

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-02237

IN THE MATTER OF AN APPLICATION BY SIEWNARINE RAMSARAN (FIRE SERVICE NUMBER 1712) FOR AN ADMINISTRATIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES 1998 (AS AMENDED)

AND

IN THE MATTER OF THE UNFAIR TREATMENT OF THE CLAIMANT BY REASON OF THE FAILURE AND/OR REFUSAL BY THE PUBLIC SERVICE COMMISSION TO PROVIDE A STATEMENT OF REASONS FOR BYPASSING HIM FOR ACTING APPOINTMENT AS DEPUTY CHIEF FIRE OFFICER

AND

IN THE MATTER OF THE UNEQUAL TREATMENT OF THE APPLICANT/CLAIMANT IN BREACH OF HIS RIGHT AND/OR LEGITIMATE EXPECTATION TO BE FAIRLY CONSIDERED FOR ACTING APPOINTMENT TO THE RANK OF DEPUTY CHIEF FIRE OFFICER IN ACCORDANCE WITH THE PUBLIC SERVICE COMMISSION REGULATIONS

AND

IN THE MATTER OF THE VIOLATION OF THE CLAIMANT'S CONSTITUTIONAL RIGHT TO EQUALITY OF TREATMENT FROM A PUBLIC AUTHORITY IN THE EXERCISE OF ITS FUNCTIONS UNDER SECTION 4(d) OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ACT NO. 4 OF 1976

BETWEEN

**SIEWNARINE RAMSARAN
(FIRE SERVICE NUMBER 1712)**

CLAIMANT

AND

THE CHIEF FIRE OFFICER

FIRST DEFENDANT

AND

THE PUBLIC SERVICE COMMISSION

SECOND DEFENDANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

THIRD DEFENDANT

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery 28 June 2021

APPEARANCES

Mr Anand Ramlogan SC, Ms Jayanti Lutchmedial and Ms Renuka Rambhajan instructed by Ms Alana Rambaran Attorneys at law for the Claimant.

Ms Nadine Nabie, Ms Nicol Yee Fung and Ms Zara Smith instructed by Ms Avaria Niles and Ms Radha Sookdeo Attorneys at law for the Defendants.

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JUDGMENT

Introduction

1. The Claimant has been a fire officer for over forty (40) years with the Trinidad and Tobago Fire Service (“TTFS”). At the time he filed the instant action he was appointed as Divisional Fire Officer (“DFO”) and he was acting in the post of Assistant Chief Fire Officer (“ACFO”). He claimed that he was treated unfairly by the First and Second Defendants as he was qualified and the most senior officer to act in the post of Deputy Chief Fire Officer (“DCFO”), but the latter bypassed him by not considering him for the said post in various periods prior to and after August 2019. He also claimed that in doing so the Defendants breached his rights under sections 4(b), 4(d) and 5(2) of the Constitution of Trinidad and Tobago¹ (“the Constitution”). This is a mixed claim for judicial review and constitutional relief.
2. The Defendants denied the Claimant’s assertions. They contended that he was treated fairly prior to August 2019, as he was not on the 2015 Order of Merit List (“OML”) which was the basis for the Second Defendant’s appointment of persons to act in the post of DCFO in 2016 and 2017. They also contended that the Claimant was not considered to act in the post of DCFO after August 2019 as he did not qualify. On these grounds they have denied that there was any breach of the Claimant’s constitutional rights.
3. The issues to be determined in this case do not only affect the parties, but also impact the TTFS with respect to the roles and conduct of the First and Second Defendants in the appointment of persons to act in positions in the TTFS.

The Claimant’s Case

4. The Claimant’s position was set out in his two affidavits filed on 4 August 2020 (“the Claimant’s Principal Affidavit”) and on 19 March 2021 (“the Claimant’s Affidavit in Reply”). They comprised a mixture of facts and contentions.

¹ Chapter 1:01

5. The Claimant deposed that he has been employed with the TTFS since 1 June 1979. He acted as DFO from 1 September 2012 to 2 November 2012 and 30 April 2015 to 30 June 2015. He skipped the rank of Assistant Divisional Fire Officer (“ADFO”) and he was appointed as DFO ahead of Mervyn Layne (“Mr Layne”). He assumed his duties in the post of DFO on 4 February 2016 following Fire Service Order No. 4 of 2016² and since 14 March 2016 he has been acting in the post of ACFO. By Fire Service Order No. 10 of 2019³ the post of DCFO became vacant with effect from 18 March 2019 and was internally advertised on 6 May 2019 for interested and qualified applicants to apply. On 6 May 2019, the Claimant applied for the post of acting DCFO. By Memorandum dated 23 May 2019⁴ from the First Defendant, the Claimant was informed that he was not considered suitable and/or selected for the post of acting Deputy Chief Fire Officer since he *“did not possess the required Brigade Command Course”*.
6. In or around May 2019, Mr Layne, a junior officer to the Claimant, based on Fire Service Order No. 10 of 2019, was appointed to the post of acting DCFO without the Claimant being informed and without allowing the Claimant to make any representations. On 23 August 2019, the Claimant successfully completed the Brigade Command Course (“the IBCC”) at the Fire Service College Morton in Marsh UK England and received a Certificate of Completion⁵.
7. By Memorandum dated 1 December 2019, the Claimant wrote to the First Defendant formally complaining that he was bypassed for the post of Acting DCFO in favour of Mr Layne and asked to be reconsidered as he had acquired the IBCC in August 2019. The Claimant also wrote to the President of the Fire Service Association on 15 December 2019⁶.
8. The Claimant did not receive any response to his complaint and he continued to perform his duties as the officer in charge of the San Fernando Division. On 1 June

² “S.R.1” to the Claimant’s Principal Affidavit

³ “ S.R.3” to the Claimant’s Principal Affidavit

⁴ “S.R. 6” to the Claimant’s Principal Affidavit

⁵ “ S.R.8” to the Claimant’s Principal Affidavit

⁶ “ S.R.12” to the Claimant’s Principal Affidavit

2020, the Claimant instructed his Attorneys-at-law to issue a Pre-Action Protocol Letter and a Freedom of Information Application to the Defendants⁷.

9. On 14 July 2020, the First Defendant responded by letter dated 13 July 2020⁸ providing the requested information. This was followed by a letter dated 17 July 2020⁹ from the First Defendant, which was to replace the letter dated 13 July 2020 but he did not attach any documents. By letter dated 30 July 2020¹⁰ the First Defendant responded to the Pre-action Protocol Letter and again provided the information requested in the Freedom of Information Application.
10. The Claimant contended that after Fire Service Order No. 24 of 2000¹¹, where there is no OML, acting appointments were to be made based on seniority in the present rank and satisfying the requirements for the next rank. He also contended that, as there were no confirmed appointments to the post of ACFO, the acting appointment ought to have been made from the seniority list for the post of DFO and he was the longest serving acting ACFO. Therefore, he had acquired the most experience performing duties in the higher rank than any other officer in the said rank.
11. According to the Claimant, the Job Description for the post of DCFO¹² specifies, *inter alia*, that sixteen (16) years' experience in the TTFS including at least six (6) years senior managerial/ administrative level experience is required and that the IBCC was a necessary qualification. Both the Claimant and Mr Layne hold the substantive post of DFO, but the Claimant is more senior to Mr Layne having been promoted to that post on 4 February 2016, four (4) days before Mr Layne was promoted on 8 February 2016.
12. The Claimant contended that in 2016 when acting appointments were made to the office of DCFO, Mr Layne only possessed approximately three (3) years of acting

⁷ "S.R.13" to the Claimant's Principal Affidavit

⁸ "S.R. 14" to the Claimant's Principal Affidavit

⁹ "S.R.15" to the Claimant's Principal Affidavit

¹⁰ " S.R. 17" to the Claimant's Principal Affidavit

¹¹ "S.R.4" to the Claimant's Principal Affidavit

¹² "S. R. 5" to the Claimant's Principal Affidavit

experience in the office of ACFO and his acting appointment as DCFO was terminated in 2017 when he was replaced by Marlon Smith. The said Marlon Smith was appointed to act as DCFO instead of Mr Layne until he was later appointed CFO based on seniority as opposed to qualifications.

13. According to the Claimant, the Defendants have applied contradictory policies/procedures for selecting acting appointments to the rank of ACFO as opposed to DCFO. He explained that he was appointed to act in the rank of ACFO based on his seniority and not his qualifications, as he was appointed to act as ACFO even though he did not have the IBCC or the five (5) years senior/managerial experience outlined in the Job Description.
14. The Claimant also contended that Kenrick Bethelmy, No. 761; Carl Williams, No. 1284; Horace Archie, No. 1056; Anthony Alexis, No. 882 and Dana Roach, No. 1138 are comparators who acted in the post of DCFO without having the IBCC at the time of their appointment and were therefore appointed based on seniority and not on their qualifications or position on an OML.
15. The Claimant claimed that, as a consequence of not being appointed to act in the post of DCFO, he has lost out on further experience relevant to future promotions and opportunities for career advancement. He claimed further that he has lost out on the difference in salary between his substantive post of DFO in the sum of \$16,445.00 per month and the acting post of DCFO in the sum of \$24,620.00 per month, which amounts to a difference of \$8,175.00 per month for the period May 2019 to present.
16. Based on the aforesaid facts and contentions the Claimant has sought the following orders based on his judicial review claim:
 - (a) A declaration that the decision of the Second Defendant to continuously bypass the Claimant for acting appointments to the office of DCFO in favour of Mr. Mervyn Lane is illegal, irrational and unfair;

- (b) A declaration that the First Defendant has breached Regulation 155 of the Public Service Commission Regulations¹³ (“the PSCR”);
 - (c) A declaration that the Claimant has been treated unfairly in breach of the principles of natural justice;
 - (d) A declaration that the Claimant is senior to Mr Layne and is suitably qualified and eligible to be considered for acting appointment as DCFO;
 - (e) An order of mandamus pursuant to section 21 of the Judicial Review Act¹⁴ directing the Defendants to reconsider the Claimant’s claim for acting appointment to the rank of DCFO in accordance with the findings of this Court within fourteen (14) days.
17. The Claimant has also sought the following constitutional relief against the Third Defendant, namely:
- (a) A declaration that the Claimant’s rights to procedural protection under section 5(2)(h) of the Constitution and consequently a breach of the Claimant’s right to the protection of the law under section 4(b) of the Constitution;
 - (b) A declaration that the Claimant’s right to equality of treatment from a public authority in the exercise of its functions under Section 4(d) of the Constitution was breached and/or violated;
 - (c) Damages to include monetary compensation and vindictory damages for the violation of the Claimant’s constitutional rights.
18. Against all the Defendants the Claimants seeks his costs. In the case management of this matter the parties agreed to defer the issue of damages until after the decision on the substantive issues.

