REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-00607

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

AND

IN THE MATTER OF THE DECISION OF THE COMMISSIONER OF POLICE DATED ON OR ABOUT THE 5TH DAY OF DECEMBER 2013 AND 29TH DECEMBER 2013 COMMUNICATED TO THE INTENDED CLAIMANTS ON OR ABOUT THE 5TH DAY OF DECEMBER 2013 WHEREBY THE INTENDED CLAIMANTS WERE INFORMED OF THE INTENDED DECISION OF THE POLICE COMMISSIONER TO CONDUCT EXAMINATIONS ON THE 18TH FEBRUARY 2014 AND 19TH MARCH 2014 CONTRARY TO SECTION 19(5) OF THE POLICE SERVICE REGULATIONS 2007

AND

IN THE MATTER OF THE FAILURE AND OR NEGLECT AND OR OMISSION OF THE COMMISSIONER OF POLICE TO CONSIDER SECTION 19 (5) OF THE POLICE SERVICE REGULATIONS IN EVALUATING AND OR ASSESSING THE PROMOTION OF THE FIRST DIVISION OFFICER SUCH AS THE CLAIMANTS

AND

IN THE MATTER OF THE INTENDED DECISION OF THE COMMISSIONER OF POLICE TO PROCEED TO CONDUCT THE EXAMINATION ON THE 18TH FEBRUARY, 2014 AND 19TH MARCH, 2014

BETWEEN

1.9849 AG SNR. SUPT WAYNE BOYD
2. 9973 AG SNR. SUPT DAVID ABRAHAM
3. 9683 AG SNR. SUPT DAVID LEWIS
4. 10292 INSP. BISNATH MAHARAJ (SECOND TO S.I.A)
5. 10374 AG. ASP FRANCIS JOSEPH
6. 10585 AG. ASP DEONARINE BASDEO
7. 10958 INSP. NOEL CORBETT
8. 11550 AG. ASP RICHARD CORBETT
9. 11669 W/ASP. BEVERLY RODRIGUEZ
10. 10521 AG. ASP LINDON GREENIDGE
11. 10521 AG. ASP SAMUEL SEEPERSAD
12. 11362 AG. ASP AROON RAMLHALAWAN
13. 9963 INSP. NYRON DOOKERAN (pre-retirement leave)
14. 11391 AG. ASP ROHAN PARDASIE

Claimants

AND

THE COMMISSIONER OF POLICE

First Defendant

THE UNIVERSITY OF THE SOUTHERN CARIBBEAN

Second Defendant

JUSTEX SYSTEM INC

Third Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. K. Wright instructed by Mr. F. Hinds for the Claimants
Mr. R. Martineau SC and Mr. G Ramdeen for the First Defendant
No appearance of the Second and Third Defendants

JUDGMENT

1. The Claimants were all Second Division officers of the Trinidad and Tobago Police Service and they bring this application for Judicial Review of the decision of the First Defendant, the Commissioner of Police (COP) to require them to re-sit the written part of the examination for promotion to the First Division they having previously done so on one ocassion, on the basis that the COP is bound by the order of another court made in a case with similar circumstances and they seek consequential orders in respect thereof. The Second and Third Defendants have played no part in these proceedings.

2. The fixed date claim filed on the 28th February 2014 was amended by the Claimants on the 7th April 2014, and so the relief which they now seek are a declaration that the decision of the COP to have them re-sit the examination is unreasonable, improper and unfair; an order of certiorari to quash that decision and a declaration that the examination administered on the 18th February 2014 (prior to the court's grant of permission to apply for judicial review and the grant of an interim injunction which was later discharged), is null and void. There are no other relief prayed save for damages and costs and further relief as the court sees fit. In particular the Claimants ***have not*** asked this court to declare that the policy procedure and/or system used by the Defendant and/or the person contracted for evaluating and/or assessing First Division Police Officers for promotion under Regulation 19 of the Police Service Regulations is unfair, null and void and of no effect.

3. The Claimants allege that the COP has the ultimate responsibility to make promotions within the police service by virtue of a combination of the provisions of the Constitution and the Police Service Act Chap 15:01. In so doing the COP is to be guided by the regulations contained in the Police Service Regulations 2007, in particular regulation 19. It is the Claimants' case that the COP has acted contrary to these regulations by deciding to implement what they refer to as a pass mark of 65. This decision, they say, goes against that which is set out in Regulation 19(3).

4. To understand the claim it is necessary to set out sub-regulations 1 to 11 and 13 of regulation 19 which read as follows:

19. (1) The Commissioner shall publish a Departmental Order specifying the points system to be followed by a supervising officer in the preparation of a performance appraisal report.

(2) The points awarded to a police officer based on his performance appraisal report shall represent ***twenty-five per cent*** *and the results of the promotional assessment process shall represent* ***seventy-five per cent*** *of his final grade as stated in the Order of Merit List mentioned in subregulation (9).*

(3) A police officer shall not be considered for promotion to and within the First Division unless he has attained sixty or more points on his performance appraisal report.

