THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: CV2017-02934

IN THE MATTER OF THE JUDICIAL REVIEW ACT NO 60 OF 2000

AND

IN THE MATTER OF AN APPLICATION BY PUBLIC SERVICES ASSOCIATION OF TRINIDAD AND TOBAGO FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION(S) OF THE PERMANENT SECRETARY IN THE MINISTRY OF ENERGY AND ENERGY INDUSTRIES TO ACT UPON AND IMPLEMENT THE PURPORTED DELEGATION PURSUANT TO LEGAL NOTICE NO 267 OF 2007 MADE BY THE PUBLIC SERVICE COMMISSION TO THE PERMANENT SECRETARY TO ADVERTISE CERTAIN VACANCIES IN THE MINISTRY, RECEIVE AND PROCESS APPLICATIONS IN RESPECT THEREOF IN ORDER TO FILL THE SAME TO WIT, THE OFFICES OF CHEMICAL ENGINEER I/II, GEOPHYSICIST I/II, GEOLOGIST I/II, PETROLEUM ENGINEER I/II, PETROLEUM CHEMIST (RANGE 53) PETROLEUM INSPECTOR 1 GEOLOGIST ASSISTANT AND PETROLEUM ENGINEERING ASSISTANT

BETWEEN

THE PUBLIC SERVICES ASSOCIATION OF TRINIDAD AND TOBAGO

Claimant

AND

THE PERMANENT SECRETARY

MINISTRY OF ENERGY AND ENERGY INDUSTRIES

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: 28th February 2018

Appearances:
Mr. Avory Sinanan SC leads Mr. Travers Sinanan instructed by Mr. Kelvin Ramkissoon for the Claimant
Mr. Russell Martineau SC leads Ms. Antonette Alleyne and Ms. Daniella Boxill instructed by Ms. Kendra Mark and Ms. Kadine Matthew for the Defendant

JUDGMENT

Introduction

1. The Defendant has applied to set aside leave which was granted to the Claimant to seek judicial review of the Defendant's decision to advertise certain vacancies in the Ministry of Energy and Energy Industries ("the Ministry") and to receive and process applications in respect of those vacancies ("the Defendant's application"). The Defendant also seeks to discharge an injunction restraining it from taking steps to advertise and fill those vacancies. The decision by the Defendant to advertise those vacancies was made pursuant to powers delegated to the Defendant by the Public Service Commission and was a step in a process of appointing officers to fill vacancies which exist in the Ministry.

2. The Claimant alleges that such a decision made by the Defendant without consulting it and by-passing a settled consultative process established between the Claimant and the Ministry is illegal, irrational, procedurally improper, a breach of its legitimate expectations and is void and of no effect. Such a consultative process was set out in a 1973 Circular issued by the Chief Personnel Officer (CPO) pursuant to section 14 of the Civil Service Act Chap 23:01 ("the 1973 Circular"). Section 14 of the Civil Service Act imposes on the Personnel Department of the civil service a statutory duty to consult with the appropriate recognised association, in this case the Claimant, on among other things, terms and conditions of employment. The 1973 Circular had established a Joint Consultative Committee (JCC) comprising representatives of both staff and management as the consultative machinery to encourage co-operation between administration and staff in dealing with matters set out in that circular. Both the provisions of the Act and the terms of the 1973 Circular are central to this dispute.

3. This is the first time that the Defendant has ever embarked upon a process of advertising vacancies and of taking steps to assist the Public Service Commission in the appointment of officers in the public service. The fact that, the Defendant is intimately engaged in a process which falls within the exclusive purview of the Public Service Commission, recognised as an autonomous body insulated from Executive interference, has caused the Claimant to call upon the Court to carefully scrutinise this power. The Claimant goes further to say that a duty of consultation with the Claimant on the Defendant is implied or imposed as an incident of general fairness which these unique circumstances demand.

4. The main issue, but by no means the only one, arising on the Defendant's application, is whether in appointing or recruiting officers in the public service, a distinction should be drawn between matters relating to their terms and conditions of employment in contrast to their actual appointment in the public service. The Public Service Commission is responsible for the latter and the former lies within the purview of the Personnel Department headed by the CPO. It is accepted by the parties in this case that the Defendant was at the material time acting pursuant to delegated authority legitimately conferred by the Public Service Commission pursuant to Legal Notice No. 267 of 2007. Such an act was therefore one of the constitutionally protected functions of the Public Service Commission of appointment of public officers. It is also accepted by the parties that there is no duty on the Public Service Commission to consult with the Claimant or anyone else (outside the provisions of the Constitution) in the making of such appointments to the public service.

5. However, the consultative process established by the 1973 Circular intended to deal with terms and conditions of employment which mentions among other things, "recruitment". The Claimant has argued that to have the Defendant act as a delegate of the Public Service Commission yet ignore the very consultative process which was established to deal with terms and conditions of employment and "recruitment" is to characterise the Defendant as having a split personality with split functions. The Defendant cannot compartmentalise his duties and he simply cannot ignore his duty to consult as set out in the 1973 Circular.

6. The short point therefore is whether the Defendant, notwithstanding his duties as delegated by the Public Service Commission, was also obliged to engage the consultative machinery established by the 1973 Circular and to consult with the Claimant on matters of recruitment such as job descriptions or salary ranges before advertising the vacancies. It is the type of point which is suitable to be re-examined on an application to set aside leave where leave was granted without a hearing and when this issue was not then considered by me in any detail.

7. I am grateful to the parties' Senior Counsel for their helpful submissions and the economy with which they were presented. I am satisfied, however, that there is no legitimacy in any expectation that the Defendant is obliged to consult with the Claimant either pursuant to section 14 of the Civil Service Act Chap. 23:01 or the 1973 Circular prior to making his decision in this case. Both section 14 of the Civil Service Act and the 1973 Circular do not and cannot

include matters concerning the appointment of officers which fall within the purview of the Public Service Commission. The Defendant therefore in advertising public sector offices acted within his remit pursuant to the Public Service Regulations.

8. The statutory duty to consult created by section 14 of the Civil Service Act is limited only to the issues of classification of offices, grievances, remuneration and terms and conditions of employment, none of which arises in this case. Further, that duty of consultation is imposed on the Personnel Department and by extension the CPO and not on the Public Service Commission. The power or duty to appoint persons to the public service falls within the power of the Public Service Commission under section 121 of the Constitution[1] and does not form part of the CPO's duty to set terms and conditions of employment. Insofar as the 1973 Circular established a consultative machinery, it can then only be within the confines of the matters expressly provided in section 14 of the Civil Service Act. It cannot legitimately extend or overreach the powers exercised by the Public Service Commission relevant to the appointment of officers short of constitutional amendment.

9. Whereas it can be argued that the Permanent Secretary may be impressed with knowledge of the 1973 Circular of long standing, there is no settled practice demonstrated on the facts of this case of any consultative machinery activated to deal with the appointment and recruitment of officers. Further, there are no special features of this case, given the established statutory context and recognised jurisprudence on the functions of service commissions, to impose any such duty of consultation on the Defendant as an incident of common law fairness.

10. There is therefore no warrant for further managing this claim for judicial review and the grounds articulated have not crossed the threshold of arguability with a realistic prospect of success. The grant of leave will be set aside and the injunction discharged.

11. Of course, the consultative machinery has not been disbanded and still exists for the benefit of continuing dialogue on matters affecting the present staff as set out in the 1973 Circular. However it is a constitutional overreach to prohibit the Defendant from executing delegated functions by imposing a duty to consult the Claimant.

[1] The Constitution of Trinidad and Tobago.

12. I expand on these reasons in this judgment below. I first set out the relevant background facts, the Court's jurisdiction to set aside leave and the constitutional and statutory context of the dispute. I then examine the substantive issues raised on this application namely the issues of legitimate expectation, the duty to consult and illegality. Finally, there are several evidential objections raised by both parties seeking to strike out portions of the affidavits filed in these proceedings. I prefer, however, to deal with those matters as a formality at the end of this judgment as they do not in my view dilute or affect the determination of the main issues which are to be determined on this application. They would of course had been important if the matter had to progress to a full hearing.

Brief factual background[2]

13. This is an important case as the Claimant conceded that for the first time Permanent Secretaries were carrying out functions of the Public Service Commission in filling vacant positions in the Civil Service. Having regard to the nature of the Defendant's application, it is sufficient to recite some brief background facts to understand the context of the Claimant's complaint.

14. The Ministry has forty one (41) entry level vacancies. By a Circular Memorandum dated 13th April 2017 from the DPA, Permanent Secretaries and Heads of Departments were advised by the Public Service Commission that they can, with the consent of the Public Service Commission and in consultation with the DPA, advertise vacant offices specific to the Ministries/Departments within and out of the Public Service. This was done pursuant to the delegated power of regulation 13(5) of the Public Service Commission Regulations.

15. Accordingly by Memorandum dated 3rd May and 15th May 2017, the Permanent Secretary sought and obtained the DPA's consent to advertise positions such as Petroleum Engineers, Geophysicists and Chemical Engineers ("the vacant positions") in the Ministry in consultation with the DPA and to comply with "Guidelines for the Recruitment and Selection Process for the Offices Specific to Ministries and Departments". Those guidelines provided among other things, for the contents of the Notice of Vacancy; how it should be advertised; the receipt of

[2] The evidence at this stage constitute the following: Affidavit of Valmiki Ian Sankersingh filed 10th August 2017, Affidavit of Gorgonia Auguste filed 10th August 2017 in support of the claim for judicial review, the Affidavit of Selwyn Lashley filed 28th September 2017 in support of the Defendant's application and the Affidavit of Valmiki Ian Sankersingh filed 11th October 2017. The brief facts which are not in dispute can be culled from the affidavits filed at this stage.

applications; the screening process; the appointment of a Selection Board and the interview process.

