

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

In the San Fernando Sub-Registry

Claim No CV 2016-04405

Between

JOAN CHEE

Claimant

AND

THE STATUTORY AUTHORITIES SERVICE COMMISSION

Defendant

Before: Madam Justice Eleanor J. Donaldson-Honeywell

Appearances:

Mr. Anand Ramlogan SC, Ms. Jayanti Lutchmedial, Mr. Kent Samlal and Mr. Douglas Bayley
Attorneys-at-Law for the Claimant.

Mr. Duncan Byam, Ms. Karlene Seenath and Ms. Amrita Ramsook Attorneys-at-Law for the
Defendant.

Delivered on April 25, 2017

JUDGMENT

I. Introduction:

1. In the twilight of a career at the Port-of-Spain City Corporation (“the Corporation”) that spanned her adult lifetime, Joan Chee (“The Claimant”), now seeks judicial review of the Statutory Authorities Services Commission’s (“SASC”), October 3, 2016 decision to appoint another person, instead of her, to act as Personnel and Industrial Relations Officer III (‘PIRO III’). She had always looked to that position as the highest in her stream at the Corporation, having held the position of PIRO I and acted as PIRO III previously.

2. The person appointed to act in the position, instead of her, had neither acted as PIRO III before nor served in lower PIRO positions. The Claimant argues that the Defendant’s stance that she was junior in line to the person selected for the PIRO III position was erroneous. She further contends that her experience, qualifications and the recommendation of the CEO of the Corporation gave her a legitimate expectation that she would be appointed to act in the position of PIRO III that had become available. The decision of the SASC (“the Defendant”) is challenged as being irrational, unreasonable and unfair. The Claimant seeks among other relief to have the decision quashed and remitted by the Court to the Defendant for reconsideration.

3. The Defendant, immediately after making its 3rd October, 2016 decision, gave no reason to the Claimant for bypassing her. No information was forthcoming for some time thereafter despite written requests by her Attorneys pursuant to **the Freedom of Information Act, 1999** and the Pre-Action Protocol prescribed by the Practice Direction under the **Civil Proceedings Rules, 1998 (“CPR”)** as amended .

4. Eventually, in a November 30, 2016 response to the Pre-action protocol letter penned by Djallon Frederick, State Counsel II at the SASC, the Defendant sought to give a reason which was largely focussed on conceived seniority of the other person selected to act. The Defendant contended that although the other person selected had not worked as a PIRO she had relevant training and experience form working as an Administrative Officer II (“AO II”) and was senior to the Claimant in the general structure of the Corporation. From her

substantive position of AO II she had acted as Deputy CEO. Furthermore the Defendant said that there was an Administrative Assistant at the San Fernando City Corporation who was also senior to the Claimant and entitled to be considered for the Port-of-Spain position. That person however refused the acting appointment.

5. Heavy reliance was placed by the Defendant on the Judgment of Moosai JA in **CA No. 122 of 2008 SASC v Jacqueline Solomon-Sankar** as authority that persons from all streams and locations falling under the SASC and not just those in any one stream at the Corporation had to be considered based on seniority for the acting appointment.
6. Such as it was, the explanation given by the Defendant was not supported by documentary proof. In particular the Minutes of the Defendant recording the decision in the manner required by **Regulation 6 and 7 of the SASC Regulations, Chap 24:01** (“the Regulations”) was not disclosed until a few weeks before the date for delivery of Judgment herein. The document; Minutes of a December 13, 2016 meeting of the Defendant which took place long after the decision was made, recorded no reference to any consideration other than alleged seniority as having been taken into account.

II. Conclusion and Issues considered:

7. In all the circumstances of this case I have concluded that the Defendant’s decision erroneously failed to properly apply the regulations and in particular **Regulation 26(1) (a)** which prescribes the manner in which seniority in “the Department” should be treated with when making acting appointments. The decision was also made without taking into account relevant factors including the specialized experience of the Claimant as well as the recommendations made in her favour by the Corporation’s CEO. The Defendant acted irrationally and in breach of the Claimant’s legitimate expectation to be considered to act as PIRO III based not only on her seniority as the person next in line in the PIRO stream but on other relevant factors being properly weighed.
8. My reasons for so finding, as set out in detail hereafter, include my conclusion that the reliance by the Defendant on the case of **SASC v Solomon Sankar** was wholly misplaced.

The said authority in no way supports the actions of the Defendant as to the propriety of their decision making process that resulted in the appointment of another person to Act as PIRO III and not the Claimant.

9. In addition, the following issues were taken into account in my determination of this claim, namely:
 - Whether in making the decision to appoint Lystra Parke ahead of, the Claimant, the Defendant:
 - Either failed to consider or gave insufficient weight to relevant factors and considered irrelevant factors.
 - Was unreasonable/irrational.
 - Acted unfairly.
 - And if so, what is the appropriate relief to be granted in the circumstances of this case?
10. The evidence, law and analysis leading to my conclusions will be addressed after providing a brief summary of the factual background to the Claim.

