

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-4868

BETWEEN

**IN THE MATTER OF AN APPLICATION BY GARVIN ALI
PRISON OFFICER I #2326
FOR JUDICIAL REVIEW UNDER PART 56 OF THE CIVIL
PROCEEDING RULES (1998) AND THE JUDICIAL REVIEW ACT 2000**

AND

**IN THE MATTER OF THE ASSESSMENT FOR PROMOTIONS
AND PROMOTIONS OF PRISON OFFICER I TO THE RANK OF PRISONS
OFFICER II (GRADE 2) PRISON SERVICE MADE IN APRIL 2013,
MARCH 2014 AND SEPTEMBER 2014**

BETWEEN

GARVIN ALI

Claimant

AND

**PUBLIC SERVICE COMMISSION
MR. CONRAD BARROW**

1st Defendant

2nd Defendant

Before the Hon. Madam Justice C. Gobin

Appearances:

Mr. M. Seepersad instructed by Mr. T. Davis for the Claimants
Mr. R. Martineau (S.C.) leads Ms. A. Ramsaran, Ms. K. Chai Hong Lai
instructed by Ms. Ramsook for the 1st Defendant
Ms. A. Alleyne for the 2nd Defendant

JUDGMENT

1. This case arises from the non-promotion of the applicant, Prisons Officer, Garvin Ali in the first promotion exercise of the Public Service Commission (PSC) under a new points based system. It began sometime about October 18, 2011 and culminated in the promotion of 180 Prisons Officers I to the post of Prison Officer

II about May 15th 2013. The second named Defendant is the Commissioner of Prisons (COP).

2. The power to appoint or promote Prisons Officers in the Trinidad and Tobago Prison Service is conferred in the PSC by Section 121 of the constitution. Within the PSC regulations is regulation 172 which sets out the criteria for consideration by the PSC of the eligibility of Prison Officers for promotion. Further, regulation 168 of the regulations places a duty on the COP to take into account the criteria listed under regulation 172 when considering officers for promotion.
3. The new points system essentially incorporated and recognised all the factors identified in the regulations. It came about after consultation between the PSC and the Prisons Officers Association (Second Division). In an affidavit filed on behalf of the PSC, Ms. Farya Mohammed-Basdaye, Human Resource Advisor, set out the background to the introduction and implementation of it.
4. At a meeting held on 15th June 2010, the PSC met with the President and members of the claimant's Association (Second Division) to solicit their views with respect to the implementation of the new system for the promotion. Following this meeting, the COP and later the Director of Personnel Administration ("DPA") conducted a series of further meetings with the executive of the Association for over a period of more than two years. As part of this exercise the PSC, at the request of the executive of the representative Association, agreed that the DPA and Senior Staff from the Service Commissions Department would conduct a three (3) day

consultative workshop at the Prisons Training Centre, Tumpuna Road, Arima, with all prisons officers from the Second Division.

5. The workshop was held over the period July 27th to July 29th, 2011 and was attended by 757 Prisons Officers as well as their representatives. At the conclusion of the workshop, the Prisons Officers (Second Division) through their representatives agreed to the implementation of the new system. The new system was thereafter established and the details of it were published and made operative by General Order 82 of 2011. **The order specifically stated that all officers who scored 60 points or more in the points based assessment would be “considered for promotion”.**

The factual background to the application

6. The applicant is a Prisons Officer I and has been in the service for a over twenty-four (24) years. He fell to be assessed for promotion under the new system. Following the assessment Mr. Ali was notified first by letter dated 20th January 2012 that he was successful, having attained a score of eighty-six (86) points. This score exceeded the cut off mark of 60 points. He was further informed that he had placed 492nd on the Order of Merit List (OML) which was valid for two years. The letter also informed the Claimant that there were seventy-one (71) vacant Prisons Officer II offices to be filled and that he would be recommended for promotion on the basis of his position on the OML and the availability of vacancies. A copy of the claimant’s evaluation scores for each category was attached to the letter.

