REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2018-03511**

BETWEEN

LYNDON RAMANAN

First Claimant

CERON RICHARDS

Second Claimant

ANDRE ROACH

Third Claimant

NAIRANJAN GOPIE

Fourth Claimant

DION JOSEPH

Fifth Claimant

AND

LYNDON RAMANAN
CERON RICHARDS
ANDRE ROACH
NAIRANJAN GOPIE
DION JOSEPH
REPRESENTING THE SECOND DIVISION PRISON OFFICERS WHO ARE MEMBERS OF THE
PRISON OFFICERS' ASSOCIATION OF TRINIDAD AND TOBAGO (SECOND DIVISION)

AND

THE PUBLIC SERVICE COMMISSION

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Tuesday, 18th June 2019.

Appearances:
Mr. Alvin Ramroop and Mr. Kingsley Walesby, Attorneys at Law for the Claimants.
Mr. Russell Martineu S.C leads Ms. Shalini Nicky Singh and Mr. Andrew Lamont instructed by Ms. Kezia Redhead, Attorneys at Law for the Defendant.

JUDGMENT

1. There are two main aspects of this claim for judicial review of the Public Service Commission's[1] decision to commence an assessment of prison officers for promotion to the rank of Prison Supervisor[2] and Prison Officer II[3] in the Prison Service (Second Division). The first involves the duty to consult the Prison Officers Association of Trinidad and Tobago (Second Division)[4] in this promotion exercise and the quality of those consultations to satisfy the requirements of public law.

2. The second feature of this judicial review claim is the rationality and fairness of the Commission's decision to proceed with a new or amended points system which would allegedly adversely affect officers who would have relied upon a previous points system to their detriment.

3. The duty to consult as articulated by the Association arises in the context of (a) an express undertaking given by the Commission to consult the Association on the use of a new points system in relation to the assessment for promotion of the Second Division prison officers of the prison service before the Commission can discharge its constitutional mandate to promote those officers and (b) an alleged settled practice that such consultations are to be engaged before a new points system is introduced.

4. The parties had been engaged in several discussions for a long period of time on the issue of devising and applying a new point system in the promotion exercise of Second Division prison officers. The question that arises on this issue is whether the historical record of "meeting and treating" between the parties amounts in law to a "settled practice of consultation" prior to the implementation of any new system. If it does, can the Association have a legitimate expectation to those consultations before the present system is introduced? If so, what is the quality of the consultations that should have been engaged? Quite apart from such a settled practice, the more narrow and compelling issue is whether the Commission can resile from a written promise or

[1] Hereinafter referred to as "the Commission".
[2] Grade III
[3] Grade II
[4] The First to Fifth Claimants were appointed representative Claimants for and on behalf of 2292 Second Division Prison Officers in the Trinidad and Tobago Prison Service hereinafter referred to as "the Association".

undertaking made to the Association by letter dated 27th April 2018 that the conduct of the proposed assessment would not proceed until the issues identified in the Claimants' pre-action protocol letter were "addressed to the mutual satisfaction of all parties".

5. No one can seriously contend in this case that such an undertaking gives rise to an expectation that there must be an agreement between the parties before the promotion exercise is conducted. What it does call for is a consideration of the nature and legal effect of such an undertaking; an examination of the reasons by the Commission to resile from such an undertaking and whether it is reasonable to do so in the circumstances.

6. Before analysing these two features of the judicial review claim, I set out a brief factual backdrop to this claim. To a large extent the main facts are not in dispute[5].

The promotion exercise

7. The Commission is mandated by the Constitution of the Republic of Trinidad and Tobago to carry out the promotion of prison officers. Section 121 (1) of the Constitution[6] confers a power on the Commission to make appointments on promotion of persons in offices in the Public Service including the Prison Service:

   "121. (1) Subject to the provisions of this Constitution, power to appoint persons to hold or act in offices to which this section applies, including power to make appointments on promotion and transfer and 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."

8. Part II of Chapter XIII of the Public Service Commission Regulations provides for the Appointments, Promotions and Transfers of prison officers in the prison service. Section 172 of the Regulations sets out the principles for promotion:

   "172. (1) In considering the eligibility of prison officers for promotion, the

[5] The affidavits filed in these proceedings are: For the Claimant: the Affidavit of Ceron Richards filed 5th October, 2018 and the Affidavit of Ceron Richards in reply filed 15th March, 2019. For the Defendant: The Affidavit of Margaret Morales filed 18th February, 2019, the Affidavit of Helen Warner filed 18th February, 2019, the Affidavit of Gloria Edwards-Joseph filed 18th February, 2019, the Affidavit of Debra Parkinson filed 19th February, 2019.

[6] The Constitution of the Republic of Trinidad and Tobago

Commission shall take into account the seniority, experience, educational qualifications, merit and ability, together with the relative efficiency of such prison officers and, in the event of an equality of efficiency of two or more prison officers, shall give consideration to the relative seniority of the prison officers available for promotion to the vacancy.

(2) In the performance of its functions under sub regulation (1), the Commission shall take into account as regards each prison officer—

(a) his general fitness;

(b) his position on the seniority list and on the list of results of the promotion examinations;

(c) any special qualifications;

(d) any special courses of training that he may have undergone (whether at the expense of Government or otherwise);

(e) an evaluation of the officer's overall performance as reflected in the annual staff reports;

(f) any letters of commendation or special reports in respect of any special work done by the prison officer;

(g) the duties of which he has had knowledge;

(h) any specific recommendation of the Permanent Secretary for filling the particular office;

(i) any previous employment of his in the Service or in the Public Service, or otherwise;

(j) any special reports for which the Commission may call;

(k) his devotion to duty."

9. Regulation 168 provides for the establishment of the Promotions Advisory Board and the process by which a prison officer who may be bypassed for promotion can make representations on this matter:

"168. (2) The Commissioner of Prisons shall, after taking into account the criteria (specified

in regulation 172), submit to the Commission a list of the Officers in the Second Division—

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

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

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

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

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

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

10. To assist the Commission in assessing the eligibility of officers for promotion a point system was devised. The introduction of a point system was also the subject of litigation in relation to promotions in the police service. In **Ganga v Commissioner of Police** [2011] UKPC 28 the introduction of a point system to assess the eligibility of police officers for promotion was seen as a legitimate exercise by the Police Service Commission. The point system formulated to assess the Regulation 20 of the then Police Service Commission Regulations, which is similar to the regulation 172 criteria in this case, was held to be rational and fair.

11. Hamel Smith JA noted in paragraphs 33 and 34 of the Court of Appeal judgment:

"33 It is more convenient at this stage to determine whether the points system was an irrational application of the regulations because if it is not, then the other issue may not be that difficult to resolve. It cannot be denied that where a public authority such as the Commission has to deal with a multitude of applications of a similar nature, in this case the promotion of a number of officers from time to time based

on identical criteria, it is convenient to develop a policy or scheme to deal with them. 34 Lord Reid in British Oxygen Co Ltd v Minister of Technology [1971] AC 610 at 625, emphasised that:

> "…. a Ministry or large authority may have had to deal with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided that the authority is always willing to listen to anyone with something new to say - of course, I do not mean to say that there need be any oral hearing.""

12. In the Privy Council Lord Dyson concluded[7]:

> "25. The Court of Appeal acknowledged at para 36 that the appellants had identified some flaws in the points system. They said that it would be difficult, if not impossible, to eliminate every single flaw. The reason why this challenge failed before the Court of Appeal (as well as before the judge) was that the points-based system was not cast in stone, but was "simply a basis on which a proper assessment of each criterion can be evaluated". Hamel-Smith JA said:
>
> > "[b]y extending the right to the appellants to make representations to the Commission, there is opportunity to deal with issues such as the time constraints and the like. As long as the Commission is willing to listen to anything new, it demonstrates that the system is a flexible one and not irrational. This built in flexibility should have the effect of taking the sting out of the appellants' complaint" (para 37). At para 39, he said that, without a challenge to the decision of the Commission, there was no warrant for the assumption that "because the Commissioner made recommendations, it inexorably meant that the Commission had abandoned its statutory duty to assess the criteria in regulation 20 and had accepted the recommendations without more."
>
> 26. The Board agrees with the general reason given by the Court of Appeal for rejecting the irrationality challenge to the points system. Even if the system is flawed

[7] **Ganga v Commissioner of Police** [2011] UKPC 28, paragraphs 25-27

in any of the respects suggested on behalf of the appellants, the material decision is taken by the Commission. It is not suggested by these appellants that the Commission slavishly follows the recommendations of the Commissioner or that disappointed officers do not have an untrammelled right to make representations to the Commission by reference to the regulation 20 criteria.