¹³ Chapter 1:01

¹⁴ Chapter 7:08

The Defendants' Case

19. The Defendants set out their position in three (3) affidavits namely an affidavit of Marlon Smith filed on 30 October 2020 ("the Smith Affidavit"); and two (2) affidavits of Corey Harrison filed on 30 October 2020 ("the First Harrison Affidavit") and on 9 December 2020 ("the Second Harrison Affidavit"). Like the Claimant, these affidavits contained facts and contentions by the deponents.
20. Mr Smith deposed that he has been the Acting Chief Fire Officer ("CFO") since 3 June 2019. As the Acting CFO, Mr. Smith is responsible for, *inter alia*, making recommendations for the promotion of fire officers within the TTFS. He produced the organisational structure for the TTFS¹⁵; the particulars of the Claimant's career in the TTFS¹⁶ ; and the particulars of Mr Layne's career in the TTFS¹⁷.
21. According to Mr Smith, by Fire Station Notice No. 10 of 2019 dated 6 May 2019¹⁸ the vacancies for CFO and DCFO were advertised. Mr Smith contended that Officers are appointed to acting posts once they are shown to be suitably qualified based on the terms of the qualifications and/or experience required for the said acting post. In the absence of officers who are suitably qualified for the post in terms of qualifications and/or experience, i.e. where there is a dearth of suitable candidates, officers can be appointed to act in a post based on seniority.
22. Mr Smith stated that the Claimant acted as ACFO since March 2016 but has never acted as DCFO. The Claimant was never promoted to ADFO and remained junior to Mr Layne until he was placed on an OML for the substantive office of DFO and was promoted to DFO on 4 February 2016.
23. According to Mr Smith, the Claimant's comparator, Mr Layne, acted as ACFO for several periods between 2013 and 2016 while in the substantive office of ADFO and

¹⁵ "M.S. 1" of the Smith Affidavit

¹⁶ " M.S. 2" of the Smith Affidavit

¹⁷ " M.S. 3" of the Smith Affidavit

¹⁸ " M.S. 5" of the Smith Affidavit

DFO. Whilst in the substantive office of DFO, Mr Layne also acted in the office of DCFO for periods in 2016 and 2017 based on a 2015 OML. The salaries for the offices of DFO and DCFO are respectively \$16,445.00 per month and \$24,620.00 per month, as stated in the 98th Report of the Salary Review Commission.

24. Mr Smith contended that Mr Layne had acquired more senior management experience having acted in the post of DFO since February 2010, whilst the Claimant has acquired senior management experience from the post of DFO since October 2014. Further, the Claimant only became senior to Mr Layne as at the date of his appointment to the office of DFO, prior to this, Mr Layne was always senior to the Claimant. In addition, upon acquiring the relevant IBCC in August 2019, the Claimant was still not the most senior officer nor the most experienced officer. The Claimant is still junior to Arnold Bristo who holds the substantive post of Brigades Engineer (“BE”) and still has less experience than Mr Layne who has been acquiring the relevant senior management experience since February 2010.
25. Mr Harrison deposed that he is the Deputy Director of Personnel Administration of the Service Commissions Department of the Second Defendant. The Service Commissions Department is the secretariat to all Service Commissions established under the Constitution of Trinidad and Tobago.
26. According to Mr Harrison, the office of DCFO became vacant with effect from 13 October 2019 upon the retirement of Roosevelt Bruce from the TTFS. By Memorandum dated 6 May 2019¹⁹, the First Defendant issued an advertisement of the vacancy for interested and qualified applicants to apply for the acting appointment in the office of DCFO. He also attached a Job Description²⁰ for the said post.
27. In accordance with Regulation 155 PSCR, the First Defendant submitted his recommendations for the appointment of, *inter alia*, Mr Layne as Acting DCFO for the period 3 June 2019 to 31 December 2019²¹. The Permanent Secretary of the Ministry

¹⁹ “C. H.3” to the First Harrison Affidavit

²⁰ “C. H.2” to the First Harrison Affidavit

²¹ “C. H. 4” to the First Harrison Affidavit

of National Security submitted information by Memorandum dated 6 April 2020²² regarding the passing over of senior officers, including the Claimant, for the post of Acting DCFO. At the material time, there was no OML for the office of DCFO and the appointment of Mr Layne to act as DCFO was made in accordance with Regulations 154 to 158 PSCR.

28. Mr Harrison stated that at the meeting of the Second Defendant on 28 April 2020, the Second Defendant considered the recommendation of the First Defendant for, *inter alia*, Mr Layne to act as DCFO for the period 3 June 2019 to 31 December 2019 and noted that: there was no valid OML for the post of DCFO as the 2015 OML which was valid for two (2) years from 8 December 2015 had since expired; and the acting appointment of Mr Layne involved the passing over of Arnold Bristo, BE, the Claimant, DFO and Andy Hutchinson, DFO. He stated that at the time of the vacancy, those persons did not satisfy the training requirements for the office of DCFO (not being in possession of the IBCC; and not satisfying the experience requirement of six (6) years at a senior managerial/administrative level).
29. According to Mr Harrison, the Second Defendant also noted that the Claimant, Arnold Bristo and Andy Hutchinson, had since attained the IBCC as at the end of August 2019, which Mr Layne had attained since 2013. Mr Layne had also previously acted as DCFO having placed No. 3 on the 2015 OML for the office of DCFO.
30. Mr Harrison further stated that the Second Defendant also considered that whilst the Claimant was now in possession of the IBCC, he still did not satisfy the requisite experience requirements for the office of DCFO as set out in the Job Description for the said office. In that regard, the Second Defendant decided, *inter alia*, to agree to the acting appointment of Mr Layne as DCFO for the period specified, and that the officers be informed that the acting appointments were made in accordance with Regulation 154(1) PSCR and was not a prelude to a permanent appointment to the respective offices and would give them no claim thereto.

²² "C.H. 5" to the First Harrison Affidavit

31. The Second Defendant also decided to continue the appointment of Mr Layne as acting DCFO on the basis of a Memorandum dated 14 April 2020²³ from the Permanent Secretary of Ministry of National Security to the Director of Personnel Administration. This decision was communicated to the Permanent Secretary, Ministry of National Security by Memorandum dated 23 July 2020²⁴. This decision was conveyed to Mr Layne by letter of even date²⁵.
32. According to Mr Harrison, the Claimant is the most senior DFO at No. 1 on the seniority list²⁶. The Claimant is fifty-eight (58) years and enlisted as a Firefighter in the TTFS on 1 June 1979. He was promoted as a Fire Sub Officer with effect from 7 March 1995 and as a Fire Sub Station Officer with effect from 15 July 2000. The Claimant was then promoted as Fire Station Officer with effect from 9 August 2005 and as DFO with effect from 4 February 2016. The Claimant has been acting as ACFO from 14 March 2016.
33. He also stated that Mr Layne who holds the substantive office of DFO is No. 3 on the seniority list while Andy Hutchinson is No. 2 on the said list. The other officers senior to the three (3) aforementioned officers are Arnold Bristo who is the BE and Marlon Smith who is Acting CFO and substantively an ACFO. The Claimant's comparator, Mr Layne, was appointed as a Firefighter on 1 September 1981. He was promoted to Fire Sub Officer on 29 December 1994 and Fire Sub Station Officer on 1 August 1998. On 2 March 2004, Mr Layne was promoted to Fire Station Officer and on 15 December 2009 was appointed to ADFO. Mr Layne was then promoted to DFO on 8 February 2016. Mr Layne acted as DFO for the periods 30 April to 30 June 2011 and from 1 July 2012 to 7 September 2012. Mr Layne also acted in the office of ACFO for the periods 9 March 2013 to 16 March 2013, 22 March 2013 to 18 April 2013, 25 September 2013 to 13 March 2016, 1 May 2017 to 1 September 2017 and 22 March 2018 to 3 June 2019. Mr Layne also acted as DCFO for the periods 15 August 2016 to 8 November 2016, 2 October 2017 to 24 November 2017 and 3 June 2019 to present.

²³ "C. H.6" to the First Harrison Affidavit

²⁴ "C.H.7" to the First Harrison Affidavit

²⁵ "C. H.8" to the First Harrison Affidavit

²⁶ "C.H.10" of the First Harrison Affidavit

34. The Claimant's Pre-Action Protocol Letter and Freedom of Information Request was received on 15 June 2020 and acknowledged by letter dated 28 July 2020. A Note was prepared for consideration by the Second Defendant at its Meeting on 27 October 2020 and based on same a response dated 30th October 2020²⁷ from the Second Defendant was issued to the Claimant's Attorney. By letter dated 8 October 2020²⁸, a response to the Freedom of Information Application was also issued to the Claimant providing information and/or documents in respect of items 1 to 10, and a Note had been prepared for the consideration of the Second Defendant in respect of Items 11 to 14.
35. Mr Harrison contended that when the Claimant commenced acting as ACFO on 14 March 2016, he was neither in possession of the IBCC nor the five (5) years' experience at the DFO level, which was listed as a requirement in the job specification for ACFO²⁹. At that time, the Claimant was appointed to act based on the seniority list for DFO. In August 2019 when the Claimant obtained the IBBC, he still did not possess the required six (6) years' senior experience at a managerial/ administrative level. At the time that the vacancy arose for the office of DCFO, Mr Layne had approximately seven (7) years' senior managerial experience while the Claimant had approximately three (3) years' senior managerial experience but without the IBBC.

Preliminary Matters

36. At the hearing of the instant matter, the directions I gave did not include the issue of damages which was claimed by the Claimant.
37. Both parties took objection with certain parts of each other's evidence. The Claimant filed his Notice of Evidential Objections on the 9 April 2021 and the Defendant filed theirs on the 29 March 2021. Both parties also addressed each other's objections in their submissions.

²⁷ "C.H.11" of the First Harrison Affidavit

²⁸ "C. H.12" of the First Harrison Affidavit

²⁹ "C.H.1" of the First Harrison Affidavit

38. I have decided not to strike out any of the evidence objected to but instead to treat with the respective evidence *de bene esse*, as both parties ran afoul of the requirements of Part 31 Civil Proceedings Rule 1998 (as amended) and the affidavits contained facts and contentions by each deponent.

The Issues

39. Based on the respective positions outlined by the parties, the following substantive issues are to be determined:
- (i) Did the First and Second Defendants act irrationally, illegally and/or unfairly when they failed to consider the Claimant to act in the office of DCFO prior to and/or subsequent to August 2019?;
 - (ii) Was there a breach of Regulation 155 PSCR?;
 - (iii) Whether the Claimant's right to protection of the law under Section 4(b) of the Constitution was infringed upon; and consequently whether that amounted to a breach of the Claimant's right to procedural protection under Section 5(2)(h) of the Constitution;
 - (iv) Whether the Claimant's right to equality of treatment from a public authority under Section 4(d) of the Constitution was breached; and
 - (v) Whether the Claimant had a legitimate expectation that he would be considered to act in the post of DCFO;

Did the First and Second Defendants act irrationally, illegally and unfairly when they did not consider the Claimant to act in the office of DCFO prior to and/ or subsequent to August 2019?