16. The Permanent Secretary caused the vacancies to be advertised internally by Circular Memorandum and Notice of Vacancies dated 19th May 2017. It was also advertised externally by publication in two daily newspapers, the Trinidad Express and the Newsday.

17. The Ministry of Public Administration and Communications issued a media release dated 12th May 2017. It attempted to explain the new process of Permanent Secretaries fulfilling this delegated role. However, it was in my view inelegantly worded and wrongly created the impression that the Permanent Secretaries were embarking on their own recruitment exercise:

> "*The Public Service Commission will allow Permanent Secretaries in five (5) specific ministries to fill a number of vacancies.*
>
> *This is expected to remove one roadblock of recruitment in the public sector and put a dent in the number of vacant positions which exist. There have been complaints and public outcry about the thousands of vacancies that need to be filled in the public service.*
>
> *In this vein, the Minister of Public Administration and Communications, the Honourable Maxie Cuffie announced "…that the Public Service Commission has agreed to several positions being filled not by the Commissions but by Ministries themselves who can now advertise and the Permanent Secretaries can fill positions in several Ministries."*
>
> *The decision arises out of an ongoing project for the 'Institutional Strengthening of the Service Commissions Departments' aimed at reforming the Public Service to deliver services more efficiently and expeditiously. The Ministries, departments and agencies will assume responsibility for more recruitment, staffing and discipline under the arrangement.*
>
> *Minister Cuffie said the positions to be delegated are "peculiar" to each Ministry and not generic positions in offices across the Public Service. The new arrangement, approved by the Public Service Commission, will only be in place at the following Ministries thus far:*
>
> *Ministry of Health*
>
> *Ministry of Energy and Energy Industries*
>
> *Ministry of Public Administration and Communications*

Ministry of Rural Development and Local Government

Office of the Prime Minister and

Ministry of Community Development, Culture and the Arts……"

18. Although not made altogether clear in the release, it was perfectly legitimate for the Public Service Commission to delegate its functions of advertising for vacancies to Permanent Secretaries, pursuant to Regulation 13(5) of the Public Service Commission Regulations. No information was released directly to the Claimant in relation to the Defendant's intention to advertise for the vacancies.

19. On 29th May 2017, upon receiving no information as to how or why the Permanent Secretary would conduct the recruitment of public servants, the Claimant issued a Freedom of Information Request to the Ministry requesting documents concerning the advertisement of the vacancies and the authorization of the Ministry to advertise same.

20. On 14th July 2017, the First Vice President of the Claimant wrote to the Permanent Secretary, Ministry of Public Administration and Communications expressing its grave concerns over the media release issued by the Ministry. It highlighted the Claimant's key complaint in this case concerning what they perceived to be increased powers granted to the Permanent Secretary to carry out the functions of recruitment and ancillary functions relating to filling vacancies. By the said letter, the Claimant expressed the following sentiments which is germane to their case:

    - The Public Service Commission is the constitutional body charged with the responsibility for recruitment and appointment of public servants.
    - Any purported delegation of power made under section 127(1) of the Constitution cannot surrender or arrogate the responsibility in its entirety to a public officer who can be considered an agent of the Executive.
    - Such arrogation of a primary statutory function to a public servant cannot be countenanced without putting the necessary checks and balances in place.
    - The decision in **Thomas v Attorney General** (1981) 32 WIR 375 made the position clear that the raison d'etre of the Commissions is to insulate the Public Service from political interference.

- The Claimant has not been consulted prior to such arrangements being implemented despite repeated requests for information or guidelines.
- The Claimant called for production of certain relevant documents including the Cabinet Note and/or Cabinet Minute which documented the agreement of the Public Service Commission to delegate its functions to the Permanent Secretary, the written approval or consent of the Honourable Prime Minister to such delegations, the empirical findings of any study or assessment that determined the selection of the ministries in question.
- The reason, if any, why the Claimant was not consulted.

21. The Permanent Secretary of that Ministry advised the Claimant that "it may be best to direct your enquiries to the Service Commissions Department" and attention was drawn to Regulation 13(5) of the Public Service Commission Regulations.

22. By amended notice of application filed 29th August 2017, the Claimant sought permission to apply for judicial review of the decision of the Defendant made between 15th May and 19th May 2017 to act upon and implement the purported delegation pursuant to Legal Notice No. 267 of 2007 made by the Public Service Commission to the Permanent Secretary to advertise certain vacancies in the Ministry and to receive and process application with respect thereof (the said decision).

23. The matter was deemed urgent and came on for hearing during the long vacation before Madame Justice Mohammed.

The injunction and Order granting leave

24. At a hearing during the court vacation on 22nd August 2017, an order was made by Madame Justice Mohammed granting the following injunction:

> "An interim order be and is hereby granted restraining the Intended Defendant from and/or taking any steps and/or measures to implement the said decision by further advertising, receiving and/or processing applications to fill any vacancies in the Ministry of Energy and Energy Industries including but not limited to the offices of Chemical Engineer I/II, Geophysicist I/II, Geologist I/II, Petroleum Engineer I/II, Petroleum Chemist I/II,

Petroleum Inspector I, Geologist Assistant and Petroleum Engineering Assistant I pending the hearing and determination of this action or further order."

25. The matter was docketed to this Court and also during the long vacation and by order dated 7th September, leave was granted in chambers without a hearing to the Claimant to make a claim for judicial review. I specifically indicated that such grant of leave was without prejudice to the Defendant's right to set aside leave or to raise any preliminary issue in relation to the grant of leave. Pursuant to the order, the Claimant issued its claim for judicial review on 8th September 2017 which was met by the Defendant's application.

The claim for judicial review

26. The claim for judicial review is supported by the affidavits of Valmiki Ian Sankarsingh, Gorgonia Auguste both sworn to and filed 10th August 2017 and the affidavit of Shalene Suchit-Dwarika filed 11th August 2017. In this claim for judicial review the Defendant seeks declaratory relief that the said decision is illegal, null and void and of no effect; in breach of the Claimant's legitimate expectation to be consulted having regard to the provisions of section 14(1)(c) of the Civil Service Act and the 1973 Circular and constitutes a failure to satisfy and/or observe the requirement of consultation provided for in section 14(1)(c) of the Civil Service Act and effects a breach of the right to consultation to which the Claimant is statutorily entitled.

27. The Claimant also seeks an order of certiorari to quash the said decision by the Defendant and damages.[3]

The grounds for judicial review

28. The grounds for judicial review are brief and are set out as follows.

    (a) Under section 14 of the Civil Service Act the Personnel Department headed by the CPO is mandated to provide for and establish procedures for consultation and negotiation between his department and the appropriate recognized association for civil servants in respect of matters concerning classification of offices; grievances; remuneration; and terms and conditions of employment.

[3] The Claimant's application for leave also sought injunctive relief and specific disclosure.

(b) Further and by virtue of the 1973 Circular dated 12th January 1973 issued under the hand of the CPO to all Permanent Secretaries and Heads of Department a consultative machinery was established with the Claimant which provided for the setting up of a consultative central committee in each Government ministry/department comprising 12 members, six of which was to be provided by the management of the Ministry and six by the Claimant (with the Permanent Secretary or Head of the Department being the Chairman).

(c) In the 1973 Circular from the CPO to All Permanent Secretaries and Heads of Departments, the CPO stated:

> "I have to inform you that, in consultation with the Public Services Association, it has been decided that consultative machinery should be established throughout the Civil Service with a view to providing a means of communication between Management and Staff and staff participation in Management decisions with the limits defined in the circular.
>
> This Consultative Machinery shall comprise a central committee in each Government Ministry/Department consisting of representatives of management and staff representatives. Where, depending on the size, location and administrative structure of the units which comprise the Ministry/Department, there is need for more than one body, sub committees shall be set up in the discretion and under the direction of the central committee. The representatives of Management shall be determined by the Permanent Secretary or Head of Department and those of the staff shall be selected by the Members of the Public Services Association and/or appropriate recognized associations."

Section 16 of the 1973 Circular provides:

> "16. The objects of the Committee shall be to secure the greatest measure of co-operation between the Administration and the Staff in matters affecting the Ministry or Department with a view to increasing efficiency and providing for the well-being of the staff by bringing together different points of view respecting conditions of service within the Department. They shall specifically include:

a) provisions of the best means of utilizing the ideas and experience of the staff;

b) means of securing to the staff a greater share in and responsibility for the determination and conditions under which their duties are carried out;

c) application of the principles governing established conditions of service e.g. recruitment, hours, promotion, discipline, tenure, remuneration and superannuation in as far as they relate to the Department."

(d) The objects of the Committee inter alia as set out in Clause 16 of the 1973 Circular are to secure the greatest measure of co-operation between administration and staff with a view to increasing efficiency by bringing together different points of view respecting conditions of service within each department. The matters within the purview of this Committee specifically include the application of the principles governing established conditions of service e.g recruitment, hours, promotion, discipline, tenure, remuneration and superannuation.

(e) Pursuant to the said 1973 Circular such a Joint Consultative Committee was established and is extant and operational at the Ministry of Energy and Energy Industries.

(f) Under section 127(1) of the Constitution of Trinidad and Tobago the Public Service Commission may delegate certain of its functions with the approval of the Prime Minister. By Legal Notice No. 267 of 2007 the Public Service Commission Regulations were amended to permit Permanent Secretaries or Heads of Department with the consent of the Public Service Commission and in consultation with the DPA give notice of such vacancies, advertise and receive applications and appoint a Selection Board to assist in the selection of a candidate to fill any such vacancy. Such Selection Board is to include the DPA or his representative.

