

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2017-00766

BETWEEN

RICARDO BONAPARTE

Claimant

AND

THE DEFENCE COUNCIL

(Established under Section 7 of the Defence Act Chapter 14:01)

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. S. Ramnanan for the claimant

Ms. M. Smith instructed by Ms. S. Maharaj for the defendant

Judgment

1. This is a decision on an application for judicial review. The claimant holds the rank of Corporal in the Trinidad and Tobago Defence Force (Regiment) (“TTDF”). The defendant is a council established by section 7 of the Defence Act Chapter 14:01 and is responsible under the general authority of the Minister for the command, administration and discipline of and all other matters relating to the Defence Force. On the 2nd July, 2015 the claimant petitioned the defendant for the following;
 - i. Retroactive promotion;
 - ii. Retroactive payment of arrears of salaries and allowances from 2012; and
 - iii. Resettlement training.

2. The claimant in his petition also made a complaint that he had been victimized by Senior Regiment Officer, Major Kester Francis (“Major Francis”). By letter dated the 25th November, 2016 the defendant informed the claimant that his petition had been denied with the exception of his resettlement training which was settled and consequentially is of no issue in this claim. By Fixed Date Claim Form filed on the 10th March, 2017 the claimant made an application to judicially review the decision of the defendant made in respect of his petition.

3. The claimant seeks the following;
 - i. *A declaration that the procedure adopted by the defendant in exercising its statutory function under Section 195(3) of the Defence Act Chapter 14:01 in addressing the petition of the claimant was unfair to the claimant;*
 - ii. *A declaration that the procedure adopted by the defendant was improper, irregular and in breach of the rules of natural justice, the principles of fundamental justice and the claimant’s right to a fair hearing in accordance with section 5(2)(e) of the Constitution;*
 - iii. *A declaration that the claimant was entitled to some sort of representation at the hearing and that the provisions of the Defence Act did not prevent the defendant from permitting the claimant representation either by an attorney-at-law, friend,*

commissioned officer or otherwise or alternatively that the defendant has the discretion to grant the claimant such representation but failed to do so;

- iv. A declaration that the decision of the defendant to dismiss the claimant's petition for retroactive promotion, arrears of salary and claims of victimization by failure to carry out a fair hearing is irrational and/or unreasonable;*
- v. An order of Certiorari to remove into the High Court and quash the decision of the defendant and said decision be remitted to the defendant to reconsider the retroactive promotion and the claims of victimization in light of the findings made by the court.*

4. The grounds upon which the claimant's claim is based are as follows;

- i. The defendant in investigating the claimant's complaint under section 195(3) of the Defence Act breached the principles of natural justice and failed to satisfy or observe conditions and procedures required by law;
- ii. The defendant erred in law by failing to allow the claimant representation;
- iii. The defendant's decision was made in the absence of evidence on which a finding or assumption of fact could reasonably be based;
- iv. The defendant's decision breached the claimant's legitimate expectation that he would be promoted as he continued to serve time in rank;
- v. The defendant failed to take into account relevant considerations and exclude irrelevant considerations;
- vi. The defendant breached or omitted to perform a duty by failing to disclose the rationale, evidence, facts, matters and materials upon which it relied upon in making its decision; and
- vii. The defendant's decision was irrational and/or unreasonable.

The evidence

5. The claimant relied on his affidavits sworn to and filed on the 10th March, 2017 and 11th September 2017. The defendant relied on the affidavits of Major Kester Francis and Lydia Jacobs both sworn to and filed on the 28th August, 2017.

The evidence for the claimant

6. The claimant was enlisted in the TTDF (Regiment) on the 20th November, 1996. He was appointed to the rank of Lance Corporal (“LCpl”) on the 1st October, 2002.¹ However, he reverted from the rank of LCpl to Private on the 1st June, 2006.² After this reversion, the claimant’s direct supervisor, Warrant Officer Class II, R. Dennis (“WO II Dennis”) made three recommendations for the claimant’s reappointment to LCpl.³
7. Contrary to those recommendations made by WO II Dennis, the claimant’s Officer Commanding (“OC”) and Head of Department, Major Kester Francis (“Major Francis”) wrote a letter recommending that the claimant not be re-instated to the rank of LCpl.⁴ According to the claimant, notwithstanding Major Francis’ recommendation, he (the claimant) was reinstated to the rank of LCpl on the 1st September, 2008 and was entitled to receive an “A” scale pay.
8. On the 28th March, 2012 the claimant together with LCpl R. Ramatali were promoted to the Acting Rank of Corporal (unpaid) to take seniority as listed below 9907 Corporal De Leon.⁵ The claimant testified that he could not confirm or deny whether this adjustment was actually made on the seniority roll. According to the claimant, the rank of Corporal (unpaid) is remunerated as a substantive LCpl pending the formalization of the promotion. If the claimant was officially promoted to the rank of Corporal (paid), he would be paid in

¹ A copy of the claimant’s appointment was attached to his witness statement at “R.B.1”.

² A copy of the claimant’s reversion was attached to his witness statement at “R.B.2”.

³ Copies of these recommendations which were dated the 17th April, 13th September and 21st November, 2007 respectively were attached to claimant’s witness statement at “R.B.3”.

⁴ A copy of this letter dated the 26th March, 2008 was attached to the claimant’s witness statement at “R.B.4”.

⁵ A copy of this promotion was attached to the claimant’s witness statement at “R.B.6”.

the rank and hold a position on the Corporal establishment. Currently, while he holds the rank, he is not compensated accordingly.

9. On or around April, 2012 a Junior Non Commissioned Officer Professional Development course (“JNCPDC 1”) was about to commence. JNCPDC 1 caters for substantive LCpls or Corporals (unpaid). The claimant testified that the purpose of being recommended to do the JNCPDC 1 is to ensure that when an individual is promoted to Corporal (paid), he would have the JNCPDC qualification. However, the claimant testified that there were situations where persons were promoted substantively to the next higher rank although they did not complete the JNCPDC. The claimant further testified that Corporal (unpaid) was not a preliminary to Corporal (paid) but that it was only issued in extraordinary circumstances where it was critical to have a person holding the rank perform a function.
10. According to the claimant, Major Francis failed to recommend him for the JNCPDC 1 without reasons. The claimant testified that after the JNCPDC 1 had commenced, he was placed on disciplinary charges in July, 2012 by Major Francis or on Major Francis’ direction. Corporal (unpaid) Ramatali was recommended for the JNCPDC 1. Consequently, Corporal Ramatali completed the JNCPDC 1 and got his promotion confirmed while the claimant remained as a Corporal (unpaid). Corporal Ramatali who was in March, 2012 one position higher than the claimant got his promotion backdated to the 23rd December, 2011 and maintained his seniority just below 9907 Corporal De Leon.⁶
11. It was only in 2014, the claimant was recommended to attend a JNCPDC (“JNCPDC 2”) which was held from the 28th July to the 9th October, 2014. Between 2012 and 2014, six other JNCPDCs were held but the claimant was not recommended to attend because he was either on charge or awaiting trial. The claimant was placed on disciplinary charges on the 30th July, 6th August, 22nd October and 28th December, 2012. Those charges were tried on the 27th February, 2013 and the claimant was placed on a three month reprimand. The claimant was further charged on the 13th May and 7th August, 2013. Those charges were tried on the 2nd August, 2013 and the claimant was awarded a six month reprimand. The

⁶ A copy of Corporal Ramatali’s promotion was attached to the claimant’s witness statement at “R.B.7”.

claimant was again charged on the 24th April, 2014, tried on the 7th May, 2014 and given a three month reprimand.