40. It was submitted on behalf of the Claimant that prior to and subsequent to August 2019 the First and Second Defendants acted irrationally, illegally and unfairly by not considering him to act in the post of DCFO on the basis that he was ineligible.
41. Counsel for the Defendants argued that the Claimant was treated fairly because he first had to be eligible to hold the office of Acting DCFO, before the criteria in

Regulations 158 PSCR could be considered. In this regard, Counsel submitted that the Claimant failed to demonstrate that he was unfairly bypassed prior to August 2019 as he was not on the 2015 OML for DCFO. It was also submitted that the Claimant did not meet the criterial to be eligible after August 2019, as he still did not possess the six years senior managerial /administrative experience.

Regulations 154 to 158 PSCR

42. In the instant case, Regulations 154 to 158 are the relevant provisions of the PSCR. They provide:

154.(1) Subject to regulation 157, the Chief Fire Officer shall ensure that recommendations made in relation to an acting appointment are based on the criteria prescribed in regulation 158.

(2) Where, in the exigencies of the Service it is not practicable to apply the principles prescribed in regulation 158, the fire officer selected for an acting appointment shall not be given any preference over other eligible officers for a substantive appointment.

155.(1) Subject to regulation 157, where an acting appointment falls to be made by the Commission, the Chief Fire Officer shall notify all eligible fire officers.

(2) For the purpose of subregulation (1), the notice may be in respect of an acting appointment which falls to be made within a period specified in the notice.

(3) The Chief Fire Officer shall allow a period of seven (7) days to elapse after the issue of the notice before forwarding any recommendations to the Director for the purpose of allowing the fire officers to make representations in respect of that acting appointment.

(4) Where representations are made to the Chief Fire Officer by or on behalf of a fire officer, the Chief Fire Officer shall forward the representations in their original form to the Director.

(5) When submitting recommendations to the Commission for an acting appointment to an office, the Chief Fire Officer shall advise the Commission of the reasons why an eligible fire officer who is more experienced than the recommended officer is being passed over.

156. Except in very special circumstances or in cases of sudden illness, the Chief Fire Officer shall submit his recommendation for an acting appointment to an office no later than twenty-eight (28) days preceding the date on which the acting appointment is intended to become effective.

157. (1) Where an acting appointment falls to be made as a result of sudden illness or other special circumstances for a period not exceeding twenty-eight (28) days, the Commission may appoint, as a general rule, the most experienced eligible officer from within the Division in which the acting appointment is to be made.

(2) In making an acting appointment under sub-regulation (1) the Commission shall—

(a) examine whether the exigencies of the Service are best served by appointing an eligible fire officer from another Division to act when there is an eligible officer in the Division; and

(b) take into account additional Government expenditure for travelling and subsistence allowances and other related expenses.

158. (1) In considering eligible fire officers for promotion, the Commission shall take into account the experience, educational qualifications, merit and ability, together with the relative efficiency of those fire officers.

- (2) Where the Commission has to select an officer for promotion from officers who appear to be of equal merit, the Commission shall determine its selection on the basis of the relevant and relative experience of the officers.
- (3) In the performance of its functions under sub regulation (1), the Commission shall take into account as regards each fire officer—
- (a) his general fitness;
 - (b) any special qualifications;
 - (c) any special courses of training that he may have undergone (whether at the expense of Government or otherwise);
 - (d) the evaluation of the officer's performance as reflected in his performance appraisal report;
 - (e) any letters of commendation or special report in respect of any special work done by the fire officer;
 - (f) the duties to be performed in the office of which the fire officer has experience;
 - (g) demonstrated skills and ability relevant to the office;
 - (h) any specific recommendation of the Permanent Secretary or Chief Fire Officer for the filling of the particular office;
 - (i) any previous, relevant employment of his in the Service, the public service, or elsewhere;
 - (j) any special report for which the Commission may call;
 - (k) his devotion to duty.

43. “Acting appointment” is defined in Regulation 2 PSCR as:

““acting appointment” means the temporary appointment of an officer to a higher office or otherwise whether that office is vacant or not”

44. Regulation 146 PSCR defines “eligible officer” as a fire officer who satisfies the qualifications for an office.

45. Regulation 157 is not applicable to the facts in the instant case.

46. Various provisions of the PSCR have come under the scrutiny of the Courts in the past. In **Dr Colin Furlonge v Mr Hamid O’Brien Permanent Secretary Ministry of Health**³⁰ the Court was called upon to determine if the Claimant was bypassed for a certain post. The Court considered certain provisions of the PSCR which were similar but not on par with the relevant provisions in the instant case. Jamadar J (as he then was) articulated the approach the Court should take when considering Regulations which deal with acting post. At page 10 of the judgment, Jamadar J (as he then was) stated:

“The Privy Council, in **Rajkumar v Lalla** P.C. Appeal No 1 of 2001 (delivered on the 29th January, 2001), has stated unequivocally that the PSC Regulations ‘set out a detailed code, for, amongst others, appointments in the prison service’ (paragraph 10). The same is unquestionably true for all acting appointments (including those otherwise than as a prelude to a substantive appointment) governed by the regulations under consideration.

Further, the PSC Regulations must be interpreted in the context of the status of the Public Service Commission itself. In this regard the opinion of Lord Diplock in *Thomas v Attorney General of T & T* (1982) AC 113 at 124 C, is apposite:

The whole purpose of chapter VIII of the Constitution which bears the rubric “The Public Service” is to insulate members of the civil service,

³⁰ HCA 2098/2003

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 PSC Regulations are thus intended to be in service of the aim of ensuring, with respect to acting appointments, that all such appointments are free from any political interference. In my opinion, this context creates a presumption that where these regulations state that certain things 'shall' be done, the intention is for compliance. Moreover, an examination of the regulations under consideration reveals that there is a carefully detailed scheme that has been prescribed by the legislature for the process of selection of officers for acting appointments. Such a scheme must be presumed to be purposeful. And, such a scheme was no doubt prescribed in order to (i) avoid both the mischief of political interference and arbitrariness; and (ii) ensure fairness and transparency/accountability in the selection process. To this extent these regulations are mandatory, even if substantial compliance is sufficient."

47. In my opinion, Regulations 154 to 158 is the self-contained code which deals with acting appointments in the TTFS. These provisions bestow several mandatory duties and responsibilities which are critical in the process of an acting appointment in the TTFS. Under these provisions the First Defendant has several important functions. According to Regulation 155, when an acting appointment arises the First Defendant has a responsibility to notify all eligible fire officers of the acting appointment. To do so the First Defendant must be fully aware of the qualifications for the office of the acting appointment and the officers who would satisfy the requirements, as it is his or her duty to ensure that all qualified or eligible officers are notified.
48. The First Defendant must ensure that a period of seven (7) days elapses after the issue of the notice, so as to allow eligible fire officers to make representations in respect of that acting appointment. During that period the First Defendant is prevented from forwarding his recommendation to the Second Defendant.

49. The First Defendant's next responsibility is to forward any representations made to him by or on behalf of an eligible fire officer, in their original form to the Second Defendant. The First Defendant can then submit his recommendation to the Second Defendant after the seven (7) days have elapsed. If the First Defendant has recommended any eligible fire officer who has less experience than another person, he must set out the reasons why the more experienced officer is bypassed. The last responsibility which the Regulation places on the First Defendant is to ensure that he submits his recommendation no later than twenty-eight (28) days preceding the date on which the acting appointment is intended to become effective. In my opinion, this last responsibility is important as it ensures that the Second Defendant receives updated information in a timely manner to consider in its deliberations. Therefore, there are two sets of information which the First Defendant must send to the Second Defendant, namely his recommendation and the original written representations which he receives from any eligible officers after he has issued the notice.
50. The role of the Second Defendant in the process is clearly set out in Regulation 158. The Second Defendant can only make a decision on an acting appointment upon receipt of a recommendation from the First Defendant which meets the requirements under Regulation 155 (5) and any representations from fire officers who responded to the First Defendant's Notice issued under Regulation 155(1). Upon receipt of those documents, the Second Defendant has a duty to consider the recommendation made by the First Defendant and all the representations made by fire officers which were forwarded to the Second Defendant. In assessing the fire officers who were eligible for promotion, the Second Defendant must consider the factors set out in Regulation 158.
51. It was submitted on behalf of the Claimant that the term "experience" in Regulations 158 (1), 158 (2) and 158(3) (f) is a synonym for seniority or alternatively, seniority is an important component in "experience".

52. Counsel for the Defendants argued that the word “seniority” does not feature in Regulations 154 to 158 of the PSCR and there is no established practice that seniority or Regulation 26 PSCR is used for acting appointments in the TTFS.
53. In my opinion, if it was the intention for seniority to be a relevant criterion to be considered under Regulation 158, it would have expressly so stated. It seems to me that the intention in using the word the “experience” was to deliberately move away from seniority as a basis to be eligible for an acting appointment to an office in the TTFS. The term “experience” as included in this Regulation is to be interpreted as a person who has been performing certain functions which would make him suitable to be a candidate for a particular office. In my opinion, seniority is not necessarily an important component in “experience” as a non-performing senior officer is not necessarily an experienced officer.

Was the Claimant eligible prior to August 2019

54. The Claimant stated in his Affidavit in Reply that he was not interviewed for the post of DCFO in 2015 which was used to compile the 2015 OML and he was prevented from participating in it on the basis that he did not have the IBCC. He stated that at the time the interviews were held in 2015 and when the acting appointments were made for the rank of DCFO in 2016, he had the relevant managerial experience as he had acted as DFO from 1 September 2012 to 2 November 2012 and 30 April 2015 to 30 June 2015 and he was appointed to act as ACFO from 14 March 2016.
55. The Claimant also stated that Mr Layne did not possess the six (6) years’ senior managerial/ administrative level experience listed as a requirement in the Job Description for the post of DCFO. He stated that Mr Layne was appointed ADFO on 15 December 2009. Mr Layne was appointed to act in the post of ACFO in 2013 and then in 2016 Mr Layne was appointed to act in the post of DCFO, however, his acting appointment in the post of DCFO was terminated in 2017 when Mr Marlon Smith replaced him as acting DCFO. The Claimant’s evidence was that Mr Layne possessed approximately three (3) years of acting experience in the rank of ACFO.