III. Background:

11. The factual matrix of this Claim is largely not in dispute save as to what was considered in making the challenged decision. The facts are set out in the Affidavit evidence filed by both parties and the closing written submissions filed by the Claimant. The Defendant failed to comply with the Court's directions to file written closing submissions. The background to the Claim as summarised from the available documents starts with the Claimant's history of having worked for decades exclusively in Personnel, Industrial Relations and Human Resources at the Corporation.
12. In October 1, 2016, the Claimant commenced her current stint as AO II (Ag). It was the position she was appointed to when the former AO II office holder Lystra Parke took the acting position as PIRO III ahead of her. The Claimant has been employed by the Corporation for approximately thirty-eight years since 1978, holding the following

substantive positions in the PIRO stream, as shown on the Corporation's Organisational Chart:

- i. Clerk I on 1 January, 1980;
- ii. Clerk II on 16 October, 1995;
- iii. Clerk III on 29 September, 1999; and
- iv. PIRO I on 28 September, 2004.

13. She also held the following acting positions:

- i. Human Resource Officer (HRO) II from April, 2006 to 30 September, 2008;
- ii. HRO III from 1 October, 2008 to 30 June, 2014; and
- iii. PIRO III from 19 May, 2015 to 13 September, 2016.

14. The office of PIRO III became temporarily vacant in 2015 when the holder of the position commenced her pre-retirement leave. By circular dated 13th July, 2015 the Chief Executive Officer (Ag.) ("CEO") made recommendations to the Defendant that the vacancy should be filled by the Claimant, giving the following as reasons:

"1) Ms. Chee has been acting in the position of PIRO III with effect from the 19th May, 2015; and 2) Ms. Chee is the next most senior officer."

15. The Claimant's acting appointment was approved by the Defendant by memorandum dated the 24th August, 2015, taking effect from the 19th May, 2015 to the 31st December, 2015. Subsequently, on the 28th January, 2016 the Defendant, by memorandum, approved the Claimant to continue acting as PIRO III from the period 1st January, 2016 to the 30th June, 2016.

16. By memorandum dated 3rd August, 2016, the CEO of the Corporation wrote to the Defendant in relation to the filing of the position of acting PIRO III recommending the Claimant based on her experience in the position of PIRO I, which was her substantive position from the period 28th September, 2004 until her appointment to the office of acting PIRO III which took effect on the 19th May, 2015, a period of approximately ten years and

seven months. The Claimant also had a track record of excellence in her performance appraisals for work done when she had acted as PIRO III.

17. The CEO's recommendation was not followed. Instead, on the 30th September, 2016, there was verbal communication from the office of the Defendant to the CEO of the Corporation to the effect that the Claimant would now act in the position of AO II to accommodate Lystra Parke's acting appointment as PIRO III with effect from 3rd October, 2016.

Difference/Similarities between AO II and PIRO Positions:

18. An important subject addressed by both parties is the nature of the position Lystra Parke held substantively and in which the Claimant is now acting for her, namely AO II, as compared with PIRO III. The parties' contentions are different in this regard. The Claimant says the positions are from separate streams and the functions therein differ. As such the experience of Lystra Parke as AO II and acting CEO is not as relevant as her own experience as PIRO I to act as PIRO III.

19. It is the Claimant's argument that the role of the AO II differs vastly from that of a PIRO. Citing the job description for the PIRO III position, the Claimant states that the minimum experience and training required for the position of PIRO III is "***considerable experience in personnel management and/or industrial relations work***" and the kind of work is "highly responsible managerial work in the field of Personnel Administration and Industrial Relations". On an examination of the job descriptions the Claimant's submission as to difference is borne out as the job description for AO II does not include such specific specialized requirements of experience in the Personnel and Industrial Relations. Instead all that is required is "***Experience in Public Administration.***"

20. The positions of PIRO I and III, the Claimant therefore argues, are specialised and fall under a separate and distinct stream, the highest office of which is PIRO III. In support of this point the Claimant relies on the Organisational Chart of the Corporation which clearly shows the positions in separate streams. The Claimant submits that the position of AO II falls under another distinct stream, the highest offices of which are City Clerk and Deputy City Clerk.