12. According to the claimant, all of the aforementioned charges made against him were initiated by Major Francis or laid on instructions by Major Francis. He testified that he believes that the aforementioned charges which were made under the instruction of Major Francis were intentionally and strategically spread out to justify his (the claimant's) non-recommendation for promotion and/or non-recommendation to attend the JNCPDC. It was the testimony of the claimant that this evidence together with the evidence that Major Francis recommended that he should not be reinstated as LCpl, complemented his allegations of victimization by Major Francis.
13. According to the claimant, Major Francis' wife prior to their marriage was a soldier and a close companion to him (the claimant) and one of his colleagues. On one occasion, the claimant whilst in the barrack room was recounting about a time he had socialized with his colleague and Major Francis' wife prior to her marriage. Unbeknownst to the claimant, someone in the barrack room called Major Francis and engaged the speakerphone mode. As such, the claimant testified that Major Francis overheard his recollection of the time he had socialized with Major Francis's wife. It was the testimony of the claimant that since that day, Major Francis has continuously victimized him.
14. It was the testimony of the claimant that Major Francis was able to instruct the charges against him because at the time he (Major Francis) had changed the policy by instructing that all reports be addressed to him as opposed to the reports being addressed to the Company Sergeant Major ("CSM"). According to the claimant, Major Francis' new policy afforded him the opportunity to formulate all charges, instruct the CSM to charge and then have the charges forwarded back to him to have same tried.
15. In April, 2015 the claimant had cause to see a psychiatrist because of the stress and victimization he endured under the instruction of Major Francis. The claimant's medical

report from the psychiatrist was forwarded to the Defence Force Welfare Officer, Lt. Commander Serette.⁷ The medical report provided as follows;

“Areas of Concern

- *C75 displays high level of distress related to his work situation. These issues are in part also negatively impacting his family.*
- *He expresses a sense of hopelessness in relation to a positive outcome of this situation.*
- *C75 scored 36 on the Beck Depression Inventory (DDI-11) which indicates severe depression. Research has shown that depression can render people disabled in their work life, family life and social life. Living with a depressed person can also be very difficult and stressful for family members.”*

16. On the 1st May, 2015 the claimant asked for and was granted an interview with his Battalion Commanding Officer to enquire about his promotion. The claimant was told by his Battalion Commanding Officer that his pay from the time he was promoted to Corporal in 2012 would not be addressed because he (the claimant) was awaiting a reversion in rank due to an offence he had committed in 2015. The claimant testified that he was never charged for this alleged offence.

17. On the 7th July, 2015 Lt. Commander Serette wrote to the claimant’s Battalion Commanding Officer, Major Singh and forwarded a copy of the claimant’s medical report which outlined the claimant’s issues, claims of victimization and promotional issues, all of which according to the claimant, severely affected his health.⁸

18. The claimant placed 25th in the JNCPDC 2 course. 10212 LCpl Mohammed, 10267 LCpl McLean, 10197 LCpl Williams and 10199 LCpl Charles placed 28th, 29th, 30th, and 32nd respectively.⁹ The aforementioned soldiers who placed lower than the claimant in the JNCPDC 2 were promoted in May, 2015 to the rank of Corporal with effect from July,

⁷ A copy of this report dated the 29th April, 2015 was attached to the claimant’s witness statement at “R.B.10”.

⁸ A copy of this letter was attached to the claimant’s witness statement at “R.B.11”.

⁹ A copy of the JNCPDC results was attached to the claimant’s witness statement at “R.B.8”.

2013. This is a fact as shown in the rank order paper exhibited as RB 9 attached to the claimant's affidavit. The claimant testified that the fact that he was on a severe reprimand of six months with effect from the 14th January, 2015 may have been the reason he was not promoted to the rank of Corporal (paid). However, on the expending of that six month period which would have been in or around July, 2015, the claimant had no further outstanding charges pending or punishments serving. As such, it was his testimony that after July, 2015 he was eligible for promotion.

19. Although more promotions took place in the latter half of 2015 and in 2016, the claimant has not to date been recommended for promotion to the rank of Corporal (paid). He testified that this was notwithstanding that he now has a clean slate. According to the claimant, it is the usual practice that when a soldier has served his time on a charge and he is eligible for promotion, his promotion is backdated to the date he should have been promoted had he not received any charge. The claimant testified that even if that was not the case, then at the very minimum his promotion should have taken place from July, 2015. It is to be noted that no promotion policy in that regard was placed before the court by the defendant. However it is the case for the defendant as enunciated by both of its witnesses that the fact that one serves time for an offence does not automatically wipe the slate clean as it were in that the defendant is entitled to consider the fact that one has been charged in the past for offences demonstrating somewhat of a propensity to commit offences. This they say is a valid consideration when determining whether to promote. See paragraphs 17 and 18 of the affidavit of Major Francis.

20. The claimant requested an interview with the Commanding Officer of Trinidad and Tobago Regiment. However, he was not granted the opportunity to see the Commanding Officer and no reasons were given for the denial of his request. Subsequently, on the 2nd July, 2015 in accordance with Section 195 of the Defence Act, the claimant petitioned the defendant seeking redress on his promotional issues and alleged victimization by Major Francis.¹⁰ Due to the delay in the defendant addressing his petition, the claimant filed judicial review

¹⁰ A copy of this petition was attached to the claimant's witness statement at "R.B.12".

proceedings on the 28th June, 2016 to compel the defendant to make a decision with respect to his petition (“the 2016 judicial review proceedings”).

21. On or around the 7th July, 2016 the claimant received a phone call from the Secretariat of the defendant informing him of the need of his presence for an interview. The claimant did confirm the name and/or identity of the person who contacted him. During this telephone conversation, the claimant asked whether he would be able to have a representative, either an attorney-at-law, a commissioned officer from the rank of Captain upwards from a different formation (Coast Guard or Air Guard) or his direct supervisor, WO II Dennis present during the interview to assist him with the pleading of his case as he anticipated having difficulties in expressing his position clearly in the presence of the members of the defendant, the Government Ministers and the Chief of Defence Staff.
22. The claimant testified that he also indicated to the person that although he had been serving in the military for quite some time, he was not very academic since he had two CXC subjects. He further indicated that he was unsure of the nature of the proceedings, the type of questions to expect and whether he would have been able to clearly articulate his position to the defendant without incriminating himself.
23. The claimant also asked whether there were any responses or materials he needed to be privy to in advance in order to be able to properly address any questions. The person who contacted the claimant told him that someone would revert to him with the answers to his questions. However, the claimant never heard anything thereafter. As such, it was the testimony of the claimant that he was not afforded any representation to assist him during the interview.
24. On or around the 9th July, 2016 the defendant interviewed the claimant on two separate days for approximately twenty minutes on both days. The interviews were held in a conference room on the second floor of the Ministry of National Security building located on Abercromby Street, Port of Spain. According to the claimant, at the interview, the Minister of National Security, the Honourable Ministers Stuart Young and Faris Al-Rawi,

Brigadier Edmund Dillon (retired), a former Chief of Defence Staff and the present Chief of Defence Staff were present.

25. After the interview, the claimant verbally asked the secretary of the Secretariat, Yolander Morris for the minutes of the meeting held sometime after the 16th July, 2016. The claimant wanted the minutes for his own records. He was not given the minutes and was told by the Secretariat that they would not be able to discuss what took place at the meeting.
26. An application was made to withdraw the 2016 judicial review proceedings and permission was granted to so do by Justice Boodoosingh on the 9th January, 2017. Those proceedings were withdrawn as the defendant had made a decision on the claimant's petition on the 3rd November, 2016 and had communicated that decision to the claimant's then attorney-at-law by letter dated the 25th November, 2016. By this letter, the defendant informed the claimant's attorney that the claimant's petition for retroactive payment and retroactive payments of arrears of salaries and allowances from 2012 were denied.¹¹
27. The claimant testified that during this period although his Battalion Commanding Officer, Major Singh became fully aware of the issues he had relating to the victimization and the dates of the interviews with the defendant, nothing was done to address his issues.
28. As part of the 2016 judicial review proceedings, the defendant wrote to the Chief State Solicitor on the 5th January, 2017 to communicate the reasons for its decision.¹² This letter provided as follows;

“The Defence Council, in response to Corporal Ricardo Bonaparte’s petition dated July 2, 2015 met on June 21, July, 8, July 29, 2016 respectively to, inter alia, deliberate on this matter and made its determination at a meeting held on November 3, 2016.