7. The claimant was not happy with his scores. He eventually filed these proceedings.

Counsel Mr. Seepersad indicated the grounds of his complaint in the application:

Central Point of the Applicant's Challenge

The central point of the challenge is that the Order of Merit List (herein after referred to as "OML") is inaccurate as the assessment of the Applicant was flawed for the following reasons:

- i) There has been no special consideration afforded to the Applicant in relation to his sick leave in accordance with the special dispensation for sick leave as a result of injury which was detailed in General Order 82 of 2011 which established the points based system for promotion.
- ii) There has been no consideration afforded to the Applicant under the category "Number of Years in the Service" for the period that he spent as an Auxiliary Officer and which said consideration was afforded to Bryan Lewis a Prison Officer similarly circumstanced as the Applicant. Mr. Lewis was initially assessed for the post of Prisons Officer II and was awarded 93 points out of a possible total of 105 points. Under the category "Number of Years in the Service" he was awarded 12 points. As a result, Mr. Lewis made representation to the Director of Personnel Administration by way of letter dated the 29th day of October 2012, wherein he communicated to them their oversight as the Assessment Team had failed to consider the number of years that he worked as an Auxiliary Officer before being appointed to the post of Prisons Officer I. His representations were considered and he was awarded the additional three (3) points as his combined years of service amounted to over twenty (20) years.

8. What this indicates is that what was at the heart of the claimant's case was the award of points under the two categories identified. If he was concerned with them then, he did nothing. By further letters dated September 2012 and May 2013, the

claimant was notified that he had slipped on the OML. He was again sent his assessment scores including those awarded for Fitness (sick leave) and Seniority. They remained the same. Again, if he took issue with them, the Claimant took no steps to have the scores revisited. He did not protest. He did not inform the Defendants by way of letter or otherwise that he intended to challenge the award of points.

9. It was open to the Claimant, as soon as he was notified of his score to ask for a reassessment on the basis of the failure on the part of the COP to award him the points to which he felt he was entitled, or to seek judicial review of the award. This application for leave for judicial review was eventually filed on 24th December 2014. Several explanations were proffered for the failure to take more timely action and for the delay in bringing the leave application. Some had to do with inaction on the part of former attorneys. What is clear though is that in his pre-action letter of the 20th day of June, 2013 the Claimant's Counsel was warning of intended litigation on the matter.

10. Not surprisingly, both Defendants opposed initially, the grant of leave and then relief, on the ground of delay. Given what in essence is the complaint, the final notification of his scores and placement having been received by the claimant on 12th September 2013 – the Defendants submitted that this application is woefully out of time. To fortify their objections they pointed out during the pendency of these proceedings, indeed well before they were filed, there have been promotions within the service, persons have moved up and assumed office following the exercise. More recently, they indicated that the OML which was valid for two years

has now lapsed, possibly rendering this matter academic. They claimed that relief should be denied in any case because of the potential effect of it on good administration, having regard to what has transpired in the service since the decision.

11. On the other hand Counsel for the claimant has argued with much tenacity that the issue of delay does not even arise. Mr. Seepersad's contention is that the COP has not so far complied with the process envisaged under S 168 of the regulations. In the circumstances, until he complies and takes all the steps mandated by the regulations, any complaint of delay is premature.
12. Mr. Seepersad contends that sub-section (2) contemplates the preparation of two lists which the COP must prepare and submit to the PSC. Since there is no evidence that the two lists have been prepared, then that process has not yet been invoked. Letters such as those the claimant received informing him that he "will be recommended for promotion" mean nothing if the COP has not begun the process by actually preparing the lists.
13. Mr. Seepersad further argued that without being notified as to which of the lists he belonged, the Claimant would not have been informed as to whether he was or was not being "considered for promotion", and regulation 168 SS (3) and (4) would not have been triggered. It would follow then that the claimant would not know whether he could avail himself of the process to make representations under 168 (4). It was only when the process was started with the lists, that the Claimant could have availed himself of the protection of reg. 168 (2) (b) and consequently of the

opportunity to be heard. In the circumstances, there could have been no start to the “running of time” for judicial review.

