REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-00815

Between

CURTIS APPLEWHITE

Claimant

AND

COMMISSIONER OF POLICE

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. C. Neptune for the claimant

Ms. M. Davis for the defendants

DECISION ON APPLICATION TO STRIKE OUT THE CLAIM

1. On the 19th April, 2017, the defendants filed a Notice of Application supported by affidavit deposed by Mr. Nairob Smart, Attorney at Law, Chief Solicitor's Department seeking the following relief;
    i. *The Claimant's Fixed Date Claim Form and Affidavit both filed on 8th March, 2017 be dismissed against the Defendants pursuant to Part 26.2(1)(b) of the Civil Proceedings Rules 1998, as amended as the fixed date claim and affidavit are an abuse of the process of the court;*
    ii. *The Claimant's Fixed Date Claim Form and Affidavit both filed on 8th March, 2017 be dismissed against the Defendants pursuant to Part 26.2(1)(c) of the Civil Proceedings Rules 1998, as amended as the statement of case (fixed date claim form and affidavit) discloses no ground for bringing or defending the claim;*
    iii. *The First Defendant be struck out as the First Defendant is not a proper party to this action; and*
    iv. *The Claimant pays the Defendants' costs in this claim, to be assessed in default of agreement.*

The claim

2. The court makes no findings of fact but has narrated the facts as set out by the claimant to provide important background information for the purpose of understanding the claim and the competing arguments.

3. The claimant is a Police Corporal, having enlisted in the Trinidad and Tobago Police Service ("the Police Service") on the 1st July, 1994. The claimant claimed that it has been and continues to be the practice of the Police Service that where a police officer is eligible to be promoted but is on suspension from active duty, the relevant vacancy in respect of the officer is held in abeyance pending the determination of charges proffered against him. The claimant further claimed that once an officer is exonerated from the said charge, he is entitled to and

is promoted retroactively to the date he would have been promoted had he not been on suspension.

4. According to the claimant, the practice is premised on the principle of fairness and the need to place a police officer (once exonerated of any allegation) in a position as if the suspension did not arise.

5. The claimant alleged that the abovementioned practice was extended to No. 12334 now Acting Inspector Gosine ("Gosine") who was suspended from active duty in 1998. The claimant claimed that upon being exonerated from the charge and subsequent resumption of active duty in 2002, Gosine was promoted retroactively to the rank of Corporal with effect from 2001. The claimant further claimed that Gosine was subsequently paid all salary and emoluments consistent with his promotion to the rank of Corporal.

6. The claimant further alleged that he was told by Gosine that he was again suspended from active duty in 2008. Gosine was again exonerated and resumed active duty in 2011. According to the claimant, upon Gosine's resumption, he was promoted retroactively to the rank of Sergeant with effect from 2008 and was paid all salary and emoluments consistent with his promotion. The claimant also alleged that he was told that there were other persons who were treated in a similar manner to Gosine.

7. On the 9th November, 2005, the claimant was suspended from active duty following the proffering of a charge of Indecent Assault against him. Prior to his suspension, the claimant was as an Acting Corporal. This charge was determined in the claimant's favour on the 26th February, 2010. According to the claimant, while the aforementioned charge was subsisting, the Police Service also proffered two Disciplinary Charges against him. Those two disciplinary charges were also determined in his favour on the 3rd September, 2014.

8. Prior to being suspended, the claimant wrote and was successful in the 1999 Police examinations for the promotion to the rank of Sergeant. During his suspension, he received an invitation to attend an interview for assessment for the promotion to the rank of Corporal from the Promotion Advisory Board of the Trinidad and Tobago Police Service. The claimant attended this interview on the 10th November, 2009. On the 26th August, 2011, an amended

Order of Merit List ("the list") was published in which the claimant appeared at position number 469.

9. According to the claimant, on the 23rd April, 2010 five hundred and fifty-four Constables from the list were promoted to the rank of Corporal. The claimant alleged that he was therefore eligible to be promoted to the rank of Corporal as of the 23rd April, 2010 if not for his then suspension. He further alleged that on the 3rd May, 2012 more Constables were promoted to the rank of Corporal with the last person being No. 12640 Police Constable Videsh Singh who held number 803 on the list.