Corporal Bonaparte has, in his petition requested:

- i. Retroactive promotion;*
- ii. Retroactive payment of arrears of salaries and allowances from 2012; and*

¹¹ A copy of this letter was attached to the claimant's witness statement at "R.B.15".

¹² A copy of this letter was attached to the claimant's witness statement at "R.B.16".

iii. *Retroactive training.*

The Defence Council informed the Petitioner by way of correspondence dated November 25, 2016 of their decision to deny his requests. The reasons for the decision are outlined as follows;

- a. The numerous charges that were brought against Corporal Bonaparte could not be compared with others who would not have recorded same;*
- b. Whilst a severe reprimand is pertinent in promotion, there were other matters that are taken into consideration for his promotion such as the necessary skills which Corporal Bonaparte did not meet;*
- c. The claims of victimization by Snr. Officer Major Francis were dismissed as Corporal Bonaparte would have been supervised by other Officers who too would have issued charges against him. So it was not an isolated unfair treatment by the Snr. Officer; and*
- d. With respect to his claim for Resettlement Training, Corporal Bonaparte received approval for same and which began on September 9, 2015 and was expected to be completed on September 8, 2016. This he had acknowledged during his interview on July 8, 2016, that he received approval for same.”*

29. According to the claimant, the reasons given by the defendant for its decision were never raised in the interview so as to allow him the opportunity to respond. He testified that he was never asked about the “*necessary skills*” that he did not allegedly possess. He further testified that the defendant’s reasons included comparing him with other persons who were not charged but that the defendant failed to take into consideration that as of the middle of 2015, he was no longer on any charges. That the defendant attempted to use his history of charges as the reason for his non-promotion but failed to consider that those charges and punishments were expended as of mid-2015 and that he was therefore now eligible for promotion. In any event, the claimant was not aware of which promotion policy the defendant used to guide its determination of his petition.

30. The claimant pointed out to the defendant that 10203 LCpl Quow had been recommended for promotion although he was serving a severe reprimand and did the JNCPDC after the claimant.
31. The claimant testified that he was not presented with any documents or evidence outlining what were the “*necessary skills*” referred to by the defendant and/or allowed an opportunity to respond. That as far as he was aware, he passed the JNCDPC 2 (which was the standard program designed to test military skills), his performance appraisal was in good order and his twenty years of service as a musician in the Regiment band was stellar. He was also not provided with any copies of his performance appraisal to evidence his deficiencies in the “*necessary skills*”.
32. According to the claimant, he was not afforded the opportunity to see and/or respond to the material before and in possession of the defendant. He testified that even if his charges were the reason for the non-promotion during the periods of 2012, 2013 and 2014 then he should have at least been promoted in the latter half of 2015 and/or in 2016 when he had no other charges. That he should have been promoted retroactively to 2015 when he completed the JNCPDC 2 or alternatively from the point when his last punishment had been served in mid-2015.
33. The claimant testified that although the defendant in its reasons stated that other officers proffered charges against him, the defendant failed to point out that all those officers were under the command of Major Francis. The claimant was again not afforded the opportunity to point out that fact to the defendant because the defendant did not make him aware that it would be relying on that evidence to dismiss his claims of victimization. The claimant was not presented with the material given to the defendant by Major Francis and/or the other officers and allowed the opportunity to respond.
34. Moreover, the claimant testified that he was not given the opportunity to make submissions and/or present evidence to demonstrate his claims of victimization. He was also not allowed to cross-examine Major Francis or provide witness testimony, oral or written to

support his claims of victimization. Further, he was not allowed to show the hierarchical structure that allowed Major Francis to instruct the other officers to charge him.

35. The claimant testified that another example of his claims of victimization was when Major Francis vetoed his sick leave and made him stay in barracks although the Regiment's doctor based on a recommendation from the claimant's Counsellor granted the claimant sick leave from the 7th to the 17th October, 2015.¹³

36. Accordingly, the claimant testified that he was unfairly treated by the defendant as he was not given a fair opportunity to present his case and/or rebut any of the allegations. The claimant was not aware of the other persons that may have given evidence to the defendant. He was also not provided with the facts, materials and evidence that were considered by the defendant in making its decisions. As such, he testified that he was not given any rationale for the decisions made by the defendant.

37. Moreover, the claimant testified that he was ambushed by the manner in which the defendant undertook his interview as he was not allowed any opportunity to raise issues but rather confined to the path and direction set by the defendant.

38. The claimant was only advised that the decision of the defendant could be challenged in late February. As such, he did not have the opportunity to issue a pre-action protocol letter because to do so would have taken the matter outside of the three month limitation period to file actions in judicial review.

The evidence for the defendant

39. **Major Francis** is the Director of Music and Staff Officer 1 Administration for the Regiment of the TTDF. He has been the Director of Music since June, 2002. His job includes the general administration, training, discipline, efficiency, welfare and appearance of the Regiment Band and Regimental Corps of Drums. He is responsible for all musical

¹³ A copy of this sick leave report was attached to the claimant's witness statement at "R.B.17".

instruments, music and property on charge to the Regiment Band and he is also the advisor to Command on all music activities in the TTDF.

40. He has been the Staff Officer 1 Administration since April, 2016. His responsibilities in this post includes the safe custody of all secret, confidential and restricted documents and for regimental books and records. He is also responsible for the smooth and efficient running of the Headquarters Orderly room and to ensure that all internal and external correspondence is dealt with promptly and in accordance with regulations. Further, he is the keeper of all records in the regiment and signs all documents in that capacity.

41. Major Francis admitted that his subordinate, WO II Dennis wrote to him on the 17th April, 2007 recommending that the claimant be reinstated to LCpl. He testified that WO II Dennis wrote to him as he was the claimant's superior in the chain of command. He further testified that when WO II Dennis wrote the subsequent letters (dated the 13th September and 21st November, 2007) to the Company Commander (who was Major Francis' superior) recommending the reinstatement of the claimant, he (WO II Dennis) committed an offence by bypassing Major Francis who was his direct chain of command. It was the testimony of Major Francis that recommendations of such nature were to be generated from the Director of Music to the Company Commander. The only exception to that is when the post of Director of Music is vacant.

42. Major Francis further admitted that he did write letter dated the 26th March, 2008. This letter provided as follows;

"...The soldier at caption was seen by COSSB on 2 May 06 and awarded a severe reprimand based on his performance and conduct. His appointment to LCpl was thus revoked with effect from 26 May 06. On 18 Sept 07, Pte Bonaparte, through COTTR, sought his re-appointment to LCpl and for his seniority to be adjusted to 6 months after he was broken.

Pte Bonaparte's conduct during the period of his revocation of appointment is nothing shy of what may easily be described as abysmal. To date, his track record as referred to at Ref D prior to his revocation continues with reckless abandon.

Previous OCs HQ Coy over the years have given leeway to accommodate Pte Bonaparte during his various domestic predicaments. Incidentally, he often claims that his string of misdemeanors is attributed to this chronic domestic situation that he possesses which is yet to yield a solution. Up to the recent times, he has been allowed to arrive for duty late and to depart early in order for him to deal with his domestic matters. His general performance became, to say the least, very sporadic and undesirable for a musician in the Regimental Band or even a soldier in the Regiment seeking re-instatement to the appointment of LCpl.

I have counselled and cautioned this soldier both unofficially and officially to little or no avail. I have witnessed little improvements and then sudden regression back to the squalor of his unbecoming ways. It is in my opinion that re-instating this soldier to the appointment of LCpl based on sympathy is only going to send a signal to him and others that indiscipline is positively rewarded and condoned. As such, I do not recommend his re-instatement to the appointment of LCpl at this time."