27. In any event, even if the points system is properly to be regarded as flawed in some respects, the Board does not accept that the flaws of which the appellants complain show that the system is not rationally connected to the objective of meeting the regulation 20 criteria. As Mr Knox QC points out, it is reasonable to have a cutoff point in any appraisal system. Views may differ as to what is a reasonable period, but none of the cut-off periods specified in the system is irrational. In any event, all the appellants received maximum points for "performance appraisal" and "discipline". It is difficult to see how any of them was prejudiced by the 3 year cut-off period that was applied in relation to previous recommendations. They have no grounds for complaint on this score. The same can be said with respect to "general fitness". The Commissioner is entitled to define "general fitness" in the way that he does. It is open to him to produce a system which does not distinguish between different causes of sick leave. This is not an irrational way of measuring "general fitness". In any event, all the appellants obtained maximum points under the "general fitness" heading. As for the point made in respect of "academic qualifications", the Board accepts the submission of Mr Knox that this is not necessarily unreasonable. It is certainly not irrational. Qualifications in areas unrelated to a job may be just as good an indicator of competence as qualifications in the same area, particularly where, as occurred here, there are other headings which bear more directly on a person's suitability for promotion."

13. I agree with the Defendant that **Ganga** therefore establishes that:

(i) The point system is rationally connected to the objective of meeting the regulation 172 criteria.[8]

(ii) Qualifications in areas unrelated to a job may be just as good an indicator of

[8] **Ganga v Commissioner of Police** [2011] UKPC 28, paragraph 27

competence as qualifications in the same area.[9]

(iii) As long as the Commission is willing to listen to anything new[10], it demonstrates that the system is a flexible one and not irrational.[11]

14. There can be no dispute in this case that notwithstanding the introduction of points to be awarded for certain areas of competencies in the proposed assessment, such a scheme comported with and was devised as a convenient working tool to assist the Commission in assessing the criteria of seniority, experience, educational qualifications, merit and ability and relative efficiency as required by the Constitution. To that extent, no argument is being made that the assessment for promotion was being conducted outside the ambit of regulation 172.

The previous point system

15. The new criteria to be used to assess officers for promotion in the Second Division to which the Association takes issue in this case is embodied in the Prison Service General Order No. 151 of 2017. It reflected a change in some of the weighting and criteria in the previous point system devised for the first time in 2011 as published in Prison Service General Order No. 78 of 2011 and as replaced by Prison Service General Order No. 82 of 2011. To understand the context of the new system of General Order No. 151 of 2017, it is important to appreciate the previous point system.

16. In 2009, the Commission created a Promotion Advisory Board/Team to compile an Order of Merit List for Prison Officers in the Trinidad and Tobago Prison Service. This Promotion Advisory Board/ Team collated the relevant information from Police Officers I and then award points to the Prison Officers II based upon set criteria. The following criteria were used to award points:

    a) General fitness;

    b) Position on Seniority List;

    c) Special Qualification;

    d) Special Courses (non-examinable courses)

[9] **Ganga v Commissioner of Police** [2011] UKPC 28, paragraph 27
[10] As the Court of Appeal observed this need not be an oral hearing. **British Oxygen** ibid
[11] **Ganga v Commissioner of Police** [2011] UKPC 28, paragraph 25

e) Performance Appraisal Report;

f) Commendation and Devotion to Duty;

g) Knowledge of duty and any previous employment in the service or otherwise;

h) Special Report (Disciplinary Report).

17. In 2010, the Director of Personnel Administration (DPA) and the Commission held several meetings with the Association at the office of the Commission where the major areas of contention identified were "special qualification", "special courses", "commendation" and "performance appraisal". The Commissioner of Prisons proposed to have superior qualifications such as Associate's degree, Bachelor's degree, Post Graduate Diploma and Master's degree included in the criterion for special qualification. However, the Association argued that the job description of Prison Officers II and Prison Supervisor did not require such superior qualification. The Claimants contend that the then DPA, Ms. Gloria Edwards Joseph sought legal advice on the issue and communicated to the parties that such superior qualifications were left out of the criteria for assessment for promotion. The Commission also consulted with the Second Division Prison Officers during a three day workshop with the officers of the Second Division. Thereafter, the Commissioner of Prisons published the agreed assessment criteria through General Order No. 78 of 2011 after all the concerns in relation to the criterion were heard by the Commission.

18. On 21st September 2011, the Commissioner of Prisons pursuant to the direction of the Commission issued Trinidad and Tobago Prison Service General Order No. 78 of 2011. This set out the criteria that should be used by the Commissioner of Prisons for the promotion and recommendation for promotion of eligible officers in the Second Division. It is the Claimants' contention that it was also acknowledged that due to the introduction of the new assessment criteria, it would be unfair to apply the said criteria retroactively to certain prison officers and as such, they should receive the maximum points under specific categories of assessment:

a) Officers who were successful in 2003, 2008 and 2010 Prison Officer II examinations would receive the maximum 10 points automatically. The new allocation of points were to be applied to assess officers doing the exam for the

first time in 2011 and any future assessment.

b) For performance appraisal reports, for the period 1st January 2010- 31st December 2010, all officers were awarded full marks of 35 for that period of review.

c) For commendation and devotion to duty, officers were awarded full marks (50 for the period 1st January-31st December 2010.

d) Knowledge of duty and any previous employment in the service- Officers who had been eligible for acting appointments but passed over and not informed would be awarded the maximum points (5) but only up to December 2010.

19. However, the Association expressed concerns about some issues in Order 78 of 2011. There were further consultations between the Commission and the Association based on those concerns.

20. On 6th October 2011, the Commissioner of Prisons, pursuant to the direction of the Commission, issued Trinidad and Tobago Prison Service General Order No. 82 of 2011 which rescinded the Order No. 78 of 2011. It set out the new criteria for Recommendation for Promotion-Second Division. In the General Order No. 82 of 2011, it was stated that the maximum points attainable for "Special Courses" would be five points for the years 2011 and 2012 and that the maximum points attainable for the year 2013 onwards would be 10 points.

21. On 15th May 2013, the Commission issued letters to various Prison Officers indicating Prison Officers I were assessed for promotion to the office of Prison Officer II using the Point System and in accordance with Regulations 172 of the Public Service Commission Regulations. The Prison Officers I were provided with their score and placement on the Order of Merit List (OML). The OML was valid for two years with effect from 15th May 2013.

22. On 27th May 2013 various Prison Officers were promoted from the position of Prison Officer I to Prison Officer II based on the Assessment of Officers in the Second Division- the Order of Merit List.

The proposed point system

23. By letter dated 30th December 2016, the DPA wrote to the Association indicating that the Commission had decided that a new points system had been approved for the award of points for officers in the Second Division. The letter stated that the Assessment Exercise for officers in the Second Division would commence before the end of January 2017 and that the assessment period for officers in the Second Division would be from 1st January 2011 to 31st December 2013. In addition, having regard to the concerns raised by the Association that officers who were successful in 2003, 2008 and 2011 promotion examinations were not given prior notice that points would be awarded on the basis of those examinations results and in the interest of equity, officers would be awarded eight points for criterion examination; that being the average of the points for the three year period. Pass marks were established at 75 and 70 for the rank of Supervisor and Prison Officer I respectively. The DPA annexed to its letter the approved point system to be introduced.

24. The Association and the DPA thereafter engaged in several consultations by letter and face to face meetings to address the Association's concerns primarily the issues of:

    (a) Special Qualifications

    (b) The Seniority List

    (c) Retroactive application of the new point system.

25. General Order No. 151 of 2017 was eventually published on 13th November 2017. Several changes were made to it after consultations when it was first introduced in 2016. A snapshot of the two different point systems is set out in tabular form below:

General Fitness (Regulation 172 (2) (a)

GENERAL ORDER NO. 82 OF 2011		**GENERAL ORDER NO. 151 OF 2017**	
Reasons for Awarding Points	**Points to be Awarded**	**Reasons for Awarding Points**	**Points to be Awarded**
No extended sick leave for three (3) years	Ten(10) points	No extended sick leave for the period 01/01/11 to 31/12/14	Ten (10) points

Extended sick leave up to seven (7) days	Eight (8) points	Extended sick leave up to nine (9) days for the period 01/01/11 to 31/12/14	Eight (8) points
Extended sick leave for seven (7) days and up to fourteen (14) days	Six (6) points	Extended sick leave for nine (9) days and up to eighteen (18) days for the period 01/01/11 to 31/12/14	Six (6) points
Extended sick leave fifteen (15) days and up to (30) days	Four(4) points	Extended sick leave for eighteen (18) days and up to thirty (30) days for the period 01/01/11 to 31/12/14	Four (4) points
Extended sick leave from one (1) month to three (3) months	Two (2) points	Extended sick leave for one (1) month to three (3) months for the period 01/01/11 to 31/12/14	Two (2) points
Extended sick leave for three (3) months and above	Zero (0) points	Extended sick leave for three (3) months and above for the period 01/01/11 to 31/12/14	Zero (0) points
Special consideration will be given to injury leave, communicable diseases, accidents and surgery. Officers will not be penalized for extended sick leave taken as a result of age related, on set diseases of diabetes, high blood pressure and arthritis.		Special consideration will be given to injury leave, accidents, communicable diseases and surgery. Officers will not be penalized for extended sick leave taken as a result of age related, on set diseases of diabetes, high blood pressure and arthritis.	