10. The claimant was reinstated to active duty with effect from the 3rd September, 2014. After being reinstated, he was directed to proceed on all his accrued vacation leave which expired on the 28th June, 2016. Subsequently, he visited the Human Resource Branch of the Police Service on several occasions to ascertain the status of his elevation to the rank of Corporal but did not receive any useful information. By letter dated the 18th January, 2016, the claimant wrote to the first defendant seeking clarity on the status of his promotion to the rank of Corporal. However, he did not receive any acknowledgement and/or response to his inquiry.

11. On or about the 29th March, 2016, the claimant caused his attorney at law to write to the first defendant setting out his case and demanding that he be promoted retroactively from the 23rd April, 2010. This letter further demanded a response to same on or before the 13th April, 2016. A copy of this letter was also sent to the office of the Chief State Solicitor.

12. On the 4th April, 2016 the office of the first defendant acknowledged the claimant's letter dated the 29th March, 2016 and advised that the matter was engaging the attention of the Commissioner of Police and that it has been referred to the Chief State Solicitor for representation. On the 13th May, 2016 the office of the Chief State Solicitor responded to the claimant's letter and asked for an extension of six weeks to respond to his claim.

13. By further letters dated the 2nd May, 2016 and 7th July, 2016, the claimant's attorney at law again wrote to the first defendant seeking information as to the status of the claimant's claim. By letter dated the 6th May 2016 the office of the first defendant communicated with the claimant's attorney at law advising that the matter was being dealt with accordingly and that

an appointment would have been sent to the claimant as soon as possible. According to the claimant, to date neither of the defendants have responded to his claim.

14. According to the claimant, during the period of November 2015 to March 2016 the first defendant commenced and completed the assessment process for the promotion to the rank of Sergeant. The claimant alleged that he, at the time of the assessment being in the substantive rank of Constable, was not invited to be assessed for the promotion to the rank of Sergeant.

15. On the 21st April, 2016, the first defendant published an Order of Merit List with respect to promotions to the rank of Sergeant and on the 22nd April, 2016 four hundred and sixty Corporals were prompted to the rank of Sergeant.

16. As such, the claimant claimed that the failure of the first defendant to act in a legal and timely manner in retroactively appointing him to the rank of Corporal from the 23rd April, 2010 denied him the opportunity to be considered and assessed for the promotion to the rank of Sergeant and the possibility of a promotion to Sergeant.

17. Consequently, by Fixed Date Claim Form filed on the 8th March, 2017, the claimant claimed the following relief inter alia;

    i. *A declaration that his rights to equality before the law and the protection of the law as guaranteed by section 4(b) of the Constitution of the Republic of Trinidad and Tobago ("the Constitution") has been and is being contravened and/or infringed by virtue of the failure and/or refusal of the Commissioner of Police of Trinidad and Tobago to promote him to the Rank of Corporal retroactively with effect from the 23rd April, 2010 upon his resumption of duty on the 3rd September, 2014;*
    ii. *A declaration that his right to equality of treatment from a public authority in the exercise of its functions as guaranteed by section 4(d) of the Constitution has been and is being contravened and/or infringed by virtue of the failure and/or refusal of the Commissioner of Police to cause him to be interviewed by the Promotions Advisory Board as part of the promotion assessment process to the rank of Police*

Sergeant and/or the failure and/or refusal of the Promotion Advisory Board to interview him;

iii. *A declaration that his right, as guaranteed by section 5(2)(h) of the Constitution not to be deprived of such procedural provisions as are necessary to give effect and protection to the said rights under sections 4(b) and (d) aforesaid has been and is being contravened and/or infringed as a result of the failure and/or refusal of the Commissioner of Police to cause the claimant to be interviewed by the Promotion Advisory Board as part of the promotions assessment process to the rank of Police Sergeant and/or the failure and/or refusal of the Promotion Advisory Board to interview the claimant.*

iv. *An Order directing that the first defendant to immediately pay to the claimant all emoluments, salary and benefits due and payable to him consistent with such a promotion pursuant to paragraph (i) herein;*