21. The Claimant argues that Lystra Parke's previous acting position as Deputy CEO of the Corporation is more administrative in nature and does not make her either next in line or a suitable candidate for the PIRO III position. The Claimant claims that the Deputy CEO position in which Parke acted does not deal on a daily basis with industrial relations matters, as would be the case with the PIRO III position. Describing the functions of the PIRO III, the Claimant outlines at paragraph 29 of her primary Affidavit that meetings are held with the relevant union/bargaining units. These meetings that deal with industrial relations matters affecting approximately two thousand (2,000) daily paid workers and over four hundred (400) monthly paid workers are held strictly between the PIRO III and the various union representatives.
22. It is the Claimant's un-contradicted contention that these interactions apply to her PIRO functions. Thus, in addition to the job description, the actual functions, skills and responsibilities of the AO II stream headed by a CEO and the PIRO III position are not comparable. There is a distinct difference in their assigned tasks and areas of responsibility. The Claimant therefore contends, having been in the PIRO and HRO streams, she would have gained more experience dealing with the aforementioned tasks than Lystra Parke who gained experience in a different stream.
23. This position is not effectively refuted by the Defendant since the response of its witness, Utra Ali, at paragraph 34 of her Affidavit does not speak to actual comparable functions and experience of Lystra Parke as AO II or acting Deputy CEO. Instead a bald assertion is made that Lystra Parke has Personnel Management and Industrial Relations experience "*as required by the Job specifications.*"
24. As it relates to streams, the Defendant's witness Utra Ali, Executive Officer of the SASC, swore in her affidavit filed herein at paragraph 25 that "*the SASC does not have streams as there are insufficient offices.*" She says that both the AO II and PIRO III positions fall under the Administrative Class and as such require the same entry level Certificate in Public Administration. At paragraph 29 she sets out a table which, according to her, depicts the structure of the Authorities under the SASC.

25. In particular the table puts the position of AO II in the same column as CEO for the Port-of-Spain City Corporation with CEO as the top position followed by Deputy CEO, then PIRO III, then AO II and finally PIRO I/Administrative Assistant. This structure, as set out by the Defendant's witness with no supporting documentation as to its origin, is however, in contradistinction to the actual existing Organisational Chart of the Corporation.
26. According to Counsel for the Claimant this alternate structure was invented by the Defendant for purposes of this litigation without reference to the reality of the Corporation's operations. It is based on this alternate structure that the Defendant says that Lystra Parke, as AO II, was not only senior to the Claimant but entitled to consideration ahead of her for the acting PIRO III position.
27. I find in favour of the Claimant's contention that the PIRO and AO III positions are distinct, falling into separate streams at the Corporation. There are specialized requirements to be met for the PIRO III position and the lines of seniority for the positions are not intertwined in the manner envisaged by the Defendant.

Further Recommendations by the CEO:

28. By letter dated 1st October, 2016, the CEO of the Corporation again wrote to the Defendant advising that in order to act or be promoted to the position of PIRO III, an officer should have gained experience as a PIRO I or PIRO III and that priority should be given to the officer who held substantive appointments in the Personnel and Industrial Relations Department when an appointment arises. In the instant circumstances that would give the Claimant priority to act having been a PIRO I since 2004. The CEO further advised that the Claimant was the best suited for the position as compared to Lystra Parke and the CEO gave many reasons for this assessment.
29. Subsequently, by memorandum dated 3rd October, 2016, notwithstanding the recommendations of the CEO of the Corporation, the Defendant advised that the acting appointment as PIRO III of Lystra Parke, whose substantive position was AO II, was

approved consequent on the retirement of Jacinta Bostic. The memorandum said that the Claimant would, instead of her recommended PIRO III acting position, be placed to act as AO II.

30. The Claimant claims that the decision to appoint Lystra Parke ahead of her as the acting PIRO III was unfair and in breach of her legitimate expectation. Her claim is based on the following facts:

- i. She is the most senior in her stream having been appointed PIRO I on the 28th September, 2004;
- ii. She previously acted as PIRO III from the 19th May, 2015 to the 13th September, 2016;
- iii. Her performance appraisals during the time that she performed these acting duties were outstanding and excellent; and
- iv. There were strong and compelling recommendations from the Chief Executive Officer (“CEO”) of the Port-of-Spain City Corporation (“the Corporation”) for her to continue acting.

31. The Defendant claims, however, that it took into consideration all relevant factors, and in particular its claim that Lystra Parke is more senior to the Claimant. Further, the Defendant is adamant that, notwithstanding the recommendations of the CEO of the Corporation and the Claimant’s previous outstanding and excellent performance as acting PIRO III, it remains for the Defendant to determine who is best suited to act. The Defendant says they took all material considerations into account before deciding to bypass the Claimant in favour of Lystra Parke.

32. According to the Defendant’s CEO in her Affidavit at paragraph 31, the factors considered by the SASC included “*the qualifications and experience of both Officers*”. She did not, however, exhibit to her primary Affidavit, herein, any Minutes of the SASC relative to the decision that would show that such factors were considered. At paragraphs 3 and 4 of her Affidavit the CEO, explained her role as CEO to include having access to all files of the SASC in relation to decisions affecting the Claimant. She advises the SASC but there is

no indication in her Affidavit that she participates in its decision making. The Minutes later disclosed reflect however, that she was present with the SASC members at the SASC Meetings that record the challenged decision.