(g) Neither the Public Service Commission Regulations nor the amendments thereunder dispense with the requirement of consultation with the Claimant and to date there has been no consultation with the Claimant with respect to any of the measures detailed above.

(h) On or about 12th May, 2017 the Ministry of Public Administration and Communications issued a media release bearing the caption "*Greater Power for Permanent Secretaries".* The said document states inter alia that:

- Certain Ministries can now advertise and Permanent Secretaries can fill several vacancies.
- The new arrangement will only be in place at the Ministry of Health, Ministry of Energy and Energy Affairs, Ministry of Public Administration and Communications, Ministry of Rural Development and Local Government, Office of the Prime Minister and Ministry of Community Development, Culture and Arts.
- These Ministries, departments and agencies will assume responsibility for most recruitment, staffing and discipline.

(i) There has been no consultation with the Claimant as the recognized union representing the interest of public servants either prior to or after the said decision to embark on this intended course of action notwithstanding the provisions of the 1973 Circular and Section 14 of the Civil Service Act.

(j) More particularly there has been no consultation with the Claimant prior to the Defendant arriving at the impugned decision to advertise certain vacancies in the Ministry of Energy and Energy Industries, receive and process applications in respect thereof in order to fill the same to wit the offices of Chemical Engineer I/II, Geophysicist I/II, Petroleum Engineer I/II, Petroleum Chemist I/II and Petroleum Inspector I Geologist Assistant and Petroleum Engineering Assistant I.

(k) The decision of the Defendant to advertise and/or take steps and/or make arrangements for the filling of certain vacancies at the MEEI is illegal, irrational, procedurally improper, null and void and of no effect.

(l) The said decision contravenes the legitimate expectation of the Claimant and in particular that of a procedural expectation engendered by a settled practice and/or course of conduct provided for and subsumed under the 1973 Circular and/or the provisions of the Civil Service Act.

(m) The provisions of the 1973 Circular are buttressed by the provisions of Section 14 of the Civil Service Act and constitute a procedural legitimate expectation in the carrying out of the functions purportedly delegated by the Public Service Commission and ordains or contemplates that the Defendant would engage in meaningful consultation with the Claimant in respect to the filling of vacancies which he sought to advertise. The Defendant has failed or neglected to have any such consultation with the Claimant.

The application to set aside leave

29. The Defendant's application to set aside leave to apply for judicial review was made on the grounds that there is a dire need for the Ministry to have critical vacancies filled so as to ensure the efficient and productive discharge of its functions and that there is no arguable ground for judicial review having a realistic prospect of success.

27. The Claimant contended that the Defendant is guilty of delay in making this application which is twenty one (21) days after the grant of leave and indeed thirty seven (37) days after the grant of the injunction. It also takes issue with the strategy of the Defendant in giving the impression that it would defend the matter on its merits when it supplied to the Claimant documents requested in its relief for disclosure referred to in its claim. In any event, they contend that the setting aside of leave is a rare event and the Defendant must cross a high threshold or deliver a "knockout blow" to the grant of leave.

28. To be fair to the Defendant, the application was made before the first case management conference (CMC). Further my order did make it clear that the grant of leave was subject to the Defendant's right to make this application. Of course, the option lay with the Defendant, as the Claimant perhaps was led to believe, that it would engage in a rolled-up hearing where both the issue of leave and the merits of the case will be considered together. See **Joann Bailey-Clarke v The Ombudsman of Trinidad and Tobago and the Public Service Commission** CV2016-01809. However, I discussed this with the Defendant's attorneys at the first CMC who confirmed that the Defendant would file further evidence to deal with the matter at the substantive hearing should the Defendant's application fail. Exercising my case management powers, I elected, therefore to hear the Defendant's application to save the costs and time of a full hearing recognising that the matters raised in their application was a discrete and narrow one. However, it is important that I clarify the Court's role when revisiting its grant of leave.

Test to set aside leave

29. Leave to apply for judicial review may be set aside where, among other grounds, the Claimant has no arguable case. It is not rare to set aside the grant of leave however, it is a discretion to be exercised sparingly having regard to the question of the costs and delays of a full hearing. See **Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v Patrick Manning Prime Minister and Head of Cabinet of Trinidad and Tobago and Minister of Finance** C.A.CIV.174/2004 and **Devant Maharaj v National Energy Corporation of Trinidad and Tobago** C.A.CIV.115/2011. In **R v Social Security Commissioners ex parte Pattini** (1992) 5 Admin L. Rep 219, Pill J recognised:

> "There is jurisdiction in the court to set aside leave as has been indicated in a number of cases including the decision of the Divisional Court in R v Secretary of State for the Home Department, Ex parte Chinoy. In that case, Bingham LJ stated: "I would, however, wish to emphasise that the procedure to set aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave ex parte were to be followed by applications to set aside inter partes which would then be followed, if the leave were not set aside, by a full hearing. The only purpose of such a procedure would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked very sparingly and it is an order which the court will only grant in a very plain case."

30. Lord Bingham also succinctly clarified the Court's role at an application to set aside leave in **Sharma v Brown Antoine** [2007] I WLR 780 at paragraph 14(6):

> "6) Where leave to move for judicial review has been granted, the court's power to set aside the grant of leave will be exercised very sparingly: *R v Secretary of State for the Home Department, Ex p Chinoy* (1991) 4 Admin LR 457, 462. But it will do so if satisfied on inter partes argument that the leave is one that plainly should not have been granted: ibid. These passages were cited by Simon Brown J in *R v Secretary of State for the Home Department, Ex p Sholola* [1992] Imm AR 135 and the Board does not understand him, in his reference to delivering "a knockout blow", at p 139, to have been propounding a different test."

31. The Court is entitled after full consideration after an ex parte grant of leave to determine whether leave was properly granted. Indeed, there would always be the case where "even Homer nods" and it is best that the Court retrace the judicial steps by setting aside the grant of leave rather than let the matter go ahead.[4] However, I should note a sound of caution with regard to any over reliance on recent English authority on this procedure.

32. The Claimant relies on **Lewis Judicial Remedies in Public Law (4th Edition)** para 9-064, for the proposition that setting aside the grant of leave is a rare event. That is to overstate the test and is not the case in this jurisdiction. The learned author commented:

> "The Court has inherent jurisdiction to set aside orders, including orders granting permission to apply for judicial review, which have been made without notice being given to the Defendant or other interested party. Now, however, the claim form has to be served on the defendant and any interested party and they will have the opportunity to put in a summary of the grounds for resisting the claim. Consequently, neither the Defendant nor any other person served with the claim form may apply to set aside an order giving permission to apply for judicial review. An application to set aside the grant of permission will be entertained only in the rare cases where permission has, for some reason, been granted before the Defendant has had the opportunity to put in an acknowledgment of service. Even then, the jurisdiction will be exercised sparingly and the Courts are likely only to set aside permission in a very plain case. Applications to set aside should be made promptly after the person concerned has discovered the grant of permission. Permission may be set aside may where there was delay because the Claimant did not bring the claim promptly, should have used an alternative remedy, or failed to disclose material facts; or where there is a statutory provision ousting the jurisdiction of the Courts, or where the Claimant has no arguable case (although only rarely and in a very clear case is it appropriate to set aside permission on this ground)…"

33. Importantly, in the English procedure of CPR Part 54 the Defendant has the right to be served with the application before the grant of leave is made and the Defendant and interested parties are afforded an early opportunity to participate at the leave stage which they did not have in

[4] See **R v Secretary of State for Home Department ex parte Doorga** [1990] COD 109 and **Harricrete Limited v The Anti-Dumping Authority and the Minister of Trade and Industry and Consumer Affairs and Trinidad Cement Limited** H.C 1254/2000.

the predecessor rules. Such participation is not automatically provided to the Defendant under our Part 56 CPR. See Rule 56.4 which leaves it in the discretion of the Judge to hear the proposed Defendant on an application for the grant of leave. See also **Steve Ferguson and Ishwar Galbaransingh v The Attorney General of Trinidad and Tobago** Civil Appeal No. 207 of 2010 where Kangaloo JA recommended the adoption of the English procedure of early involvement by the Defendant.

34. Where such an opportunity has been afforded to a proposed Defendant it would be a rare event that leave would then later be set aside. Similarly, had this Defendant been invited to participate at the hearing for leave and leave was granted it would be very rare for this Court then to set aside leave let alone to accede to even hearing an application to set aside leave. However, that is not the procedural circumstance of this case and the Court retains its jurisdiction to set aside leave, in this case, on the basis that leave plainly ought not to have been granted. I make it clear at the outset, however, that despite arguments by the Defendant in its written submissions there is no case here of non-disclosure to be investigated which will affect the grant of leave.

Submissions

35. The parties provided their written submissions, oral and written answers to pointed questions raised by this Court which further refined the dispute in this case. The Claimant's submissions can be summarized briefly as follows:

    - The Permanent Secretary can act as the delegate of the Public Service Commission in the advertisement of vacancies and compliance with guidelines for recruitment. However, it is subject to his obligation of consultation under the 1973 Circular and pursuant to the common law duty of fairness.

    - The 1973 Circular has created a legitimate expectation that the Claimant will be consulted on matters pertaining to recruitment. The Permanent Secretary cannot act inconsistently with the 1973 Circular.

    - The Courts are moving towards a position where they would not allow the State by the subterfuge of binary fission in the discharge of duties to avoid the recognition of the eye of good administration. It would jar the conscience of any Court to allow the State to smother good governance by proliferating agencies to carry out State, statutory

and/or and constitutional functions which overlap and then when called upon to account to exculpate itself by passing the buck and on the very narrow ground and say "not me-next agency." An abuse of power will therefore occur if the Permanent Secretary is permitted to act schizophrenically as it were turning a blind eye to the established practice in his own Ministry.