v. *An Order directing that first defendant to immediately convene a Promotion Advisory Board to interview and assess the claimant's eligibility for promotion to the rank of Sergeant;*

vi. *An Order directing that the first defendant following such interview/assessment pursuant to paragraph (v) herein that the claimant's name be included on any current Order of Merit List that was generated for promotion to the rank of Sergeant pursuant to the score awarded to him following the said interview/assessment;*

vii. *An Order directing that the first defendant promote the claimant to the rank of Sergeant at the earliest opportunity consistent with any vacancy that exists, once he is eligible following the said interview;*

viii. *Damages for breach of the claimant's constitutional rights including damages to vindicate his said constitutional rights and freedoms.*

ix. *All such consequential orders, writs and directions as the court may consider appropriate for the purpose of enforcing and/or securing the enforcement of and/or redressing the contravention of the claimant's fundamental rights and freedoms under the Constitution.*

Issues

18. The issues for determination are as follows;

    i. Whether the first defendant is a proper party to this action;
    ii. Whether the fixed date claim and affidavit of the claimant discloses no grounds for bringing or defending the claim; and
    iii. Whether there was an alternative remedy in Judicial Review available to the claimant at the time he chose to proceed by way of Administrative Claim pursuant to the Constitution having regard to the true nature and substance of his claim.

Issue 1 - *whether the first defendant is a proper party to this action*

19. The defendants submitted that the first defendant is not a proper party to this action. In so submitting, the defendants relied on ***Section 19(2) of the State Liability and Proceedings Act Chapter 8:02*** which provides as follows;

    "Subject to this Act and to any other written law proceedings against the State shall be instituted against the Attorney General."

20. The claimant submitted that the first defendant was added as a party to these proceedings since if the relief sought at 16(iv), (v), (vi) and (vii) is granted, same can only be made operational by the first defendant. The claimant further submitted that even if he concedes that the first defendant is not a proper party to these proceedings, the general rule is that a claim will not fail because a person was added to the proceedings who should not have been added: See ***Part 19.3 of the CPR.***

21. Even though the allegations made by the claimant directly relate to the first defendant, the proper party to this action according to Section 19(2) of the State Liability and Proceedings Act is the second defendant particularly since in this case, the claim is one for constitutional

relief and the court so finds. Consequently, the court finds that the first defendant is not a proper party to these proceedings and the first defendant ought to be removed as a party.

Issue 2 - *whether the fixed date claim and affidavit of the claimant discloses no grounds for bringing or defending the claim.*

The submissions of the defendants

22. The defendants submitted that the claimant's fixed date claim form and affidavit are unsustainable and bear no buttress to this action. According to the defendants, in his affidavit the claimant sought to rely on information which was told to him by Acting Inspector Gosine who has not filed an affidavit in this matter. As such, the defendants submitted that the claimant hopes to rely on inadmissible hearsay evidence in order to sustain his claim.

23. The defendants further submitted that the claimant alleged in his affidavit that other persons were treated in the same manner as Gosine but failed to mention who those other persons were. As such, the defendants submitted that the claimant has failed to comply with Part 58.4(1) of the CPR which provides as follows;

"58.4 (1) Where a claim is made in proceedings against the State the claim form or statement of case must contain reasonable information as to the circumstances in which it is alleged that the liability of the State has arisen and as to the government department and officers of State involved."

24. The defendants directed the court's attention to the case of ***Allan Ramai v Commissioner of Police CV2014-01289*** wherein the claimant's claim was dismissed because he failed to lead any probative evidence of any comparator(s). In Allan Ramai supra, the claimant in his application for judicial review claimed that Commissioner's failure to promote him retroactively was unreasonable and irrational. He further claimed that he was treated unfairly and that he had a legitimate expectation that he would have been promoted retroactively. Justice Seepersad dismissed the claimant's application for judicial review and held that there was no evidence before the court to find that the decision of the Commissioner to promote

the claimant retroactively was unreasonable, unfair, irrational or that he was treated unfairly. At paragraph 18, His Lordship stated as follows;

"…The Claimant however failed to lead any probative evidence of any comparator (s) who was promoted retroactively. There is no evidence before the Court that the Claimant has been treated differently from other similarly circumstanced person or persons and although the Claimant mentioned the names of individuals who he claims were promoted retroactively, none of their information and their material circumstances were put before this Court, so as to enable the Court, to determine whether they were similarly circumstanced to the Claimant."