56. The Defendants evidence was that Mr Layne acted in the post of DCFO for the periods 15 August 2016 to 8 November 2016 and 2 October 2017 to 24 November 2017 based on the 2015 OML³¹.
57. It was submitted on behalf of the Defendants that the Court should disregard the Claimant's assertions about the 2015 OML and that he was unfairly prevented from participating in the 2015 interviews that would have allowed him to be placed on the said OML. The Defendants stated that the Claimant had provided no evidence in the Claimant's Principal Affidavit on those matters and as such the Defendants' Affidavits did not address how the 2015 OML came into being. Counsel also submitted that those were new assertions which were first raised in the Claimant's Affidavit in Reply which meant that the Defendants were denied the opportunity to address them.
58. In response, it was argued on behalf of the Claimant that the Defendants were given the opportunity by the Court to file further evidence in light of the Amended Fixed Date Claim but they chose not to do so, as such the Court must draw the necessary adverse inferences against the Defendants in favour of the Claimant's case.
59. On 26 February 2021 I gave the Claimant permission to amend the Fixed Date Claim where he was allowed to challenge the decision to bypass him prior to August 2019 for the acting appointment in the post of DCFO.
60. At that time the Defendants had filed their affidavits in response to the Claim. Upon granting the Claimant permission to amend the Fixed Date Claim, Counsel for the Defendants requested the Court's permission to file further evidence in light of the order granting the amendment, as she stated there was no evidence from the Defendants to address the Claimant's challenge to the 2015 OML. This request was opposed by Senior Counsel for the Claimant and the Court directed the Defendants to file a formal application seeking permission to file further evidence.

³¹ Paragraph 21 of the First Harrison Affidavit

61. The Amended Fixed Date Claim was filed on 1 March 2021. Paragraphs 2 to 5 of the grounds of the Amended Fixed Date Claim set out the details of the Claimant's allegations of being bypassed for the post of acting DCFO prior to August 2019. In summary, the grounds stated that: Mr Layne was not qualified to act in the rank of DCFO as he did not possess the requisite minimum six (6) years' experience at a senior managerial/ administrative level; in the absence of any qualified candidate who satisfied the requirements for the office of DCFO, the most senior from the candidates should have been appointed to act; even if the temporary acting appointment was based on the 2015 OML, it was not a valid and proper OML as it was compiled in an unfair and improper manner because Mr Layne was interviewed even though he did not satisfy the mandatory six (6) years' senior managerial/ administrative experience whilst the Claimant was excluded from the process; and if the 2015 OML was valid when it was exhausted or expired, temporary acting appointments ought to have been determined by reference to seniority in favour of the Claimant, which was not done.
62. By email dated 11 March 2021 the Attorney at law for the Defendants indicated to the Court and the Attorney at law for the Claimant inter alia that they did not intend to file any application to put in further evidence in this matter. Two (2) days after the Claimant's Affidavit in Reply was filed. In it the Claimant alleged that the 2015 OML was not properly compiled and that he was unfairly prevented from participating in the said interview in 2015.
63. The effect of the Amendment to the Fixed Date Claim was to permit the Claimant to pursue an additional claim. Rule 56.7 (3) and (4) Civil Proceedings Rule 1998 states that a Claimant must file an affidavit setting out the grounds on which the reliefs are being sought and the facts on which the claim is based. In the Claimant's Principal Affidavit, he acknowledged the use of the OML in acting appointments in the TTFS. The Claimant also annexed as "S.R. 4" to the Claimant's Principal Affidavit a Fire Service Order No. 24 of 2000 wherein the Second Defendant advised that in addition to Regulations 154 (1), 154(2) and 158 of the PSCR, acting appointments in the TTFS shall be in accordance with the following criteria:

(a) OML shall be used as a guide in selecting officers for acting appointments which are a prelude to promotion to the substantive rank.

(b) Where no OML exist, acting appointments shall be based on seniority in the present rank and satisfying the requirements for the next rank.

64. However, there was no evidence from the Claimant's Principal Affidavit that the 2015 OML was invalid, or that he applied to act in the office of DCFO and that he was unfairly treated as he was not interviewed when the said list was being compiled. The Claimant also failed to file a supplemental affidavit to put before the Court any evidence to support the new grounds as set out in his Amended Fixed Date Claim. Having failed to file any supplemental affidavit to set out the facts to support the new grounds of the Amended Fixed Date Claim, there was no evidence by the Claimant to support his contention that the 2015 OML was invalid and/or he was treated unfairly prior to August 2019. Therefore, there was no evidence for the Defendants to respond to with respect to the allegations prior to August 2019. In my opinion, the Claimant cannot rely on the facts raised in his Affidavit in Reply to support those grounds in his Amended Fixed Claim as it deprived the Defendants of the opportunity to address those allegations.

65. For these reasons I am of the view that the Claimant failed to make out a prima facie case that prior to August 2019 he was treated unfairly with respect to the acting appointment of DCFO.

Was the Claimant eligible after August 2019

66. It was contended on behalf of the Claimant that after August 2019 the Claimant was treated unfairly, as he was ignored and excluded from consideration on the first basis that he did not complete the IBCC and on the second basis that he did not have the requisite experience.

67. The First and Second Defendants' position was that the Claimant was treated fairly after August 2019 when he was not considered to act in the post of DCFO, as he was

still not eligible since he did not meet the criteria of being in possession of six (6) years senior managerial /administrative experience.

The IBCC

68. It was not in dispute that on 23 August 2019 the Claimant successfully completed the IBCC³². According to the Claimant on 1 December 2019 he wrote to the First Defendant lodging a formal complaint of being bypassed for the post of Acting DCFO in favour of Mr Layne and requested that he be reconsidered as he had acquired the IBCC in August 2019. Although the First Defendant disputed receiving the Claimant's memorandum dated 1 December 2019, he admitted that he had a conversation with the Claimant about the latter being overlooked for the acting appointment as DCFO and that on one (1) occasion he indicated to the Claimant that the matter was under review.
69. Even if the First Defendant did not receive the Claimant's correspondence dated 1 December 2019, it was not that he was unaware that the Claimant had acquired the IBCC at the end of August 2019 as he admitted in the Smith Affidavit that he indicated to the Claimant that the matter was under review. In any event, the Claimant was away from office during the period June to August 2019 attending the training programme to obtain the IBCC, a course which the TTFS approved and sent the Claimant to pursue. Therefore, it was very probable that the First Defendant was aware of the Claimant attaining the IBCC at the end of August 2019.
70. There were a few memoranda which were written by the persons who were in the post of the First Defendant, concerning Mr Layne acting in the post of the DCFO for the period from June 2019. Exhibit "M.S.4" is a memorandum dated 18 March 2019 which was written by the then First Defendant, Mr Gopaul to the Director of Personnel Administration u.f.s. In this memorandum, the First Defendant stated the reasons he was recommending Mr Layne to act in the post of DCFO from 3 June 2019 as this was Mr Gopaul's date of departure from the TTFS. The memorandum did not state the

³² Exhibit "S.R.8" to the Claimant's Principal Affidavit

period of this acting appointment. Notably, there was no mention in this memorandum that the First Defendant had complied with his responsibilities under Regulation 155 PSCR before he issued the said memorandum.

71. By memorandum dated 2 January 2020³³ the First Defendant recommended that Mr Layne act as DCFO for the period 3 June 2019 to 31 December 2019. The said memorandum stated that the recommendations were made in accordance with Regulations 154(1), 155(5) and 158(1), (2) and (3) of the PSCR. Notably, this memorandum was not in compliance with regulation 156 PSCR which mandated that the First Defendant make his recommendation to the Second Defendant no later than twenty-eight (28) days preceding the expected date the acting appointment is to be effective.
72. Factually, based on the contents of the Smith Affidavit, the contents of the First Defendant's memorandum dated 2 January 2020 appears to be misleading. During the period September 2019 to December 2019 the Claimant had met all the necessary qualifications for the office of DCFO, as he had attained the IBCC at the end of August 2019 and based on the memorandum dated 23 May 2019 this was the only reason he had not been eligible at that time to be considered to act in the post of DCFO.
73. The next memorandum which was issued by the First Defendant concerning the acting in the office of the DCFO was dated 30 January 2020³⁴ from the First Defendant to the Permanent Secretary in the Ministry of National Security responding to a memorandum dated 6 January 2020. The memorandum dated 6 January 2020 was not exhibited to any of the affidavits filed on behalf of the Defendants. Therefore, the Court was deprived of the nature of the request which the memorandum dated the 30 January 2020 was responding to. In the memorandum dated 30 January 2020 the First Defendant stated that in August 2019 the Claimant had completed the IBCC and he was now deemed to be qualified for the acting appointment. This is consistent with the First Defendant's memorandum dated 23 May 2019 to the Claimant where he

³³ Exhibit "C.H.4" to the First Harrison Affidavit. This was written by the First Defendant to the Permanent Secretary, Ministry of National Security for onward transmission to the Director of Personnel Administration

³⁴ Exhibit "M.S. 6" to the Smith Affidavit

indicated that the Claimant was not qualified for the post of acting DCFO as he did not have the IBCC.

74. However, despite this acknowledgement by the First Defendant that the Claimant qualified to act in the office of DCFO by at least September 2019, in memorandum dated 28 February 2020³⁵ the First Defendant still recommended Mr Layne to act in the office of DCFO for the period 1 January 2020 to 30 June 2020. The said memorandum stated that the recommendations were made in accordance with Regulations 154(1), 155(5) and 158(1), (2) and (3) of the PSCR. The said memorandum did not indicate if there was any eligible fire officer who was more experienced than Mr Layne who was being passed over. It also did not indicate the reason Mr Layne was recommended save except that his performance appraisal for the period 1 October 2018 to 30 September 2019 was “very good”.
75. It is striking that in all the memoranda issued by the First Defendant on the Claimant’s qualification to act in the office of DCFO, the only issue which the First Defendant indicated which caused the Claimant to be ineligible prior to August 2019 was his lack of the IBCC. It was never stated in any of those contemporaneous documents that the Claimant did not possess the requisite senior managerial/ administrative experience. Even the First Defendant acknowledged in his memorandum dated 30 January 2020 that the Claimant was qualified or eligible for the post of acting DCFO as he had meet all the requirements. Therefore, the only reasonable conclusion is that when the Claimant returned with the IBCC in August 2019, he had met the requirements or qualifications to be considered to act in the office of DCFO.