- The directive of the CPO, directed as it was to all Permanent Secretaries was meant to be a policy directed at the whole and single entity of the government. The Permanent Secretary was enjoined by the Public Service Commission under delegated power to engage in the advertisement and recruitment of officers and was so also conjointly carrying out the function of the CPO.

- It is the first time post-independence that such a delegation has been made by the Public Service Commission and should therefore be jealously supervised by the Court as it threatens to blur the established principles of insulation adumbrated by **Endell Thomas v The Attorney General** [1982] AC 113.

- Since this is the first time that the Permanent Secretary was carrying out such a function "that as a matter of fairness, the consultation process ought to have been engaged." As a radical departure from previous practice and because of its public significance, it triggers the right to act fairly and to consult.

36. The Defendant's main contention is that the delegated powers of the Public Service Commission carries no duty to consult with the Claimant either by statute or by reference to the 1973 Circular.

Issues

37. The following main issues arise on the Defendant's application:

(a) Whether the Claimant's complaints of a breach of its legitimate expectations and the duty of consultation are arguable with a realistic prospect of success;

(b) Whether there is any evidence of a settled practice or clear and unambiguous representation that the Defendant will consult with the Claimant on matters of recruitment prior to exercising his delegated powers;

(c) Whether the 1973 Circular can or is capable of fettering the Defendant's right to carry out the mandate of the Public Service Commission or impose a duty on him to consult with the Claimant prior to taking the said decision;

(d) Whether such a duty to consult the Claimant is to be implied by reference to section 14 (1)(c) of the Civil Service Act or as an incident of common fairness;

(e) Whether the lack of consultation dilutes the constitutional importance of the appointment of public officers and exposes it to the threat of political interference.

38. To resolve these issues, it is necessary to understand the constitutional context of the process of appointments in the Civil Service, the terms of the 1973 Circular and Public Service Commission's memoranda.

The Constitutional/ Statutory Regime

39. Lord Wilson quite rightly observed in **Mohammed v Public Service Commission** [2017] UKPC 31 that in our relatively small community there is considerable sensitivity about the risk of political influence upon the process of making appointments including promotions of officers in the public service. That sensitivity has given rise to this dispute. The constitutional provisions of section 121(1) are designed to buttress the independence of the process of such appointments by vesting in the Public Service Commission and insulating its work from interference by the Executive. The involvement of the Permanent Secretary in the work of the Public Service Commission in this case has given the Claimant its base to launch the argument that the Court must be sensitive to the need to sanitize the process from political inference, a matter which a consultative process with the Claimant potentially addresses. It is a seductive argument of the Claimant, but the constitutional and statutory context of the process demonstrates that there is no need to be alarmed by the process adopted in this case.

40. I now briefly examine the autonomous nature of the Public Service Commission, its work of making appointments and the separate functions carried out by the Executive in relation to terms and conditions of employment. This analysis demonstrates the lack of any statutory or constitutional basis to consult with the Claimant on the issue of appointments of officers.

The Public Service Commission and the Executive-Split functions and duties

41. The local jurisprudence is clear that the Public Service Commission's work in the appointment of officers is distinct and separate from the establishment of terms and conditions of employment of those officers.

42. The autonomous nature of the Public Service Commission was underscored by the Privy Council in **Endell Thomas v The Attorney General** [1982] AC 113. Lord Diplock's observation is pertinent and deserves repeating:

> "The whole purpose of chapter VIII of the Constitution which bears the rubric "The Public Service" is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous commissions, although public authorities, are excluded by section 105 (4) (*c*) from forming part of the service of the Crown. Subject to the approval of the Prime Minister they may delegate any of their powers to any of their members or to a person holding some public office (limited in the case of the Police Service Commission to an officer of the police force); but the right to delegate, though its exercise requires the approval of the Prime Minister, is theirs alone and any power so delegated is exercised under the control of the Commission and on its behalf and not on behalf of the Crown or of any other person or authority … In respect of each of these autonomous commissions the Constitution contains provisions to secure its independence from both the executive and the legislature."[5]

43. There was indeed, understandably, grave concerns by this Claimant when the press release was published. It gave the impression that the Permanent Secretaries were conducting the process of appointment of officers in the public service and so usurping the function of the Public Service Commission. However, the Permanent Secretary was at all material times acting as the delegate of the Public Service Commission within the established regulatory framework. Clear

[5] **Endell Thomas v The Attorney General** [1982] AC 113, page 124 C-G.

guidelines were issued to it by the Public Service Commission and no question of executive or political interference can arise.

44. Chapter 9 of the Constitution is headed "Appointments To, And Tenure of, Offices". Part 1 of that Chapter contains provisions relating to the Public Service Commission with sections 120 and 121 dealing with the Public Service Commission. Section 121 provides that subject to the provisions of the Constitution, the power to appoint persons to hold or act in offices, to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices and to enforce standards of conduct on such officers shall vest in the Public Service Commission. Sections 126 to 129 of the Constitution make general provisions for the operation of these Commissions such as the power to delegate its functions and the duty to consult in sections 127, 128 and 129 of the Constitution.

45. In terms of delegating its functions, section 127 of the Constitution provides for a Service Commission to delegate any of its functions to any public officer with the approval of the Prime Minister and subject to such conditions as it may think fit. I deal later with the mechanics of that delegated power.

46. With reference to consultations, section 128 of the Constitution requires the Service Commission to consult with another Commission if it appoints to an office a person holding or acting in any office where such power is vested in another Commission. Section 129 of the Constitution further confers on the Commission, with the consent of the Prime Minister, the power to regulate its own procedures including the procedure for consultation with persons "with whom it is required to by this Constitution to consult". There is nothing in the Constitution therefore which suggests that the Commission is to consult with any body or persons other than another Commission, least of all the Claimant.

47. The Public Service Regulations further elaborates on the process to be adopted in dealing with appointments (Chapter III). These regulations are recognised as "a self-contained code governing" appointments. See the Privy Council's observations in **Lovell Romain v Attorney General** Privy Council Appeal No. 100 of 2012.

48. The procedure for appointment of officers in the public service are on the basis of competitive examination. The Public Service Commission may appoint one or more Selection Board(s) to

assist in the selection of candidates. Examinations are held by an Examinations Board appointed by the Commission.

49. Regulation 13 provides for the filling of vacancies in the public service. The Permanent Secretary or Head of Department will communicate to the Director of the vacancies that exist. It is for the Director to give notice of the vacancies that exist in the service and any officer may make an application for an appointment to that particular vacancy.

50. Regulations 13 and 16 sets out the machinery for the delegation of certain of the Public Service Commission's functions in relation to the advertisement and filling of vacancies to the Permanent Secretary.[6]

51. The conjoint effect of Regulations 13(5) (6) (7) and 16 (3) (4) (5) (6) is that the Permanent Secretary or Head of Department may with the consent of the Public Service Commission and in consultation with the DPA by (a) circular or memoranda and (b) publication in the Gazette give notice of the vacancies that exist in the office to which an eligible officer may apply.

52. Upon issuing a notice of vacancy pursuant to regulation 13(5), that Permanent Secretary shall appoint a Selection Board to assist in the selection of a candidate for appointment to the vacancy which will include the Director or his representative and shall be constituted in accordance with guidelines issued by the Public Service Commission. Such a Selection Board shall follow the procedures outlined by the Public Service Commission in "Guidelines for the selection of candidates". In this case the Public Service Commission had issued its guidelines which is exhibited as "S.L.4" in the affidavit of Selwyn Lashley filed 28th September 2017. The report of the Selection Board shall then be submitted to the Public Service Commission for consideration. It is then for the Commission in its discretion to summon for interview any of the candidates recommended by that Selection Board. Such a process importantly does not prejudice any eligible officer who has not responded to the Permanent Secretary's notice of vacancy. Such eligible officers can still be considered by the Public Service Commission. See Regulation 13(7).

53. From this summary of the constitutional framework, the Public Service Commission's exclusive purview is to appoint officers to the public service. It does so without any

[6] See also other delegated powers such as contained in the First Schedule, Part II of the Public Service Commission (Delegation of Powers) Order.

requirement to consult with the Claimant. It can so embark on a process of appointment by delegating some of its functions to the Permanent Secretary. Importantly, those appointed do not become employees of the Public Service Commission; they are employees of the Executive. The Public Service Commission therefore acts as the independent and insulated intermediary to ensure appointments are removed from the Executive's interference. However, the actual terms and conditions of the office are established by the Executive by the terms of the individual contracts that the officers enter with the State. See **The Director of Personnel Administration v Equal Opportunity Commission and The Attorney General** Civ App P291/2014.

54. This was a matter considered in detail in **Cooper and Balbosa v Director of Personnel Administration and the Public Service Commission** [2007] 1 WLR 101 and confirmed in **Mohammed v Public Service Commission**. In **Cooper** the issue arose as to whether the Executive had overreached its powers in establishing an Examination Board. The Privy Council drew the distinction between the Public Service Commission's power in appointing officers and the Executive's powers to set terms and conditions of employment. Lord Hope drew the distinction between appointing officers to the service which is a matter exclusively for the particular service commission. On the other hand, there are the terms and conditions of service which are to be included in the contract of the individual officer which may be laid down and where there are gaps because the matters at issue have not been dealt with by the legislature, they may be dealt with by the employer. Lord Hope explained at paragraph 27:

> "In the case of police officers, their contract of service is with the executive. So it is open to the executive to fill the gaps. But this has nothing whatever to do with the matters that lie within the exclusive preserve of the Police Service Commission. It is for the Commission, and the Commission alone, to appoint and promote police officers. Terms of service are what each police officer enters into with his employer following the confirmation by the Commission of his appointment to, or his appointment on promotion within, the police service."