(4) The promotional assessment process shall be conducted by the person contracted, who shall appoint such number of panels, comprising not less than three persons each, as the person considers necessary and the members of each panel shall possess appropriate skills, expertise and qualification in policing and particularly to the rank under consideration.

(5) The promotional assessment process shall comprise of two stages as follows:

(a) stage one shall require every qualifying officer to write a qualifying examination, from which only the top performing candidates as determined by the person shall proceed to stage two; and

(b) stage two shall be a suitability assessment process.

(6) To assess the competencies of an officer relevant to the position for which he is being considered, the suitability assessment process may include, inter alia, role play, exercises dealing with hypothetical situations, and other appropriate methods of assessment that are consistent with contemporary professional standards and

needs of policing.

(7) The person shall establish the competencies before conducting the suitability assessment process and such competencies shall be given in writing to each qualifying candidate at least one week before the suitability assessment process is conducted.

(8) The competencies, which may comprise core or technical competencies, may include matters such as leadership, communication, initiative, decision making, problem solving, customer relations, integrity, and organisational awareness.

(9) Subject to subregulation (2), every officer considered for promotion shall be rated according to the results of the promotional assessment process specified in this regulation together with the points awarded to him based on his performance appraisal report and be placed on an Order of Merit List.

(10) The person shall, as soon as the promotional assessment process is completed, submit the Order of Merit List to the Commissioner, who shall immediately cause it to be published in a Departmental Order.

(11) Subject to subregulation (12), an Order of Merit List shall be valid for a period of twelve months from the date of its publication under subregulation (10).

(13) An officer who is not promoted during the twelve month period or such other period as ordered by the Commissioner under subregulation (12) is required, to repeat the promotional assessment process.

5. The court understands the process as set out in the regulations to be this; in order for an officer of the Second Division to move on to the promotional assessment process he

must first have obtained sixty or more points in his performance appraisal report (a report submitted by a supervisor and not a written examination). This performance appraisal report accounts for 25% of the final grade.

6. Once an officer has been selected as a candidate for promotion via the performance appraisal report, the officer is then required to enter the promotional assessment process. This in itself is a *two stage* process. At the first stage the officer sits a written qualifying examination. The second stage takes the form of an interview which may include practical exercises. This second stage of the promotional assessment process is called the suitability assessment process. The promotional assessment process, inclusive of the suitability assessment process, accounts for the balance of the final grade in the amount of 75%. Having completed the entire process, the officers who are found eligible for promotion by way of final grade rating are placed on a merit list.

7. It is with the promotional assessment process and in particular the first stage thereof that the Claimants' complaints lie. They claim that having qualified for candidacy by way of the performance appraisal report in 2011, they sat the written examinations. All things being equal, according to them, the next stage would have been the interview stage, that is, the suitability assessment process. The Claimants say that they were prevented from entering upon this suitability assessment process because of the decision of the COP to institute a pass mark for qualifying entry into the said suitability assessment process *after* they had already written the first stage of the promotional assessment process. This pass mark they say is that of 65. The Police Service Regulations provide no such criteria but sets out that only the "top performing candidates" shall proceed to the suitability assessment process, see Regulation 19(5(a). As a result of the imposition of a pass mark, the Claimants say that they have been prohibited from advancing to the suitability assessment stage. They say that when they entered into the written examination no such pass mark existed or could have existed pursuant to the Regulations and therefore the decision to now deny them advancement to the interview stage on that basis is unfair, arbitrary and unlawful. So too by extension is the decision to have them re-sit the first stage written examinations which were originally carded for the 18th February and 19th March 2014 but have since been postponed. This, the court understands to be the fulcrum of the case for the Claimants.

8. In answer the COP submits that there simply is no evidence that he has in fact applied a pass mark of 65 in relation to the written stage of the promotional assessment process and that there is no credible and reliable evidence on the Claimants' case to this effect. Further and in any event he submits that the body responsible for the conduct both stages of the promotional assessment process is not the COP but the "person" who is referred to in regulation 19, namely the entity contracted to conduct such examinations. So that it is his submission that not only did he not institute a pass mark, her could not have done so according to the regulations and so did not.

9. Further, the Claimants submit that the decision of the COP goes against the grain of the order made by my brother Rampersad J in the case of ***Hazel and Caruth v The Commissioner of Police and The Attorney General of Trinidad and Tobago*** CV2011-01894 as far as that order purports to rule *inter alia* that the policy, procedure and/or system used for promotion under regulation 19 is null and void. They say that their circumstances are the same as that of the Claimants in ***Hazel and Caruth*** and that they ought to be treated in the same manner. That the policy, procedure and/or system having been found to be null and void, unlawful and of no effect, to now consider the said policy, procedure and/or system valid, fair and lawful for others who are essentially in the same circumstances is unfair.