The Requisite Experience

76. It was submitted on behalf of the Defendants that the Claimant was aware or ought to have known, that in order to be eligible to act in the office of DCFO, he needed to have at least six (6) years’ senior management/administrative level experience and that the senior management experience counted from the office of DFO and offices

³⁵ Exhibit “C.H.6. to the First Harrison Affidavit. This was written by the First Defendant to the Permanent Secretary, Ministry of National Security for onward transmission to the Director of Personnel Administration

senior thereto; and that he did not qualify as he only began to acquire such experience from October 2014. As a consequence, even when the Claimant acquired the IBCC he had not yet acquired the requisite experience. In support of this position the Defendants relied on exhibit “C.H.14” in the First Harrison Affidavit and the judgment of Rampersad J in **Siewnarine Ramsaran v Chief Fire Officer and ors.**³⁶

77. Exhibit “C.H.14” was the pre-action protocol letter issued on behalf of the Claimant against the Defendants when he challenged the First and Second Defendants’ decision in 2017 not to promote him to the office of ACFO. The judgment of Rampersad J in **Siewnarine Ramsaran** addressed the Claimant’s challenge. In that case, the Court was concerned with the interpretation of Regulations 158 and 160 PSCR which dealt with the requirements for promotion to the office of ACFO in the TTFS. It was also in contention in that case whether the requirements for the office of ACFO were easily discernible by the Claimant.
78. In the instant case, it was not in dispute that Regulations 154 to 158 are the relevant provisions which deal with the appointment of persons in the TTFS to acting post and that the Claimant was aware that the requirements to be eligible for the office of DCFO were set out in the Job Description³⁷.
79. The Job Description for the post of DCFO³⁸ stated under the subheading of experience that “sixteen years’ experience in the Fire Service including at least six years at a senior managerial/administrative level”. The Claimant was aware of this requirement as he referred to it in the Claimant’s Principal Affidavit.
80. According to paragraph 20 of the First Harrison Affidavit, the relevant managerial/administrative experience for acting in the post of DCFO is when a fire officer is performing in the office of ACFO and higher. Based on the organisational structure for the TTFS which was attached as “M.S.1” to the Smith Affidavit, the only

³⁶ CV2017-00540

³⁷ See exhibits “ S. R.5” to the Claimant’s Principal Affidavit and “C.H.2” to the First Harrison Affidavit

³⁸ “S.R 5” to the Claimant’s Principal Affidavit and “C.H.2” to the First Harrison Affidavit

offices which are higher than ACFO is DCFO and CFO, as the office of BE is at the same level as ACFO.

81. The Second Harrison Affidavit changed this position as he stated at paragraph 7 that the Second Defendant considered senior managerial experience to be “obtained when a person is performing in the function of DFO and offices senior thereto”.
82. The Smith Affidavit seemed to have identified that the senior managerial/administrative experience for the post of DCFO is computed from the rank of ADFO and above. Based on the organisational structure of the TTFS this would be management experience in the offices of ADFO, DFO, ACFO, BE and DCFO.
83. This contradiction in the First and Second Defendants’ evidence on what constitutes six years at a senior managerial/administrative level in order to qualify to act in the post of DCFO is material, as both parties played an important function in the process of appointing persons to act in that office. However, neither Mr Harrison nor Mr Smith identified the basis for asserting from which office in the TTFS the requisite managerial experience could be obtained.
84. It seems to me that the Fire Service (Terms and Conditions of Employment) Regulations 1998³⁹ is instructive on this issue. Regulation 9(3) deals with the requisite qualifications for appointment to any office in the First Division of the TTFS. The offices of the First Division as set out in the Second Schedule are: CFO, DCFO, ACFO, DFO, BE and Third Officer. Regulation 9 states:

(1) A candidate for appointment Assistant to the office Divisional Fire Officer shall be selected from among those persons holding the office of Fire Station Officer or Fire Equipment Supervisor with at least ten years’ service in the Service.

³⁹ Chap. 35:50

(2) A Fire Station Officer or a Fire Equipment Supervisor in order to be a candidate for appointment to the office of Assistant Divisional Fire Officer shall possess one of the following qualifications:

(a) passes in five subjects in the Caribbean Examinations Council Examinations including a pass in the subject of English Language at General Proficiency Grade I, II, III or Basic Proficiency at Grade I and in the other subjects at the General Proficiency Grade of I, II or III or the Basic Proficiency Grade of I or II, and passes in two (2) subjects at “Advanced” level in the General Certificate of Education Examination;

(b) a General Certificate of Education with passes at “Ordinary” level in not less than five subjects including English Language and passes in two subjects at “Advanced” level;

(c) the Graduate Diploma of the institution of Fire Engineers, or equivalent related qualification as assessed by the Chief Fire Officer after consultation with the Permanent Secretary and the Chief Personnel Officer;

(d) the Diploma from the Joint Services Staff College;

(e) successful completion of the Overseas Operational Commanders’ and Fire Prevention Course;

(f) passes in a written examination in English and Management Studies conducted by the Examinations Board.

(3) A candidate for another office in the First Division shall have the qualifications prescribed for the office of Assistant Divisional Fire Officer and shall have served in that office. (Emphasis added)

85. Based on Regulation 9(3) as set out aforesaid, the experience acquired in any office from ADFO to offices senior thereto is relevant in determining if one has acquired six years senior managerial/ administrative experience for acting in the post of DCFO.

86. According to Exhibit “M.S.2” the Claimant acquired the following managerial experience, namely in the post of: ADFO, where he acted for various periods between 11 October 2008 and 30 June 2015⁴⁰; DFO, where he acted for various periods between 6 October 2014 and 3 February 2016⁴¹; and ACFO, where he acted for various periods between 14 March 2016 to 30 September 2020.⁴²
87. Based on this exhibit, the Claimant acquired more than six (6) years’ experience at a senior managerial / administrative level. Between the period 11 October 2008 and 25 August 2019 when the Claimant acquired the IBCC, he attained approximately seven (7) years, three (3) months and ten (10) days acting in the requisite posts.
88. The First Defendant’s role under Regulation 155(5) PSCR is to make recommendations for an acting appointment to an office and advise the Second Defendant of reasons why an eligible fire officer who is more experienced than the recommended officer is being passed over. The First Defendant clearly considered that the Claimant had met the six (6) years at senior managerial/administrative level experience to act in the office of DCFO, as in his memorandum dated 30 January 2020 he acknowledged that the Claimant was eligible for the post.
89. Therefore, by August 2019 the Claimant had met the experience qualification to be considered to act in the post of DCFO.

⁴⁰ The Claimant acted in the position of ADFO for the following periods: (i) 11 October 2008 to 14 December 2008; (ii) 1 March 2010 to 8 April 2010; (iii) 21 April 2010 to 31 October 2010; (iv) 3 January 2011 to 31 October 2012; (v) 8 January 2013 to 31 October 2013; (vi) 1 July 2014 to 5 October 2014; and (vii) 30 April 2015 to 30 June 2015

⁴¹ The Claimant acted in the post of DFO for the following periods: (i) 6 October 2014 to 25 November 2014; (ii) 1 January 2015 to 1 March 2015; (iii) 1 July 2015 to 31 December 2015; and (iv) 1 January 2016 to 3 February 2016.

⁴² The Claimant acted in the post of ACFO for the following periods: (i) 14 March 2016 to 31 December 2016; (ii) 1 July 2017 to 1 September 2017; (iii) 22 September 2017 to 31 December 2017; (iv) 1 January 2018 to 30 June 2018; (v) 1 July 2018 to 23 October 2018; (vi) 5 February 2019 to 28 June 2019; (vii) 26 August 2019 to 31 December 2019; (viii) 1 July 2019 to 31 December 2019; and (ix) 1 January 2020 to 30 September 2020.

Legality of the First Defendant's Actions/Decision

90. From the Defendants' evidence there were a few memoranda which dealt with Mr Layne's acting as DCFO for the period June to December 2019 and January 2020 to June 2020. The memorandum dated 18 March 2019 was not in compliance with Regulation 155, as there was no evidence that it was issued after the First Defendant had complied with Regulation 155 (1), (3) and (4). I have noted that Mr Harrison did not state that the Second Defendant considered the contents of this memorandum at its meeting on the 28 April 2020.
91. Based on the First Defendant's memorandum dated 30 January 2020, the Claimant was eligible to act in the office of DCFO. However, there was no evidence that the First Defendant called upon the Claimant to make representation to him on the acting appointment in the post of DCFO. I accept that when the vacancy first arose in 2019 and the Notice was first issued in May 2019, the Claimant was not eligible. However, the First Defendant did not make his recommendation within the period stipulated under Regulation 156 PSCR. The First Defendant only did so on 2 January 2020, by which time, events overtook the effect of the Notice dated May 2019 as the Claimant had obtained the IBCC and he was qualified to be considered for the acting appointment in the post of DCFO, at least for the period after August 2019. To this end, the action and/or decision of the First Defendant not to inform the Second Defendant that the Claimant was eligible to act in the post of DCFO after August 2019 was illegal.

Legality of the Second Defendant's Decision

92. At its meeting on 28 April 2020, the Second Defendant made a decision to appoint Mr Layne to act in the office of DCFO for two (2) periods namely the period of 3 June 2019 to 31 December 2019 and then for the period 1 January 2020 to 30 June 2020.
93. With respect to the period 3 June 2019 to 31 December 2019 the First Harrison Affidavit stated at paragraphs 18 and 19 that:

“18. At its meeting of 28th April, 2020, the Commission considered the recommendation of CFO endorsed by the Permanent Secretary, Ministry of National Security as aforesaid. The Commission noted inter alia that (i) the office of the DCFO, Fire Service is specific to MNS and that there was no Order-of-Merit List for the office of DCFO and that the 2015 Order-of-Merit List for the office of DCFO which was valid for two years with effect from 8th December, 2015 had expired; (ii) the acting appointment of Mr. Mervyn Layne, Divisional Fire Officer (Grade 6) as DCFO, involved the passing over of officers Arnold Bristo, Brigade Engineer (BE), the Claimant, DFO (Grade 6) and Andy Hutchinson DFO (Grade 6), since they did not satisfy the training requirements for the office of DCFO, not being in possession of the International Brigade Command Course at the time. Additionally, the officers did not satisfy the experience requirement of the office of at least six (6) years at a senior managerial/administrative level.

19. The Commission further noted inter alia at the said meeting that the Claimant, Mr. Bristo and Mr. Hutchinson had since attended the International Brigade Command Course and completed the training as at the end of August, 2019. Mr. Layne attended the International Brigade Command Course in 2013 at the Fire Service College, Moreton on-Marsh, United Kingdom and had acted previously as DCFO, having placed No. 3 on the 2015 Order-of-Merit List for the office of DCFO.

The Commission also noted inter alia although the Claimant was now in possession of the International Brigade Command Course, he did not satisfy the experience requirements for the office of at least six (6) years at a senior managerial/administrative level as outlined in the Job Description for the office of DCFO. The Commission decided inter alia to the acting appointment of Mr. Layne as DCFO for to agree to the recommendation of the Permanent Secretary, MNS that the Prime

Minister be consulted in accordance with the provisions of sub-section (3) of Section 121 of the Constitution of the Republic of Trinidad and Tobago with respect to the acting appointments as CFO and DCFO; and that the officers be informed that the acting appointments were in accordance with the provisions of Regulation 154(1) of the PSCR and that it was not a prelude to permanent appointment to the respective offices and would give them no claim thereto. The Commission further decided to continue Mr. Layne's acting appointment as DCFO based on ... a memorandum dated April 14th 2020 from the Permanent Secretary MNS to the Director of Personnel Administration. A true copy of this memorandum is now produced shown to me hereto annexed and marked "C.H.6".