14. In further answer to the question as to why he did not file proceedings at an earlier date, the Claimant sought to justify his neglect or reluctance to do so. He anticipated that there would be an objection in line with his argument that the procedure provided by the regulations had not even been invoked, no lists had yet been prepared, any representations he might need to make had not yet been invited, any legal challenge would be premature.

15. Before the Court of Appeal in *Procedural Appeal 052 of 2015 Emmerson Sam v. PSC and COP* Mr. Seepersad advanced the same argument. It was a case which arose in similar circumstances. Statements made by members of the panel during the hearing indicated the thinking, but they were made obiter. That appeal concerned the refusal of leave by the first instance Court on the ground of delay. In these proceedings, out of deference to Mr. Seepersad’s industry and the intensity of the passion with which he presented his argument, I went on to consider the point on the **regulation 168** procedure.

16. **Regulation 168** provides: -

168. (1) (a) A prison officer may apply to the Commission to be allowed to take the Promotion Examination for Prison Officer II when he has been in the Service for at least two years.

(b) A prison officer in a grade lower than that of Prison Assistant Superintendent who was passed an Examination for Promotion to Prison Officer II may apply to

the Commission to be allowed to take any promotion examination.

(c) A prison officer who is successful in a promotion examination may be considered for promotion in accordance with this regulation.

(2) The Commissioner of Prisons shall, after taking into account the criteria (specified in regulation 172), submit to the Commission a list of the Officers in the Second Division—

(a) whom he considers suitable for promotion to an office; and

(b) who are not being considered for promotion yet but who have served in the Service for a longer period in an office, or who have more experience in performing the duties of that office than the officers being recommended.

(3) The Commissioner shall also advise those officers referred to in subregulation 2 (b) of their omission from the list for promotion, together with the reasons for such omission.

(4) An officer who is advised under subregulation 2 (b) may make representations on his own behalf to the Commission within fourteen days of being so advised and the Commission may invite him for interview on the basis of his representations.

(5) The Commission shall advise those officers making representations under this regulation of the outcome of their representations.

(6) The Commission may, after considering all the representations made, endorse or otherwise, the recommendations of the Commissioner when promoting an officer.

17. I considered the regulations against the history of Order 82, and the objective of the introduction of the points system in the promotion exercise. The Claimant's submission was premised on an interpretation of regulation 168 (2) which limited

the means of the discharge of the obligation of the COP to the preparation of two physical lists of persons considered for promotion and persons not so considered. There may have been some merit in this submission prior to the implementation of the new system. But Order 82 was clear. It expressly fixed a cut-off mark of 60 on the assessment scores. It was clearly communicated to all concerned including the Claimant, at least through his representatives. The fixing of a cut-off mark would have clearly identified which candidates of a pool numbering more than a thousand persons, would be “eligible for consideration for promotion” and which would not. In the circumstances, it cannot avail the claimant to suggest that the “listing process” has not been invoked.

18. All persons such as the Claimant whose score exceeded the 60 mark would have been included in the list or category contemplated by regulation 168 (2) (1). In the absence of a complaint that that cut off mark is arbitrary or that the scheme under Order 82 does not properly apply the criteria set out under S 172 of the regulations, or is unlawful for some other reason, it seems to be that by notifying the Claimant of his mark, the COP effectively discharged his legal obligation. The regulations require only that he indicate which officers would be “considered for promotion”. It does not require anything more. Specifically there is no obligation to recommend for promotion outside of the tallying of scores. A dispute about the marks awarded to any officer who scored at least 60 marks and who is aiming for upward movement in his mark would not change the category into which he falls under regulation 168 (2).