10. The COP counters that there is no *res judicata* in Judicial Review proceedings and each case turns on its own merits so that the outcome of one claim for Judicial Review does not necessarily entitle another similarly circumstanced claimant to the same relief. In this case, the Claimants have failed to lead any evidence that they were similarly circumstanced as the Claimants in ***Hazel and Caruth*** and have failed to put before the court the facts of that case.

11. Further, he submits that it is obvious on the face of the order made by Rampersad J on the 15th June 2012 was made in the absence of the Defendant and therefore there were no arguments in opposition to those made by the Claimants in that matter. He submits that in any event this court is not bound by the findings of that court.

12. Additionally, in respect of the order made by Rampersad J by consent on the 17th February 2014, the COP submits that the Claimants in that case were the recipients of a

benefit which they may not have been entitled to in law but took the benefit of the order in that case by way of agreement. In this case the Claimants are not entitled to such a benefit and cannot and ought not to benefit from the terms of an order in respect of which they were not a part. That fairness does not demand that they be given the same benefit. In other words the agreement entered into in the consent order was in relation to those claimants only and the Claimants in this matter cannot benefit from such an agreement having regard to the provisions of the Police Service Regulations.

13. The court therefore finds that there are four issues which must be determined if the Claimants are to succeed on this claim. They are as follows;

a. Whether this court is bound by the Orders of Rampersad J.

b. Whether the Claimants are entitled to take the benefit of the said orders even if the court is not so bound.

c. Did the COP in fact impose a pass mark of 65 in respect of the first stage of the promotional assessment process as a consequence of which the Claimants were debarred from proceeding to the suitability assessment process and required to re-sit the first stage of the promotional assessment process.

d. If he did, then is the imposition of a pass mark of 65 in respect of the written stage of the promotional assessment process unlawful and arbitrary.

Is this court bound by the Orders of Rampersad J

14. The resolution of this issue is to be had by an examination of whether issue estoppel applies to claims in Judicial Review.

15. On the 15th June 2012, the Honourable Mr. Justice Rampersad made the following order (the first order) in relation to the claim filed by ***Hazel and Caruth***:

(i) That the policy procedure and/or system used by the Defendant and/or the person contracted for evaluating and/or assessing First Division Police Officers for promotion under Regulation 19 of the Regulations is null and void and of no effect.

(ii) That the letter dated 14th April 2011 signed by the Defendant and handed to each of the Claimants on the 19th April 2011 is null and void and of no effect.

(iii) That the decision of the Defendant as contained in the said letter of the 14th April 2011 to exclude the Claimants from advancing to stage two of the promotional assessment process (hereinafter called "the first decision") under Regulation 19(5) is null and void and of no effect.

(iv) That the failure of the Defendant to include the names of the Claimants in the Order of Merit List which was recently published by him in the Departmental Order is unlawful.

(v) That the failure of the Defendant to inform the Claimants prior to their writing the qualifying examination referred to in Regulation 19(5)(a), of the pass mark required to advance to stage two of the promotional assessment process is unlawful.

(vi) That the failure of the Defendant to notify the Claimants prior to their writing the qualifying examination referred to in Regulation 19(5)(a) as to who was the person charged with determining the "top performing candidates" in the qualifying examination is null and void and of no effect.

(vii) That the failure of the Defendant to notify the Claimants prior to their writing the qualifying examination referred to in Regulation 19(5)(a) by what criteria were the "top performing candidates" to be determined is unlawful.

(viii) That the failure of the Defendant to notify the Claimants prior to their writing the qualifying examination referred to in Regulation 19(5)(a) that the pass mark for same was 65 and not 50 as they expected is unlawful.

(ix) That the decision of the Defendant to use a mark of 65 as the pass mark for the qualifying examination referred to in Regulation 19(5)(a) without informing the

Claimants prior to their writing the qualifying examination is null and void and of no effect.

(x) That the decision of the Defendant to change the procedure for determining the top qualifying candidates for promotion to the rank of Assistant Superintendent and/or to change the pass mark for the qualifying examination to 65 is null and void and of no effect.

(xi) That the decision of the Defendant to use a different pass mark for the qualifying examinations written by the Claimants on the 29th March 2011 from that used for previous qualifying examinations for candidates seeking promotion to the rank of Assistant Superintendent is null and void and of no effect.

(xii) That the failure of the Defendant to use the same pass mark for the qualifying examinations for all ranks in the First Division is unlawful.

(xiii) That the Claimants were deprived of a legitimate expectation of a substantial benefit.

(xiv) That the Claimants were treated unfairly

(xv) That the system/procedure devised and/or adopted by the Defendant for evaluating/assessing First Division Police Officers under Regulation 19(5) is unfair, illegal and unreasonable.