94. The only evidence on the Second Defendant's decision with respect to the period 1 January 2020 to 30 June 2020 was that at the same meeting on 28 April 2020 "the Commission further decided to continue Mr. Layne's acting appointment as DCFO based on ... a memorandum dated April 14th 2020 from the Permanent Secretary MNS to the Director of Personnel Administration".
95. In my opinion, the decision of the Second Defendant to exclude the Claimant from being considered for the acting appointment to the office of DCFO for the period after August 2019 to December 2019 and 1 January 2020 to 30 June 2020 on the basis that he did not possess the requisite managerial experience was flawed and for these reasons they are also illegal.
96. First, there was no evidence in the First Harrison Affidavit and the Second Harrison Affidavit that the Claimant's senior managerial/administrative experience in the various posts from ADFO to ACFO were before the Second Defendant for it to make an assessment that he did not meet the requisite experience. The First Harrison Affidavit only included the details of Mr Layne's experience.
97. Second, the Second Defendant did not have all the relevant memoranda from the First Defendant on the persons who were qualified to be considered for the acting post of DCFO. According to Mr Harrison, the Second Defendant had the recommendations

written by the First Defendant in his memorandum dated 29 August 2019 which was forwarded to it by the Permanent Secretary Ministry of National Security by memorandum dated 19 September 2019. Notably, in the copy which was attached to the First Harrison Affidavit, the memorandum from the First Defendant did not contain any recommendation for Mr Layne to act in the office of DCFO for the period 3 June 2019 to 31 December 2019. According to Mr Harrison's evidence, the first time the First Defendant made this recommendation to him was in the First Defendant's memorandum dated 2 January 2020 which was forwarded to the Second Defendant by memorandum dated 7 February 2020. Mr Harrison gave no evidence that he had received the First Defendant's memorandum dated 18 March 2019 to the Permanent Secretary Ministry of National Security which outlined the First Defendant's reasons for recommending Mr Layne and not the Claimant and other senior officers.

98. Further, there was no evidence that the memorandum dated 30 January 2020⁴³ from the First Defendant to the Permanent Secretary Ministry of National Security which stated that the Claimant was now eligible to be considered by the Second Defendant to act in the office of DCFO, was actually considered by the Second Defendant.
99. In my opinion, the effect of the Second Defendant's deliberations at the meeting on the 28 April 2020 without the First Defendant's memorandum dated 30 January 2020 meant that its deliberations and subsequent decision were skewed. It also calls into question the basis for the Second Defendant stating the reasons it bypassed the Claimant and other officers in favour of Mr Layne, as neither the First Harrison Affidavit nor the Second Harrison Affidavit mentioned the memorandum dated 18 March 2019 which contained the First Defendant's reasons for recommending Mr Layne.
100. Third, the Second Defendant did not have any representations from the Claimant. As stated previously, the First Defendant's memorandum dated 30 January 2020 acknowledged that the Claimant was eligible to act in the office of DCFO. However,

⁴³ Exhibit M.S. 6

the First Defendant did not call upon the Claimant to make a representation to him on the acting appointment in the post of DCFO after August 2019. By failing to comply with the obligations set out in Regulation 155 (1), (2) and (3) the Claimant was deprived of the opportunity to make a representation to the Second Defendant.

101. Last, from the evidence of Mr Harrison, the Second Defendant did not consider all the fire officers who were qualified to act in the office of DCFO and it did not consider the factors under Regulation 158. Under Regulation 158 the Second Defendant is required to consider all eligible fire officers for acting posts which become available and in doing so it must consider the factors set out at Regulation 158(1), (2) and (3). The evidence on behalf of the Second Defendant was that it only considered the factors in Regulation 158 PSCR with respect to Mr Layne, but not the Claimant who was also eligible at the material time.

Was there a breach of Regulation 155 PSCR?

102. It was submitted on behalf of the Claimant that the failure and/or refusal by the Defendants to provide the Claimant with an opportunity to make representations in respect of the acting appointment to DCFO in accordance with Regulation 155 PSCR was a breach of his right to natural justice.
103. Counsel for the Defendants argued that the First Defendant did not breach Regulation 155 PSCR as he had no duty to do so as the Claimant was not eligible for the said office.
104. When the First Defendant issued the Notice in May 2019, the Claimant was not eligible for the post of DCFO as he did not have the IBCC. However, the First Defendant did not comply with Regulation 156 PSCR and forward his recommendation to the Second Defendant no later than twenty-eight (28) days preceding the date of the intended effective date for the acting appointment. If the First Defendant had complied with Regulation 156 PSCR he would not have breached Regulation 155 PSCR, as he had complied with the issue of notice up to that time.

105. Instead, the First Defendant only made the recommendation for the period 3 June 2019 to 31 December 2019 on the 2 January 2020, which was after the Claimant became eligible to act in the said post. By delaying in making his recommendation, the First Defendant permitted circumstances to change to the extent that after August 2019, he had to notify the Claimant to give him the opportunity to make representations, so that he could be considered by the Second Defendant to act in the post of DCFO. However, the First Defendant failed to notify the Claimant that there was an acting appointment to be made for the office of DCFO before making his recommendation. By failing to do so he deprived the Claimant of the opportunity to make a representation in respect of that acting appointment and he breached his duty under Regulation 155 PSCR.
106. With respect to the period 1 January 2020 to 30 June 2020, the First Defendant was also in breach of Regulation 155(5) PSCR as there was no evidence that he notified all eligible fire officers that an acting appointment was to be made by the Second Defendant for the office of DCFO for that period. The effect was that he again deprived the Claimant of the opportunity to make representation in respect of the said acting appointment.
107. In my opinion, in both cases, the First Defendant's failure to notify the Claimant, a fire officer who was eligible to be considered to act in the office of DCFO, prevented the Claimant from making representation to the Second Defendant and was a breach of natural justice and Regulation 155 PSCR.

Whether the Claimant's right to protection of the law under Section 4(b) of the Constitution was infringed upon; and consequently whether that amounted to a breach of the Claimant's right to procedural protection under Section 5(2)(h) of the Constitution;

107. Section 4(b) of the Constitution states:

“4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

(b) the right of the individual to equality before the law and the protection of the law.”

108. Section 5(2)(h) of the Constitution provides:

“5. (1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not—

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.”

109. At paragraphs 7 to 26 of the grounds in the Amended Fixed Date Claim Form the Claimant asserted that he is being treated unfairly, unlawfully and contrary to his Constitutional right to equality of treatment from a public authority in the exercise of its functions under sections 4(b) and (d) of the Constitution. In summary, the Claimant asserted that the Regulations and the Defendants’ policy, practice and procedure for making temporary acting appointments in the TTFS and particularly the office of DCFO are vague, uncertain, unclear, lacks transparency and certainty and provides fertile ground for arbitrariness and capriciousness in the exercise of administrative discretion by the First Defendant and/or the Second Defendant.

110. The Claimant also contended at paragraph 19 of the Claimant’s Affidavit in Reply that the First Defendant and the Second Defendant applied contradictory policies/ procedures for selecting persons to act in the rank of ACFO and DCFO. Acting appointments for the former are based on seniority while the latter is based on the qualification requirement of possessing the IBCC.
111. The Defendants argued that the PSCR and the procedure for making acting appointments is certain, clear and definitively laid out in law and as such is transparent and upholds the requirements of Sections 4(b) and 5(2)(h) of the Constitution. The Defendants also submitted that even if the PSCR and the internal policies of the TTFS do not comply with section 4(b) of the Constitution, there are situations where such a departure is allowed.
112. What is “protection of the law” under section 4(b) of the Constitution? The recent Privy Council judgment in **Jamaicans for Justice v Police Service Commission and another**⁴⁴, provides guidance on the interpretation of the definition of “protection of the law” under section 4 (b) of the Constitution. In **Jamaicans for Justice**, Lady Hale, who delivered the judgment, referred to the several leading judgments of the Caribbean Court of Justice (CCJ) which adopted a wide interpretation of the definition of protection of the law”. At paragraph 22, Lady Hale stated:

“22. The Caribbean Court of Justice, in *Nervais v R* [2018] 4 LRC 545, when construing section 11 of the Constitution of Barbados, which also begins with the word “whereas”, held that this did not mean that the section was merely “aspirational [or] a preliminary statement of reasons which make the passage of the Constitution, or sections of it, desirable” (para 25). It was intended to have the force of law. The court went on to say, of the right to the protection of the law, that it “affords every person ... adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power” (para 45). This is an echo of the words of the Caribbean Court of Justice in *Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15

⁴⁴ [2019] UKPC 12

(AJ), para 47, in turn citing Attorney General v Joseph and Boyce [2006] CCJ 3 (AJ), (2006) 69 WIR 104, 226, para 20.”

113. At paragraph 24 Lady Hale adopted the position articulated by the CCJ and she stated:

“24. The Board is also disposed to accept that the right to equality before the law, like the right to the equal protection of the law, affords every person protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power. These are, in any event, fundamental common law principles governing the exercise of public functions. As there is nothing in the statutory framework governing the PSC to contradict them, they are applicable in this case irrespective of whether or not they have the status of constitutional right.” (Emphasis added)

114. In this jurisdiction, the Court of Appeal in **Attorney General of Trinidad and Tobago v Dion Samuel**⁴⁵, also adopted the approach articulated by the CCJ and applied a broad interpretation to the term “protection of the law”. In that case the issue was whether the Respondent’s right to a fair hearing under Section 5(2)(e) and to protection of the law guaranteed by Section 4(b) of the Constitution had been infringed by the procedure adopted by the Defence Force to discharge military officers from its service.

115. At paragraphs 24 and 25 of **Dion Samuel**, Mendonca JA stated:

“24. However, as Mr. Martineau correctly acknowledged, Section 5 (2) (e) is not entirely without relevance as it serves to inform the content of the right to protection of the law (see Thornhill v Attorney General of Trinidad and Tobago [1981] AC 61, 70). It is now well settled that the right to protection of the law includes a right to a fair hearing by courts and other judicial bodies. As was noted by Lord Diplock in Ong Ah Chuan v Public Prosecutor [1981] AC 648, 670 para G:

⁴⁵ CA No. P 181 of 2013

“...a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to ‘law’ in such contexts as ‘in accordance with law’, ‘equality before the law’, ‘protection of the law’ and the like, in their Lordships’ view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.”