33. The Defendant admits that when the Claimant acted as PIRO III, her performance appraisals were “excellent” and “outstanding” and at no time was there any problem area identified or any corrective measure necessary. They claim, however, that the same applies to Lystra Parke in relation to her appraisals for AO II and acting CEO.

IV. Law and Analysis:

A. Inapplicability of Judgment in Sankar:

34. **Sankar** was a case in which the Judicial Review challenge arose from circumstances that were not on all fours with those giving rise to the present Claim. On the facts of **Sankar** the Claimant had requested and was eventually granted a transfer. **Sankar** is not an authority for the proposition advanced by the SASC in the instant case that it has a duty to consider all eligible officers from all statutory authorities whenever it has to make an acting appointment. The issue determined in **Sankar** was not that when making appointments, the SASC must consider all officers in all authorities. It was that when an officer is transferred, for whatever reason, the officer does not lose his or her seniority as a consequence.
35. In the Court of Appeal Judgment delivered by Moosai JA in **Sankar**, their Lordships held the following:

“It is therefore axiomatic that officers appointed to a statutory authority under the provisions of the Act belong to a service which is transferable. Accordingly, transfer is an incident of service and an officer, unless otherwise prohibited by the legislation, may be compulsorily transferred pursuant to the provisions of the Act. Clearly, the rationale for conferral of such powers on the SASC was that, given the diverse number of statutory authorities under its jurisdiction, it could have proved inimical to the proper functioning of the entire service if SASC were unable to

provide the manpower where, for example, administrative necessity or the exigencies of the service demanded same.”

36. It is therefore clear that the rationale of the decision in **Sankar** is that, upon transfer of an officer, their seniority would be preserved. It does not however provide authority and precedent for the proposition that when the Defendant is selecting an officer for acting appointment or promotion, that it must consider officers in all statutory authorities. The Defendant’s contention that it is mandated by the **Sankar** decision to consider persons from all statutory authorities for acting positions is misconstrued. It is not therefore correct that Lystra Parke and one Yvette Rousseau from the San Fernando City Corporation are senior to and had to be allowed to bypass the Claimant as the most senior officers eligible for appointment as PIRO III.

B. Relevant/Irrelevant Considerations:

37. In considering whether the decision of the Defendant in appointing Lystra Parke ahead of the Claimant was erroneous, account was taken in my final determination, herein, as to whether they:

- i. Considered irrelevant factors;
- ii. Failed to consider relevant factors; and
- iii. If they did consider those relevant factors, they attached too little weight to them.

These issues under the heading of relevance were determined based on an analysis of each of these considerations.

i. Irrelevant Factors:

38. On a proper application of **Regulation 26(1) (a)** seniority is clearly an important factor to be considered by the Defendant in making acting appointments. However, the decision making process whereby the Defendant concluded that the Claimant was not “*the senior officer of the Department eligible*” for the acting appointment was flawed. The term “Department” is not defined in the regulations or its governing Act. It is however used in context in various sections. For example at **Regulation 20(1)** the context implies that Department means the entire authority in relation to which a Head is in charge.

39. Department for purposes of **Regulation 26** is not defined. It must be read in the context which included the words “senior” and “eligible” before and after it. If given its literal meaning it connotes “*a division of a large organization or building, dealing with a specific area of activity*”¹. This meaning clearly fits the context of the type of decision to be made. It would be illogical if what was intended was that persons from all areas of work namely, Public Health, City Treasurer, City Engineer, City Assessor, City Police, City Administration and PIRO, depicted as separate in the Corporation’s Organisational Chart, had to be considered based on seniority for any acting vacancy.
40. It was submitted by the Claimant that there is a distinct stream in the corporation for the office of PIRO III and that the Claimant is the most senior officer in her stream. The word “stream” is not used in the Regulations however it is clear from the context in the submissions that what is referred to by the Claimant here is really “the Department” as provided for in the Regulations or in other words a division dealing with a specific area of activity.
41. The Claimant’s evidence is that the Corporation’s Organisational Chart provides a clear stream in which the next most senior office to PIRO I is PIRO III. This “stream” is clearly depicted on the Organisational Chart as a separate PIRO Department. The Defendant contends that there are no streams in the corporation “*as there are insufficient offices to maintain the stream system*” and argues that AO II is the next most senior office before PIRO III. The Defendant further states that Lystra Parke as AO II is senior to the Claimant as PIRO I.
42. According to the Claimant, the Organisational Chart is well-known by all employees and therefore would have been the reference point for persons such as the Claimant seeking promotions. It was therefore submitted that, the Defendant in considering appointments within a particular stream as established by the Corporation’s Organisational Chart, ought

¹ Compact Oxford Dictionary, Thesaurus & Wordpower Guide , Oxford University Press, 2002.

to have considered the Claimant as the most senior officer in the PIRO stream. Furthermore, the Defendant's argument that Lystra Parke was the most senior officer, based on an alternate organisational structure described by their Witness in her Affidavit, is wholly misconceived.