Seniority List (Regulation 172(2)(b)

Promotion from Prisons Officer I to Prisons Officer II

GENERAL ORDER NO. 151 OF 2017		GENERAL ORDER NO. 151 OF 2017	
Reasons for Awarding Points	**Points to be awarded**	**No. of Years of Service in the Prison Service/Length of Service**	**Points to be Awarded**
20 years and above in the Prison Service	Fifteen (15) points	20 years and above in the Prisons Service	Fifteen (15) points

15 to 19 years in the Prison Service	Twelve (12) points	15-19 years in the Prison Service	Twelve (12) points
10 to 14 years in the Prison Service	Nine (9) points	16-14 years in the Prison Service	Nine (9) points
6-9 years in the Prison Service	Six (6) points	6-9 years in the Prison Service	Six (6) points
5 years and under in the Prison Service	Three (3) points	5 years and under in the Prison Service	Three (3) points

Promotion from Prisons Officer II to Prisons Supervisor

GENERAL ORDER NO. 82 OF 2011		**GENERAL ORDER NO. 151 OF 2017**	
Time Spent in the Preceding Rank	**Points to be Awarded**	**Time Spent in the Preceding Rank**	**Points to be Awarded**
Three (3) years and above	Maximum ten (10) points	Three (3) years and above	Maximum ten (10) points
Two (2) years but under three (3) years	Eight (8) points	Two (2) years but under thee (3) years	Eight (8) points
One (1) year but under two (2) years	Five (5) points	One (1) year but under two (2) years	Five (5) points
Under one (1) year	Five (5) points	Under (1) year	Three (3) points

<u>Examination (position on the list of results of the promotions examinations)</u>

GENERAL ORDER NO. 82 OF 2011		**GENERAL ORDER NO. 151 OF 2017**
Reasons for Awarding Points	**Points to be Awarded**	For the period January 1 2013 to December 31 2014 <u>all</u> officers will be awarded ten (10) points for this criterion.
70 to 100	Ten (10) points	
60 to 69	Eight (8) points	
50 to 59	Six (6) points	
Officers who were successful in the 2003, 2008 and 2010 Prisons Officer II Examinations will be awarded 10 points since they did not have prior		

<table>
<tr><td>knowledge that points will be awarded according to the point system.

Officers doing the exam for the first time in 2011 and any future examination the points system outlined will be implemented.</td><td></td></tr>
</table>

Special Qualification (Regulation 172(2) (c)

<table>
<tr><th>GENERAL ORDER NO. 82 OF 2011</th><th colspan="2">GENERAL ORDER NO. 151 OF 2017</th></tr>
<tr><td rowspan="6">Certificated that may be obtained which will be awarded one (1) point each up to a maximum of five (5) points (evidence of certificate)

These courses can also be part of a component of a diploma, certificate , or degree which the officer may be perused, these are as follows:

• Supervisory skills (Prisons Officer II only)
• Management skills (Prisons Supervisor only)
• ADR
• Crisis management/conflict management
• Mediation skill/counselling
• Human Resource Management
• Firearm
• Communications
• Computer
• First Aid and Emergency
• Self Defence
• Music</td><td>Qualifications</td><td>Points to be Awarded</td></tr>
<tr><td>First Degree</td><td>Five (5) points</td></tr>
<tr><td>Associate Degree/Diploma (from an accredited tertiary institution)</td><td>Four (4) points</td></tr>
<tr><td>Two (2) year Certificate (from accredited tertiary institution)</td><td>Three (3) points</td></tr>
<tr><td>One (1) year Certificate (from an accredited tertiary institution)</td><td>Two (2) points</td></tr>
<tr><td colspan="2">No individual courses arising from a Degree program will be used for the awarding of points.

All certificates must be examinable courses.</td></tr>
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Special Courses

GENERAL ORDER NO. 82 OF 2011	GENERAL ORDER NO. 151 OF 2017
• Food and Nutrition • Security Management • Religious Instruction • Physical Training • Locksmith	In a memorandum dated October 16 , 2017 the Commissioner of Prisons was requested to collaborate with the Prisons Officers' Association of Trinidad and Tobago (Second Division) to submit a list of Special

• Auditing Skills • Photography • Computer Skills • Health and safety • Phlebotomy • Armourer training One (1) point each will be awarded up to a maximum of five (5) points	Qualifications and Special Courses that contribute to the strategic direction of the Prison Service. With regard to the awarding of points for this criterion, officers will be receive four (4) points each, up to a maximum of five (5) points.

Performance Appraisal Report

GENERAL ORDER NO. 82 OF 2011		**GENERAL ORDER NO. 151 OF 2017**	
Performance Appraisal Report for the period January 1st 2010 to December 31st 2010 to be considered for this period. In future assessment Performance Appraisal Reports over a year period to be considered.			
Reasons for Awarding Points (relevant to performance)	**Points to be awarded**	**Performance Rating**	**Points to be awarded**
Outstanding	Thirty five (35) points	Outstanding	Twenty five (25) points
Very Good	Thirty (30) points	Very Good	Eighteen (18) points
Good	Twenty five (25) points	Good	Twelve (12) points
Fair	Five (5) points	Fair	Five (5) points
Unsatisfactory	Zero (0) points	Unsatisfactory	Zero (0) points
For this period of review only all officers will be awarded the full marks under this category.		Officers who have been absent from duty for a one (1) year period due to Study Leave or Vacation Leave, the last Performance Appraisal Report will be used. Where officers have two of three Performance Appraisal Reports for the period, the mean would be used. The average points for the years 2011 to 2014 will be awarded to officers, for example an officer was given the following	

	Performance Appraisal Report: 1/1/11 to 31/12/11- Outstanding 1/1/12 to 31/12/12- Very Good 1/1/13 to 31/12/13- Very Good 1/1/14 to 31/12/14- Outstanding The officers rating will be: 25+18+18+25+86÷4=21.5 Officers who are on study leave for the assessment period ie 1st January 2011 to 31st December 2014 will be awarded points based on the Grade Points Average (GPA) as follows: 3.6 GPA and above will receive points for an "Outstanding" Performance Appraisal Report 3.0 to 3.59 GPA will receive points for a "Very Good" Performance Appraisal Report 2.0 to 2.99 GPA will receive points for a "Good" Performance Appraisal Report

Commendation and Devotion to Duty

GENERAL ORDER NO. 82 OF 2011 For the period January 01st 2010 to December 31st 2010 all officers would be awarded five (5) points. In future points will be awarded as follows:		**GENERAL ORDER NO. 151 OF 2017**	
Reasons for Awarding Points	**Points to be Awarded**		**Points to be Awarded**
Commendation	Five (5) points	Commendations	5
Devotion to Duty	Five (5) points	Devotion to Duty	5
		For the period January 1, 2011 to December 31, 2014 all officers would be awarded zero (0) points for this criterion.	

Knowledge of duty and any previous employment in the service or otherwise

GENERAL ORDER NO. 82 OF 2011		GENERAL ORDER NO. 151 OF 2017	
Knowledge of Duty	**Points to be Awarded**	**Periods of Experience/Acting**	**Points to be Awarded**
Over 6 months to 1 year	5	Over six (6) months to one (1) year	Five (5) points
Over 3 months to 6 months	2	Over three (3) months to six (6) months	Two (2) points
1 month to 3 months	1	One (1) month to three (3) months	One (1) point
Officers who have been eligible for acting appointment but passed over and not informed will be awarded full five (5) points but only up to December 2010.		Officers who were eligible for acting appointment but passed over and not informed will be awarded for the full five (5) points but only up to 31st December 2014.	

Recommendation from the Permanent Secretary

GENERAL ORDER NO. 82 OF 2011	GENERAL ORDER NO. 151 OF 2017
Officers were all in agreement that everyone should receive the full five (5) points	

Special Report (Disciplinary Report)

GENERAL ORDER NO. 82 OF 2011		GENERAL ORDER NO. 151 OF 2017	
Reasons for Awarding Points (Review of the conduct of Prisons Officers over 1 year)	**Points to be Awarded**	**Convictions over three (3) years**	**Points to be awarded**
No conviction	10	No conviction	Ten (10) points
1 conviction	6	Each additional conviction	Four (4) points will be deducted
2 convictions	4	Conviction relates to Court or Disciplinary	

<table>
<tr><td>3 convictions</td><td>2</td><td rowspan="3">charges. Conviction is a court conviction or when a penalty is imposes on an officer as a result of disciplinary proceedings in accordance with the Public Service Commission Regulations.</td></tr>
<tr><td>4 convictions</td><td>0</td></tr>
<tr><td colspan="2">Conviction relates to Court or Disciplinary charges. Conviction is a court conviction or when a penalty is imposes on an officer as a result of disciplinary proceedings in accordance with the Public Service Commission Regulations.</td></tr>
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Cut-off Points

GENERAL ORDER NO. 82 OF 2011	GENERAL ORDER NO. 151 OF 2017
It was agreed that officers who scored sixty (60) points and more in the assessment should be considered for promotion.	Candidates who score seventy five (75) points and more in the assessment for Prisons Supervisor will be considered for promotion. Candidates who score seventy (70) points and more in the assessment for Prison Officer II will be considered for promotion.

The discussions prior to the commencement of these proceedings

26. From 2016 to 2018 the parties held discussions and the proposed point system was amended. As a result the date for the commencement for the assessment for promotion initially announced end of January 2017 was put off for over a year to facilitate these discussions. By letter dated 27th March 2018, the DPA wrote to the Association indicating that the new commencement date for the assessment of officers for promotion to the rank of Prison Supervisor (Grade 3) and Prisons Officer (Grade 2) in the Second Division would be Monday, 9th April, 2018.