25. The defendants further relied on the case of ***Real Time System Limited and Renraw Investments Limited Civil Appeal No. 238 of 2011 at paragraphs 9 & 10,*** wherein Jamadar JA stated as follows;

"9. The thrust of the CPR, 1998 is towards litigation with full disclosure at the earliest opportunity and against tactical non-disclosure for the purposes of gaining strategic advantages in the conduct of litigation.
10. Moreover, the duty on both claimant and defendant to set out fully all facts which ought to be stated in the statement of case and defence respectively, is also so as to allow a judge to properly manage a matter in the context of the CPR, 1998…"

26. The defendants also relied on the authority of ***Beverly Ann Metivier v Attorney General and Evolving Technologies and Enterprise Development Co. CV2007-00387*** wherein Kokaram J at paragraphs 4.1 and 4.2 stated as follows;

"…The statement of case is a fundamental pillar to the Claimant accessing justice under the CPR. It must be carefully drafted so as to properly articulate the facts in support of the cause(s) of action or the basis on which the claim is being made against the Defendant. This duty is reinforced by rule 8.6(1) and (2) CPR which mandates that the claimant include in his claim form or statement of case, a short statement of all the facts on which he relies and to identify or annex a copy of any document which the claimant considers necessary to his case.

4.2 The principles of proper pleading has not been jettisoned by the general wording of rules 8.6(1) and (2) CPR. The duty to state material facts necessitates a careful attention to the details of the case that are material to establishing a claim."

27. Moreover, the defendants submitted that it should be noted that in 1998, 2001 and 2002 the Police Service Commission was the appropriate body at that time endowed with the responsibility of appointing police officers. As such, the defendants submitted that the Commissioner of Police did not promote Acting Inspector Gosine retroactively. The defendants therefore submitted that the claimant cannot rely on Gosine as a comparator since the Constitution (Amendment) Act 2006 which gave the Commissioner of Police powers to inter alia promote police officers took effect on the 1st January, 2007.

28. Consequently, the defendants submitted that the claimant's claim should be struck out as he has no grounds for bringing same.

The submissions of the claimant

29. The claimant submitted that he has complied with ***Part 56.7 of the CPR***, which is the relevant rule for this claim. Part 56.7 provides as follows;

"…
(3) The claimant must file with the claim form an affidavit.
(4) The affidavit must state—
(a) the name, address and description of the claimant and the defendant;
(b) the nature of the relief sought identifying— (i) any interim relief sought; and
(ii) whether the claimant seeks damages, restitution or recovery of a sum due or alleged to be due, setting out the facts on which such claim is based and, where practicable, specifying the amount of any money claimed;
(c) in the case of a claim under s. 14(1) of the Constitution, the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;
(d) the grounds on which such relief is sought;

(e) the facts on which the claim is based;
(f) the claimant's address for service; and (g) the names and addresses of all defendants to the claim…"

30. The claimant further submitted that in accordance with Part 58.4, he has provided such relevant information to allow the defendants to properly address the issues raised in his claim.

31. The claimant submitted that if the defendants were of the opinion that his claim was lacking in information, they could have asked for more information pursuant to ***Part 58.4(2) of the CPR*** which provides as follows;

"At any time during the period for entering an appearance under rule 9.3(1) the defendant may request information under rule 35.1."

32. Further, ***Part 35.1 of the CPR*** provides as follows;

"If a party does not give information which another party has requested under rule 35.1 within a reasonable time, the party who served the request may apply for an order compelling him to do so."

33. The claimant relied on the authority of ***Real Time Systems Limited v Renraw (2014) UKPC 6,*** wherein Lord Mance stated as follows at paragraph 14,

"The Centre could in the present case have applied not under r 26.2 to strike out, but under r 26.3 for an 'unless' order, requiring Real Time to serve an amended statement of case or adequate details within a specified period, failing which the statement of case would be struck out. Since the Centre's interest was in getting rid of the proceedings, it did not so apply. But it would again be very strange if, by choosing only to apply for the more radical than the more moderate remedy, a defendant could force the court's hand, and deprive it of the option to arrive at a more proportionate solution."