43. The Claimant further argues that the Regulations limit the scope of the Defendant's powers and do not give it the power to create its own streams in determining seniority. The Claimant submitted that the Regulations provide a comprehensive code accepted by the Privy Council in **Lovell Romain v The Police Service Commission (2014) UKPC 32**, at Paragraph 29:

“For those reasons the Board accepts the submission made by Mr Peter Knox QC on behalf of the respondent that the regulations are intended to provide a self-contained, comprehensive code governing promotions within the service...”

44. The Defendant in considering an alternate seniority structure based on there being no streams, considered an irrelevant factor in arriving at its decision to bypass the Claimant. This is so because the Defendant is not conferred with any power to create or define streams in the governing Regulations. Instead the un-contradicted evidence of the Claimant is that there is an existing Organisational Structure, the PIRO function, in a separate stream from the AO II function at the Port-of-Spain City Corporation, a copy of which was disclosed in her Affidavit.

45. In **Fordham's "Judicial Review Handbook" (fifth edition)** ("Fordham"), the learned author at Paragraphs 56.1 and 56.1.1 states the following in relation to relevance:

“56.1 The relevancy/irrelevancy principle. A public body should take into account all relevant considerations and no irrelevant ones. A material failure to do so is a common ground for judicial review.

56.1.1 Relevancy/irrelevancy principle: in a nutshell. In Re Duffy [2008] UKHL 4 at [53] (Lord Carswell: “the Secretary of State was bound to have regard to the proper factors, and not to have regard to any other improper factors, in reaching his decision”)...”

46. According to this learning, a public authority is not permitted to have regard to any other improper factor. In this case, the Defendant is bound by the confines of the Act and Regulations and therefore cannot for purposes of defending this Claim invent its own structure and organisational chart. It is clear from the Corporation's organisational structure that the PIRO stream, headed by the PIRO III is considered separate from the Administrative stream, headed by the City Clerk ["now called CEO"]. Therefore, it is my finding that the Defendant, in considering the alternate structure, took into account an irrelevant factor and thereby concluded that Lystra Parke was first in line as the most senior officer in "the Department" for the PIRO III acting position thereby bypassing the Claimant.

ii. Relevant Factors:

47. **Regulation 26** of the Regulations sets out the considerations relevant for acting appointments. It provides that:

"26(1) Where an acting appointment falls to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall –

(a) As a general rule be the senior officer of the Department eligible for such acting appointment;

(b) Assume and discharge the duties and responsibilities of the office to which he is appointed to act.

(2) In submitting any recommendations for an acting appointment, the Commission shall examine whether the exigencies of the particular service would best be served by transferring an officer from another Authority or district next in line of seniority to act where there is an officer in the same Authority or district who is capable of performing the duties of the higher grade, and in such examination the question of additional expenditure for travelling and subsistence allowances and other expenditure payable by the Statutory Authority shall be borne in mind." (Emphasis added)

48. Guidance on how the words "as a general rule" are to be construed was provided by the Privy Council Decision in **Harinath Ramoutar -v- Commissioner of Prisons and Public Service Commission (2012) Ukpc 29.**

49. At Paragraph 12 of that judgment, the Privy Council held that:

“Regulation 26 does not impose an absolute rule of appointment by seniority, but only a “general rule” to that effect. In other words, it is capable of being displaced by other relevant considerations.” (Emphasis added)

50. The Privy Council was interpreting **Regulation 26 of the Public Service Commission Regulations**, which is identically worded to Regulation 26 herein. The Judgment makes clear that though seniority is the general rule, it is not absolute, and there will be appropriate instances where other relevant considerations may displace that rule.

51. The Claimant submits that the following relevant factors ought to have been taken into account by the Defendant but were ignored:

- i. She is the most senior in her stream having been appointed PIRO I on the 28th September, 2004;
- ii. She previously acted as PIRO III from the 19th May, 2015 to the 13th September, 2016;
- iii. Her performance appraisal during the time that she performed these acting duties were outstanding and excellent; and
- iv. There were strong and compelling recommendations from the CEO of the Corporation for her to continue acting.

52. It is my finding that these were all relevant factors that ought to have been taken into account. The Defendant’s evidence in the affidavit of Utra Ali indicates that the performance of Lystra Parke was also “outstanding” based upon her own appraisals. The Defendant further indicated that “the qualifications and experience of both Officers were considered in making the decision”. This was not borne out in the evidence as the record of the decision of the SASC is in direct conflict to that Affidavit evidence of Utra Ali. The said decision, made in October, 2016, is reflected in the Minutes of the 9th Meeting of the SASC held on December 13, 2016 (which is an attachment to her supplemental Affidavit filed herein on March 20, 2017). There are however, neither minutes of an October, 2016

meeting nor any other official record such as would reveal that any of the relevant factors other than seniority in the Defendant's alternate structure were considered.