27. The Claimants' attorneys issued a pre action letter to the DPA on 16th April 2018 requesting the DPA to provide a written undertaking that the Commission would refrain from conducting the assessment of Prison Officers until the various concerns raised by the Claimants could be properly ventilated.

28. By letter dated 27th April 2018, the DPA in response to the pre action letter wrote to the Claimants' attorneys:

"The Commission has given the undertaking, as requested in your Pre-action Protocol Letter referenced above, that the conducting of the proposed Assessment will not proceed until the issues identified in your Pre-action Protocol Letter are addressed to the mutual satisfaction of all parties."

29. The Association wrote to the DPA on 2nd August 2018 and indicated that the Association and the Commissioner of Prisons had met and agreed no changes should be made to the assessment structure which was utilized the first time points were credited to score the various criterion for promotion of prison officers in the Second Division set out in General Order 82 of 2011.

30. On 14th August the Association was invited by the office of the DPA to attend a meeting at the office of the Commission. The meeting was held on 21st August 2018 between the Service Commissions Department Executive, Prison Service Executive and the members of the Association. The issues on the agenda were- Points awarded for Performance Appraisal Report, Points awarded for Academic Qualifications and Issue of Special Courses and Special Qualifications. Only the first two items on the agenda were discussed.

31. At the conclusion of the meeting the Second Claimant requested a further meeting to be held directly with the Commission, the Commissioner of Prisons and the Association. The DPA requested that the Association send an agenda in respect of the proposed meeting with the Commission. On 22nd August 2018, secretary to the Association informed the DPA of the three items the Association wished to discuss with the Commission at the meeting.

32. By letter dated 20th September 2018, the DPA wrote to the Association informing it that the new commencement date for the assessment of officers for promotion to the ranks of Prison Supervisor (Grade 3) and Prisons Officer (Grade 2) in the Second Division would be 3rd October 2018.

33. On 27th September 2018, the Claimants' attorneys wrote to the DPA pointing out that its letter dated 20th September, 2018 was in breach of its written undertaking given in letter dated 27th April, 2018. The Claimants' attorneys requested that the Defendant's letter dated 20th September, 2018 be rescinded and that it provide a written

undertaking that the Defendant would abide by the terms of its original undertaking.

34. Thereafter, by letter dated 27th September, 2018, the DPA advised that the contents of the letter dated 27th September, 2018 would be brought to the attention of the Defendant and requested fourteen (14) days in which to provide a written response. The Claimants' attorneys responded to the letter on 28th September, 2018 stating they had no objection to the extension of time for the reply subject to the Defendant providing a further undertaking that the proposed assessment for 3rd October, 2018 would not proceed pending the Defendant's response to the Claimants' pre-action correspondence. There was no response from the Defendant until 15th October, 2018.

35. The application for leave for judicial review was filed on 1st October 2018 and it was heard inter partes. At that hearing on 2nd October, 2018 the Court after hearing submissions of the Commission that it had no objection holding its hand on the exercise, made an order staying the assessment exercise pending the determination of the proceedings. Notwithstanding the Commission's position articulated by Senior Counsel at a later case management conference that such an injunction ought not to have been granted, the Commission agreed to the continuation of the injunction on the basis that the main claim could have been determined within a relative short period of time.

36. Before analysing the two main features of this case identified earlier, I first examine the constitutional duty of the Commission in conducting the promotion exercise and general principles of public law.

<u>The Commission's duty</u>

37. It is important to note that several of our Courts have highlighted the need for promotions of officers in the public sector to be effected without delay. In **Chief Fire Officer and Public Service Commission v Elizabeth Felix- Phillip** C.A S49 of 2013 Bereuax JA observed at paragraph 62:

> "It is also in the public interest that the best candidates be promoted and without delay, for reasons of efficiency and good administration. As I have set out at paragraph 51 there are also wider implications of good governance which affect civil society. Third parties rights are also affected. Deserving candidates may be delayed in obtaining promotion."

See also Jones v The Public Service Commission CV2017-00796 where it was observed at paragraph 42:

> "The Defendant should have approached the issue of promotions with a greater degree of alacrity and efficiency and should have proactively taken steps to obtain the list of recommendations from the Chief Fire Officer. When the list was eventually obtained, the Claimant's name was not included as he had retired.

38. The duty of the Commission to promote officers with a degree of alacrity is clearly established by the authorities. It certainly redounds to the benefit of the entire prison service if the promotion exercise is conducted efficiently and without delay. It is also well established that the defendant in discharging its functions must act independently. See **Thomas v The Attorney General** [1981] 32 WIR 375 at 381 j to 382 c.[12] The Commission retains an unfettered discretion to carry out its duty. Two useful judgments of the Privy Council underscore the zone of exclusive responsibility invested in the Commission in the execution of their duties inclusive of matters such as promotional exercises which is the subject of this claim.

39. In **Cooper v Director of Personnel Administration** [2006] UKPC 37, Lord Hope observed at paragraphs 28-29:

> "**[28]** The Constitution requires that the powers which it has given to the Public Service Commissions, and to the Police Service Commission in particular, to appoint persons to hold or act in public offices and to make appointments on promotion must be exercised free from inference or influence of any kind by the executive. There is room in this system for the taking of some initiatives by the Cabinet. A

[12] **Thomas v The Attorney General** [1981] 32 WIR 375 at 381 j to 382 c.:

> "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, although 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."

distinction can be drawn between acts that dictate to the Commissions what they can or cannot do, and the provision of a facility that the Commissions are free to use or not to use as they think fit. The appointment of a Public Service Examination Board by the Cabinet for the Commissions to use if they choose to do so is not in itself objectionable. The advantages of using such a centralised body are obvious, and in practice the Commissions may well be content to continue to make use of them. The objection which has given rise to these proceedings lies in the misapprehension as to where the responsibility for choosing that system lies. In their Lordships' opinion the proposition in the media release of 8 July 2002 that the sole responsibility for the conduct of examinations falls under the Public Service Examination Board's purview was based on a profound misunderstanding of where the line must be drawn between the functions of the Commissions and those of the executive.

[29] There is no doubt that the Police Service Commission Regulations envisage the existence of an Examination Board. Regulation 15(5) requires that the interview of a police officer who is successful in the promotion examination for promotion to any office in the Service must be conducted jointly by, among others, the chairman of the Examination Board. So the appointment of an Examination Board is an essential part of the whole process. The Constitution, for its part, does not permit the executive to impose an Examination Board on the Commission of the executive's own choosing. It is for the Commission to exercise its own initiative in this matter, free from influence or interference by the executive. It may, if it likes, make use of a Public Service Examination Board appointed by the Cabinet. There may be advantages in its doing so. This no doubt is a service that must be paid for somehow. Where resources are scarce the Commission cannot be criticised if it chooses to make use of an existing facility. On the other hand it cannot be criticised if it chooses not to do so. The Constitution requires that it must have the freedom to exercise its own judgment. It must be free to decline to use the services of the Public Service Examination Board if it suspects that the executive is seeking to use the Board as a means of influencing or interfering, whether directly or indirectly, with appointments to or promotions within the Police Service. Those are matters that lie

exclusively within the responsibility of the Police Service Commission."

40. In that case, objection was taken to the alleged interference of the promotional exercise by the Executive. The Court underscored that sole responsibility for the conduct of promotions lay with the Commission. Importantly, "How the Commission discharges that responsibility is a matter for the Commission itself to determine, in the exercise of its powers under the Police Service Commission Regulations."[13] The Commission, therefore, in the exercise of its discretion in discharging its responsibility for promotions within the service must not fetter or delegate this core function to another entity.

41. Following **Cooper**, **Ashford Sankar and ors v Public Service Commission** [2011] UKPC 27 explored this latter point of the Commission exercising its discretion in such a manner to take into account of initiatives created by the Executive so long as the core function of making the decision to promote has not also been delegated or divested to another entity. In **Ashford Sankar** the Judicial Committee of the Privy Council held that the outsourcing of the examination to ACE was a legitimate tool to shortlist candidates. The shortlisting was done using an Assessment Centre Exercise (ACE) through the Public Service Commission of Canada. The methodology of the ACE was challenged. There was an agreement between the Ministry of Public Administration and Information and the United Nations Development Program (UNDP) regarding the provision of project management services to improve, inter alia, efficiency and new mechanisms for career management. The UNDP engaged the services of the Canadian Public Service Commission to design an ACE for the selection of Candidates for Deputy Permanent Secretary after the Commission agreed to use the Canadian Public Service Commission as consultants for the ACE. The Court found that there was no breach of the regulations.

42. As in **Ashford Sankar** the use of the ACE was not an interference of the Commission's exclusive zone of responsibility. There is a distinction to be made between creating a facility which the Commission is free to use in the exercise of its discretion and a dictate that mandates how it should act. The latter clearly runs contrary to the Commission's constitutional mandate, the former does not.

43. In this case, therefore, it is important to note that the promotional exercise falls within

[13] **Cooper v Director of Personnel Administration** [2006] UKPC 37, paragraph 31

the remit of the Commission and it cannot delegate or bind itself to any other authority or body in discharging those functions. By analogy to those two latter cases, the facility that would have been employed by the Commission in this case is one of "consultation". While such consultation keeps in step with the modern approach of good governance, even such consultations cannot rise to the level of giving edicts or mandates to the Commission as to how it should act in the carrying out of the promotional exercise.