16. Rampersad J then proceeded to further order that spaces be set aside on the Order of Merit List for the Claimants in that case. It appears on the face of the order that the Defendant was unrepresented at the hearing of the application for Judicial Review and it would have therefore meant that Rampersad J did not have the benefit of submissions by the COP in coming to his decision. Nevertheless, by operation of the provisions of Part 12 of the CPR, default judgment cannot be obtained on a Fixed Date Claim Form which is the type of form to be used in Judicial Review applications. In addition to procedural propriety, this principle is a substantive one more so in judicial review proceedings as the court must satisfy itself on the merits of the claim before proceeding to make declarations particularly in respect of matters which carry a heavy public interest component. It is therefore to be presumed that this was the approach taken by my

brother Rampersad J in relation to ***Hazel and Caruth*** so that the absence of submissions from the COP in that case is of no relevance to this claim.

17. By Consent Order made the on the 17th February 2011 between the said parties (the second order), a procedure was agreed to outside of the prescribed terms of the Regulations whereby the Claimants in that case were to be exempted from the written stage of the examination for 2014, (they having already written it in previous process) and were to proceed straight to the suitability stage. Practically, this meant that in respect of the 2014 assessment process, they would be exempted from the writing part of the process. The COP has deposed that this was necessary because by that time the Order of Merit List had expired and he could not then in law comply with the specific order of the court made in relation to the expired Order of Merit List.

18. The Claimants rely on the first order as having conferred benefit to them although they were not a party to those proceedings and they rely on the second order as being the procedure which was then adopted and which should be adopted in their case. This court, however does not consider that it is **bound** by the first order of Rampersad J in particular since that case would have been decided by my brother on its own facts and circumstances. It means that the Claimants cannot rely on the mere fact of the existence of the first order as conferring a benefit to them without more.

19. In relation to the second order, it is abundantly clear that this amounted to a specific agreement by the parties to that claim outside of the procedure set out by regulation 19 and would have been made for the purpose of scouring the terms of the first order, the appeal of that first order having been dismissed for want of prosecution. That being the case, the second order similarly cannot be relied on as having conferred any right unto these Claimants to obtain the same benefit by virtue of the said order.

20. Additionally and in any event, the COP has submitted and this court agrees with the submission that there lies no issue estoppel in matters of Judicial Review. Issue estoppel is a doctrine appropriate to proceedings in private law, not public administrative law. While in certain circumstances it would be an abuse of process to permit a public authority which had acted in disregard of a declaration or order made in judicial review proceedings to seek to reopen debate about whether its actions were justified, in judicial

review there is always a third party who is not present: the wider public or public interest. The wider public or public interest should not be prejudiced by the failure of a public authority to place all the relevant material and arguments before the court on the first occasion. See ***Halsbury's 4th ed*** at paragraph 983. See also ***R v Secretary of State for the Environment, ex p Hackney London borough Council*** (1984) 1 All ER 956.

21. In the circumstances the Claimants in this case appear not to be the only ones who may be affected by the decision in the previous claim. In fact, this court specifically sought information from the Claimants at the hearing of the application for leave whether other police officers who were not named in the claim would have also been affected by the decision of this court in relation to interim injunction sought by the Claimants at the time and was told that there were no such persons. As the record would show, despite this initial statement by Attorneys for the Claimants, there were other persons and there are still others who may be affected by the court's decision in this case and this has now been admitted by Attorneys for the Claimants who it seems were unaware of that fact at the time this court made the inquiry of them. It is therefore in the wider interest not only of all police officers but also of the public which they serve to treat with the issue of the lawfulness of the action of the COP in this case without being bound by the first or second order made by my brother based on the circumstances of that case. This of course is dependent on a finding by this court that as a matter of fact, the COP did in fact institute a pass mark.

22. Further and in any event, this court being one of equal jurisdiction with that of my brother's court it is not bound by any of the findings in that case. The court's finding on the first issue is therefore that it is not so bound and the Claimants are not entitled to take the benefit of the orders.

Are the Claimants entitled to take the benefit of the said orders even though the court is not so bound.

23. The resolution of this issue should involve the court in an exercise to determine whether the present Claimants are similarly circumstanced as Hazel and Caruth. If they are, then

dissimilar treatment by the COP would be grossly unfair to these Claimants in those circumstances.

24. The COP has submitted that the evidence of the facts have not been placed before this court to demonstrate any similarity between the facts of ***Hazel and Caruth*** and the present case. While the court agrees that this is in fact so, the court is of the view that it can nevertheless consider the documents filed in support of that case as a matter of public record and therefore have recourse to the facts that emanate there from without the said documents having to be formally admitted into evidence in the present claim. So that the court can take judicial notice of those documents. No prejudice shall be suffered by the COP should the court adopt this approach. In that regard the facts of the case of ***Gibson v Public Service Commission*** [2011] UKPC 24 relied on by the COP in support of his submission are readily distinguishable on this point. In this case there is a public record of proceedings in the other claim to which this court can have regard, but in ***Gibson***, there simply was no other evidence in existence as a matter of public record which could be put before the court or which could have been used by the court to assist it in making the finding that formed the basis of the declaration made by that court.