That applies equally to the Constitution of Trinidad and Tobago (*see also Maya Leaders Alliance and Others v Attorney General of Belize (2015) 87 WIR 178 para 47; Attorney General and Others v Joseph and Boyce (2006) 69 WIR 104 para 64 and Sam Maharaj v Prime Minister [2016] UKPC 37*).

25. It is also well settled that the right to protection of the law includes access to the courts and other judicial bodies. As the Caribbean Court of Justice observed in the Maya Leaders Alliance case at paragraph 44, “*access to independent and impartial courts or other judicial bodies is perhaps the most visible aspect of the right to the protection of the law*.” (Emphasis added)

116. At paragraph 46 of **Dion Samuel** Mendonca JA explained the circumstances when the constitutional right to protection of the law is infringed as:

46. In the circumstances the constitutional right to protection of the law is not infringed where the unfair or unlawful treatment that is complained about can be effectively or properly remedied under the existing administrative, statutory or common law. The question therefore is whether Sections 118 and 195 of the Defence Act and the remedy of judicial review provide an effective or proper remedy.”

117. In **Dion Samuel**, the Court of Appeal found that the Respondent's discharge from the Trinidad and Tobago Defence Force on the ground that his service was no longer required had breached the Respondent's right to the protection of the law as guaranteed under Section 4(b) of the Constitution. It stated that neither Section 195, Section 118 of the Defence Act nor judicial review proceedings would provide an effective or proper remedy and in those circumstances the Respondent's right to protection of the law had been infringed.
118. In my opinion, after August 2019, there was no breach of the Claimant's right under section 4(b) of the Constitution for the following reasons. Regulations 154 to 158 PSCR is a self-contained code which deals with the acting appointments in the TTFS. They are clear, unambiguous and certain and do not lend themselves to arbitrary and capricious conduct. In my opinion, Regulation 155 which mandates the First Defendant to notify eligible fire officers that there is a vacancy for an acting appointment and which gives the eligible fire officer the opportunity to make representations are the protections within the said Regulations to guard against arbitrary conduct.
119. However, based on the evidence, when the Claimant became eligible after August 2019 to act in the office of the DCFO, the Second Defendant had still not appointed anyone to act in the office of DCFO and the First Defendant had not followed the procedure as set out in Regulation 155 PSCR, as he failed to notify the Claimant of the available acting appointment so as to give him the opportunity to make a representation to the Second Defendant. Based on the Claimant's evidence, if he had received the said notice he would have issued his representations. The effect of the First Defendant's action is the Claimant was denied the opportunity to make his representation which could constitute a breach of the Claimant's right to protection of the law.
120. Having been denied the opportunity to make representation to the Second Defendant the next issue is whether that amounted to a breach of the Claimant's right to protection of the law.

121. The Defendants have contended that there was no infringement of the Claimant's constitutional right to protection of the law because the Claimant could access the Court to obtain his remedies.
122. In the instant case, even with the clarity of the self-contained code in Regulations 154 to 158 PSCR, the failure by the First Defendant to follow the procedure set out therein caused the Second Defendant not to be in possession of the relevant information of all the eligible fire officers when it deliberated at its meeting on 28 April 2020 and appointed Mr Layne to act in the post of DCFO. The result was that the deliberations were skewed. In the circumstances of this case, judicial review is an avenue which is an effective remedy for the unfair and unlawful treatment which the Claimant has complained of as he was denied his opportunity to be heard.
123. With respect to the Claimant's complaint about prior to August 2019, my position is no different, as the Claimant could have accessed the Court to obtain his remedy.

Whether the Claimant's right to equality of treatment from a public authority under Section 4(d) of the Constitution was breached

124. The Claimant contended that his right under section 4 (d) of the Constitution was breached as he was being discriminated against. The Claimant's reason for alleging such discrimination was that he was being denied the opportunity to act as DCFO whilst his comparator, Mr Layne who was junior to him at the material time and also did not possess all of the requirements for the post, was appointed to act in the post of DCFO ahead of the Claimant.
125. The Defendants denied that there was any breach of the Claimant's right under section 4 (d) of the Constitution. They submitted that the Claimant failed to establish any prima facie breach of his right to equality of treatment under the Constitution as he failed to present any evidence of any comparator who was analogous to him. They argued that although the Claimant used Mr Layne as a comparator, their circumstances were substantially different. Alternatively, the Defendants submitted

that even if the Claimant and Mr Layne were broadly similar, there was still no breach of section 4(d) of the Constitution as the difference in treatment was justified.

126. The principles of law were not in dispute by the parties. Their dispute was with respect to the application of the evidence to the said principles. Section 4(d) of the Constitution states:

4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: ...

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions.

127. There is a plethora of case law on the right to equality of treatment by a public authority under section 4(d) of the Constitution. In 2010 the Court of Appeal in **Police Service Commission v Dennis Graham; Dennis Graham v Police Service Commission and anor**⁴⁶ provided guidance on the approach to be adopted when considering whether there has been a breach of the said right. At paragraph 55 Mendoca JA stated the following:

“Given the current state of the law, it is arguable that an applicant who alleges a breach of his section 4 (d) right need only show that he was treated less favourably than one similarly circumstanced. It is for the public authority to justify the difference in treatment on some legitimate or reasonable basis. If it is thought that mere difference in treatment would not be sufficient to displace the presumption of regularity, consideration should be given to what Justice de la Bastide, the President of the Caribbean Court of Justice, said in his address on “Developments in Judicial Protection of Human Rights in the Commonwealth Caribbean” delivered on November 9th 2009 at the Inaugural Symposium on Current Developments in Caribbean Community Law:

⁴⁶ Civil Appeal No. 143 of 2006 and Civil Appeal No. 8 of 2008

“Hamel-Smith, JA has pointed out that the requirement of proof of mala fides can be regarded as a fetter on the right to equality of treatment, particularly as those who practise discrimination are often at pains to conceal their motive. This lends weight to the argument that it should be sufficient for an aggrieved party to prove that he was less favourably treated than other persons who were similarly circumstanced, or that someone similarly circumstanced was more favourably treated than him. This argument could be accepted without abandoning the presumption of regularity if it was accepted that the burden on the aggrieved party is not only to prove difference in treatment, but also at least to negative on a prima facie basis the existence of any reasonable or legitimate reason for the difference. This could be regarded as necessarily involved in proving that the persons who were differently treated were similarly circumstanced.”

128. Jamadar JA (as he then was) in **Dennis Graham** echoed similar sentiments at paragraph 25 where he stated:

“I therefore remain convinced, that in order to establish a section 4 (d) breach of the Constitution all that is required is proof by an aggrieved party that he was less favourably treated than other similarly circumstanced persons and/or that they were more favourably treated than he was. This determination is to be undertaken by a court on a consideration of all the evidence, both of the claimant and of the respondent. The duty of all parties is of candour. The presumption of bona fides is facilitative of full disclosure by a public authority which has nothing to hide and is genuinely interested in accountability and transparency and in achieving good public administration. Once a prime facie case of the violation of the right to equality of treatment is raised, the onus shifts to the public authority to explain and justify its decision and to show that there is no breach of the right. It is in this context, of an evaluation of all the evidence (in which the role of the court may be viewed in somewhat of an investigative light), that the presumption of regularity may play a role in

determining the outcome of that exercise. At the end of the process it remains for a claimant to show both a difference in treatment and a lack of legitimate or lawful reason for that treatment. In my opinion, this approach is clear, fair and balanced. It is also an approach that would make sense and be acceptable to the ordinary Trinidadian and Tobagonian.”

129. The principles to apply in determining if there is a breach of the right to equality of treatment by a public authority under section 4(d) of the Constitution as enunciated by Lady Hale in the judgment of the Privy Council in **Webster & ors v the Attorney General of Trinidad and Tobago**⁴⁷ was cited with approval by the Court of Appeal in **Audine Mootoo v the Attorney General and the Public Service Commission**⁴⁸ where the Court stated at paragraph 73 that:

“Section 4 (d) is an independent, free-standing constitutional right embodying the core constitutional value of equality, in this instance equality of treatment by public authorities. It is not limited to discrimination on the enumerated grounds of colour, origin, race, religion or sex, but is of general application. The unequal treatment or discrimination complained of in the instant case falls, not within the enumerated grounds, but within the latter category. In *Annissa Webster v The Attorney General of Trinidad and Tobago*, the Privy Council set out the current approach where a claim is founded on the fundamental right to equality of treatment from a public authority under section 4 (d) of the Constitution. At paragraphs [24] - [25] Lady Hale stated:

"[24] ... (1) The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment.

(2) Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment.

⁴⁷ [2015] UKPC 10.

⁴⁸ Civil Appeal No 38 of 2009.

(3) To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(4) Weighty reasons will be required to justify differences in treatment based upon the personal characteristics mentioned at the outset of s 4: race, origin, colour, religion or sex.

(5) It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged).

[25] It must, however, be acknowledged that there is a considerable overlap between the "sameness" question at (1) above and the justification question at (3). This is because the question of whether a difference between the two situations is material will to some extent at least depend upon whether it is sufficient to explain and justify the difference in treatment."

130. From the aforesaid learning, it is clear that the onus is on the Claimant to raise a prima facie case that he was treated less favourably than other similarly circumstanced persons and/or that they were more favourably treated by the public authority. Once the prima facie case has been established the burden is shifted to the Defendant to justify its actions. There is no requirement by the Claimant to prove mala fides by the Defendant in order to prove that he was not treated equally.

Comparators with the Claimant

131. The Claimant alleged that he was discriminated against by the First and Second Defendants prior to and after August 2019.

132. I have already found that the Second Defendant did not act illegally when it appointed Mr Layne to act in the office of DCFO prior to August 2019, as there was no evidence from the Claimant's Principal Affidavit that the 2015 OML was invalid or that he had applied to act in the office of DCFO and had been unfairly treated by not being interviewed when the said list was being compiled.