44. However, there is no gainsaying that the established authorities demonstrate that this constitutional mandate must comport with the principles of procedural propriety, legality and rationality.

The duty to consult

45. There is no general duty on decision-makers to consult before they take their decisions. In **R (Hillingdon London Borough Council) v Lord Chancellor** [2008] EWHC 2683 (Admin) [2009] 1 FCR 1 Dyson LJ stated at paragraph 48 "It is not the law that authorities must necessarily consult those who are liable to be disadvantaged by a proposed decision before they can make the decision." An obligation to consult might arise by way of an express or implied statutory duty or consultation might be required in order to give effect to a legitimate expectation of consultation.[14] In this case there is no statutory duty to consult.[15]

46. However, I recognised that consultation is in fact a feature of good governance and public authorities are commended to adopt voluntarily a duty to consult stakeholders even where there is no legal duty to do so. In **National Carnival Bands Association of Trinidad and Tobago v The Minister of Community Development, Culture and the Arts and Trinidad and Tobago Carnival Bands Association** CV2018-03359 I observed that "the lack of consultation creates dissatisfaction with decision making not so much with the decision itself but with the feeling of disrespect and lack of involvement in a matter which is in the public domain. It is important in any democracy that persons feel they are included in important decisions. For this reason, even in the absence of a statutory duty to consult, an approach of consultation and collaboration with known persons,

[14] **Judicial Review Principles and Procedure, Jonathan Auburn, Jonathan Moffett and Andrew Sharland**, paragraph 7.03 page 185

[15] **Judicial Review Principles and Procedure, Jonathan Auburn, Jonathan Moffett and Andrew Sharland**, paragraph 7.09 page 186

groups or organisation affected by a decision is a feature of administrative justice if not administrative best practice"[16].

47. The common law duty to consult is simply an aspect of the common law duty to act fairly.[17] Such a duty to consult as a general aspect of fairness is a responsible feature of open transparency, governance and democracy in action. In **R (on the application of Moseley) v London Borough of Haringey** [2014] UKSC 46, the Supreme Court of the UK provided guidance on how to conduct a fair public consultation process. Lord Wilson explained that, regardless of the origin of the duty to consult, the starting point was the common law duty of procedural fairness, which would inform the manner in which consultations should be conducted. He considered there to be three purposes for conducting fair consultations, stating that what fairness required in a given case was linked to the purpose of the consultation in question (para 24). First, a fair consultation "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested". Secondly, it will avoid "the sense of injustice which the person who is the subject of the decision will otherwise feel". Finally, fair consultations should reflect "the democratic principle at the heart of our society". The court endorsed, as a "prescription of fairness", the "***Sedley criteria***" in **R v Brent London Borough Council ex parte Gunning**.

48. In **The Public Services Association of Trinidad and Tobago v the Permanent Secretary Ministry of Energy and Energy Industries** CV2017-02934 this Court observed at paragraph 78 when the duty to consult may arise as culled from the relevant authorities:

    "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

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[16] **National Carnival Bands Association of Trinidad and Tobago v The Minister of Community Development, Culture and the Arts and Trinidad and Tobago Carnival Bands Association** CV2018-03359, paragraph 99

[17] In **R v Devon County Council ex p Baker** [1995] 1 All ER 73 CA, Dillion LJ observed at 77:

> "It was accepted by the councils that they owed the residents a duty to act fairly in making the decision to close a home, and it was submitted for the applicants that the duty to consult was an aspect of the duty to act fairly; see generally the observations of Lord Bridge of Harwich in *Lloyd v McMahon* [1987] **1 All ER** 1118 at 1161, [1987] AC 625 at 702–703. "

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.

[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)."

49. In this case, I am satisfied that the Commission adopted the admirable course of action of consulting the Association, where there was no statutory duty to do so, recognising the undoubted impact the change in the point system which was previously introduced would have on its members. To the extent that the Commission delayed the commencement of the assessments for over one year, the Commission balanced its duty to carry out the promotions with "alacrity" with giving the Association an opportunity to be heard. Of course where a decision maker conducts a consultation exercise voluntarily (despite not being subject to a duty to engage in consultation) the consultation process must be carried out properly. The proposition in **R v North and East Devon HA ex p Coughlan** [2001] QB 213, is that even though a body is under no duty of consult, if that body embarks on a process of consultation, it will then be taken to be subject to a duty to comply with the full requirements of lawful consultation:

    "108 It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168."

50. The "Gunning requirements" are a useful summary of some key features of a lawful consultation process. See **R v Brent LBC ex p Gunning [**1985] 84 LRG 168, QBD:

    (i) Consultation is undertaken at a time when the relevant proposal is still at a formative stage;

    (ii) Adequate information is provided to consultees to enable them properly to respond to the consultation exercise;

    (iii) Consultees are afforded adequate time in which to respond; and

    (iv) The decision-maker gives conscientious consideration to consultee's responses.

51. The Supreme Court in **Haringey** went so far to say that fairness may require that interested persons are consulted "not only upon the preferred option, but also upon

arguable yet discarded alternative options". Even where the statutory obligation only extends to consulting on the preferred option, as in Haringey's case, fairness may nevertheless require passing reference to be made to alternative options.[18]

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[18] The law was usefully set out in **Haringey**:

> "[23] A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in **R v Devon CC, ex p Baker, R v Durham CC, ex p Curtis** [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.
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> [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 **Osborn v Parole Board, Booth v Parole Board, Re Reilly's application for Judicial Review (Northern Ireland)** [2013] UKSC 61, [2014] 1 All ER 369, [2014] AC 1115, [2013] 3 WLR 1020, 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 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' (see [67]). Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' (see [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?'
>
> [25] In **R v Brent London BC, ex p Gunning (1985) 84 LGR 168** Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said (at 189):
>
> > 'Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.'
>
> Clearly Hodgson J accepted Mr Sedley's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the Baker case, cited above (see 91 and 87), and then in **R v North and East Devon Health Authority, ex p Coughlan** (Secretary of State for Health intervening) [2000] 3 All ER 850 at 887, [2001] QB 213 at 258 (para 108). In the Coughlan case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated ([2000] 3 All ER 850 at 887–888, [2001] QB 213 at 259 (para 112)):
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> > 'It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive

52. In my view, notwithstanding the absence of any statutory duty of the Commission to consult the Association, consultations in which it engaged voluntarily are to be viewed in the context of the law as developed with respect to our Service Commissions not to read down, whittle away, fetter or in any way restrict the Commission in the exercise of its constitutional mandate. The standards of fairness are not immutable. What fairness demands is dependent on the context of the decision. An essential feature of the context is the Constitution which confers the discretion, the nature of the power being

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> > consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.'
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> The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in **R (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts** [2012] EWCA Civ 472, (2012) 126 BMLR 134 (at [9]), 'a prescription for fairness'.
>
> [26] Two further general points emerge from the authorities. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting. Thus, for example, local authorities who were consulted about the government's proposed designation of Stevenage as a 'new town' (Fletcher v Minister of Town and Country Planning [1947] 2 All ER 496 at 501) would be likely to be able to respond satisfactorily to a presentation of less specificity than would members of the public, particularly perhaps the economically disadvantaged. Second, in the words of Simon Brown LJ in the Baker case, at 91, 'the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit'.
>
> [27] Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options. For example, in **R (on the application of Medway Council) v Secretary of State for Transport** [2002] EWHC 2516 (Admin), [2002] All ER (D) 385 (Nov), [2003] JPL 583, the court held that, in consulting about an increase in airport capacity in South East England, the government had acted unlawfully in consulting upon possible development only at Heathrow, Stansted and the Thames estuary and not also at Gatwick; and see also R (on the application of Montpeliers and Trevors Association) v Westminster City Council [2005] EWHC 16 (Admin), [2006] LGR 304 (at [29]).
>
> [28] But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options. In **Nichol v Gateshead Metropolitan BC** (1988) 87 LGR 435 Gateshead, confronted by a falling birth rate and therefore an inability to sustain a viable sixth form in all its secondary schools, decided to set up sixth form colleges instead. Local parents failed to establish that Gateshead's prior consultation had been unlawful. The Court of Appeal held that Gateshead had made clear what the other options were: see 455, 456 and 462. In the Royal Brompton case, cited above, the defendant, an advisory body, was minded to advise that only two London hospitals should provide paediatric cardiac surgical services, namely Guys and Great Ormond Street. In the Court of Appeal the Royal Brompton Hospital failed to establish that the defendant's exercise in consultation upon its prospective advice was unlawful. In its judgment delivered by Arden LJ, the court, at [10], cited the Gateshead case as authority for the proposition that 'a decision-maker may properly decide to present his preferred options in the consultation document, provided it is clear what the other options are'. It held, at [95], that the defendant had made clear to those consulted that they were at liberty to press the case for the Royal Brompton."

exercised and the work of the Commission under consideration, the exclusive zone of decision making as described earlier in this judgment.