43. Moreover, Major Francis admitted that the claimant was reinstated to LCpl. However, he could not confirm whether the claimant receives the emoluments of LCpl (paid). He testified that that could only be explained by the Staff Officer with responsibilities for finance at the Defence Force Headquarters.

44. According to Major Francis, the purpose of being recommended to attend Professional Development courses is to ensure that personnel are so equipped for the next rank so that they may be able to execute such duties and responsibilities in the correct manner. He testified that where persons are promoted prior to being coursed to either the acting or substantive rank (both being paid), they are required to undergo such training to ensure that they are similarly equipped to execute such duties and responsibilities in the correct manner.

45. Major Francis testified that as he was the claimant's Company Commander at the time, he had to recommend the claimant for the JNCPDC I if he thought it appropriate to do so. That his reasons for not recommending the claimant were the same as contained in letter dated the 26th March, 2008 as those issues were still a problem. Major Francis further testified that the claimant was aware that he had reports made against him for alleged offences committed prior to the JNCPDC I and that that did not place the claimant in good standing for a positive recommendation.
46. Major Francis admitted that the claimant was placed on disciplinary charges in July 2012 after the JNCPDC 1 had commenced. He does not recall whether the matter was elevated to the Commanding Officer for disposal but he was the Company Commander that tried the matter.
47. Major Francis testified that the claimant's evidence in relation to Corporal Ramatali and his placement of seniority was incorrect. That while the date of seniority was correct, Corporal Ramatali placed one below 9710 Corporal Samaroo. Major Francis further testified that the claimant could not have been promoted even if he had completed the JNCPDC 1 because he (the claimant) still had other prior charges against him.
48. Major Francis testified that the charges laid against the claimant between 2012 and 2014 were made by other persons reporting various offences against the claimant. He further testified that during the period of May, 2013 to December, 2013 he was not the claimant's Company Commander as he was overseas on military training. As such, it was the testimony of Major Francis that if there were any Professional Development courses running during that period, he would not have been in a position to make any recommendations for persons.
49. According to Major Francis, charges against the claimant were not instructed to be proffered but rather reports were written against him (the claimant) which revealed offences committed by him. Those reports of infractions were the basis upon which charges were laid and tried by a Company Commander. The Company Sergeant Major is normally the person that would prepare the charges based on the investigation(s) and the contents of

the report(s). Major Francis denied that the summary trials and/or charges against the claimant were strategically spread out to justify the non-promotion and/or the non-recommendation of the claimant for attendance at the Professional Development Training. He further denied victimizing the claimant. Moreover, he denied that someone called him and that he overheard any conversation wherein the claimant was talking about his wife.

50. Major Francis testified that the claimant was summarily tried by his Commanding officer on the 14th January, 2015 for two offences that had occurred on the 18th July, 2014. That the claimant was found guilty and was severely reprimanded on both charges. Due to the claimant's continued indiscipline, Major Francis submitted a performance appraisal¹⁴ to the Commanding Officer recommending that the claimant unpaid rank be rescinded and that he be reverted to the rank of LCpl.

51. According to Major Francis, the claimant could not have been recommended for promotion on or around the 2nd July, 2015 as he (the claimant) committed an offence by engaging the defendant without going through the proper chain of command. Engaging the defendant without going through the proper chain of command is a military offence and the basis of a charge being proffered against claimant. As such, it was the testimony of Major Francis that the claimant could not have been recommended for any form of advancement until six months after his summary trial and dispensation of award. Further, Major Francis testified that the claimant annexed certain classified and confidential documents to his affidavit which were marked "restricted". That the unauthorized release of classified documents into the public domain is also the basis of charges that are to be proffered against the claimant upon completion of this matter.

52. Major Francis admitted that the report from the claimant's psychiatrist was received by Lt. Commander Serette. However, he denied that he caused the claimant any stress and/or victimized him.

53. Major Francis testified that the interview the claimant had on the 1st May, 2015 was with his Battalion Commanding Officer, Major Ashook Singh. That the claimant was awaiting

¹⁴ Dated the 14th January, 2015

a reversion in rank as that was the recommendation that was made based on the prior offences the claimant had committed. Major Francis was unsure of the offences the claimant had committed in 2015.

54. Major Francis admitted that the claimant did make a request to see the Commanding Officer of the Regiment. However, he testified that before a response from the Regiment Headquarters could have been obtained pertaining to the scheduling of the interview with the Commanding Officer, the claimant engaged the defendant with a pre-action protocol letter dated the 2nd July, 2015. Major Francis became aware of the claimant's petition to the defendant when he received same on the 15th October, 2015. Major Francis has no knowledge about the 2016 judicial review proceedings.
55. Major Francis testified that he has no knowledge about the circumstances surrounding and/or leading up to interview the claimant had with the defendant save and except that the claimant was interviewed by the defendant on the 8th July, 2016. Major Francis knew this as the claimant and he saw each other outside of the room on the day of the interview. Major Francis was interviewed by the defendant.
56. Major Francis testified that he was not aware of LCpl Quow's disciplinary record at the time he was promoted because LCpl Quow was not in his Command chain.
57. According to Major Francis, at the time of the claimant's interviews with the defendant, the claimant's Battalion Commanding Officer changed to Lieutenant Colonel Malcolm Nedd. Major Francis testified that it should be noted that he was not in the claimant's chain of command at that time as the claimant was on Resettlement Training. He further testified that once the matter was before the defendant, the TTDF could not do anything to interfere with the claimant's advancement or disciplinary action as the defendant had to come to a decision or make a recommendation before any action could be taken.
58. Major Francis admitted that the claimant passed the JNCPDC 2. He testified that while the claimant's musical abilities were quite good, the claimant's performance appraisal reflected continuous displays of misconduct which caused the claimant to be unable to

secure positive recommendation. This was expounded in the claimant's performance appraisal which was forwarded to his Commanding Officer on the 14th January, 2015.

59. According to Major Francis, the claimant could not have been promoted retroactively as during the period, the claimant would have had disciplinary matters against him for which he was summarily tried and found guilty. Major Francis testified that the aforementioned nullified the existence of the claimant being in good standing.

60. Major Francis testified that he is unaware of any application made by the claimant for sick leave from the 7th to the 17th October, 2015. He recalled the claimant being seen by the TTDF medical officer on or around the 17th July, 2015 and that the medical officer recommended that the claimant see the Commanding Officer of the Regiment. According to Major Francis, the aforementioned was not a medical disposal. As such, he testified that the claim that he vetoed the claimant's sick leave is false. The claimant in his affidavit in reply admitted that he made an error with the dates of his sick leave and that the date as stated by Major Francis was correct.

61. Major Francis further testified that when a soldier is recommended to proceed on sick leave, it remains within the remit of the Company Commander to decide whether the soldier may proceed out of camp to spend the period of sickness at home. That the Company Commander is not mandated to release the soldier to spend such leave out of barracks. Moreover, he testified that the TTDF medical officers do not have the authority to grant leave to persons as they are not administratively responsible for such persons.

62. **Lydia Jacobs** ("Jacobs") is the Permanent Secretary ("PS") of the Ministry of National Security ("the Ministry"). She has been the PS since the 5th September, 2016. Pursuant to section 7(1) of the Defence Act, the PS is the Secretary to the defendant and is responsible for the administrative matters that are necessary for the operation of the defendant. The defendant currently comprises of the Minister of National Security (who is the chairman of the defendant), the Honourable Attorney General, The Honourable Minister of the Attorney General and Legal Affairs, the Chief of the Defence Staff and the PS of the Ministry of National Security.

