 22 April 2016 to the date of her promotion.

43. A consequence of this decision may be the need to look at the probation requirement where a police officer who is on injury leave finds herself unable to complete the probation period and therefore be confirmed in the position before retirement or being medically boarded. The probation period can be waived in certain circumstances under the present Regulations. No evidence was put before me as to what takes place during the probation period and

what this entails. There was no evidence put forward as to what defaults or deficiencies would prevent a person on probation being confirmed. However, a person who has a work related injury which prevents him or her from resuming duty may be deserving of special consideration as to a waiver. This would at least allow persons who are unable to resume duty to be confirmed in whatever position they had been promoted into during the time of their injury or sick leave. The key point is that if, notwithstanding their injury or illness, the promotion process deems them suitable for promotion and places them on a spot on the Merit List where they can be promoted, they should not be disadvantaged as a consequence of that illness or work related injury.

44. The defendant must pay the costs of this claim to be assessed by application to the Registrar in default of agreement.

Ronnie Boodoosingh

Judge