55. Similarly in drawing the line between the functions of the Public Service Commission and that of the Executive, the Public Service Commission plays no part in the terms and conditions of employment far be it being consulted on it.

56. In a similar vein, Lord Diplock observed in **Endell Thomas** that the functions of the Police Service Commission fall into two classes: (1) to appoint officers, including their transfer and promotion and confirmation in appointments and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers. These are matters for the legislature and, in respect of any matters not dealt with by legislation, whether primary or subordinate. He noted:

> "It is for the executive to deal with in its contract of employment with the individual police officer. Terms of service include such matters as (a) the duration of the contract of employment, e.g., for a fixed period, for a period ending on attaining retiring age, or for a probationary period as is envisaged by the reference to "confirmation of appointments" in section 99 (1); (b) remuneration and pensions; and (c) what their Lordships have called the "code of conduct" that the police officer is under a duty to observe."[7]

57. It was not contemplated by these provisions, therefore, for a consultative machinery to be invoked in the matters of appointment and ancillary matters related to it such as advertising vacancies, save for where the Constitution expressly provided to limit the power of the Public Service Commission to appoint officers to existing vacancies. It remains a matter for the Legislature and the Executive to determine how those terms and conditions for those offices are to be established. To this end, section 14 of the Civil Service Act and the 1973 Circular are important. It was the Legislature and the Executive providing for a consultative machinery to deal with terms and conditions of employment of the staff in the public service.

58. At page 130 D of **Endell Thomas**, Lord Diplock also noted that the powers of "prescribing the procedure for appointments from within the police service; "prescribing the probationary period on first appointment and for the reduction of such period in appropriate cases"; "prescribing conditions for the termination of first appointments" were examples of activities which dealt "with promotions and transfers and with appointments and confirmations of appointments which are exclusive functions of the Commission under section 99(1)" of the then Constitution.

59. At page 131 H, he noted:

[7] **Endell Thomas v The Attorney General** [1982] AC 113, page 128.

"If "enlistment" were interpreted as including the process of selection of recruits to the police service, as distinct from laying down physical and educational qualifications for recruitment, it would to that extent be inconsistent with section 99 (1) of the Constitution which vests the function of selection exclusively in the Commission."

60. In **Cooper and Balbosa v Director of Personnel Administration and the Public Service Commission**, the Privy Council highlighted the distinction between terms and conditions of employment and matters that fall in the exclusive preserve of the Commission. At paragraph 27 it was stated:

"Terms of service, of which Lord Diplock gave various examples, may be laid down by the legislature. Where they are laid down in that way they must form part of the contract. Where there are gaps because the matters at issue have not been dealt with by the legislature, they may be dealt with by the employer. In the case of police officers, their contract of service is with the executive. So it is open to the executive to fill the gaps. But this has nothing whatever to do with the matters that lie within the exclusive preserve of the Police Service Commission. It is for the Commission, and the Commission alone, to appoint and promote police officers. Terms of service are what each police officer enters into with his employer following the confirmation by the Commission of his appointment to, or his appointment on promotion within, the police service."

61. The Legislature was therefore clear in section 14 of the Civil Service Act Chap 23:01 to provide a mechanism for consultation on terms and conditions of employment:

"14. (1) The Department shall carry out such duties as are imposed on it by this Act and the Regulations, and in addition shall have the following duties:

(a) to maintain the classification of the Civil Service and to keep under review the remuneration payable to civil servants;

(b) to administer the general regulations respecting the Civil Service;

(c) to provide for and establish procedures for consultation and negotiation between the Personnel Department and an appropriate recognised association or associations in respect of—

(i) the classification of offices;

(ii) any grievances;

(iii) remuneration; and

(iv) the terms and conditions of employment.

62. Section 16 of the Civil Service Act further provides for consultation between the Personnel Department and the association of civil servants at the request of the representative or whenever the Minister of Finance deems such consultation necessary. Where no agreement is reached on the proposals of the association during consultation and negotiations with the Personnel Department with respect to matters in section 14, section 17 of the Civil Service Act provides that the Personnel Department or the association shall report the matter to the Minister of Finance and upon such report being made, a dispute will be deemed to exist.

63. Section 18 provides that where the Personnel Department does not consult with the representatives of the appropriate association before making proposals to matters in section 14, the Personnel Department shall submit the proposals to the association for consideration and agreement save that where the Personnel Department and the association are unable to reach an agreement, the Personnel Department or association shall report the matter to the Minister of Finance and upon the report being made, a dispute will be deemed to exist.

64. Section 20 provides that the disputes under section 17 and 18 are to be referred to the Special Tribunal for settlement by the Minister within 21 days from the date on which the dispute was reported to him. The Essential Services Division of the Industrial Court established under Chapter 88:01 sits as the Special Tribunal to determine these disputes. Importantly, therefore, consultation is the beginning of a process which may end, if not resolved, in an adversarial resolution system at the Special Tribunal.

65. For the Claimant to succeed or mount an arguable case with a realistic prospect of success, it must point to a provision in this Commission's self-contained code which requires consultation with the Claimant before the process of appointment to an office by the Public Service Commission is instigated or vacancies for that office advertised.

66. **Harinath Ramoutar v Commissioner of Prisons and Public Service Commission** [2012] UKPC 29 in fact makes the point pellucid. The duty to consult with the association to set terms and conditions of employment or to establish job descriptions cannot fetter the constitutional

duty of the Public Service Commission in making their appointments to offices or to take the necessary ancillary steps.

67. The appeal in **Harinath Ramoutar** concerned an application for judicial review of the decision not to consider Mr. Ramoutar for an appointment as acting Chief Prison Welfare Officer of the Trinidad and Tobago Prison's Service. In denying his application, the Commissioner of Prisons wrote to Mr. Ramoutar referring to the "Job Specification and Description" for the Office of the Chief Prisons Welfare Officer. This was a document agreed in 1998 between the Permanent Secretary of the Ministry of National Security, the Chief Personnel Officer of the Prison Service and the Prison Officers' Association. The document contained a "brief description of the functions of the office, a list of the qualities required most of them described in very general terms, and a summary of the working conditions, reporting relationships and duties, together with certain criteria by which performance of those duties would be assessed". A bachelor's degree in "social work from a recognised institution or equivalent" was also required which Mr. Ramoutar did not possess and for which reason the Commissioner indicated he was unable to recommend Mr. Ramoutar for promotion.

68. Lord Sumption in delivering the judgment of the Privy Council noted that the Job Specification and Description had no statutory status. He stated:

> "16. Second, the Job Specification and Description has no statutory status. It is a government document, agreed with the relevant professional association for the prison service. It was suggested to the Board on behalf of the Commission that it had statutory force under section 15 of the Prison Service Act, which provides that it is the duty of the service's Personnel Department to "provide for and establish procedures for consultation and negotiation between the Personnel Department and an appropriate recognised association or associations in respect of... (iv) the terms and conditions of appointment." But this simply means that they must consult upon and negotiate the terms of the contract of service. The Job Specification and Description appears to have been the result of consultation and negotiation between the Personnel Department and the relevant association, but it does not record the terms of the contract of service. It is exactly what it says it is: a job description, including a statement of qualities required to perform the duties.

17. Third, even if the Board were persuaded that the Job Specification and Description was produced pursuant to a statutory duty of the prison service, it would not follow that it defined the criteria for eligibility even of those appointed to permanent positions. It is one thing for the prison service to agree a job description with the relevant officers' association, but quite another to bind the Public Service Commission to treat it as a statement of the criteria for threshold eligibility. Moreover, the document itself appears to the Board to be wholly unsuitable for that purpose. Threshold eligibility, if it is to operate as a basis for excluding an application from consideration on its merits, has to be based on some objectively verifiable litmuspaper test. Eligibility of this kind cannot be a question of degree. However, the qualifications expected of a Chief Prisons Welfare Officer are described in the Job Specification and Description in terms which call for an exercise of judgment about the strength of the candidate's personal qualities for the job. They refer, for example, to his "expert counselling skills" or "sound observational skills", to his "expert knowledge of principles and practices of correctional administration", his "sound knowledge of principles and practices of social work", to his "basic knowledge of relevant computer application." It is true that a few of the qualities said to be required are susceptible to a litmus paper test yielding a Yes/No answer, and one of these is the requirement for a degree in social work. But even in these cases, the document is not wholly prescriptive. Many of the specified qualities overlap. Read as a whole, the document leaves open the possibility, for example, that "sound knowledge of principles and practices of social work" (another of the listed criteria) may have been acquired by some means other than a degree."[8]

69. Lord Sumption's observation simply underscores the distinct or split compartments of the Public Service Commission's powers and duties of appointment as distinct from the employer's duty to consult on terms and conditions of employment. Quite rightly, Lord Sumption in **Harinath Ramoutar** observed that the Courts are concerned to ensure that the public bodies carry out the functions that the relevant legislation assigned to them. The challenge for the Claimant in this case is to identify a particular legislative basis or other special feature where the Permanent Secretary is involved which can modify the clear requirement and

[8] **Harrinath Ramoutar v Commissioner of Prisons and Public Service Commission** [2012] UKPC 29 paragraph 16 and 17.

duties in the appointment of officers in the public service. From this constitutional and legislative framework, the Claimant simply cannot mount an argument that a statutory duty to consult exists.