53. In my view, therefore, while I agree with the Commission that there is no duty to consult with the Association, they had voluntarily and commendably agreed to consult with them. Having done so, I am satisfied that upon an examination of the evidence, their consultation process was not defective as they took their views into consideration and deliberated for a considerable period of time. All of this in the context of our Court's urgings on our Service Commissions that promotional exercises are to be effected with a degree of alacrity:

- By letter dated 30th December 2016, the DPA wrote to the Association indicating that the Commission had decided that a new points system had been approved for the award of points for officers in the Second Division.
- The Association wrote to the DPA by letter dated 16th January 2017 indicated that the previous DPA advised that under the heading "Special Qualifications" Master and/or degree qualifications were not a requirement for the positions of Prison Officer II and would not be factored into the assessment.
- By letter dated 31st March 2017, the DPA requested that the Association submit the names of nominees to serve on each of the 4 assessment teams to assist with verification of the application of the Point System for Assessment of Officers for the Offices of Prison Supervisor (Grade 3) and Prison Officer (Grade 2).
- The DPA wrote the Association by letter dated 11th April 2017 indicating that the Commission had decided that the assessment period for the officers in the Second Division would be from 1st January 2011 to 31st December 2014; to amend the point system for the officers in the Second Division; that the approved point system would be used to award point for officers in the Second Division; that the assessment exercise for officers in the Second Division would commence on 1st May 2017 and that the appended point system be publish by the General Order for all officers in the Second Division.
- The Association wrote to the DPA by letter dated 24th April 2017 seeking to notify the Service Commission Department that no amendments should be made to the

current point system especially on the eve of the assessment and reiterated that no consideration should be given to degrees under the criteria of special courses and special qualifications.

- By letter dated 31st May, 2017, the Service Commission's Department responded stating that pending the finalization of the points system, three (3) assessment teams would be established to assess officers for promotion to the rank of Prison Officer II.
- By pre-action protocol letter dated 24th July 2017, the Claimants' attorneys wrote to the DPA and requested inter alia, written confirmation as to whether a decision has been made by the Commission to introduce a new method of scoring and weighting of the points system and to apply same retroactively to assess Prison Officers for promotion within the Second Division.
- By letter dated 21st August, 2017, the Association wrote to the DPA expressing concern regarding the proposed criteria to be used to assess officers for promotion.
- On 5th October 2017 executive members of the Association including first and second Claimant met with the DPA, members of the Service Commissions Department and representatives of the office of the Commissioner of Prisons to discuss the concerns of assessment of officers for promotion in the Second Division.
- On 20th October 2017, the DPA wrote to the Association enclosing a copy of the Minutes of the meeting on 5th October 2017.
- By letter dated 8th November 2017, the Director of Personnel Administration wrote to the Association stated that the Commission had decided that the attached point systems be used for the award of points in the assessment of officers for promotion to the ranks of Prison Supervisor (Grade 3) and Prisons Officer (Grade 2) in the Second Division; the assessment of officers for promotion to the ranks of Prison Supervisor (Grade 3) and Prisons Officer (Grade 2) in the Second Division begins on 20th November 2017 and the Commissioner of Prisons publish the approved point system and notify the officers that the assessment of

officers for promotion to the ranks of Prison Supervisor (Grade 3) and Prisons Officer (Grade 2) in the Second Division will begin on Monday, 20th November 2017.

- On 13th November 2017, the Trinidad and Tobago Prison Service published General Order No. 151 of 2017-Assessment of Officers for the Office of Prison Supervisor (Grade 3) and Prisons Officer (Grade 2).
- On 14th August the Association was invited by the office of the DPA to attend a meeting which was to be held on 21st August 2018 at the office of the Commission. The meeting was held on 21st August 2018 between the Service Commissions Department Executive, Prison Service Executive and the members of the Association to discuss points awarded for Performance Appraisal Report, Academic Qualifications and Issue of Special Courses and Special Qualifications.
- By letter dated 20th September 2018, the DPA wrote to the Association informing it that the new commencement date for the assessment of officers for promotion to the ranks of Prison Supervisor (Grade 3) and Prisons Officer (Grade 2) in the Second Division would be 3rd October 2018.
- By letter dated 27th September, 2018, the Claimants' attorneys-at-law wrote to the DPA pointing out that its letter dated 20th September 2018 was in breach of its written undertaking provided in letter dated 27th April, 2018. They requested that the 20th September, 2018 letter be rescinded and that a further written undertaking be provided by the Commission that it would abide by its original undertaking.
- In response to the pre action letter of 27th September 2018 the Commission wrote to the Claimants' attorneys on 15th October, 2018 setting out its reasons for proceeding with the assessment, delayed by over one year:
    - The points-based system of assessment was introduced and has been used to promote officers in the Prison Service since 2011.
    - The current exercise being undertaken by the Commission is not the introduction of a new system but the finalization of the points to be awarded during the current assessment for each of the criterion listed in

Regulation 172 of the Public Service Commission Regulations which has been in effect since 1966.

- There is no requirement in the Public Service Commission regulations for consultation with officers prior to exercise of any of its functions therefore the Commission refutes the allegation that there is a "clear settled practice and policy" to consult with the Association.
- The meetings held between the Service Commissions Department and the union between 2016 to 2018 were to attempt consensus with respect to the points to be awarded for each criterion during this assessment based on concerns raised by the Association.
- The DPA's endorsement of the Association's request for another meeting after 21st August 2018 was subject to the convenience and approval of the Commission after its members reviewed the agenda.
- The undertaking given in letter dated 27th April 2018 was erroneously recorded. The Commission committed to "ventilation of the issues" and not "the undertaking that the issues identified should be addressed to the mutual satisfaction of all parties."
- The Commission is of the view that all of its decisions have been communicated to the Association and sufficient time has been spent ventilating the issues identified.

54. In the context of this evidence of consultation, the Association's main complaint is that the Commission promised to continue to consult with them. The difficulty with the Association's case is firstly insofar as it asserts a case of legitimate expectations, as analysed below, such a claim is without merit. Secondly, how long should the Commission continue to consult with the Association? Should these discussions continue ad infinitum? The Commission ultimately, as reflected in its belated letter of 15th October 2019 correctly sought to bring the consultations to an end having listen to the views of the Association for over one year and having addressed some but of course not all of their concerns.

Legitimate Expectations-Settled Practice

55. The Association has contended that from a review of the evidence that there was a settled practice and policy that if a new system is introduced by the Commission to assess prison officers of the Second Division for promotion, that the Association would be consulted prior to the implementation of same. It contends that such a settled policy and practice was in place since "prior to the Defendant's implementation of General Order 82 of 2011 and directly resulted in the said General Order 82 of 2011 in its final form".

56. The Association has, in my view, confused the mixed question of law and fact of the existence of a settled policy of consultations with a facility offered by the Commission of consulting the Association prior to the introduction for the first time in 2011 of a new point system to guide the Commission in its assessment exercise. The Association sought leave to cross examine the Commission's deponents on this question whether the interaction between the parties arose to the level of a settled practice. However, an examination of the past meetings and interaction of the parties described in the minutes of Ms. O'Brady, the affidavits of Ms. Edwards-Joseph and Ms. Warner do not demonstrate that there was a "settled practice" of consultations. It was, despite the characterisations ascribed by either party to these interactions, in my view, the voluntary adoption by the Commission to consult with the Association on the important matter of introducing a points system in the prison service for the first time to guide the assessment exercise to be carried out under regulation 172 of the Public Service Regulations in the Constitution.

57. There is already evidence of extensive consultations Ms. Warner deposed in her affidavit in relation to General Order No. 82 of 2011. However, there is no evidence that those consultations taking place in relation to that specific exercise established a settled practice that there will be in the future consultations with respect to any changes or new promotional exercises with respect to that point system. It is important to note that General Order No. 82 of 2011 for the first time introduced a point system a matter that is the subject of judicial pronouncement. The point system was not cast in stone and allowed for some degree of flexibility. In my view, there could not have been a legitimate expectation to have consultations or such detailed consultations that took

place in 2011. Apart from those consultation there is no evidence of any settled practice of consultations.

58. Moreover, it is quite understandable why the introduction of an entirely new system would have required if not generated such extensive consultations.

    - On 25th June 2010, the Commission met with the President and members of the Prison Officers' Association (Second Division) to inform them and solicit their views with respect to the implementation of the points system for promotions of prison officers consistent with the Public Service Commission Regulations.
    - The DPA then conducted further meetings with the DPA for more than two (2) years.
    - A three (3) day consultative workshop on the points system was held over 27th July to 29th July 2011 with Prison Officers from the Second Division.
    - Following the workshop a points system for promotion was published in Order No. 78 of 2011.
    - Thereafter, the Commission caused a revised points system to be published as Order No. 82 of 2011.

59. It is quite a different matter if there is a modification or change to be made to the point system after it was introduced. Indeed the introduction of the point system for the first time contemplated future modifications to it. Having introduced such a system through extensive consultations, there is no warrant to expect that modifications which is inherent in such a system would require further consultations. The latter would in any event not require such an extensive consultative process as introducing a new system altogether. The new system which amends the point system is a further working out of the points adding some more flexibility in the system, improving and modernising the prison service.