34. The claimant submitted that even though the defendants have submitted that his claim is based on hearsay evidence, they have not placed any evidence to challenge the accuracy of his evidence.

35. The claimant further submitted that prior to the Police Service Act 2006, Section 123(1) of the Constitution vested the responsibilities of promotion in the Police Service Commissions. According to the claimant, those powers were however exercised on the advice of the Commissioner of Police. As such, the claimant submitted that the recommendations for promotions in the Police Service under the pre 2006 arrangement were ultimately made by the Commissioner of Police and confirmed and/or approved by the Police Service Commissions. It was therefore the submission of the claimant that the defendants' submission that he cannot rely on Gosine as a comparator because the Police Commissioner did not promote him is inaccurate.

Law and Analysis

36. ***Part 26.2(1) (c) of the CPR*** provide as follows;

"26.2 (1) The Court may strike out a statement of case or part of a statement of case if it appears to the Court –

...(c) that the statement of case or the part to be struck out disclose no grounds for bringing or defending a claim..."

37. In ***Beverley Ann Metivier v The Attorney General of Trinidad and Tobago and others H.C.387/2007,*** Kokaram J at paragraph 4.7 and 4.8 stated as follows;

"4.7 Of course, the power to strike out is one to be used sparingly and is not to be used to dispense with a trial where there are live issues to be tried. A. Zuckerman observed: "The most straightforward case for striking out is a claim that on its face fails to establish a recognisable cause of action... (Eg. A claim for damages for breach of contract which does not allege a breach). A statement of case may be hopeless not only where it is lacking a necessary factual ingredient but also where it advances an unsustainable point of law" 4.8

Porter LJ in Partco Group Limited v Wagg [2002] EWCA Civ 594 surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bring a claim include: "(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides Harris v Bolt Burden [2000] CPLR 9; (b) Where the statement of case does not raise a valid claim or defence as matter of law""

38. In ***Terrence Charles v Chief of the Defence Staff and the Attorney General CV2014-02620***, Justice Jones (now Justice of Appeal) stated as follows at paragraph 11;

"A decision made by the Court under Part 26.2 (1)(c), that the statement of case discloses no grounds for bringing the claim, amounts to a decision on the merits of the case. The burden of proof in this regard is on the applicant. At the end of the day the Defendants, as applicants, must satisfy me that no further investigation will assist me in my task of arriving at the correct outcome. That said the rule ought not to be used except in the most clear of cases. Where an arguable case is presented or the case raises complex issues of fact or law its use is inappropriate."

39. Although it was available to the defendants to file affidavits in response to the facts presented by the claimant, they have chosen not to do so. Consequently, for the purpose of this application, the court has to treat the facts as presented by the claimant in his affidavit as unchallenged.

40. The claimant alleges that the Commissioner of Police has breached his right to equality before the law and the protection of the law, and to equality of treatment by a public authority, set out in sections 4(b) and 4(d) of the Constitution respectively. He also alleges that his right to procedural safeguards set out in section 5(2)(h) of the Constitution has been infringed.

41. Justice Pemberton at paragraph 13 in the case of ***Trevor Bailey v The Attorney General CV2015-02443*** stated as follows;

"We turn to the first part of 4(b), the right to equality before the law, in order to succeed under this head, TB must show there were comparators, that he was treated differently from

those comparators and that treatment was actuated by malice. I have read the affidavit in support, and I have seen a number of names paraded in his quest, but in no instance has there been the specific comparator of a similarly circumstanced person. That is, with respect to any of the persons named, there is no indication that these persons had been interdicted from duty on the basis of alleged disciplinary action, brought about by an officer facing criminal charges…"

42. In ***The Attorney General of Trinidad and Tobago v Ravi Doodnath Jaipaul Civ. App. No. 35 of 2011, Moosai JA at paragraphs 45 and 51,*** stated as follows;

"45. Equality is a comparative concept. In a constitutional setting not all differential treatment would be discriminatory. The concept is neither Orwellian nor Utopian. Rather, the constitutional right to equality before the law connotes the right to equal treatment with others in similar circumstances. In Bhagwandeen v Attorney General Lord Carswell propounded the test for inequality of treatment: "A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All E R 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same or not materially different in the other.