70. What the Claimant has resorted to, however, is to point to the 1973 Circular as setting out a consultative machinery established pursuant to section 14 of the Civil Service Act. From the analysis above such a machinery was established by both the Legislature in section 14 of the Civil Service Act and the Executive issuing the 1973 Circular. It contends that such a process must be observed by the Permanent Secretary before it embarks upon the advertisement and filling of vacancies by the Public Service Commission. It must do so as a fundamental principle of fairness and also the 1973 Circular creates a legitimate expectation that it would be consulted prior to the discharge of the Permanent Secretary's functions under the Civil Service Regulations. However, a closer analysis of the law of legitimate expectation and the duty to consult demonstrates that even here the Claimant's argument has no merit.

Legitimate Expectation-General Principles

71. Legitimate expectation is an expectation which is founded on the reasonable assumptions which is capable of being protected in public law. It enables the Claimant to challenge a decision which deprives it of an expectation founded on a reasonable basis that its claim would be dealt with in a particular way.

72. In **Nadarajah & Abdi v Secretary of State for the Home Department** [2005] EWCA CIV. 1363 Laws LJ noted at paragraph 68 that:

> "The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

73. Although **Paponette v The Attorney General of Trinidad and Tobago** [2010] UKPC 32 dealt with the law of substantive legitimate expectation it is settled law that the initial burden lies on the applicant to prove the legitimacy of his/her expectation, that is, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. Once these elements have been proven, the onus then shifts to the respondent to justify the

frustration of the legitimate expectation and to identify any overriding interest on which it relies to justify the frustration of the expectation.

> "The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified."[9]

74. In **United Policy Holders Group and others v The Attorney General of Trinidad and Tobago** [2016] UKPC 17, Lord Neuberger in commenting on legitimate expectations noted at paragraph 37:

> "37. In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2009] AC 453, para 60."

75. A department circular can create binding legitimate expectations, see **R (on application of Midcounties Cooperative Ld) Wyre Forest District Council** [2009] EWHC 964 (Admin). Equally, a representation may be made generally and may be evidence of the adoption of a policy. See **De Smith's Judicial Review (7th ed)** at paragraph 12-023. The burden, however, remains on the Claimant to establish a representation that is clear, unambiguous and devoid of relevant qualification or a settled practice. The onus then shifts to the Defendant to demonstrate good reason judged by the Court to be proportionate to resile from it. The Claimant's case is one of procedural legitimate expectations an expectation that it would be consulted, it also argues that a general obligation to consult can be implied.

Consultations-The duty to consult

[9] **Paponette v The Attorney General of Trinidad and Tobago** [2010] UKPC 32, paragraph 42.

76. There is no doubt great benefits to be derived for managers to consult persons affected by decisions before those decisions are taken. In an employment context, one achieves synergies of organizational needs with individual goals, foster good administration and introduces an element of democratization of the civil service[10]. In **Judicial Review by Supperstone and Goudie 5th Edition**, paragraph 10.6.2, the learned authors commented:

> "..Moreover, consultation is a crucial part of central government decision making. It improves the information and understanding of the decision- maker, and therefore leads to better administration. In addition, it is an important aspect of democracy; those affected by decisions are able through the consultative process to have some influence on that decision…."

77. The Claimant submitted that since this is the first time that the Permanent Secretary was carrying out such a delegated function "that as a matter of fairness, the consultation process ought to have been engaged." Recognizing that there is no statutory requirement of the Public Service Commission to consult with anyone (save where provided in the Constitution) in the discharge of its functions to appoint officers, the Claimant's real argument is that a general duty to consult the Claimant by the Defendant should be implied consistent with the duty to act fairly given the unusual circumstances of this case and the unique nature of the public functions being discharged.

78. **R (Plantagenet Alliance Ltd) v Secretary of State for Justice** [2014] EWHC 1662 (Admin) Hallet J usefully summarized the law of when the duty to consult may arise and I adopt the general principles culled from the authorities:

> [97] A duty to consult may arise by statute or at Common Law. When a statute imposes a duty to consult, the statute tends to define precisely the subject matter of the consultation and the group(s) to be consulted. The Common Law recognises a duty to consult, but only in certain circumstances.

[10] "Industrial democracy means the government mandated worker participation at various levels of the organisation with regard to decisions that affect workers. It is mainly the joint consultations that pave the way for industrial democracy and cement relationship between workers and management. This benefits both. The motivated workers give their best and maximum to the organisation, on the one hand, and share their share of the fruits of organisational progress jointly with management, on the other." **Importance of Industrial Relation for Employees and Employers**, TAB 24 of the Claimant's Bundle of Authorities filed 8th December 2017.

[98] The following general principles can be derived from the authorities:

1. There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. *Harrow Community Support Ltd) v Secretary of State for Defence* [2012] EWHC 1921 (Admin) at para 29, [1993] 3 All ER 92, [1993] 3 WLR 154, *per* Haddon-Cave J).

2. **There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (*R (Cheshire East Borough Council) v Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paras 68 – 82, especially at 72).**

3. The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) (*(R Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, at paras 41 and 48, *per* Laws LJ).

4. A duty to consult, *ie* in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures (*R (BAPIO Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at paras 43-44, *per* Sedley LJ).

5. The Common Law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator (*R (BAPIO Ltd) (supra)* at para 47, *per* Sedley LJ).

6. The courts should not add a burden of consultation which the democratically elected body decided not to impose (*R(London Borough of Hillingdon) v The Lord Chancellor* [2008] EWHC 2683 (Admin), [2009] LGR 554, [2009] 1 FCR 1).

7. The Common Law will, however, supply the omissions of the legislature by importing Common Law principles of fairness, good faith and consultation where it is necessary to do, *eg* in sparse Victoria statutes (*Board of Education v Rice* [1911] AC 179, at p 182, 9 LGR 652, 75 JP 393, *per* Lord Loreburn LC) (see further above).

8. Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (*Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346, [1983] 2 WLR 735, especially at p 638G).

9. The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was be cast upon them (*In Re Westminster City Council* [1986] AC 668, at 692, [1986] 2 All ER 278, 84 LGR 665, (HL), *per* Lord Bridge).

10. A legitimate expectation may be created by an express representation that there will be consultation (*R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA Civ 1768), or a practice of the requisite clarity, unequivocality and unconditionality (*R (Davies) v HMRC* [2011] UKSC 47, [2012] 1 All ER 1048, [2011] 1 WLR 2625 at paras 49 and 58, *per* Lord Wilson).

11. Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (*R(Coughlan) v North and East Devon Health Authority* [2001] QB 213 at para 89, [2000] 3 All ER 850, 97 LGR 703 *per* Lord Woolf MR).”

79. In my view, there could be no legitimacy by the Claimant of an expectation that it would be consulted by the Permanent Secretary based on either a settled practice or on the 1973 Circular. Further, the Claimant's case fails the "Plantagenet test". There is no statutory duty nor promise to consult with the Claimant prior to the decision being made. There is no established practice of consultation on the issue and no duty can be implied or imposed in the circumstances of this case on the Defendant when acting as a delegate of the Public Service Commission.

Legitimacy of the expectation

80. It is conceded by the Claimant that this was the first time that the Defendant had embarked upon a "recruitment exercise". This defeats any argument that there was a settled practice to consult the Claimant on such a unique exercise by reference to the 1973 Circular. The fact is, the issue of the Defendant engaging in a recruitment exercise has never arose before. There is no evidence advanced in the Claimant's affidavit of any settled practice of consultation on the question of the recruiting of officers within the public service. The only evidence adduced is that of Mr. Sankersingh who can only attest to attending three meetings in 2014 where grievance issues were dealt with. No minutes have been produced and the paucity of the evidence of the Claimant can hardly be described as a settled practice of consultation before a recruitment exercise is engaged by the Defendant.

81. The claim to a legitimate expectation falls squarely on the interpretation of the 1973 Circular. However, even here there are difficulties for the Claimant. First, an expectation if established must yield to the governing statute and a public authority cannot be held to a promise made outside its jurisdiction or authority. Having considered the powers of the Public Service Commission extensively above and the duties carried out by the Defendant pursuant to Legal Notice No. 267 of 2017, it is illegitimate to expect that the Claimant would be consulted within that legislative framework. It would constitute an impermissible constitutional overreach to impose such a duty to consult through the 1973 Circular in a process of appointment which is within the exclusive purview of the Public Service Commission. Such an expectation defeats the insulation of the Public Service Commission and its process from Executive interference as it invites the Executive through the JCC to intermeddle in the process of appointments. The consultative machinery established by the 1973 Circular cannot operate in conflict with the Constitution.

82. Second, the representation in the 1973 Circular made on behalf of the CPO simply could not be attributed to the Public Service Commission. In **Pharsalus Inc v Commissioner of the Guyana Geology and Mines Commission** 83 WIR 401, it was noted at paragraph 30-31:

> "[30] To ascertain whether a substantive legitimate expectation has arisen the courts focus upon not what the claimant subjectively expects but upon what the claimant is entitled to expect as a result of 'a specific undertaking, directed to a particular individual or group, by which the relevant policy's continuance is assured, so that the defendant's conduct is 'equivalent to a breach of contract or breach of representation. There needs to be 'a clear and unambiguous representation, devoid of relevant qualification so that effect can be given to such representation, it being clearly unfair to the representee in all the circumstances for the court to allow this representation to be defeated by the public interest (which is never static) in changing the policy reflected in the representation.
>
> [31] This undertaking or representation needs to be made by the decision-maker who will be required to implement the undertaking or representation. Here the Commission gave no such undertaking or representation. Its chief officer merely recorded the fact of a grant of a survey permit to Pharsalus by the Minister that contained the Minister's undertakings or representations in clause 2 of the Permit. Thus the terms of the Permit cannot give rise to any legitimate expectation against the Commission which has not been shown to have directed its mind to the issues."