53. Little weight can be applied to the evidence provided by the Defendant's witness, Utra Ali, who was present on December 13, 2016, relative to what transpired in relation to the SASC's decision making. Evidence from Minutes as to what relevant factors were considered is required.

54. **Regulation 7** of the Regulations imposes a specific obligation on the Executive Officer to keep a record of minutes and decisions:

“(1) The Executive Officer shall ensure that Minutes of all meetings of the Commission and of all decisions arrived at under regulation 6, shall be duly recorded and kept and that the same be presented for confirmation by the Commission as soon as practicable at a subsequent meeting or by individual members on circulation thereof.

(2) Any member of the Commission who dissents from a decision may require that his dissent and reasons for dissenting be recorded in the Minutes.”

55. Counsel for the Claimant highlights, in written submissions filed, herein that the wording of Regulation 7 is such that it draws a distinction between the “minutes of all *meetings*” as opposed to minutes of “all *decisions* arrived at under **Regulation 6**”. This is important as it means that full minutes are required by law for meetings. Such minutes would be expected to contain, at minimum, the material factors considered by the Defendant and the reasons and justification for its decision. This is in contrast to decisions taken under **Regulation 6** without any meeting when no such minutes are possible.

56. On the facts of the instant case the Minutes in question do not support the contentions of the Defendant that there was a Meeting at which the SASC considered the relevant factors in favour of the Claimant. The Minutes simply record that on the 3rd November, 2016, the Defendant “*appointed the under-mentioned officers named in the respective offices at the Port-of-Spain Corporation, for the period 1st July 2016 to 30th September, 2016 in the*

vacancies identified”, which included the appointment of the Claimant to the acting position of PIRO III. Further, on the 13th December, 2016, the Defendant “*appointed the officers to act in the respective offices at the Port-of-Spain Corporation, for the period 3rd October, 2016 to 31st December, 2016 in the vacancies identified.*” This included Lystra Parke as acting PIRO III and the Claimant as acting AO II. No reasons, deliberations or considerations were recorded in the Minutes. There is merit to the Claimant’s contention that this, logically, must have been because there was no such exercise of considering all relevant factors, other than seniority undertaken by the Defendant.

57. It is logical to conclude that there was no meeting of the SASC to decide on who to appoint as PIRO III since the Defendant has produced no evidence of such a meeting. Instead the decision may have been made under **Regulation 6** without any meeting (hence the minuted decision alone in a vacuum without any minutes of the meeting itself as required by law). If there was in fact a meeting as alleged, then in breach of the law there are no minutes of that meeting. The Defendant cannot establish its case based on the memory and recollection of its Witness, the Executive Director, of matters that ought properly to have been included in the minutes.

58. This, according to the Claimant, would be tantamount to the court allowing the Executive Officer to create minutes of her own via affidavit evidence of what the Defendant considered and did ex post facto. In this regard, the Court was asked to note that the Executive Officer is not a member of the SASC and to accept, as well, that what the law envisaged and required were contemporaneous minutes that would be credible and conduce to transparency in public administration.

59. In all the circumstances the submission of the Claimant is that it is not sufficient for the Court to take into account just the evidence of Utra Ali who is not a Commissioner on the SASC. They cite the Australian case of **Australian Securities and Investments**

Commission v Meredith Hellicar No. S177/2011 as support for the contention that the actual minutes are important and significant as explained as follows:

“The relevance of this consideration goes beyond legal obligation. Provisions of this kind correspond with a strong feeling that accurate minutes should be kept of general meetings and committee meetings in organisations of all kinds. They include businesses; educational and medical institutions; social and sporting clubs; cultural and religious groups; professional and trade associations; trade unions; community bodies and political parties. The members of these organisations, humble as they often are, see it as important that minutes accurately record what took place. How much greater is the importance of accurate minutes in the case of directors running a large wealthy multinational public company, listed on stock exchanges, in which thousands of people had invested on the faith of a belief that its affairs were efficiently conducted?

The probative weight of the minutes is also supported by the urgent need to make a decision about the Foundation in view of the impending change in accounting standards. It is supported by the importance of an ASX announcement which was not only required by law but was seen as a key element in a "communications strategy", the goal of which was to reassure hypercritical stakeholders that asbestos claims would be fully met. It was discontent over that matter which seems to have influenced the board not to approve the management's proposal considered on 17 January 2001.”

60. It was submitted by the Claimant that the contents of any Minutes of the SASC are of strong probative value as the accuracy of such minutes is required by law to be maintained, thereby, properly recording SASC deliberations in meetings as well as decisions.

61. In the instant case however, the Minutes disclosed by the SASC merely indicate that Ms Lystra Parke would be appointed to the position of PIRO III *“in lieu of Ms. Joan Chee, Personnel and Industrial Relations Officer I, her junior.”* It is clear from the foregoing that seniority was considered but there is no record that any other relevant factor was taken into account. Thus in the absence of contemporaneous evidence put forward by the Defendant of consideration of the relevant qualifications, performance and recommendations of both candidates, there was only the evidence ex post facto of Utra Ali that these were considered. It is therefore my finding that contrary to the evidence of Utra

Ali, none of the other relevant factors such as experience, performance and recommendations were considered by the Defendant's Commissioners.