19. As to his claim that he was entitled to make representations, the Claimant clearly did not fall under regulation 168 (2) (b) for the very reason that his score exceeded 60 marks. Documents produced in evidence showed those scoring above 70 as numbered 900. The number of vacancies was limited to 180. The letters sent to the claimant indicated that he would be promoted on the basis of his placement on the OML and the availability of a vacancy. There is nothing more that the COP was required to do after the assessment exercise. To read into the words which appeared in his notification letters that “he would be recommended for promotion” and “that there would be further communication” as indicating some further process or additional assessment, is stretching it. The claimant was entitled to no more.
20. The claimant’s score of 86 had been first communicated by letter dated January 2012. As I have said, on doing so the COP effectively discharged his obligation under regulation 168 (2) (A). For the purpose of the running of time, for judicial review I find that time began to run from January 2012. Two subsequent letters did not change the position, but in any case by the date of the claimant’s pre-action letter dated 20th January 2013 it would have been clear to the claimant that he needed to file proceedings. By any count this application was woefully out of time, and the reliefs claimed by the claimant are refused.
21. On the issue of costs I will order the claimant to pay 40% the Defendants’ costs and no more only because I believe that what encouraged these proceedings is the lack of uniformity in the wording of letters of the COP to officers who had actually achieved above 60 marks. This in turn caused uncertainty about the policy regarding representations.

22. So for example the COP's letter to #1697 Officer Gedeon Mahabir dated 9th January 2012 placed him at No. 201 with a score of 92. He was nevertheless invited to make representations within 14 days of receipt of it. If Order 82 of 2011 had been properly applied, as it was intended, Mr. Ali who had attained a score well over the cut off mark to be considered for promotion would not have been invited to make representations. There were other officers, similarly circumstanced, who likewise received invitations to make representations. This inconsistency of approach would inevitably have led to some measure of confusion in the minds of officers such as the claimant and indeed Counsel.

23. The situation was not helped by the statements made in an affidavit filed by Acting Permanent Secretary, Ingrid Seerattan in the response to an application filed under the Freedom of Information Act filed in Civil No. 03161 of 2013 by Officer Gedeon Mahabir. The relevant paragraphs (8) and (9) are set out :-

- (a) In respect of paragraph 21 of my affidavit of January 31, 2014:
- **(i) Please indicate when the Commissioner of Prisons made recommendations under Regulation 168(2)** in respect of the promotions decided upon by the Public Service Commission whereby officers at numbers 1 to 180 on the 2013 Order of Merit List were promoted; **(ii)** in respect of the recommendations of the said Commissioner of Prisons, please state whether the Claimant's name appears within those recommendations of the Commissioner of Prisons; **(iii) Please indicate the date upon which the Commission made the decision to fill 180 vacancies instead of the 79 vacancies** as mentioned in the letter from the Commissioner of Prisons dated

14th September, 2012 which is exhibited at “GM3” in the Claimant’s principal affidavit filed 31st July, 2013. **Please provide the relevant (minutes of the meeting) of the Commission redacted as necessary.**

(b) **The Commissioner of Prisons never made recommendations. The Commissioner of Prisons had not done so for years resulting in disharmony and distrust in the Second Division** so that the Commission requested him to supply a list of vacancies which he did and the Commission sought to fill by promoting a first batch and left the Commissioner of Prisons to promote the others pursuant to his delegated authority.

24. This response could only have fuelled the argument that the COP had not discharged his responsibility. To compound it, part of the defence in these proceedings was that letters were sent inviting representations from the claimant to which he did not respond and Defendants also argued that the claimant was allowed to make representations via the pre-action letter of his Counsel. These positions which were so inconsistent with the clear wording of the regulations did not help to clear up the confusion.

Determination

25. The claimant's claim for judicial review is refused. The claimant is to pay 40% of the Defendants' costs to be assessed in default of agreement.

Dated this 8th day of August 2017

**CAROL GOBIN
JUDGE**