63. Jacobs testified that the defendant as currently constituted was re-established on the 19th May, 2016 since its last date of the 28th February, 2011. She has no knowledge or information with respect to the reason for the defendant not meeting between the period of February, 2011 and May 2016. As such, it was her testimony that the defendant had no sittings on the date of the claimant's petition which was the 2nd July, 2015.
64. According to Jacobs, the defendant first met on the 21st June, 2016 to deal with the claimant's petition. At that time, it was decided that the claimant and two other officers, Major Francis and Major Mc Lean should be invited to appear before the defendant as witnesses since the aforementioned persons had direct knowledge of the allegations. It was also decided that letters would be issued to all three officers for them to appear before the defendant. She testified that the claimant filed judicial review proceedings on the 28th June, 2016 to compel the defendant to make a decision regarding his petition.
65. On the 7th July, 2016 the Ministry's Business Operations Coordinator, Yolander Morris emailed the claimant's attorney to inform them that on the 8th July, 2016 the claimant's presence was being sought before the defendant to deal with his petition. Jacobs testified that the claimant's attorney replied by email stating that the claimant would be attending.¹⁵ As such, it was her testimony that it was not correct to state that the claimant was not afforded any representation to assist him in clearly articulating his position.
66. On the 8th July, 2016 the defendant met to deal with the claimant's petition.¹⁶ According to Jacobs, the minutes of this meeting confirm the following;
- i. The claimant and Major Francis were interviewed;
 - ii. The claimant did not bring his attorneys, indicate that he wanted them or any form of representation to be present and/or ask for the matter to be rescheduled so that his attorney or some form of representation could be present; and
 - iii. The claimant did not state that he felt hesitant, intimidated and/or uncomfortable to answer the questions.

¹⁵ Copies of these emails were attached to Jacobs' witness statement at "L.J.1".

¹⁶ A copy of the minutes of this meeting was attached to Jacobs' witness statement at "L.J.2".

67. On the 14th July, 2016 the defendant met again to consider the claimant's petition and various documents regarding same.¹⁷ Jacobs testified that the minutes of this meeting show that the defendant also decided that the claimant should be invited to be apprised of the evidence to ensure natural justice and proper procedure.
68. On the 29th July, 2016 the defendant met again to consider the claimant's petition. Jacobs testified that during this meeting the claimant made comparisons between himself, LCpl Quow and some other officers. She further testified that the evidence was reviewed and that the evidence included a letter from the claimant dated the 15th July, 2016. The claimant submitted this letter in response to a question addressed to him at the previous hearing. The claimant was also interviewed. Jacobs testified that the minutes for this meeting show that the claimant was permitted to make submissions and that he acknowledged that the charges against him were true and correct.¹⁸
69. On the 3rd November, 2016 the defendant met once more to consider the claimant's petition. At this meeting, there was a determination of the claimant's petition. The defendant received submissions from Lt. Col. Ramnanan and was guided on the promotion policy within the TTDF by the former Chief of Defence Staff.¹⁹ Jacobs testified that the minutes of this meeting show that the defendant in determining the issue of promotion, took into consideration other matters other than a severe reprimand. That one of those other matters was whether the claimant had the necessary skills for promotion.
70. Jacobs testified that the usual procedure is that persons are not given copies of the defendant's minutes. That the petitioner is sent a letter stating the decision of the defendant. She further testified that the claimant was not prohibited from taking notes during the meetings he had with the defendant.
71. According to Jacobs, the minutes of the meetings the claimant had with the defendant show that the defendant ensured that the claimant was apprised of the evidence, that he was given

¹⁷ A copy of the minutes of this meeting was attached to Jacobs' witness statement at "L.J.3".

¹⁸ A copy of the minutes of this meeting was attached to Jacobs' witness statement at "L.J.4".

¹⁹ A copy of the minutes of this meeting was attached to Jacobs' witness statement at "L.J.5".

the opportunity to address the issues including the numerous offences against him and that he was given the opportunity to raise any concerns he had. She testified that minutes further show that the claimant did not express any concern regarding how the defendant was handling his matter. She further testified that the defendant did not receive any correspondence from the claimant and/or his attorneys expressing any such concern. Moreover, she testified that from the minutes, there was no record that the claimant raised the issue of promotion in the latter half of 2015 and/or in 2016 before the defendant.

72. Jacobs testified that she has no knowledge of the request made by the claimant for the promotion policy. She further testified that the minutes show that the defendant examined the claimant's issue of promotion by listening to his submissions, interviewing witnesses, and reverting to the position of the TTDF. As such, she testified that the defendant dealt with the claimant's petition fairly, ensured that there was natural justice, ensured that the claimant was given the opportunity to address the matter and that he was apprised of the evidence and the decision.

73. Jacobs testified that no pre-action protocol letter was received regarding this matter.

The procedure before the Defence Council

74. There were four meetings in which the defendant treated with what will be loosely referred to as the Bonaparte issues. The minutes exhibited as evidence, the accuracy of which has not been challenged and is therefore accepted in law, demonstrate that the claimant was present at two of those meetings. It is also clear from the minutes that the defendant would have dealt with other issues unrelated to the issues in this case during those meetings. The claimant was required to and did attend on the 8th July 2016. He was invited to attend once again on the 29th July 2016 for the purpose of being informed of matters which were brought to the attention of the defendant during its enquires in his absence.

Error of law

Law

75. The defendant was invoked by the claimant through Section 195 of the Defence Act which provides as follows;

“195. (1) If an other rank thinks himself wronged in any matter by any officer other than his commanding officer or by any other rank, he may make a complaint with respect to that matter to his commanding officer.

(2) If an other rank thinks himself wronged in any matter by his commanding officer, either by reason of redress not being given to his satisfaction on a complaint under subsection (1) or for any other reason, he may make a complaint with respect thereto to the Council.

(3) The Council or the commanding officer shall investigate any complaint received by him under this section and shall take such steps as he may consider necessary for redressing the matters complained of.”

76. In so far as the claimant submits that the process employed by the defendant was flawed as a matter of law, the court is of the view that the argument is misconceived. As section 195 supra demonstrates, the defendant’s remit is to investigate the facts and make a determination as whether redress is necessary. Its role is not to receive formal sworn testimony or to have a trial of matters in the strict sense. So that the defendant does swear witnesses (indeed there is no evidence to this effect before this court), there is no cross examination under oath and no closing submissions. In fact the Defence Act is devoid of any power conferred unto the members of the defendant to administer oaths. Additionally, as were the circumstances here, the claimant was not an accused person and was not facing a charge. He was not on trial for anything. The function of the defendant is clearly prescribed as being that of a body to investigate and decide based on information provided simpliciter.

77. To that end, the use of the words evidence and trial in the minutes are themselves misnomers. There was no duty to provide a fair trial as there was no trial. Similarly as stated before there was no evidence. There is a material distinction between evidence and information. It follows and the courts finds that the trial process is a different one from an investigative process. Trial safeguards have no place in an investigative process. So that the deprivation of the opportunity to cross examine belongs to the former and not to the latter. Similarly, the investigative process is not one that admits the right to legal representation at the investigative process as a matter of law. Indeed no authority has been provided to this court to support the argument of the claimant that he was entitled to legal representation at the investigative hearing as a matter of law.

78. Neither has he satisfied this court that he was as a matter of law entitled to disclosure as part of the lawful process of the defendant in investigating his complaint. In any event, the submissions of the claimant appear to demonstrate that he shifted his argument on the issue of deprivation of representation to fall within the head of breach of the principles of natural justice thereby abandoning his argument on error of law.