133. However, the Claimant stated at paragraph 64 of the Claimant's Principal Affidavit that prior to August 2019, the following persons namely: Mr Kenrick Bethelmy (Fire Service No. 761); Mr Carl Williams (Fire Service No. 1284); Mr Horace Archie (Fire Service No. 1056); Mr Anthony Alexis (Fire Service No. 882); and Mr Dana Roach (Fire Service No. 1138) were treated differently from him, as they were previously allowed to act as DCFO without having the IBCC at the time of their acting appointment which was required for appointment to that post. He stated further that unlike him, their appointments were based on seniority and not their qualifications or their position on a Merit List.
134. The Defendants reasons for appointing those persons identified by the Claimant were set out at paragraphs 29 to 33 of the First Harrison Affidavit.
135. According to Mr Harrison, Mr Kenrick Bethelmy held position No 2 on the 2008 OML and as such he was the next candidate to be considered for the acting appointment. Mr Bethelmy was promoted to the post of DCFO on 17 September 2008, having satisfied the necessary requirements for that office. On 6 April 2010, the Second Defendant then appointed Mr Carl Williams to act in the post of DCFO for the period 21 January 2010 to 26 February 2010. Mr Harrison explained that although Mr Williams had not satisfied the requirements for the post of DCFO, the Second Defendant had appointed him to act in the post based on the recommendations of the Selection Board and advice of the Chief Personnel Officer ("the CPO").
136. Mr Harrison explained further that the Selection Board, which is responsible for interviewing candidates for the offices of CFO and DCFO, had identified that based on the interviews conducted on 23 November 2009 there was a shortage of senior officers satisfying both the experience and training requirements. The Selection Board cautioned the Second Defendant that based on these interviews, it had formed the opinion that the TTFS would be at a loss if they adhered to the job specification for the post of CFO and DCFO, as the senior officers would have attained the compulsory age of retirement by the end of June 2010. As a result, the Second

Defendant sought the advice of the CPO and acting on his advice⁴⁹, Mr Williams was appointed to act in the post of DCFO as he was the next senior officer to be considered for an acting appointment.

137. Mr Harrison stated that though he was unsure whether Mr Archie had completed the IBCC, Mr Archie had satisfied the requirements for the post of DCFO as he had Certificates in: (i) Divisional Command Course; (ii) Overseas Command and Control; and (iii) Public Administration, as well as a Diploma in Management Studies. Further, Mr Archie had been appointed as a Fire Substation Officer on 23 December 1982, then promoted to DFO on 1 May 1998 and ACFO on 17 November 2009.
138. Mr Harrison stated that by virtue of the 2009 OML for the office of DCFO, Mr Alexis was No. 2 on that list and as such was the next officer to be considered for an acting appointment. Similarly, Mr Roach was No. 3 on the 2012 OML for the post of DCFO and was the next officer to be considered for an acting appointment.
139. At paragraphs 36 to 39 of the Claimant's Affidavit in Reply, the Claimant addressed the reasons which the First Harrison Affidavit put forward. He stated that by virtue of a memorandum dated 12 February 2010, the CPO had decided to waive the qualifications for the post of CFO, however, this decision did not extend to the post of DCFO. Therefore, Mr Harrison could not rely on the CPO's advice, to justify the acting appointment of Mr Williams to DCFO, without him having the necessary qualifications. Similarly, Mr Archie lacked the necessary qualifications to be considered for an acting appointment for the post of DCFO, as he had not completed the IBCC and was therefore appointed based on seniority. The Claimant then stated that though the IBCC was listed as a requirement in the Job Description for DCFO⁵⁰, it was not necessary for an acting appointment to the post. Nonetheless, he submitted that Mr Harrison had not provided a sufficient reason for appointing Mr Archie to act in the post of DCFO.

⁴⁹ Exhibit C.H.13

⁵⁰ Exhibit C.H.2

140. In relation to the appointment of Mr Alexis and Mr Roach to act in the post of DCFO, the Claimant submitted that Mr Harrison had not stated whether they had the IBCC required for promotion to the post or how they had been interviewed and placed on an OML without the IBCC. Moreover, Mr Harrison had not exhibited the 2009 and 2012 OML which he relied on to justify his decision that Mr Alexis and Mr Roach had been appointed based on their respective placement on the said lists.
141. In my opinion, the Claimant failed to establish a prima facie case that prior to August 2019 Kenrick Bethelmy, Carl Williams, Horace Archie, Anthony Alexis or Dana Roach were his comparators as those officers' circumstances were different from the Claimant for various reasons.
142. Kenrick Bethelmy was appointed to act as DCFO from 17 September 2008 as he had placed No. 2 on the 2008 OML, and he satisfied the requirements for the office of DCFO. Carl Williams was appointed to act as DCFO from 21 January 2010 to 26 February 2010. Although he did not satisfy the requirements of the office, he was allowed to act by way of a one-time only waiver issued via a memorandum dated 12 February 2010 which was annexed as "C.H.13" to the First Harrison Affidavit. The said memorandum permitted Mr Williams' appointment on the basis that there was a dearth of senior officers who satisfied both the experience and training requirements for promotion to the office of CFO. Horace Archie also satisfied the requirements for the office of DCFO. Anthony Alexis placed No. 2 on the OML for the office of DCFO established by the Second Defendant on 22 December, 2009 and Dana Roach placed No 3 on the 2012 OML for DCFO.
143. All of the officers whom the Claimant asserted were his comparators were either placed on an OML and/ or satisfied the requirements of the office, unlike the Claimant who was neither placed on an OML for DCFO nor satisfied the requirements for the post of DCFO prior to August 2019.
144. However, after August 2019, the Claimant was able to establish a prima facie case that Mr Layne was a comparator who was similarly circumstanced as him. Both the

Claimant and Mr Layne hold the substantive office of DFO; the IBCC and at least six (6) years' senior managerial/ administrative experience. However, both were not treated in the same manner as only Mr Layne was recommended and appointed to act in the office of DCFO without objection while the Claimant was not even considered as being eligible.

145. The Claimant having established a prima facie case that he was treated less favourably than Mr Layne after August 2019, the burden is now shifted to the Defendants to justify its actions.

Differential treatment of Mr Layne justified?

146. According to the First Harrison Affidavit, the reason the Claimant was not considered to act in the office of DCFO after August 2019 was because he still did not meet the requisite senior managerial/ administrative experience. However, this position was inconsistent with the evidence of the Claimant's experience set out in the Smith Affidavit and the memorandum which was written by the First Defendant on 30 January 2020, where he acknowledged that by August 2019 the Claimant had met all the requirements to be considered to act in the office of DCFO.

147. In my opinion, this is not an acceptable reason for failing to treat the Claimant similarly to Mr Layne, which was to consider him for the acting DCFO post. For these reasons the Claimant's right to equality of treatment by a public authority was breached after August 2019.

Whether the Claimant had a legitimate expectation that he would be considered to act in the post of DCFO

148. The Claimant contended that he had a legitimate expectation that he would be considered for acting appointments in accordance with the Regulations. It was argued that the Defendants breached the Claimant's legitimate expectation when they acted unfairly, unreasonably and illegally by not notifying him in advance or giving him an

opportunity to make representations to act in the office of DCFO and by not allowing the seven (7) day period to elapse so he could seek legal advice and challenge their decision. Alternatively, it was argued on behalf of the Claimant that he also had a legitimate expectation that the policy that seniority would determine acting appointments, where there was no officer who was qualified to be promoted to the higher office of DCFO would be followed. There was no good reason to depart from this policy.

149. The Defendants argued that there was no clear, unambiguous statement issued to the Claimant by the Defendants or any clear promise, unequivocal statement or assurance that once he acquired the IBCC he would be appointed to act as DCFO. Counsel also submitted that the doctrine of legitimate expectation cannot be invoked where it would interfere with the Second Defendant's statutory duties.
150. Lord Neuberger in the Privy Council decision of **United Policyholders Group v The Attorney General of Trinidad and Tobago**⁵¹ repeated some of the principles of legitimate expectation. He stated at paragraphs 37 and 38:

“In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC453, para 60 ...

⁵¹ [2016] UKPC 17

Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty — see e.g. *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.”

151. The burden of proving the legitimacy of the expectation initially rest on the Claimant. Once the Claimant has proven the elements, the onus is shifted to the Defendant to justify the frustration of the legitimate expectation. The Privy Council judgment in **Francis Paponette v The Attorney General**⁵² described the position at paragraph 37 as :

“The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

152. At paragraphs 38 and 42 in **Francis Paponette** the Board said:

⁵² (2010) UKPC 32

38. If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power...

42. It follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation. Without evidence, the court is unlikely to be willing to draw an inference in favour of the authority. This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified...If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies.
(Emphasis added)

153. I have understood the Claimant's case to be that he had a legitimate expectation to be considered to act in the post of DCFO as he was eligible and not as was submitted on behalf of the Defendants that he had no legitimate expectation to be appointed to act in post of DCFO upon acquiring the IBCC.
154. In my opinion, the Claimant has discharged the burden of proving the legitimacy of his expectation as Regulations 154 to 158 PSCR was the lawful procedure and practice which the First and Second Defendants, as public bodies had a duty to follow before the Second Defendant considered any eligible person to act in any office in the TTFS. The procedure set out therein is clear and unambiguous and the Claimant was entitled to expect that the First and Second Defendants would follow the procedures as set out.
155. However, the First Defendant did not follow the procedure set out in Regulation 155 PSCR, after August 2019, when the Claimant became eligible to act in the post of DCFO as he had met the criteria set out in the Job Description for the said post, in

particular he had the IBCC and the requisite experience. The First Defendant did not notify the Claimant of the acting post in advance so that he could have the opportunity to make representations and he also did not give him the statutory period of seven (7) days to allow the Claimant to make representations.

156. The Claimant having discharged the burden placed on him, there was no evidence from the First Defendant to justify the frustration of the legitimate expectation held by the Claimant. In the absence of any evidence by the First Defendant, it is reasonable to conclude that there was no sufficient reason to justify the First Defendant's lack of action. For these reasons I am satisfied that with respect to the period after August 2019, the Claimant's legitimate expectation that he ought to have been considered to act in the post of DCFO was frustrated.
157. With respect to the period prior to August 2019, the Claimant failed to discharge the burden of proving the legitimacy of his expectation as he was not eligible to be considered and the burden did not shift to the Defendants to justify its actions.

ORDER

158. In light of the aforesaid findings the reliefs which the Court is prepare to grant on the judicial review claim is as follows:
 - (a) It is declared that the decision of the Second Defendant not to consider the Claimant for the acting appointment to the office of DCFO after August 2019 was illegal, irrational and unfair.
 - (b) It is declared that after August 2019 the First Defendant breached Regulation 155 of the Public Service Commission Regulations.
 - (c) It is declared that after August 2019, the Claimant was treated unfairly and in breach of the principles of natural justice.
 - (d) It is declared that after August 2019 the Claimant is eligible to be considered for acting appointment as DCFO.

(e) The First and Second Defendants are directed to reconsider the Claimant's claim for the acting appointment to the post of DCFO within twenty-eight (28) days of this order.

159. In relation to the Claimant's constitutional claim against the Third Defendant the Court grants the following reliefs:

(a) It is declared that after August 2019 the Claimant's right to equality of treatment from a public authority in the exercise of its functions under Section 4(d) of the Constitution was breached.

(b) The Third Defendant to pay the Claimant damages to include monetary compensation and vindicatory damages for the violation of the Claimant's right under section 4(d) of the Constitution. The Court will give directions for the assessment of the said damages on Friday 27 August 2021 at 9:15 am virtual hearing.

160. The Court will hear the parties on costs.

/S/ Margaret Y Mohammed

Judge