25. In that regard the Claimants have advocated the approach used by their Lordships of the Privy Council in the case of ***Ranjan Rampersad v COP & Police Service Commission*** (2011) UKPC 25, in that the court could validly compare the facts of the present case to the facts of Hazel and Caruth in the same way that their Lordships compared the case for ***Rampersad*** to the case of ***Ganga and Others v COP & Police Service Commission*** (2011) UKPC 28. Of course in so saying the Claimants seemed to have missed the fact that both decisions in ***Ganga*** and ***Rampersad*** were delivered by the same bench of judges on the same day, namely the 9th August 2011 so that the judges in ***Rampersad*** were also seized with ***Ganga,*** unlike the present case where the first decision was given by another judge. Further, that these were appeals of decisions of the court of appeal and not first instance decisions in which evidential issues arise. This court is therefore of the opinion that the cases relied on by the Claimants are not applicable to the issues to be decided by this court.

Hazel and Caruth

26. Collis Hazel and Shirley Caruth were Inspectors of Police and therefore members of the Second Division of the Police Service of Trinidad and Tobago. They filed a claim in 2011 and deposed to a joint affidavit in support which was sworn to and filed on the 20th May 2011. In that affidavit they depose to their assumption that there was a pass mark of 50 marks applicable to the first stage of the promotional assessment process, they not having been informed of a pass mark in that regard . Further, they testify that they were not made aware as to the criteria used to select the "top performing candidates" as required by Regulation 19(5)(a), in order to move on to the suitability assessment stage. On the 26th January 2011 they were briefed by Professor Zettemoyer, Director of the Penn State Justice and Safety Institute (the "person" contracted to design and implement the promotion process pursuant to the Regulations), that the top performing candidates would be chosen by the COP.

27. On the 29th March 2011 both Hazel and Caruth wrote the first stage examinations. Hazel was informed thereafter by the Human Resources Department of the Trinidad and Tobago Police Service that he had attained 60 marks in the said examination. Caruth was informed that she had attained 58 marks. Both officers were told that they had therefore failed the examination as the pass mark was 65 marks and they would have to re-sit the examination.

28. Further, they have alleged that the examination which they wrote was the second such examination under the said Regulations which were passed in 2006. They say that all the officers who wrote the written stage of the first examinations pursuant to the new regulations were permitted to move to the second stage suitability assessment process and subsequently placed on the Order of Merit List.

29. Further, on the 14th April 2011, they were handed letters of even date under the hand of the COP, informing them of their marks and of the fact that they would therefore not have been permitted to move on to the Second stage. No pass mark was set out in that letter and they were ***not*** told in that letter that the reason that they were not to advance was that they had attained less that 65 marks in the written examination. Again they were

not informed in this letter as to how the top performing candidates were determined. These were the facts in brief of the Hazel and Caruth case.

30. In the present claim, affidavits in the substantive claim were filed by the First Claimant on the 28th February 2014 and the 21st March 2014. Affidavits by the COP were filed on the 11th March 2014 and 20th May 2014. An affidavit was also sworn to and flied on the 13th March 2014 by Ann Marie Alleyne on behalf of the COP.

31. It is the evidence of the First Claimant, Boyd, that when they the Claimants entered upon the written examination in 2011, they did so on the understanding that and expectation that there was no applicable pass mark for entry to the suitability assessment stage, that a pass mark of 65 is way above that which is required in accordance with international best practices (of which the court notes there is no supporting empirical evidence whatsoever) and that a reasonable cut off mark was 50. The other aspects of the evidence for the Claimants deal with meetings with the COP in large measure.

32. The court must pause at this stage to comment on the contents of the affidavit of the First Claimant filed in support of the claim on the 28th February 2014. The affidavit is of minimal assistance to this court to say the least. It fails to set out the facts of the case for the Claimants which is a fundamental purpose of such an affidavit. The ideas set out in the affidavit appear to be related ideas and facts which have been thrown into an affidavit in an arbitrary manner without regard for what has to be proven by the Claimants in this case. To present an affidavit in these terms to a court is to do a tremendous disservice to the case for the Claimants as the court is now left with the unenviable task of deciphering what if anything was said to establish the facts which support the case of the Claimants in that affidavit.

33. In so doing, having scrutinized the affidavit of the 28th February 2014 the court finds that nowhere in that affidavit is there evidence which demonstrates that these Claimants attained a mark of 65 or lower. In fact the affidavit does not disclose an iota of evidence as to the mark received by each or any of the Claimants. Neither are there any documents attached which assist in this regard. The documents exhibited in that affidavit are simply a photocopy of a cover of a book, which is of no assistance whatsoever to this court and a copy of the first order. Additionally, the affidavit fails to disclose the precise

date on which these Claimants would have sat the first stage examination. To say the least, when dissected, this affidavit was of little assistance to this court on these factual issues.