79. In any event for the reasons stated above the submission on error of law must fail and the court so finds.

Natural Justice/ Right to a fair hearing section 5(e) of the Constitution

80. Section 5 (2)(e) of the Constitution provides as follows;

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

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations”

81. In *Ceron Richards v The Public Service Commission and The Attorney General of Trinidad and Tobago*²⁰, this court summarized the principles of natural justice at paragraphs 70-71 as follows;

“70. The rules of natural justice require that the decision maker approaches the decision making process with 'fairness'. What is fair in relation to a particular case may differ. As pointed out by Lord Steyn in Lloyd v McMahon [1987] AC 625, the rules of natural justice are not engraved on tablets of stone. The duty of fairness ought not to be restricted by artificial barriers or confined by inflexible categories. The duty admits of the following according to the authors of the Principles of Judicial Review by De Smith, Woolf and Jowell;

a) Whenever a public function is being performed there is an inference in the absence of an express requirement to the contrary, that the function is required to be performed fairly. Mahon v New Zealand Ltd (1984) A.C. 808.

b) The inference will be more compelling in the case of any decision which may adversely affect a person's rights or interests or when a person has a legitimate expectation of being fairly treated.

The requirement of a fair hearing will not apply to all situations of perceived or actual detriment. There are clearly some situations where the interest affected will be too insignificant, or too speculative or too remote to qualify for a fair hearing. This will depend on the circumstances.

71. In delivering the decision in Feroza Ramjohn v Patrick Manning [2011] UKPC 20 Their Lordships made it abundantly clear that what is fair in any given circumstance is entirely dependent of the facts of the particular case. This is what the court said at paragraph 39. “As is trite law, the requirements of fairness in any given case depend crucially upon the particular circumstances – see, for example, R v Secretary of State for the Home Department Ex p Doody [1994] 1 AC 531, 560. Almost always, however, if a decision is to be taken against someone on the basis of an allegation such as that made here, fairness will demand that they be given an opportunity to meet it. A characteristically

²⁰ CV 2016-04291

illuminating statement of the law appearing in Bingham LJ's judgment in R v Chief Constable of the Thames Valley Police Ex p Cotton [1990] IR LR 344 (para 60) deserves to be more widely known:

"While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:

- 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance."*

The submissions of the defendant

82. The defendant submitted that the right to a fair hearing is inherent to the principles of natural justice. That the common law imposes minimum standards of procedural fairness or due process and that such fundamental rights are enshrined in the Constitution.²¹

83. According to the defendant, the claimant was not denied his constitutional right to a fair hearing in accordance with Section 5(e) of the Constitution. The defendant submitted that in investigating the claimant's complaint under Section 195(3) of the Defence Act it did not fail to act fairly and/or allow the claimant the opportunity to respond.

84. The defendant submitted that the claimant was not denied the opportunity to present evidence and/or cross-examine witnesses with regards to his claims of victimization made against Major Francis. According to the defendant, the evidence in Jacobs' affidavit clearly showed that the claimant's attorney was informed via email that the claimant's presence was being sought and that his attorney responded by stating that he (the claimant) would be attending.

85. As such, the defendant submitted that it cannot be said that the claimant was denied his constitutional right to a fair hearing or that it erred in law by not allowing the claimant

²¹ Judicial review Handbook, Michael Fordham, Fourth Edition, paragraph 60.1, Seeromani Maraj-Naraynsingh v the Attorney General of Trinidad and Tobago and the Director of Public Prosecutions, Privy Council Appeal No. 108 of 2009 which applied DPP v Tokai (1996) AC 856.

representation by an attorney, friend or commissioned officer since the claimant was afforded the opportunity to be represented by his attorney or representation of his choice at the hearing of his petition but failed to utilize that opportunity.

The submissions of the claimant

86. The claimant submitted that the defendant as a statutory body established by the Defence Act and a forum of last resort to an aggrieved soldier was subject to the rules of natural justice when considering his petition.²² That although his petition dealt with promotional prospects and a victimization complaint which may not necessarily be considered as a statutory right, that fact was not sufficient to say that the principles of justice should not apply. In so submitting the claimant relied on the case of **Ganga - Persad Kissoon v The Honourable Prime Minister Patrick Manning and Service Commission**²³ wherein Mendonca J.A. stated as follows;

“However even in some privilege cases the Courts have ruled that the principles of natural justice apply. As was pointed out in De Smith’s Judicial Review (6th ed.) (paras. 7-005- 7-006) to exclude all such cases could lead to anomalies and injustice The fact therefore that the Appellant is seeking a privilege in the form of an appointment to which he has no entitlement is not sufficient to say that the principles of justice should not apply. The principles of fairness may apply where there is any interest deserving of protection. As the ex parte Fayed case demonstrates, it may apply where a person’s reputation is at stake. So too in my judgment, the principles of fairness may apply where what is at risk is the person’s career or livelihood. It is at risk not in the sense that it will come to an end...”

87. Further, the claimant relied on **Section 20 of the Judicial Review Act** which provides as follows;

“An inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall exercise that duty or

²² See also Amira Saeed and Minister for Immigration and Citizenship [2010] HCA 23, paragraphs 11 - 15

²³ Civil Appeal 22 of 2006 at paragraph 50

perform that function in accordance with the principles of natural justice or in a fair manner.”

88. The claimant submitted that the defendant breached the principles of natural justice by not allowing him representation during the hearing. That the defendant has admitted that he was entitled to representation but has asserted that he chose not to come along with representation. The claimant further submitted that the email sent to his previous lawyer was an invitation to him alone not to his lawyer. That the only reason the email was sent to his lawyer was because she was the person who filed the 2016 judicial review proceedings to compel the defendant to make a decision on his petition.

89. As such, the claimant submitted that it was never the intention of the defendant to invite his lawyer but rather to simply inform her that his petition was going to be heard so that she could withdraw the 2016 judicial review proceedings. Moreover, the claimant submitted that he did not indicate that he wanted his lawyer present during the hearing because he was at the behest of the defendant’s forum. That it was for the defendant to indicate whether he was entitled to representation.

90. The emails in contention were as follows. On Thursday July 7, 2016 at 2:08pm Ms. Yolanda Morris wrote to Ms. Kavita Sarran, Attorney at law setting out;

*“As indicated via telephone, reference is made to the matter at caption.
The presence of your client, Mr. Ricardo Bonaparte, is being sought to appear before the Defence Council on his pending matter before the Council. The hearing of his case is scheduled for 2pm tomorrow, Friday, July 8, 2016 at the Ministry of National Security, in the Minister’s Conference Room, Temple Court, 31-33 Abercromby Street, Port of Spain.”*

91. On the same day by reply email at 2:32pm Ms. Kavita Sarran wrote to Ms. Yolanda Morris copied to Mr. Kent Samlal Attorney at law saying;

“Pursuant to your request, my client Mr. Ricardo Bonaparte will be attending the Defence Council tomorrow at the Ministry of National Security.”

92. According to the claimant, the defendant's evidence showed that although the defendant made the decision to address his petition on the 21st June, 2016, it only informed his lawyer of that decision on the 7th July, 2016 at 2:08pm which was less than twenty-four hours before his hearing on the 8th July, 2016. The claimant submitted that even if he wanted to have representation at the hearing whether through a lawyer or friend, he could not have so secured same because of the insufficient notice of his hearing. He further submitted that because of the insufficient notice of the hearing he was unable to review his petition and prepare the relevant facts and evidence necessary to present to the defendant.
93. Moreover, the claimant submitted that the defendant failed to observe the principles of natural justice as it did not allow him to view and respond to 1) letter dated the 17th October, 2015 which Major Francis wrote in response to his petition and 2) the notes of Major's Francis' interview with it. According to the claimant, had he been able to see the letter dated the 17th October, 2015 and/or a record of Major's Francis' interview, he would have been able to know how to structure his submissions to dispute any issue of fact put forth by Major Francis and also put forward more evidence to amplify his claims of victimization.
94. The claimant further submitted that the defendant in its reasons for dismissing his petition stated that there were other officers who charged him. According to the claimant, in his affidavit he gave evidence that Major Francis proffered those instructions to charge him. The claimant in his affidavit of reply also gave further evidence as to how Major Francis was able to use his powers as a senior TTR officer to instruct other soldiers to charge the claimant. The claimant submitted that the aforementioned are examples of factual disputes which were not allowed to be ventilated at the defendant's forum. That the defendant simply accepted Major Francis' version of the facts and therefore failed to give the claimant a fair hearing in accordance with rules of natural justice
95. The claimant submitted that Jacobs made reference to letter dated the 15th July, 2016 in her affidavit to justify that he had an opportunity to respond to something relevant to the core issues of his petition. That one can easily glean from the contents of that letter that it had nothing to do with responding to anything that was relevant to the hearing. The letter simply

contained a correction to the claimant's petition concerning a date and a response to a question from the Attorney General at the first hearing on how the claimant knew the former Attorney General. The claimant submitted that the aforementioned had absolutely nothing to do with demonstrating proper procedure and natural justice to the instant matter at hand, as espoused by the defendant in the affidavit of Jacobs. That it was quite possible that the Attorney General was more preoccupied with how he (the claimant) knew his nemesis and political foe the former Attorney General, which one can speculate now raises an issue of whether the Attorney General may have been biased in the proceedings against him because of his perceived relationship with the former Attorney General, Anand Ramlogan SC.