83. In **R (BAPIO Action Ltd) v Secretary of State for the Department** [2008] 1 AC 1003 the Law Lords opined at paragraph 29:

> "The imperative underlying a judicial review challenge on "legitimate expectations" grounds to an executive act or decision is, or should be, that of fairness. The thought that the decision-maker should not be allowed to frustrate expectations that have been engendered by assurances that the decision-maker has, whether expressly or impliedly, previously given seems to me the underlying theme. But there are two limiting factors that, in my opinion, need to be taken into account in a case such as the present. First, the assurances that are relied on should be assurances that have been given by the decision-maker. Sullivan J in R v Secretary of State for the Home Department, Ex p Mapere [2001] Imm AR 89, paras 34, 36 agreed that for a legitimate expectation to arise it had to be

founded on "some promise or policy statement or practice made by the relevant decision-maker" and that "it would be wrong in principle for courts to rule that a decision-maker's discretion should be limited by an assurance given by some other person". To the same effect, in De Smith's Judicial Review, 6th ed (2007), para 12-032 the authors say:

> "The representation by a different person or authority will therefore not found the expectation. Thus representations by the police will not create a legitimate expectation about the actions of the prison service."

I respectfully agree."

84. In **Gillette Marina Ltd. v Port Authority of Trinidad and Tobago** HCA S 1747 of 2002, the Claimant argued that representations made by government departments and agencies other than the Defendant could and did lead to the legitimate expectation that it claimed. The Defendant argued it did not because government entities cannot create binding obligations on the PATT unless it was demonstrated that these were made or done in the capacity of an agent of the PATT. Justice Jamadar, as he then was agreed. In **Gillette Marina Ltd. v PATT** Civ App. No. 30 of 2003 the Court of Appeal upheld the decision and Kangaloo JA stated:

> "It cannot be that a public body such as the Port Authority in this case, makes no representations or inducements to an applicant but is liable in judicial review because another state agency who is not a respondent did."

85. Ipso facto, the process of appointment conducted by the Public Service Commission cannot be held liable in judicial review because the CPO has made a representation in relation to terms and conditions of employment, a matter which has already been demonstrated to fall outside the constitutional remit of appointing officers to the service.

86. The 1973 Circular was neither a representation made by the Public Service Commission nor the Permanent Secretary even when it is acting pursuant to the Public Service Commission Regulations to discharge constitutionally insulated duties.

87. Third, there is no clear no unambiguous commitment or representation that the Defendant would consult with the Claimant when it embarks upon this delegate function. The 1973 Circular, of course, does not speak about a consultative machinery with the Claimant alone but with a committee known as the JCC. Paragraph 1 of the 1973 Circular is concerned with

Management decisions. As already demonstrated the process of appointment to office is not a management decision.

88. Even the terms of the 1973 Circular in relation to "recruitment" is ambiguous. It is true that to "Recruit" means to "Enrol (someone) as a member of worker in an organization or as a supporter of a cause."[11] The Claimant submitted that "recruitment" can carry a meaning that includes setting the minimum qualifications and the selection of recruits. The Claimant also contends that in **Endell Thomas**, Lord Diplock uses the term "terms of service" which is distinct from "terms and conditions of employment". The Claimant contends that the act of advertisement is a subset of "recruitment" and therefore engages this definition of "conditions of employment." They state that "insofar as the Commission is empowered to select and appoint persons to join the public service, the act of advertisement: a) is a composite function that involves the CPO and which is encompassed in the terms and conditions of employment and is therefore a matter upon which the Claimant was entitled to be consulted; and b) forms a distinctly separate function that falls with the term "recruitment".

89. This ignores two critical matters. First, the clear jurisprudence discussed above that it is the Department of Personnel Administration which has responsibilities across the whole of the public service on matters relating to terms and conditions of employment, and it conducts negotiations from time to time with associations on employment matters, but it is not responsible for making decisions about appointments to the service.

90. Second and fundamentally, it ignores the meaning and purpose of the 1973 Circular. A proper reading of the 1973 Circular demonstrates that it has nothing to do with the appointment of officers in the service but everything to do with the existing management of the complement of staff in the organisation. The use of the word "recruitment" has been clearly picked by the Claimant out of context. The words could not carry any meaning that the consultative machinery was to be invoked to deal with the process of appointing or recruiting officers. It was a consultative machinery to deal with the existing staff of the organisation consistent with principles of employment including recruitment. It could not therefore be a representation in relation to the act of recruitment which the Claimant submits embodies the act of advertisement. At worse it is ambiguous as to its meaning and scope especially given the clear

[11] The Oxford Dictionary.

constitutional boundaries of the Public Service Commission and its statutory duty to consult with other service commissions where the circumstances so demand and not with the Claimant.

No duty to consult-The split personality

91. There is therefore no statutory duty to consult nor a promise to consult nor an established practice of consultation on the issue of appointments and recruitment. The Claimant has contended that the Defendant in this unique setting simply could not ignore its duties as set out in the 1973 Circular. It ought to have taken off its "Commission hat" and put on its "employer hat" and recognised the importance of consultation or it ought to have recognise the importance of the "two hats" or personalities as one composite.

92. There is of course no general duty to consult. See **Plantagenet**. The common law duty to consult is really an aspect of the common law duty to act fairly. See **Board of Education v Rice** [1911] AC 179. Absent a legitimate expectation of consultation, a duty to consult probably does not arise simply from the extent of the interest at stake or the context. It has been said that the recognition of a duty to consult simply on the basis of the extent of the interest or its context "would be entirely open ended and no public authority could tell with any confidence in what circumstances a duty of consultation was cast upon them." See **Re Westminster City Council and others** [1986] A.C. 668 at page 692.

93. There is however the exceptional cases where a failure to consult would lead to conspicuous unfairness. This is really the last salvo of the Claimant that having regard to the political sensitivities and unique nature of the functions exercised by the Defendant and given the backdrop of a consultative machinery engaging the very same Permanent Secretary it would be fair to consult with the Claimant on the question of recruitment and appointments before vacancies are advertised.

94. Fairness indeed is an elastic concept but to allow such an imposition on the process of appointment stretches the concept beyond its limits of elasticity. **R (Moseley) v Haringey LBC** [2014] I WLR 3947 Lord Wilson JSC opined at paragraph 24:

> "24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2014] AC 1115, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first

two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested": para 67. Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel": para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not: "Yes or no, should we close this particular care home, this particular school etc?" It was: "Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our borough, should we make one in the terms which we here propose?"

95. I have considered the Claimant's argument that the Defendant cannot compartmentalize his duties, he is to be treated as a composite whole as both delegate of the Public Service Commission and acting for the CPO. The Claimant relied on **Bapio** for the argument that:

> "…the executive power of the Crown is, in practice, exercised by a single body of ministers, making up Her Majesty's Government. With the increased range of responsibilities of central government today, there are, of course, more ministries dealing with domestic affairs than once there were, but they all exist to carry out the policies of the Government. As this case illustrates, policies adopted in one field often have repercussions in other fields."[12]

Further at paragraph 34 Lord Rodger opined:

> " I am accordingly satisfied that it would be wrong, not only as a matter of constitutional theory, but as a matter of substance, to put the powers, duties and responsibilities of the Secretary of State for the Home Department into a separate box from those of the Secretary of State for Health. Both are formulating and implementing the policies of a single entity, Her Majesty's Government."

[12] **R (BAPIO Action Ltd) v Secretary of State for the Department** [2008] UKHL, paragraph 33.

However, this ignores the settled constitutional jurisprudence in this jurisdiction of the independence of the insulated practice of the Public Service Commission.

96. I have also considered the Claimant's argument as to whether the statutory scheme ought to be supplanted by the common law duty to consult with the Claimant. However, I find no warrant to do so for the following reasons. First, there ought to be no unusual sensitivity of the member of the executive discharging this aspect of the function of the Public Service Commission as the Defendant has not run afoul of the clear provisions of the Public Service Commission's delegated functions. Second, there are ample safeguards included by the Public Service Commission by including its representative at every stage of the process and by reserving unto itself the decision of selecting the appointees. Third, questions of the advertising for vacant positions is a matter which must be dealt with expeditiously in any department and equally it is in the public interest of the department to act expeditiously. Fourth, there is no evidence that any serious attempt has been made by the Claimant to deal with the question of the manpower requirements of the department, the job descriptions and other terms and conditions of employment at the JCC. Fifth, notwithstanding this, the consultative machinery can still be engaged and has not been abandoned. The fact that the consultative machinery clearly exists to deal with matters in relation to existing staff points the way to a clear dissection of appointment and recruitment to the existing complement of staff on the existing terms and conditions of employment and the engagement of consultations for the benefit of all such members of staff that are present and within the department. The Defendant is not being invited to become a schizophrenic. To the contrary, he is being invited to be sensitive to the duties which he is constitutionally called upon to execute bearing in mind our settled jurisprudence on the question of appointments to the public service.

Illegality

97. I turn finally to the issue whether the Defendant's decision was illegal. From the analysis of his statutory powers and duties above acting as a delegate of the Public Service Commission, no illegality has arisen. The Defendant is not acting for the CPO when he made his decision. Section 14(1)(c) of the Civil Service Act cannot by any purposive construction be allowed to overreach clear constitutional provisions and jurisprudence of the autonomy and independence

of the Public Service Commission and its work. Further as discussed above, no claim for breach of legitimate expectation can arise in this case.

Discharging the injunction

98. For the reasons explained above, the grant of leave should be set aside. Having regard to the conclusion that leave should be set aside, it follows that the injunction should be discharged and the question whether an injunction should continue does not arise.