34. The affidavit of the First Claimant filed on the 21st March 2014 is equally of no assistance to the Claimants on the issue of whether they are similarly circumstanced as Hazel and Caruth and there is no need for this court to traverse the contents herein they being irrelevant to this particular issue. In sum the Claimants have failed, by their evidence, to provide to this court the following:

a. The dates when the Claimants would have sat the first stage of the examination. (The only evidence which vaguely appears to be relevant in that regard is to be found at the first line of paragraph 9 (viii) of the affidavit of the First Claimant of the 28th February 2014 which in itself is somewhat unclear).
b. The scores attained by the Claimants in relation to the first stage of the examination whether by way of notification of scores by the COP, by way of letter or representation by a division qualified to so represent or otherwise.

These facts are the pillars upon which the case for the Claimants is based and this court is somewhat concerned *(to put it otherwise would be for the court to fail to exercise a modicum of judicial restraint)* that these affidavits would glaringly omit the basic facts of the case for the Claimants. The court also notes that in oral submissions, advocate attorney at law for the Claimants has, with the candour that this court has come to expect from him, admitted that this is the state of the evidence on the part of the Claimants and quite properly so in the court's view.

35. That being said, evidence to support the case for Claimants in a given case may also be gleaned from admissions made by a Defendant. To that end the court has examined the affidavits filed by the COP on his behalf. Nowhere in those affidavits are the marks of the Claimants set out. Neither is there an admission by the COP that each of the Claimants or any of them has achieved 65 marks or less. Neither has the COP admitted that these Claimants sat the written examinations at the same time as Hazel and Caruth on the 29th March 2011 or that they sat the examination at any other time in 2011 and that the examination was the same one which was designed by Penn State University.

The affidavit of Anne Marie Alleyne filed in support of the COP likewise contains no such admission.

36. In those circumstances the court has found that there is simply no evidence before this court that these Claimants are similarly circumstanced as Hazel and Caruth. The main facts upon which the Claimants base their case are patently absent. Hazel and Caruth wrote the exam on the 29th March 2011. There is no evidence that these Claimants wrote the same exam or a similar exam designed by the same person namely Penn State University. Hazel and Caruth were notified of the marks that they attained both orally and in writing by the COP and evidence of same was annexed to the proceedings in that claim. These Claimants have given ***no evidence*** by way of affidavits of the marks they have obtained and have failed to annex any document which shows same whether by way of letters or other documents. There simply is no evidence of their score. It means therefore that there is no evidence that they are similarly circumstanced as Hazel and Caruth. It would be quite improper for a court so to find in the patent absence of such evidence. Even if the court was to presume that all the Claimants would have written the examination at the same time as Hazel and Caruth, (which the court is willing to do based on paragraph 9 (viii) of the affidavit of the First Claimant of the 28th February 2014), the absence of the scores which they have achieved is a fundamental flaw in their case.

37. By way of illustration, if the court was to ask itself whether the facts in relation to the Fifth Claimant, Assistant Superintendant (Acting) Francis Joseph show that his circumstances are similar to those of Hazel and Caruth so that it can find that he is therefore entitled to be treated in the same manner as Hazel and Caruth or declare that it is unfair to treat him in an unequal manner, (even if the court assumes that he wrote the very same examination as Hazel and Caruth), the court would have to find as a preliminary finding of fact that his score was under 65 marks. But how can this court so do when the court has not been told how much marks ASP Joseph has scored.

38. Further, in the case of Hazel and Caruth, there was clear evidence by way of the attached letters from which it could be implied that the reason for the non-advancement of Hazel and Caruth to the suitability assessment process was the scores which they achieved. There is no such evidence in this case. The absence of such evidence in the

present case is of particular importance as it is the evidence from the COP that the life of the Order of Merit List has expired and therefore all persons who were not promoted are required to re-sit the examination in any event. In the absence of evidence of the marks of the Claimants and of the score being the reason for the requirement that they re-sit the examination it may well have equally been the case that the reason for the re-sit was the expiration of the Order of Merit List and the requirement that the process therefore be begun afresh. The court simply has no evidence either way. Even if the individual scores were not set out in the affidavits at the least this court would have expected a bald statement in any of the affidavits filed by the Claimants that they attained less than 65 marks in the written stage of the examinations. This bare statement may have satisfied the minimum evidence necessary to found the claim but astoundingly even such a statement is absent (paragraph 9(vii) of the Boyd affidavit of the 28th February refers to the point attained on the performance appraisal report and not the written examination).

39. For these reasons the court finds that the Claimants are simply not entitled to take the benefit of the orders of Rampersad J.