62. It is the Claimant's submission that in the instant case, where there were strong and compelling recommendations made by the CEO of the Corporation in support of the Claimant, and where the Claimant had previously acted as PIRO III with excellent and outstanding performance reviews, the Defendant ought rightly to take those factors into consideration and apply the appropriate weight.

63. With regard to this submission, I find that the performance reviews and appraisals of Lystra Parke are comparable to those of the Claimant. However, distinct additional factors in favour of the Claimant included, the fact that the Claimant was highly recommended by the CEO of the Corporation and had prior experience in the PIRO stream. These factors were relevant for consideration by the Defendant but there is no evidence that they were taken into account. The Defendant's decision in addition to being made based on irrelevant information regarding the alternate structure was erroneously made without taking into account relevant factors.

iii. Weight:

64. The Claimant, citing **Fordham**, submits that if the Defendant did in fact consider those other relevant considerations, it wrongly gave too little weight:

"[56.3.4] R (Von Brandenburg) v East London and The City Mental Health NHS Trust [2001] EWCA Civ 239 [2002] QB 235 (CA) at [41] (Sedley LJ: "The principle that the weight to be given to such facts is a matter for the decision-maker, moreover, does not mean that the latter is free to dismiss or marginalise things to which the structure and policy of the Act attach obvious importance") (HL is at [2003] UKHL 58 (2004) 2 AC 280)"

65. It is clear, that there is a strong likelihood, that by the very nature of the other relevant considerations, had they been taken into consideration, it may not have resulted in the Claimant being bypassed. The Defendant erred in attaching too much weight to the sole criterion of seniority to the disproportionate weighting of the other considerations that

favoured the Claimant's acting appointment. In **Fordham** at Paragraph 56.3.5 the author cited the following dicta:

“R v Secretary of State for Trade and Industry, ex p BT3G Ltd [2001] EuLR 325 (Silber J) at [187] (“Courts have ... been willing to strike down as unreasonable decisions where manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration”) (CA is [2001] EWCA Civ 1448 [2001] EuLR 822)”.

66. It is my finding that the Defendant placed great emphasis on the issue of seniority and failed to give due weight to the recommendations of the Deputy CEO who would have been intimately familiar with the performance of the Claimant. It is clear from the last paragraph at page 3 of the Defendant's response to the Pre-action Protocol letter that scant regard was paid to the CEO's recommendation.

67. The Regulations prescribe at **Regulation 13 (1)** that making of recommendations is part of the process when vacancies occur. It would be illogical if such recommendations are required to be made for no purpose as would be the case if the SASC is not required to consider them as a relevant factor in filling vacancies whether by acting appointments or permanently. Further although seniority is a relevant factor and it was taken into account, the Claimant's experience in the stream of PIRO is also relevant to considering her as a suitable candidate and there is not sufficient evidence before me that it was taken into account.

C. Unreasonableness and Irrationality:

68. Having addressed the issue as to whether the relevant factors were considered in the Defendant's decision, making the issue as to whether the decision was unreasonable and irrational will now be addressed.

69. The principles of unreasonableness and irrationality were considered at Paragraphs 105 and 106 of the judgment of **Paul Lai v The Attorney General of Trinidad and Tobago CA P129/2012** as follows:

“[105] The starting point for any discussion on unreasonableness is by reference to the well-established principle as stated by Lord Greene, M.R in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation:

“...a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.”

And later at pages 233 to 234:

“The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.”

[106] On this issue of irrationality in R v. Ministry of Defence ex parte Smith⁸³, Sir Thomas Bingham MR (as he then was) endorsed the following as an accurate distillation of the principle:

“The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker.””

70. Further, the Claimant cites the learned author in **Fordham** at Paragraph 57.2.2:

““Outrageous defiance of logic or morality”. Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410G-H (Lord Diplock: “By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’ ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”)”

71. The Claimant submits, in accordance with these authorities, that the decision to bypass the Claimant in favour of Lystra Parke is so outrageous in its defiance of logic that no sensible person who applied his mind to the issue at hand could have arrived at it. They argue that the decision to do so, was based solely on seniority in a vacuum without proper reference and/or consideration to the strong recommendations in the Claimant’s favour and her unblemished record of performance, or the “other relevant considerations” as enunciated by the Privy Council in **Harinath Ramoutar** (supra).

72. The court, in the present case, had to determine whether the decision in question was unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. It is clear in this case that if proper considerations were fairly weighed the Claimant may have been considered the most suitable candidate for the position of PIRO III. The Defendant did indeed place too much weight on the issue of seniority without there being any evidence of adequately considering the Claimant’s suitability for the position based on other relevant criteria. A reasonable decision-maker, having sight of all the relevant factors, would not have decided to select Lystra Parke instead of the Claimant.