96. According to the claimant, Jacobs in her affidavit stated that the minutes of the meetings reflected that the defendant decided that he should be apprised of the evidence to ensure natural justice and proper procedure. The claimant submitted that that was a matter of form and not substance, and a mere charade.
97. According to the claimant, the defendant's letter dated the 5th January, 2017 stated that there were "*other matters that are taken into consideration such as the necessary skills which Corporal Bonaparte did not meet*". The claimant submitted that those necessary skills were communicated and outlined to him after his petition was already determined. As such, the claimant submitted that if those necessary skills were communicated and/or outlined to him during the hearing, it was quite possible that he would have provided evidence to demonstrate that he possessed those necessary skills and/or would have been able to show there were persons who did not possess those necessary skills but were promoted.
98. The claimant submitted that he was also not given any opportunity to see his "so-called" performance appraisals that were not in good order as alleged by the defendant and given the opportunity to respond. That the minutes of the 28th July, 2017 annexed as "L.J.4" to the affidavit of Jacobs reflected that his direct supervisor stated that "*Performance Assessments were done every six (6) months and that Bonaparte was passed and recommended by Mr. Dennis*".

99. As such, the claimant submitted that the lack of those necessary skills as articulated could have only come from Major Francis and/or the Chief of Defence Staff (“CDS”), since his direct supervisor stated that his performances were exceptional. The claimant further submitted that *maybe* those necessary skills were stated in Major Francis' letter to the defendant, since that was the only way the defendant could have determined that he lacked the necessary skills.

Was the claimant entitled to the opportunity to have representation as a matter of natural justice

100. The authorities above clearly demonstrate that the answer to this question lies with the peculiar facts of a given case. It is clear that in some cases, the right to be represented is a fundamental entitlement of fairness. Whether this is so depends on the nature of the hearing, the complexity thereof and any adverse consequences which may attend the person who asserts the right having regard to the powers vested in the body making the decision. Put another way, do the principles of fairness apply so as to protect the interest of the claimant in this case.

101. In *Ceron Richards* supra, the circumstances were quite different. In that case, Richards was the subject of a disciplinary charge and was suspended based on information received by the Commission. The consequence of the decision to suspend Richards without at the least hearing his version of the events may have had an adverse consequence on his interest and was in the court's view unfair. In this case however, the claimant was not the subject of a complaint but he was in fact the complainant. Of course the difference in the facts between both cases is insufficient to distinguish the general principles which apply equally to both. It must also be noted that at the date of writing, an appeal from the decision in *Ceron Richards* supra is pending.

102. The words of Mendonca JA in **Ganga Persad-Kissoon** supra are however instructive and carry much weight in the court's view. The complaint must be summarized. First the claimant's complaint at the hearing is that he was being victimized by Major Francis because of a prior relationship between himself and Major Francis' wife. This

victimization manifested itself in all of the charges laid against him which was at the behest and instructions of Major Francis.

103. Secondly, he was complaining that he was being treated unequally in that other persons who were also charged, found guilty and placed on severe reprimand were promoted retroactively in preference to him. Information to the contrary was provided to the defendant either by Major Francis or WOII Dennis in the absence of the claimant and the claimant was recalled and informed of the information provided (*see minutes for the 29th July 2016*). Further on that date, the claimant having been recalled, he also accepted as a fact that the charges laid against him were correct.

104. The issue of resettlement training had been resolved by the time he was heard by the Defence Council.

105. In the case of ***Regina v Secretary of State for the Home Department and Another, Ex parte Tarrant***²⁴ (a case relied upon by the claimant) Webster J detailed the circumstances which give rise to the need for legal representation (albeit in the context of a board of visitors at a prison);

"As it seems to me, the following are considerations which every board should take into account when exercising its discretion whether to allow legal representation or to allow the assistance of a friend or adviser. (The list is not, of course, intended to be comprehensive: particular cases may throw up other particular matters.)

(1) The seriousness of the charge and of the potential penalty.

(2) Whether any points of law are likely to arise...

(3) The capacity of a particular prisoner to present his own case...

(4) Procedural difficulties...

(5) The need for reasonable speed in making their adjudication, which is clearly an important consideration..."

²⁴ [1985] QB 251 at. 285B-286E.

106. In *Pett v. Greyhound Racing Association Ltd.*²⁵ (a case relied upon by Webster J in Regina v Secretary of State for the Home Department and Another, Ex parte Tarrant supra) Lord Denning had the following to say at page 132;

“...It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor.”

107. Having regard to the facts of this case and applying the relevant authorities supra, it is clear to the court that the complexity of the complaint and the information which was likely to have been given to rebut the complaint would have required legal or other representation on the part of the claimant to assist him in formulating and pursuing his complaint, considering and distilling any other information provided which he was not privy to prior to the hearing and providing suitable information to the defendant in response thereto. Fairness demanded such an approach particularly in light of the following;

- a. The Defence Council is comprised of senior administrative officials of the Government of the day. Under **section 7** of the **Defence Act** the members are the Minister of National Security, two members of Cabinet (in this case the Honourable Attorney General and the Minister in the Ministry of Legal Affairs, both attorneys at law of considerable standing in this case), the Chief of Defence Staff and the Permanent Secretary of the Ministry of National Security. One only has to examine the composition of the Defence Council to observe that anyone appearing before them does so before a formidable battery of persons holding high office in a relatively small

²⁵ [1969] 1 Q.B. 125

society. Pitted against them, the lone soldier may well be out of his league both in terms of expression and educational background. Such a person may feel intimidated (when this may in fact be perception only) and may therefore be unable to properly present his own complaint. One is reminded of the old biblical tale of David against Goliath. Further, it is to be noted that one of the members is the Chief of Defence Staff. This office holder is far superior to the claimant. By itself that may not be an issue for concern but when one considers that the claimant's complaint involves allegations against an officer who is also much higher in rank, then the difficulty of the claimant becomes even more apparent. The evidence of the claimant himself at paragraph 31 of his first affidavit is supportive of this view.

- b. The claimant was absent on the 14th July 2016 when information was provided by other witnesses and he was recalled and provided with that information on the 29th July 2016 when he again appeared unrepresented before the very body. The presence of a representative even at that stage would have been beneficial to the claimant as a representative may have asked for time to consider the new information with a view to further addressing it in writing or orally.
- c. The nature of the proceedings were such that the outcome would have affected the claimant's entitlement to promotion and his reputation within the armed forces due to the fact that he appeared to have been bypassed on several occasions for promotion in circumstances where those lower in rank were promoted ahead of him. He therefore possessed an interest both in relation to the risk to his career in the armed forces and to his reputation deserving of protection. When viewed in the round, the complaints are inextricably linked although at first blush they may appear to be separate. In essence, the claimant complains that because of an incident between he and Major Francis, he has been set up for several charges, at least one laid by Francis and others on the instructions of Francis, that this has been done with malice and further that

because of these charges and the malice held towards him he has been denied promotion.