51. In my view the judge was correct in adopting the test for equality established in Graham, namely that where a claim is brought for inequality of treatment under section 4(d) of the Constitution, a claimant need only raise a prima facie case that he was treated less favourably than one similarly circumstanced. The onus then shifts to the public authority to justify on an objective basis the difference in treatment."

43. The claimant at paragraph 12 of his affidavit stated that Acting Inspector Gosine (then Constable Gosine) was suspended from active duty in 1998 pending the outcome of a criminal charge against him. That upon being exonerated from the charge and subsequent resumption

of duties, he was promoted retroactively to the rank of Corporal. The claimant failed to provide the court with any details of his own personal work record from 1994 when he joined the police service to the 9th November 2005 when he was suspended and/or any records of Gosine when he, Gosine, was promoted in 2001 for the purposes of an inquiry as to whether or not he and officer Gosine were similarly circumstanced during that period. Further, as submitted by the defendants, the court agrees that the claimant alleged in his affidavit that other persons were treated in the same manner as Gosine but failed to at the least, identify those other persons. Therefore, notwithstanding the fact that the defendants have failed to provide any evidence to dispute the claimant's claim, it would seem that the claimant does not have an arguable case in relation to his claim under section ***4(d)*** of the Constitution.

44. In relation however to the other constitutional relief sought, it is clear to the court that the claimant has an arguable case and so the successful argument of the defendants cannot equally attach to these relief. Consequently, the court finds that the claimant's fixed date claim and affidavit discloses no grounds for bringing or defending his claim in relation to the ***4(d)*** right only and all relief in relation to the section ***4(d)*** right ought to be struck out.

Issue 3 - *whether there was an alternative remedy in Judicial Review available to the claimant at the time he chose to proceed by way of Administrative Claim pursuant to the Constitution having regard to the true nature and substance of his claim*

The submissions of the defendant

45. The defendants submitted that they are not disputing the fact that the claimant has a constitutional right to apply for redress if he thinks his fundamental human rights or freedom has been or was likely to be contravened. However, the defendants submitted that this claim should have been in judicial review and is therefore an abuse of process since the claimant had a parallel remedy available. According to the defendants, it is trite law that where a parallel remedy exists, the normal procedure ought to be utilized save in exceptional

circumstances. The defendants submitted that the claimant has neither shown nor established that his circumstances are exceptional. The defendants further submitted that resort to constitutional relief is appropriate where factual issues are not in dispute.

46. The defendants relied on the authority of ***Thakur Jaroo v Attorney General (2002) 59 WIR 519 at paragraph 29*** wherein Lord Hope of Craighead stated as follows;

"Nevertheless, it has been made clear more than once by their lordships' Board that the right to apply to the High Court which s 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy. In Kemrajh Harrikissoon v Attorney-General (1979) 31 WIR 348 at 349, Lord Diplock said with reference to the provisions in the Trinidad and Tobago (Constitution) Order in Council 1962:
'The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under s 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under s 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

47. Further, the defendants relied on the authority of ***Khemrajh Harrikissoon v Attorney General (1980) AC 265*** wherein the Privy Council held as follows;

"..although the right to apply to the High Court under section 6 (1) of the Constitution for redress when a human right or fundamental freedom had been or was likely to be contravened was an important safeguard of those rights and freedoms, it was an abuse of the process of the court to make such an application as a means of avoiding the necessity of applying for the appropriate judicial remedy for an unlawful administrative action which involved no contravention of a human right or fundamental freedom; that, since the right of a public officer not to be transferred against his will was not a right of property and since the appellant had deliberately chosen not to apply for the appropriate judicial remedy which the law gave him, the proceedings brought by the appellant and his claim that he had been deprived of the human rights and fundamental freedoms guaranteed by section 1 (a) and (b) of the Constitution, namely, the rights to enjoy property, equality before the law and the protection of the law, were totally misconceived…"

48. Moreover, the defendants relied on the case of ***Allan Ramai*** supra to show that the claimant should have applied for judicial review. According to the defendants, the claimant's action in judicial review is now statutorily barred. As such, the defendants submitted that the claimant is subtly trying to circumvent the law by seeking constitutional relief as opposed to the appropriate action in judicial review.