73. Consequently, the decision to bypass the Claimant for the position of acting PIRO III and to appoint Lystra Parke instead is irrational and unreasonable. The Defendant failed to consider relevant considerations and/or considered irrelevant considerations and/or did not

place sufficient weight on the relevant considerations and the result was an irrational decision.

D. Unfairness:

74. The Claimant also contends that the decision was unfair. The Claimant argues that, when the decision was made to bypass her, having regard to all the circumstances of the case and all the relevant considerations which were in her favour, the Defendant did not provide the Claimant with any reasons as to why she was being bypassed. There was no record of a reasoned decision or deliberations by the Board of the Defendant in its Minutes. These circumstances, the Claimant claims, amount to an unfair process in the decision-making.

75. Citing **R v Secretary Of State For The Home Department Ex P Doody [1994] 1 AC 531, 560**, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the law on natural justice and fairness as follows:

"My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what

factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

76. In the Privy Council case of **Peerless Ltd v Gambling Regulatory Authority and others (2015) UKPC**, Sir Paul Girvan held the following:

"It is now clear that fairness may require that reasons be given for a decision in a wide range of circumstances. As stated in R v. Civil Service Appeal Board, ex parte Cunningham... the form of a determination is part of the procedure of a hearing and is no less subject to the requirements of procedural fairness than any other part. The very importance of the decision in question to the individual may be such that the individual cannot be left to receive an unreasoned decision as if "the distant oracle had spoken" (per Lord Mustill in R v. Secretary of State for the Home Department, ex parte Doody...)"

77. Further, **Regulation 28** states as follows:

"In submitting recommendations for acting appointments, Heads of Statutory Authorities shall state the reasons why officers, if any, are being passed over."

78. The Claimant is wrong on this point. The Defendant did give an explanation for its decision on the basis of seniority, although it was not a reason that the Claimant agreed with. There, therefore, was no breach of natural justice in the procedure followed by the Defendant in coming to its decision. This saving grace is however insufficient to atone for the otherwise irrational and unreasonable nature of the decision.

V. Summary of Findings:

79. The Defendant's evidence supported the Claimant's case that only one relevant factor was fully considered in deciding who would act in the vacant PIRO III position and that was seniority. The decision-making based on seniority was however justified ex post facto by reference to an alternate structure put forward by the Defendant in the Affidavit of Utra

Ali. It bore no relation to the reality of the Corporation's existing Organisational Chart which clearly depicts a separate PIRO stream or to use the terminology of the Regulations, Department. The Defendant extended the consideration as to seniority beyond the relevant stream. Thus even by basing the decision on seniority the SASC acted erroneously. Furthermore, the reliance on the **Sankar** Judgment, which the Defendant construed as establishing that officers from all streams and different locations at other authorities had to be considered ahead of the Claimant, was not in accordance with the precise and clear *ratio decidendi* of that Court of Appeal Judgment.

80. The Claimant has succeeded in proving that the substantive decision was in fact one which no reasonable decision-maker could have come to given the other relevant factors of experience and recommendations by the Deputy CEO in relation to which there is insufficient evidence of consideration.

81. The Defendant failed to properly consider the relevant factor of seniority, considered irrelevant factors and placed insufficient weight on relevant considerations such as the CEO's recommendations. There is insufficient evidence that the Claimant's long record of unblemished service, her excellent and outstanding performance during previous acting appointments in the position of PIRO III, the fact that she was already serving in the PIRO stream and appraised as eminently qualified for promotion to the office of PIRO III, and the several strong and compelling recommendations of the CEO which made in her favour were taken into account. In all the circumstances and on a balance of probabilities the Claimant has established a case for the relief claimed.

VI. Relief Awarded:

82. Judgment for the Claimant in terms of the relief sought as follows:

- i. An order of certiorari is granted to remove into this Honourable Court and quash the decision to bypass the Claimant for acting appointment to the office of Personnel and Industrial Relations Officer (PIRO) III;
- ii. It is hereby declared that the Claimant has been treated unfairly and contrary to the principles of natural justice when she was bypassed for the said acting appointment;

- iii. It is hereby declared that the decision to bypass the Claimant for the said acting appointment in favour of Lystra Parke was unreasonable, irrational, unfair and illegal;
- iv. An order is granted remitting the matter of her acting appointment for the Defendant to reconsider in accordance with the findings of the Court in accordance with **Section 21 of the Judicial Review Act, Chapter 7:08**;
- v. Costs are awarded to be paid by the Defendant to the Claimant certified fit for Senior and Junior Counsel to be assessed in accordance with **rules 67.2 and 67.12 of the Civil Proceedings Rules 1998** by the Registrar in default of agreement.

April 25, 2017

Delivered by

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by:

Christie Borely

Judicial Research Counsel I