- d. These are serious allegations which he has doggedly pursued for years without resolution. The relentless pursuit of his claim has been to his detriment in that the medical report dated the 29th April 2015, disclosed to his Defence Force Welfare Officer Lt. Commander Serrete and his Batallion Commanding Officer Major Singh demonstrated that he displayed a high level of stress due to the very issues. That he held a sense of hopelessness that there would be a resolution and that he was medically severely depressed. The Psychotherapist who signed the report opined that the depression (he scored 36 on the Beck Depression Inventory) also affected his family life. This information was in the possession of his superior officers at the time of the investigation by the defendant. It ought to have been clear to at least the Chief of Defence Staff (assuming he was possessed of the relevant history of the claimant, which is a reasonable assumption) that such a person should have been afforded the opportunity to have representation of some form.

108. In all of the circumstances therefore the court finds that in this case, fairness demanded that the claimant be afforded the opportunity to have representation in some form as a matter of natural justice.

Was the claimant afforded such an opportunity

109. Both Sarran and Samlal had acted for the claimant in his 2016 Judicial Review proceedings. Those proceedings were brought in an attempt to have the Defence Council convene to consider his petition. The Defence Council would have been privy to that case being named as a party and having been represented before the court by attorney on the 9th January 2017 when the claim was withdrawn. It is reasonable to infer that being armed with the knowledge of the names of the lawyers in record for the claimant in that claim, the email sent to Sarran by the defendant would have been so sent because both attorneys were on record in the 2016 claim. But the email itself simply informed the attorney that the

presence of the claimant was necessary for the hearing of the petition at 2:00 p.m. the next day. This email was sent at 2:08 pm on the 7th July 2016.

110. Two matters are to be noted in this regard. Firstly, the email in no way informs the claimant that he was entitled to have a representative present at the hearing or be heard whether in writing or otherwise. Secondly, the email comes some twenty four hours prior to the hearing. In relation to the first matter, it was in the court's view the duty of the defendant to inform the claimant that he was being afforded the opportunity to be represented. In failing so to do the defendant appeared to making the assumption that the claimant should have known this because he had been represented at the high court. But this is not at all a reasonable assumption.

111. In *Attorney General of Trinidad and Tobago and Another v Wayne Whiteman*²⁶, the Privy Council confirmed the right to be informed of the right to retain and instruct an attorney-at-law although in the context of persons who have been arrested or detained. However, the principle must be applicable in other appropriate circumstances.

112. Additionally, it is the evidence of the claimant that on the 7th July 2016 he received a call from the secretariat of the defendant who informed him of the hearing the next day and that he enquired whether he would be able to have a representative. He was told that someone would revert to him on his request but he received no calls thereafter. In response Ms. Jacobs deposed that she had no knowledge of those allegations. If the evidence of the claimant is correct it would mean that the defendant failed to treat with the issue of representation although a direct request had been made to it.

113. In the court's view therefore the claimant was not afforded the opportunity to have a representative present or make representation in writing or otherwise. Any such opportunity provided must be real and not illusory. In this case the claimant was barely afforded one day to obtain legal or other representation. Even if therefore one was to mount a successful argument that an opportunity for the claimant to obtain representation was given on the 7th July 2016, the facts show that such an opportunity would have been

²⁶ [1991] 2 W.L.R. 1200

defeated by the very timing of the notice of the hearing so as to amount to no opportunity at all. The court therefore finds that no such opportunity was provided to the claimant.

114. Additionally, the defendant may have if it had so chosen, assuaged its failure to provide the opportunity to the claimant to be represented had it been made clear to him on the last day of the hearing that he was so entitled in circumstances where the defendant was reserving its decision. It is to be noted that the defendant decided the issues raised on the 3rd November 2016 (See minutes of that day's proceedings).

115. The court therefore finds that the defendant would have breached a core principle of natural justice by failing to inform the claimant that he was entitled to have representation and by failing to afford him the opportunity so to do.

116. In relation to the submission of infringement of the right under section **5(2)(e)**, the court is of the view that this submission must succeed. As set out above, it is the court's finding that the Defence Council is vested with the authority to determine whether in any given case, fairness demands that a complainant be afforded the opportunity to have representation. This decision is highly dependent on the facts and circumstances of each case. A fair hearing encompasses not only the right to be heard but also the right to be afforded the opportunity to be represented in the appropriate case. The court has found that this is one such case. The declaration will therefore be made.

117. Before moving on the court thinks it imperative that some guidance be afforded in relation to the issues raised in this ground. It may be prudent that the defendant provides sufficient notice of hearing of a petition of not less than fourteen days prior to the date of the hearing in writing. The decision as to whether a particular complainant should be afforded the opportunity to be represented is one which should be made by the defendant prior to the issuance of the notice. As stated above, such a decision is dependent on several factors and fall solely within the purview of the defendant on a case by case basis. In the case where a complainant asks that he have legal representation the defendant should ordinarily not refuse such request except in the interest of national security or for other very good reason. Should the decision be one to afford the opportunity of representation to

the complainant, same should be communicated to the complainant in writing together with the notice of the hearing. Such representation may take the form of appearing before the defendant or representation in writing. It should be made clear to the complainant that either of these methods is acceptable. In such a case the fourteen-day period of notice will also afford the opportunity for written representation. Whether a complainant chooses to avail himself of the opportunity is of course a matter for him.

118. It is to be noted that these are merely suggestions by the court and ought not to be interpreted as being compulsory in any manner whatsoever.

Irrationality/Unreasonableness

Absence of evidence

119. Having regard to the court's decision above, it is clear that the decision must be quashed and the matter remitted to the defendant to provide the opportunity to the claimant to avail himself of representation whether in writing or otherwise as the defendant sees fit before a decision is made. Therefore the issues of irrationality and unreasonableness ought not to be determined in light of the order of the court.

Legitimate expectation/relevant and irrelevant considerations/breach of duty

120. Although the claimant raised these grounds in his application for leave to issue Judicial Review proceedings, they are not set out in his claim form nor he did not pursue any of them in his submissions and appeared to have abandoned them. He however attempted to raise those issues of law in his affidavit which is itself quite improper. In any event he subsequently failed to pursue them.

Conclusion

121. In closing the court would add that it was by no means lost on the court that the defendant may have been proceeding in a manner which it considered to be fair. Indeed this appeared to be the purpose of having the claimant recalled to inform him of what had been said in his absence and to confirm some of those facts. Also there is no evidence that

any of the members of the defendant knew of the request by the claimant by way of telephone the day before the hearing. But with respect, the court is of the view that fairness in the continuously changing landscape of local jurisprudence required more on the part of the defendant.

122. Finally, this is yet again another case to come before this court in which there is information that points to severe depression or mental illness on the part of members of the armed forces. This court has had cause to comment on this in the past and repeats its comment that the Defence Force owes duty (although not necessarily a legal one) to both its member and to the country as a whole to ensure that steps are taken to assist such persons as they seek a way out of the deep dark hole that is mental illness. The benefits far outweigh the disadvantages to all.

Disposition

123. The court makes the following order;
- a. It is declared that the decision of the Defence Council made on the 3rd day of November 2016 to dismiss the petition of the claimant (“the said decision”) was made in breach of the claimant’s right to a fair hearing under section **5(2)(e)** of the Constitution.
 - b. It is declared that the said decision was made in breach of the principles of natural justice in that the claimant was deprived of the right to be informed that he was entitled to representation and was deprived of the entitlement to be represented at the hearing.
 - c. The said decision is moved into the High Court of Justice and is quashed.
 - d. The petition is remitted to the Defence Council for further consideration after affording the opportunity to the claimant to be represented or make representation in writing.
 - e. The defendant shall pay to the claimant the costs of the claim to be assessed by a Registrar in default of agreement.

Dated the 21st day of September 2018

Ricky Rahim
Judge