49. The defendants further relied on the case of ***Trevor Bailey v Attorney General CV2015-02443*** wherein the claimant, a police officer resumed duties after a charge of fraud against him was dismissed. He alleged that the State breached his constitutional rights to equality before the law and right to the enjoyment of property by not bringing the charges against him to trial within a reasonable time. He also claimed that he was treated unfairly and unequally by the Commission which failed to promote him while promoting other similarly circumstanced persons. Justice Pemberton found that the claimant had a parallel remedy in judicial review available to him and therefore struck out his constitutional action as an abuse of process. Her Ladyship further found that the relief pleaded did not disclose a cause of action for constitutional relief. At page 6, paragraph 13 Her Ladyship stated as follows;

"I have seen a number of names paraded in his quest…there is no indication that these persons had been interdicted from duty on the basis of alleged disciplinary action brought about by an officer facing criminal charges."

50. The defendants also relied on the case of ***Michael Dindayal v Attorney General HCA No. S-1623 of 2000,*** wherein the applicant, a firefighter filed a constitutional motion claiming inter alia that he was treated unequally and unfairly after he was not promoted. Justice Alexander found that the applicant failed to utilize a parallel remedy and consequently, his application was regarded as an abuse of process.

51. Moreover, the defendants relied on the authority of ***Gregory Rogers v Attorney General CV2014-01341,*** wherein the claimant's constitutional claim was struck out on the ground of abuse of process. The claimant, a firefighter claimed that his constitutional rights including right to equality were breached. Justice Des Vignes (now Justice of Appeal) found that the appropriate remedy available to the claimant was by way of an application for judicial review. At page 5, paragraph 13 His Lordship stated as follows;

"The claimant has failed to set out in his affidavit or in the affidavit of Sharon Nicholas-Charles any facts that amount to exceptional circumstances which justify allowing him to seek constitutional relief at this stage. He had available to him the alternative remedy of judicial review to challenge the actions or inactions of the Chief Fire Officer and/or Public Service Commission within three months of the issue of the relevant Orders on August 30, 2010. He failed to do so and to permit him to seek constitutional relief based on facts set out in support of his claim would amount to an abuse of process."

52. According to the defendants, in ***Attorney General v Ramanoop Privy Council Appeal No. 15 of 2005,*** the respondent had shown that his circumstances were exceptional which required him to resort to constitutional relief notwithstanding factual issues were in dispute and he had a parallel remedy in common law: ***See also Antonio Webster v the Attorney General Privy Council No. 22 of 2001.***

53. Consequently, the defendants submitted that claimant's constitutional claim should be struck out on the ground of abuse of process.

The submissions of the claimant

54. The claimant submitted that his claim is not an abuse of process and that any perceived defect and/or deficiency in the proceedings can be cured pursuant to the inherent jurisdiction of the court. The claimant relied on the authority of ***Dion Samuel v The Attorney General of Trinidad and Tobago CV2012-03170, paragraph 13 & 14*** wherein Kokaram J stated as follows;

"13. I do not view these proceedings as an abuse of process. In determining whether a constitutional motion amounts to an abuse of process there are two competing principles. First that the Constitution provides in clear terms of the person right to apply to the High Court is without prejudice to any other action with respect to the same matter that is lawfully available. Where there is a breach of the fundamental law the citizen must have recourse to the court. The second competing principle is that at the same time however the court's process is not to be abused by frivolous claims that are not made bona fide or genuinely in pursuit of a vindication of constitutional rights, or where resort is being had to circumvent restrictions of time in disposing of cases in ordinary private action or leave requirement in judicial review. I hasten to add that in cases where there clearly is a remedy in common law and in a private action such as the case of Jaroo v AG (2002) UKPC 5 and Ramanoop v AG (2005) UKPC 15 the inference of abuse is more patent. However in balancing the competing interests the court also has an overriding duty to deal with a case justly, it can be creative. This is what was in effect fashioned the procedural devices in Ramanoop and in Damian Belfonte CA Civ 84/2004. Rather than for instance shut a litigant out proceedings can be converted, directions can be given, the Court has been invested with power to save proceedings.