60. Lord Justice Elias points out the benefit of having such consultations which do not meet the high legal requirement of the "Gunning" principles:

    "**[43]** But even is (sic if) we assume in the Applicant's favour that the Government was not finally persuaded to adopt this policy until the summit meeting, that would

still not, in my view, convert this meeting into a consultation exercise of the kind which would trigger the panoply of procedural requirements identified in *Gunning*. Contact with interest groups (or "stakeholders", I think it is, given the modem spin) is the very warp and woof of democratic government; it is central to decision making. It means that Government is better informed of the implications of the different options, and will more likely to be made aware of potential pitfalls, political or otherwise, which the decision may create. But it cannot be the case that every time a minister deals with one group, he or she must hold a similar meeting with a group holding the opposite view. It must be for Government to decide what information it requires, and from what source and at what time, in order to facilitate its decision making. If the Government decides to enter into a formal consultation process, that exercise must satisfy the *Gunning* requirements if it is to be fair and meaningful. But, in my view, a court cannot justifiably infer that a minister has entered into a consultation exercise merely because a decision is taken after a meeting with a particular interest group, even where representations from that group have, in fact, proved decisive. The purpose of the meeting may have been to clarify a particular matter, or to gauge the strength of the group's opposition to a proposed decision, or simply so that the Government will be able to trumpet that group's support for the decision when it was announced. None of this could remotely be said to amount to consultation with all the baggage inherent in that process."[19]

61. I am also not satisfied that the there was such a breach of the duty of candour as to base a positive case that the evidence demonstrates that there was a settled practice. In **Winston Gibson v The Public Service Commission C.A Civ No. 56 of 2006** the Court of Appeal set out guidelines on the duty of candour placed on public authorities in judicial review. Archie CJ noted at paragraph 41:

    "41. I agree entirely with the proposition that in public law matters, there is a duty of full and frank disclosure and for clarity and future guidance, it bears repetition here. The general principles are set out in two cases that are often cited before these courts. They may be summarized thus:

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[19] **R (on application of Personal Injury Lawyers) v Secretary of State for Justice** [2013] EWHC 1358 (Admin), paragraph 43

a. It is for the applicant to make out his case and not for the respondent to do it for him;

b. However, since it is often the case that much of the pertinent information that will assist the courts lies in the possession of the respondent public authority, it has a duty to respond as fully and as transparently as the circumstances require. This has been described as conducting the proceedings "with all the cards faced upwards on the table";

c. Courts have a very good appreciation of the complexities and realities of public administration and, while it may be presumed in the absence of evidence to the contrary that authorities have acted properly, it does not assist the authority or the court merely to give a blanket assertion that it has acted properly;

d. Accordingly, once an applicant can satisfy the court that, prima facie, something has gone wrong and leave to apply for judicial review has been granted, the respondent must dispel that perception. It does not have to prove that the decision was correct but it must provide enough evidence to meet the case;

e. How detailed that reply must be would depend on the circumstances of the particular case. So, for example, if the issue is whether the respondent took a particular factor into account, it will be enough to demonstrate that it did. Where the allegation is one of irrationality, or omission of material considerations, it may well be that at least the principal factors upon which the decision was based must be enumerated."

62. While some of the correspondence which ought to have emanated from the Commission was exhibited Mr. Ceron Richards in his reply such as the letters dated 19th November 2010, 15th July 2011 and the minutes of meetings held in 21st August 2018, there is nothing in those documents to suggest that there was a "settled practice" to engage in consultation rather than an acknowledgment that there is no general duty to consult. However, having regard to the nature of that exercise the Commission thought it prudent to engage the Association prior to introducing the point system for the first

time.

63. In any event, I am satisfied that there were extensive consultations to introduce the new point system as set out earlier in this judgment.

Legitimate expectation to consultation- Express undertaking

64. The real nub of the case of the Claimants lie in the express undertaking given by the Commission in its letter dated 27th April, 2018. In my view that was an express undertaking given by the Commission. However, I am satisfied that it is reasonable and just for the Commission to resile from this undertaking on the following basis (a) it would fetter the Commission's discretion and result in undue delay in the promotional exercise (b) that it was a vague undertaking and could not form the basis of any legitimate expectation (c) it is in the interests of good administration to proceed with the promotional exercise.

65. Unlawful fetter of duty: The Commission indicated in its letter of 15th October 2019 that the undertaking was erroneously given. I am not impressed with that argument as such an explanation comes some six (6) months after the undertaking was given and only after the proceedings were commenced. It is indeed a matter which will be taken into account on the question of costs at the end of this judgment. However, what is clear is that no legitimate expectation can arise out of this promise which is in conflict with the duty of the Commission. As pointed out earlier in this judgment the power to make appointments on promotions lie with the Commission independently and without interference. As settled by the Privy Council in **United Policyholders Group v The Attorney General of Trinidad and Tobago** [2016] UKPC 17, Lord Neuberger observed at paragraph 38:

> "38. Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty - see eg *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 636, per Lord Fraser of Tullybelton. Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. This third point can often be elided with the

second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or *a fortiori* should, reasonably decide not to comply with the statement."

66. It could not be the case that it was legitimate to expect that the assessment would proceed only after the issues are addressed to the mutual satisfaction of the both parties. This unlawfully fetters the discretion of the Commission to discharge its constitutional mandate.

67. Vague and Equivocal: In fact such an undertaking is vague and equivocal. Lord Neuberger pointed out that in order to found a claim based on the principle of legitimate expectations it is clear that the statement or promise in question made by the public body "must be clear unambiguous and devoid of relevant qualification". Lord Carnwath neatly summarised the trend of modern authority on the law of legitimate expectations in the following terms:

    "121. In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the *Coughlan* principle, which can be simply stated. Where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a "macro-economic" or "macro-political" kind. By that test, for the reasons given by Lord Neuberger, the present appeal must fail."[20]

68. What does "mutual satisfaction of both parties" mean? Does it mean that the parties must arrive at an agreement or something short of agreement? Should there be agreement on all issues or only the main issues? How long should this process be engaged? In fact, the equivocal and uncertain nature of this statement is confirmed by the Claimants' own submissions in reply which seek to qualify these words with their

[20] **United Policyholders Group v The Attorney General of Trinidad and Tobago** [2016] UKPC 17, paragraph 121

own interpretation of the undertaking that it was not an undertaking that the parties would agree with the Claimants on their arguments raised but that they would engage in a proper and meaningful consultation exercise. I do not accept the Claimants' submissions. To establish a legitimate expectation the representations relied upon must be clear or unequivocal. These words "to the mutual satisfaction of the parties" must either carry a distinct and clear meaning or they do not. The Claimants in my view concede that it is ambiguous and one cannot seek to impose their own "gloss" of interpretation on an undertaking for it to carry such important restrictions and fetter on the Commission's legitimate exercise of power.

69. Good administration: I have also considered the Commission's submission of its entitlement to resile from such an undertaking on the basis of mistake and the authorities of **R v Secretary of State for Education and Employment ex. P Begbie** [2000] 1 WLR 1115 and **R (on the application of Capital Care Services UK Ltd) v Secretary of State for Home Department** [2012] EWCA Civ 1151. While it is true that a Court will be slow to fix a public body to statements made by public bodies through a genuine mistake, I am not impressed with this aspect of the Commission's evidence coming so late in the day. It appears to me more prudent to view the Commission's case by its letter of 15th October 2018 that it was of the view that there is good reason to resile from the undertaking for the interests of good administration in carrying out its promotion exercise. To this extent, having regard to the need of the Commission to proceed without undue delay in the assessment exercise as mandated by our Courts, the needs of the prison service for the promotion of its officers, there are strong and proportionate reasons for the Commission to adopt the view that they have spent enough time treating with the Association and the time had come to carry out its constitutional mandate.

Natural Justice

70. It is common ground that the duty to act fairly is contextual. In **R v Secretary of State for the Home Department ex p Doody** [1994] 1 AC 531, 560 D-G, Lord Mustill stated:

> "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is

taken, with a view to procuring its modification; or both."

71. In **Michael Fordham's Judicial Review Handbook Fifth Edition** paragraph 54.1**,** the learned author observed:

"Though once associated with procedure, fairness is also a substantive standard linked to abuse of power and legitimate expectation. Whether conduct is conspicuously unfair or an abuse of power depends ultimately on whether, in all the circumstances, strong disapproval is called for."

72. In my view the Commission acted fundamental fairly in its approach to introducing the new point system. Firstly, the point system General Order No. 82 of 2011 itself does not commit the Commission to an immutable position but it was clearly demonstrated that these criteria would not remain for an indeterminate period. Indeed, clear signals were given to the Claimants by the Commission of the need to change the point system as early as 30th December 2016. The Commission is in fact obliged to continuously review its assessment policy. See **The Trinidad and Tobago Automotive Dealers Association v Minister of Trade** CV 2014-01301. Secondly, there have been prolonged discussion between the parties on the changes to Order 82 of 2011 as discussed earlier in this judgment. Finally, in any event, the process of fairness continues even after the assessment exercise as any officer unlawfully bypassed in this promotion exercise can still have his claim be the subject of review pursuant to regulation 168 of the Public Service Commission Regulations.