Did the COP in fact impose a pass mark of 65 in respect of the first stage of the promotional assessment process as a consequence of which the Claimants were debarred from proceeding to the suitability assessment process and required to re-sit the first stage of the promotional assessment process

40. The affidavits filed by the COP seek to explain the procedure adopted in the Hazel and Caruth case. The COP testifies in his affidavit that he was not the COP at the time that Hazel and Caruth wrote their examinations on the 29th March 2011. Neither was he COP on the date that they filed their claim. He has in fact been acting as COP since the 7th August 2012. It was therefore his predecessor who would have contracted Penn State University to design and implement the 2011 promotion process. He sets out his understanding of the promotion process and the fact that the process ends with the contracted person's production of an Order of Merit List. According to the COP, his role would be to hire the person the design and implement the process and thereafter, to make the promotions after the Order of Merit List has been compiled by the

contracted person. The statutory support for this evidence is to be found at sections **17A (1) and (2)** of the Police Service Act Chap 15:01 which read;

17A. (1) Where there is a vacancy in the First Division, the Commissioner shall, in accordance with the procedure prescribed, cause to be contracted from time to time a person to design and implement a promotional assessment process in accordance with internationally accepted promotional assessment standards to determine the suitability for promotion of a police officer to and within the First Division.

(2) The person shall conduct the promotional assessment process to determine the suitability for promotion to and within the First Division to the next higher rank of a police officer from the rank of Inspector through to Senior Superintendent and shall submit its results, taking into account the points attained by the officer under section 16(2), in the form of an Order of Merit List to the Commissioner in relation to his functions under section 123A(2)(a) of the Constitution.

41. At paragraph 12 of the affidavit of March 11th 2014, the COP deposes that the regulation does not call for a pass mark for the written examinations but requires that the best performing candidates go on to the suitability assessment process. He states further, that the assessment was designed to eliminate a certain number of candidates after the first part leaving only the best performing candidates in that round for placement on the Order of Merit List. He also treats with the issue of the number of candidates placed on the Order of Merit List. He states that there are usually fewer vacancies than there are candidates and the best thing to do therefore is to have an Order of Merit List with enough officers on it to fill those vacancies plus a few extra to fill the vacancies which may arise over the life of the Order of Merit List. According to the COP, sufficient numbers of persons are placed on the Order of Merit List so that when all vacancies are filled during its life there would still be those who would have not been promoted. In other words more officers would be placed on the Order of Merit List than those which are needed to fill all vacancies both existing and anticipated during the life of the list. This is done out of an abundance of caution so that the position does not arise where there are vacancies to fill but no one left on the Order of Merit List to fill them. So that according to him, by the time the list is exhausted (the court assumes that this applies

equally to the time when the list expires), there would be three categories of persons, namely:

i. those who were higher up on the merit list and were promoted
ii. those who were lower down on the list and were not promoted and;
iii. those who were not on the list (the court infers that this would include those who sat both stages of the examinations but did not make it onto the list).

42. It is his evidence that those who fall within categories one and three (supra) would have to begin the process anew, in which case they will be joined by those who have since become eligible to be considered for promotions during the period.

43. At this stage, the court wishes to make it abundantly clear that this case is not about the non-inclusion of the Claimants on the Order of Merit List. This case is about a pass mark allegedly implemented by the COP in relation to officers who were to move on to the second stage of the promotion process and nothing more. The evidence of the COP set out above provides however, a very useful historical context of the process to which the court can have regard in deciding the issues in this claim.

44. It is in this context that the COP has explained at paragraph 20 of the said affidavit as follows:

> *"In 2011, my predecessor hired Penn State University to design and implement an assessment. In keeping with what is explained above, the first part, which was a written examination, did not have a pass mark. There was instead a limit for the number of candidates who would be put on the merit list, calculated in the way set out above. The lowest scoring candidates within that limit got 65 marks or less."*

45. The Claimants have made heavy weather of the paragraph set out above and has asked the court to find that this amounts to an admission by the COP that a pass mark of 65 was in fact applied. Of note, as submitted by the Claimants is the fact that the COP refers to marks and not to percentage. This they say is sufficient evidence from which the court can draw the conclusion that the COP was in fact referring to the score achieved at the written stage as opposed to the overall percentage attained for

qualification to the Order of Merit List. The COP argues that this statement shows that it is not that a pass mark was applied but that as it turned out, the lowest scoring candidates within that limit got 65 marks or less. Suffice it to say that in the court's view, the Claimants are correct it being obvious that the COP was specifically referring to marks attained in the written stage of the examination. The COP dos not contend otherwise in any event.

46. This court readily accepts that the statement made in that paragraph is somewhat unclear on first reading. To say that it has been ineloquently put would be to put it mildly. The Claimants say that this was done on purpose by the COP in an effort to obfuscate the truth. Whether this is so or not, this court cannot tell and will not speculate as there is no evidence in support of that contention. However, the court will not treat this evidence as an admission unless it is clear that it amounts to same when looking at the ordinary meaning of the sentence. When one applies the ordinary meaning to the sentence and takes a closer look, a different picture from that which has been submitted by the Claimants emerges.