The evidential objections

99. I turn finally and belatedly to the evidential objections. I have examined the objections of both parties and I am guided by the following principles:

- Affidavits are not to be used as vehicles for the witness to present complex legal arguments or submissions but to give the relevant evidence.
- In public law cases some latitude can be made for parties to state their respective cases. See **B v The Children's Authority and the Attorney General** CV2016-0437 where the Court opined at paragraph 10:

> "For evidence to be admissible there should be adequate foundation evidence adduced, the deponent must be an appropriate person to give the evidence. It must not offend against the hearsay rule, subject to any relevant exceptions to that rule, and perhaps any residual judicial discretion to admit otherwise legally inadmissible evidence and it must not constitute opinion evidence, subject to the exception to the rule. See Chaitlal v Attorney General of Trinidad and Tobago HCA No. 2472 of 2003. The boundaries of admissible evidence is also set by Rule 31.3 CPR. The Court will also be alive to strike out matters that are scandalous, irrelevant or otherwise oppressive."

And further at paragraph 14:

> "Opinion Evidence: The general rule is that opinion evidence is inadmissible. Halsbury's Laws of England, 2015, Volume 28 sets out the exceptions to the general rule under the heading "Opinions of ordinary witnesses." Opinion evidence will however be admissible in the some instances such as evidence as to condition

and observations as to the conduct of a person with whom he is well acquainted which lead the witness to a conclusion which summarises the results of his observations."

100. I am also guided by the principles enunciated in **Faaiq Mohammed v Jack Austin Warner** CV2013-04726.

101. I have reproduced below the particular objections and my rulings.

The Claimant's evidential objections to the affidavit of Selwyn Lashley filed 28th September 2017.

PARAGRAPH	OBJECTION	RULING
Paragraph 6 the lines "Therefore, the efficient execution of the Minister's and his Ministry's functions under the Act is essential to engendering positive growth in the economy of Trinidad and Tobago."	Opinion; Imports a conclusion of fact; Usurpation of the Court's functions.	Although it is an opinion by the Defendant it is permissible as a matter which a Permanent Secretary is qualified to comment upon.
Paragraph 7 the words "major difficulties".	The deponent has not particularized what these difficulties are and the assertion amounts to an unsubstantiated statement of no probative value.	The statement is not objectionable and may be the subject of a request for further information. In any event the Claimant has answered it in its affidavit in reply. For this very reason to maintain equality of arms between the parties, the Defendant's objection to the Claimant's evidence (dealt with below) dealing with this issue will also be overruled.
Paragraph 7 the words "However, officials of the Commission have on several occasions informed me, and I	The deponent has not particularized the source of this information-he has not named the persons who informed him of such. The	Struck out on the grounds of hearsay.

PARAGRAPH	OBJECTION	RULING
verily believe it to be true, that the limited resources of the Commission makes it difficult to make the appointments to all the vacant offices in the entire Public Service in a timely manner."	statement is doubtful provenance and of no probative utility. It ought not to be admitted.	
Paragraph 8 the words "This arrangement is far from ideal as it is inherently disjointed, inefficient and does not provide the job security and employment benefits necessary to inspire worker morale and loyalty. Moreover, this arrangement does not support ordered professional growth and the development of sustainable organizational capacity. With the downturn in the economy due to decreasing revenues from the energy sector, it is even more necessary, crucial and urgent to have these vacant Public Service positions filled."	This is essentially Opinion evidence disguised as fact. It lacks evidential foundation and is of no probative utility.	This is a permissible statement from the Permanent Secretary as head of the department to make these observations.
Paragraph 9 "At the meeting, the DPA asked if I was willing to assist the Commission with their recruitment process."	Inadmissible hearsay	Hearsay. Struck out.
Paragraph 18 "...and there is no such settled practice".	The term "settled practice" is one of mixed fact and law	The statement is allowed not for its legal meaning but for

PARAGRAPH	OBJECTION	RULING
	which is a question for judicial determination.	the layman's terminology of a settled practice.
"The question of procedure to be employed in appointing public servants has always been, and continues to be, under the sole and exclusive jurisdiction and control of the Public Service Commission. This procedure must be distinguished from the procedure for dealing with terms and conditions of service of public officers".	Matters for judicial determination; Opinion; Conclusions. Interpretation of the law is the exclusive province of the Court. The views of academics and even eminent Counsel, do not constitute evidence.	This is a matter of judicial determination and opinion. It is argumentative and a submission made and not statement of fact. Struck out.
Paragraph 19 in its entirety.	Submissions for paragraph 18 are repeated.	This Deponent is competent to provide this evidence. It is important in this case for the Defendant to be alive to his duties and responsibilities.
Paragraph 21 in its entirety.	Inadmissible hearsay.	This evidence amounts to hearsay and has absolutely no probative value.
Paragraph 30 "Further, some of the skills that have been described above speak to health, safety and environmental concerns in the oil and gas sector".	No evidential foundation.	This Deponent would be allowed to state its narrative.
Paragraph 31 "There is also the risk that the delay in completing the process of filling the advertised vacancies in the MEEI would cause eligible and superior candidates to accept other	Conjecture and speculation; Opinion.	There is nothing speculative about this statement. Whereas it is an opinion, it lies with the Permanent Secretary to state what his fears and expectation may be.

PARAGRAPH	OBJECTION	RULING
offers of employment or lose interest in the offers of my Ministry. The natural expectation after submitting an application in response to a vacancy is that it would be processed in a timely manner and without undue delay".		
Paragraph 32 "This will involve the filling of additional establishment positions and in the interim contract positions".	This sentence flows from the first in the paragraph which speaks of receipt by the Ministry of the approval by the Cabinet of phase 1 of the Ministry's restructuring and institutional strengthening. The Cabinet approval is not produced or disclosed. The deponent cannot speak to matters deposed to in the second sentence (which is objected to) as this is a sequitur to the first. It is effectively giving the contents of and a corollary to the Cabinet approval- which would have been contained in a document. It is therefore documentary hearsay and inadmissible.	This evidence would be permitted as explaining this Deponent's understanding of the process.

The Defendant's evidential objections to the second affidavit of Valmiki Ian Sankersingh filed 11th October 2017.

PARAGRAPH	OBJECTION	RULING
Paragraph 4 lines 1-4 from the words "Mr. Lashley as Permanent Secretary…" to "crucial offices in the Ministry."	Statements are opinion and argumentative and oppressive.	Not argumentative. He can speak from his own knowledge. It goes to weight.
Paragraph 4 lines 8-12 from the words "I further say that…" to "recruited at the end of the day."	Statements are opinion and argumentative and oppressive.	This is speculative and argumentative and will be stuck out.
Paragraph 5 in its entirety.	Statements are opinion and argumentative and oppressive. Statements constitute new facts which ought to have been disclosed at its application for leave and for interim relief.	This Deponent would be allowed to state his understanding of the consultative machinery save for the last sentence which will be struck out on the basis that it is for this Court to interpret the legal meaning of the Circular and not this Deponent. The last sentence is struck out.
Paragraph 6 lines 1-2 from the words "I further say that the necessity..." to "and warranted since" and line 4 from the words "The issue of recruitment..." to the end of the paragraph.	Statements are opinion and argumentative and oppressive.	The Claimant will be allowed to state its case and the unusual features of this case.
Paragraph 6 in its entirety.	Statements constitute new facts which ought to have been disclosed at its application for leave and for interim relief.	These are not new facts but further support the substratum of facts in the application for judicial review.

PARAGRAPH	OBJECTION	RULING
Paragraph 8 line 8 from the words "I verily believe…" to the end of paragraph.	Statements are opinion and argumentative and oppressive.	Delete "as far as I am aware" to end of paragraph" Argumentative and opinion.
Paragraph 10 lines 4-7 from the words "I verily believe that the…" to "recruit outside the service".	Statements are opinion and argumentative and oppressive.	Not argumentative. This is a statement of the Deponent's knowledge. A question relevant to the issues for determination.
Paragraph 10 in its entirety	Statements constitute new facts which ought to have been disclosed at its application for leave and for interim relief.	These facts which support the substratum of facts were already adduced at the leave stage.
Paragraph 11 line 7 from the words "This office can therefore be..."	Statements are opinion and argumentative and oppressive.	These are statements being made by the Deponent based on his own knowledge.
Paragraph 11 in its entirety.	Statements constitute new facts which ought to have been disclosed at its application for leave and for interim relief.	These facts which support the substratum of facts were already adduced at the leave stage.
Paragraph 14 line 2 to the end of the paragraph from the words "There is no demonstrated urgency…"	Statements are opinion and argumentative and oppressive.	The second sentence is struck out on the grounds of being argumentative.
Paragraph 15 lines 4-7 beginning with the words "Mr. Lashley does not interview…" to "therefore not advanced further".	Statements are opinion and argumentative and oppressive.	The Deponent will be allowed to state his case.

PARAGRAPH	OBJECTION	RULING
Paragraph 15 lines 8-12 from the words "As stated at paragraph 20..." to "April 2014."	Statements constitute new facts which ought to have been disclosed at its application for leave and for interim relief.	These facts support the substratum of facts already adduced at the leave stage.
Paragraph 16 in its entirety.	Statements are opinion and argumentative and oppressive.	Argumentative and struck out.
Paragraph 17 line 6 to the end of the paragraph beginning with the words "I have been advised by Senior..."	Statements are opinion and argumentative and oppressive.	Argumentative and should be left for legal submissions. Struck out.
Paragraph 19 in its entirety.	Statements are opinion and argumentative and oppressive.	The Claimant would be allowed to state his case as would the Defendant.

Conclusion

102. My conclusion having been stated at the opening of this judgment, the order granting leave would be set aside and the claim for judicial review would be dismissed. Ordinarily costs will follow the event. Unless the parties file their submission on costs within fourteen (14) days of the date hereof the Court's order on costs will be that the Claimant shall pay to the Defendant its costs of this application to be assessed in default of agreement.

Vasheist Kokaram

Judge