<u>Irrationality</u>

73. While the Association's case of irrationality was not properly set out in its claim, I am also satisfied that its claim as articulated in its written submission of irrationality is not made out on the evidence. It is observed that the Association has not articulated the traditional Wednesbury test of unreasonableness. Rather, it relies on other standards of reasonableness along the "rationality spectrum".

74. In considering the concept of "unreasonableness" in public law in Michael Fordham's **Judicial Review Handbook**, Fifth edition the learned author at paragraph 57.1.1 also cites **Re Duffy** [2008] UKHL 4 at [28] in which Lord Bingham stated:

"The decision…was one which a reasonable Secretary of State could not have made

if properly directing himself in law, if seised of the relevant facts and if taking account of considerations which, in this context, he was bound to take into account."

75. Further, at paragraph 57.3.1 of Michael Fordham's, Judicial Review Handbook, Fifth edition the learned author cites the case of **R v Parliamentary Commissioner for Administration, ex p. Balchin** [1998] 1 PLR1, 13E-F in which the Court held that:

    "[The Claimant] does not have to demonstrate… a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term 'irrationality' generally means in this branch of the law is a decision which does not add up- in which in other words, there is an error of reasoning which robs the decision of logic." 22) R (Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions [2001] UKHL 23 [2003] 2 AC 295 at 50 (Lord Slynn stated,

    > "If the Secretary of State…takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision…the court may set his decision aside."

76. It would seem that, not only is the Association relying on a lower threshold of irrationality, it also seeks to include a claim of "irrelevant considerations", all of which should have been properly articulated in its claim. In any event, I understand that the three grounds now articulated for the first time in these submissions of irrationality to be that the decision to proceed with the assessment is devoid of logic as (a) approximately 180 officers in the last assessment in 2011 were promoted to Prison Officer II in the year 2013 but with retroactive effect to the year 2011. In other words, they would not have acted as Prison Officers II for the period 2011 to 2013 and their performance appraisals for such a period ought not to be considered and would be irrelevant to this exercise. (b) These 180 officers would be treated unfairly and unequally to other officers who would have been carrying out the duties of Prison Officer II in the period 2011 to 2013. The Commission would only have the performance appraisals of these 180 officers as Prison Officers II for only 2014 to carry out this exercise. (c) The Association also claims that their right to equal treatment pursuant to section 4(d) would be breached as the checks and balances mechanism has not been implemented

to allow for fair appraisals.

77. While I understand the Association's anxiety over the new point system, equally I see a rational connection in the new points and criteria with the legitimate objective of a competitive process to select the best person for an organisation to be promoted. Contextually, the Court must acknowledge the sensitive relationship of employer and employee in the public sector and decisions with respect to selection and manpower requirements fall within a very well defined area of macro political consideration which a Court will be slow to interfere. The Association relying on irrationality therefore carries a heavy burden and the Court must be satisfied that the new point system is absurd, manifestly irrational, out of portion with any reasonable criteria that a reasonable body would contemplate. I am not satisfied that it is.

78. I say so for the following reasons.

- The point system is a matter which and must be under constant review to meet the demands of the prison service.
- There is a rational connection between the new point system and the question of suitability for promotion in the prison service. For example, it cannot be for the Association to dictate the Commission that the inclusion of degrees to assess a supervisor "serves no reasonable benefit."
- In reviewing such a system there will always be officers who would be impacted in that new criteria will be created for promotions. The points system is simply a guide to arriving at a decision of overall suitability. There is no doubt that all of the candidate's attributes will be taken into account and any failure in one area maybe balanced by success in another. Ultimately, overall suitability is determined having regard to the regulations and the constitutional mandate of the Commission. The point system simply a tool and guide to the Regulation 172 criteria of the Public Service Commission Regulations.
- There is no proper identification of suitable comparators to make ground any claim of unequal treatment.
- In any event any officer that feels aggrieved by his assessment still has an avenue of redress through regulation 168.

79. Simply put, the Association's anxiety over a new system is no sufficient reason to conclude that the new point system is irrational.

Conduct of the Commission

80. I must take into account, however, two aspects raised by the Association of the Commission's conduct in its duty of candour and pre-action conduct. I am not satisfied that the Commission acted with the alacrity demanded in providing the relevant information to the Claimants. The Commission only replied to the pre-action correspondence in this claim after the proceedings had commenced. I have consistently held that pre-action conduct is a matter to be taken seriously by the parties.

81. In **BS v Her Worship Magistrate Marcia Ayers-Caesar and The Attorney General of Trinidad and Tobago** Claim No. CV2015-02799, Claim No. CV 2015-3725, this Court in dealing with compliance with pre-action protocol guidelines stated as follows:

> "28. I consider pre-action protocol as establishing the 3 building blocks of best practice to effect a change in the culture of civil litigation. These are:
>
> > i. To encourage the exchange of early and full information about the prospective legal claim;
> >
> > ii. To enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings; and
> >
> > iii. To support the efficient management of proceedings under the CPR where litigation cannot be avoided.
>
> 29. Information exchange, settlement discussions and efficiency in the management of litigation are fundamental pillars of the new civil practice. Sharma CJ in his foreword to the CPR bemoaned the fact that the previous system encouraged an adversarial culture which often degenerated into an environment in which the litigation process was seen as a virtual battlefield rather than the arena for the peaceable resolution of disputes. The pre-action protocol represents the first shift in the culture from adversarial to collaborative.
>
> 30. It is therefore logical that if civil litigation was being reformed to give effect to the overriding objective, that parties must now think constructively about their

cases, organise comprehensive case plans and as far as possible collaborate rather than rush headfirst into litigation with blinders or blindfolds on.

31. These objectives of the pre-action protocols were in fact birthed from the considerations of Mr. Greenslade where he stated that the pre-action protocols was to ensure early and sufficient notification of potential claims.10 Lord Woolf in his celebrated "Access to Justice" report, also highlighted the purpose and importance of the use of pre-action protocols. "Pre-action protocols will be an important part of the new system. They are not intended to provide a comprehensive code for all pre-litigation behaviour but will deal with specific problems in specific areas. They will set out codes of sensible practice which parties are expected to follow when they are faced with the prospect of litigation in an area to which the protocol applies. Protocols will make it easier for parties to obtain the information they need, by the use of standard forms and questionnaire where possible. This will be assisted by wider powers for the Courts to order pre-action disclosure."

32. Lord Woolf further recommended that: "Unreasonable failure by either party to comply with the relevant protocol should be taken into account by the Court, for example, in the allocation of costs or in considering any application for an extension of the timetable."

…………………………..

34. Paragraph 2.1 of the Practice directions state that "The Court will expect all parties to have complied in substance with the terms of an approved protocol. If the proceedings are issued the Court may take into account the failure of any party to comply with a pre-action protocol when deciding whether or not to make an order under Part 26 (Powers of the Court) or Part 66 (Costs- General). Conceptually, sanctions, beyond costs orders can be imposed when there has been non-compliance with the pre-action protocols such as striking out a claim under rule 26.2(1)(a). Further, the Court expects the parties to comply as far as is reasonably possible with the terms of the approved protocol. In **Dennis Graham v Police Service Commission and Ministry of National Security** CV2007-00828, Justice Pemberton in her interpretation of Paragraph 2.1 noted that "To this I attach the meaning that the

Court may take the non-compliance with a protocol to decide whether to award costs or not or to make a reduced order for costs."

……………………………………

40. In the Jackson ADR Handbook although Lord Jackson emphasises that pre-action obligations should be proportionate to each case, he observed that the core requirements of pre-action activity are:

- An exchange of letters setting out sufficient details of the matter. These letters cannot formally fetter what might be contained in a later statement of case, but a major deviation that could not reasonably be explained might attract a costs sanction;

- Encouraging the parties to exchange sufficient information about the matter in dispute to enable them to understand each other's position, and make informed decisions about settlement and how to proceed. Each party should list 'essential documents', and identify other 'relevant documents', with copies of relevant documents being exchanged, or a reason given for why this will not happen. It is for the parties to define what they see as the key documents, but the use of the word 'relevant' means that potentially any document that might be subject to disclosure might be identified, though proportionate cost is relevant;

- That the parties should consider whether some form of ADR process might enable them to settle the matter, and options such as negotiation, mediation or early neutral evaluation are expressly suggested."

82. In **Primnath Geelal v The Chairman, Alderman, Councillors and Electors of the Region of San Juan/Laventille** CV2017-04558 it was further observed on the duty of candour at paragraph 129-130:

"…It was their duty to answer them when their decisions are under review. Their duty was to place material at least in the form of minutes before this Court or some record of the "gist of the reasons of the Council's decisions". See R v East Hertfordshire District Council ex parte Beckham. Lord Mance in his elucidating judgment in Kennedy remarked "information is the key to sound decision making".

Conversely, as in this case the lack of information paves the path for perverse decisions.

83. In my view, the conduct of the Commission in failing to respond timeously to the pre-action correspondence, in proffering the late excuse of the erroneous undertaking offered by it ought to be sanctioned in costs that is, they ought not be entitled to its costs notwithstanding that the general rule is that the successful party in this litigation is entitled to costs.

Conclusion

84. For the reasons set out, the claim will be dismissed. Unless I have written submissions of the parties within seven (7) days on the question of costs my order for costs will be that there will is no order as to costs.

Vasheist Kokaram
Judge