47. The COP clearly refutes that there was a pass mark in the second sentence of the paragraph. He further says that instead of a pass mark there was a limit for the number of candidates who would be put on the merit list. Thus in the court's view, the COP appears to be saying that the only limit which existed would be the limit imposed in relation to being put on the merit list as set out at paragraphs 15, 16 and 17 of his affidavit. So that he is referring to the process whereby in addition to placing enough candidates on the merit list to fill the number of vacancies which exist, a few extra candidates would be placed on that list to cater for vacancies which may arise within the life of the list (one year). So that it could only be this to which the COP refers as a "limit" in his evidence at paragraph 20 as he has set out no other limit or procedure and has stated quite emphatically at the first sentence of the very paragraph that there is no pass mark. It means that he is saying by extension that included amongst the persons who fall into category two of his categorizations set out at paragraph 16 of his affidavit of the 11th March 2014, (which he apparently refers to as a "limit" instead of as a "category" in paragraph 20) namely, those lower down on the order of merit list who were not promoted, would have been persons who scored 65 marks or less. The COP is therefore saying that persons who scored less than 65 marks were included on the Order

of Merit List. According to the regulations, to be so included, a candidate for promotion has to sit both stages of the promotional assessment process. It therefore follows that even though those persons would have scored less than 65 in the written examination, they were not prevented from moving onto the second stage and were not prevented from being placed on the order of merit list albeit on the lower end of the spectrum.

48. In so far as the evidence by the COP shows that there is a cut-off point when it comes to placing persons on the Order of Merit List, this appears not to be in keeping with the regulations which demarcates no cut-off point or gives no discretion when it comes to admission onto the Order of Merit List. According to the regulations every officer considered for promotion who has gone through the process successfully should be on the merit list but in the order of merit. If the evidence of the COP is to be believed in this regard, then it appears that the imposition of a limit on the number of officers to be placed on the Order of Merit List out of those who would have gone through the process successfully is *ultra vires* the provisons of regulation 19(9) which mandates by use of the word "shall", that **all officers** who are considered for promotion (which could only in context mean those who were allowed to sit both stages of the promotional assessment process) be rated and placed on the Order of Merit List.

49. But as stated before, this case is not about being placed on the Order of Merit List. This is not where the Claimants' complaints lie. If that were the case, the finding of this court may have been quite different. The mandatory regulation that applies to the Order of Merit List does not apply with respect to advancement to the second stage of the promotional assessment process which is dependent on whether one falls within the category of top performing candidate at the written stage. Thus the COP in the court's view is not here making an admission at all. To the contrary, he is giving evidence in support of his contention that there was no pass mark of 65 at the written stage and the court accepts that this is the meaning of his evidence which is to be found at paragraph 20.

50. Further, the reasonable inference to be drawn from the evidence of the COP is that the category of best performing candidates is a fluid one. By way of example, if in one year, the highest mark in the written examination is 55, one would well surmise that the best performing candidates would be persons who received 55 marks and below. So that the

choice of the number of persons who are the best performing seems to be guided by the scores of all of the candidates in a given examination or series of examinations in one promotional assessment session and not a cut off pass mark. It appears to the court that this is what the legislation was intended to provide so that the system was moved away from a points based system in 2006 and shifted to what appears to be a combined system of points and merit. It may not be a perfect system, but it certainly does not appear to be an unfair one. It may well be that these Claimants did not fall within the category of the top performing candidates among those who wrote the examination on that occasion. It is not to say that they shall never be among the top performing candidates in any of the examinations because of a cut off mark as top performers it appears, are to be reckoned with regard to the demand for posts and the scores made on the written examinations by all of those who wrote it.

51. So that on the Claimants' evidence and on the evidence on behalf of the First Defendant, there is no evidence in this case to support the contention of the Claimants that the COP would have applied a pass mark of 65 to the written stage of the promotion process. The evidence is in fact heavily weighted to the contrary as set out above. Further, according to the COP in his affidavit of the 11th March 2014 at paragraph 32, under the new process designed and being implemented by Justex (part of which has already been conducted on the 18th February 2014), there is no pass mark. So that this being an application for judicial review to challenge a decision of the COP, it would appear to the court that the Claimants although making a bald assertion on the application for leave that the COP has decided to impose a pass mark and had prohibited them from moving on to the next stage because of his imposition have fallen woefully short at trial of proof that such a decision was made and was the cause of their having to re-sit the written examination. The Order of Merit List having since expired it may well mean that they are to begin the process afresh.

52. This being the finding of the court, the fourth issue set out at paragraph 13(d) of this judgment does arise for the court's consideration. Suffice it to say that applying the ordinary meaning to the words used in Regulation 19(5)(a), it could hardly be said to be an unreasonable contention that the regulation does not provide for a cut off mark of 65 and the imposition of one may be *ultra vires* to say the least.

Dispositon

53. In the circumstances, the claim shall be dismissed. The parties shall be heard on the issue of costs.

Dated this 10th day of November 2014.

Ricky Rahim

Judge