Where the alternative remedy is also an administrative claim seeking relief under the Judicial Review Act the enquiry becomes focused on the special features of the case which will permit the constitutional court from hearing the claim rather than dismiss it knowing that the time

bar has already elapsed and in effect the Claimant will be without relief. Resort to Constitutional remedies rather than resort to judicial review is not unexceptional and can be permitted. In Jaroo it was expressed as permitted in exceptional circumstances. In Ramanoop there must be some feature to make it appropriate to take such a course. Such as the inadequacy of the parallel remedy, the arbitrary use of state power."

55. The claimant further relied on the authority of ***Kenneth Duncan v The Attorney General HCA NO. 2631 of 1922,*** wherein the applicant brought a constitutional motion asserting that he was deprived of his property without due process of the law. The State relying on Jaroo supra raised a preliminary objection that the applicant could have sued for his money by ordinary common law action and therefore to adopt a constitutional procedure was an abuse of process. At page 16, Ventor J stated as follows;

"…in the Jaroo case their Lordships seem to have given section 14(1) of the Constitution a very restrictive interpretation by holding that only in exceptional circumstances should the individual be allowed to use the originating motion procedure provided by section 14(1) while a parallel remedy exists. Clearly, the intention must be to ensure, as Lord Diplock had cautioned in the Harrikissoon's case, that the value of the important and valuable safeguard that is provided by section 14(1) would not be diminished by allowing it to be used as a general substitute for the normal procedures in cases where those procedures are available. We have not been told what would constitute "exceptional circumstances" so that the door is left wide open for each case to be so categorized depending upon its own set of facts. What we have been told however, by their Lordships in the Jaroo's case is that the originating motion procedure under section 14(1) of the Constitution is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. See paragraph 36 of the Privy Council's decision. In other words where issues of facts are to be resolved, then the procedure provided by section 14(1) of the Constitution will be inappropriate."

56. His Lordship found that the applicant's case fitted well within the category of exceptional circumstances adumbrated by the Privy Council in the Jaroo supra and therefore was not an abuse of process.

57. The claimant submitted that the facts as indicated by him are not in dispute since the defendants have not placed any evidence before the court. As such, the claimant submitted that there is clear evidence that he was treated differently from other similarly circumstanced persons.

58. The claimant further submitted that in the event the court is minded to hold that the action ought to have been commenced by way of judicial review, then it has the power to make an order pursuant to ***Section 13 of the Judicial Review Act Chapter 7:08*** ("JRA") which provides as follows;

"Where the Court is of the opinion that a decision of an inferior Court, tribunal, public body or public authority against which or a person against whom a writ of summons has been filed should be subject to judicial review, the Court may give such directions and make such orders as it considers just to allow the proceedings to continue as proceedings governed by this Act."

59. The claimant submitted that section 13 of the JRA envisages that litigants can fall into error in the commencement of such proceedings and provides a safe guard to protect litigants who have commenced by writ instead of by way of judicial review.

60. According to the claimant, the defendants' reliance on the authority of ***Harrikissoon*** supra to influence any decision to convert the matter is retrogressive and erroneous having regard to Section 13 of the JRA. The claimant submitted that no such provision was in effect when Harrikissoon was decided. The claimant further submitted that if Harrikissoon supra was filed subsequent to the JRA as it exists today and the facts revealed that his action should have not been filed by way of judicial review but by common law action, the action would have been saved by ***Section 12 of the JRA*** which provides as follows;

"Where the Court is of the opinion that an inferior Court, tribunal, public body or public authority against which or a person against whom an application for judicial review is made is not subject to judicial review, the Court may allow the proceedings to continue, with any necessary amendments, as proceedings not governed by this Act and not seeking any remedy by way of orders of mandamus, prohibition or certiorari, and subject to such terms and conditions as the Court thinks fit."

61. As such, the claimant submitted that sections 12 & 13 of the JRA provide a built in safe guard to protect actions that were wrongly commenced either way.

62. The claimant relied on the authority of ***Antonio Webster v The Attorney General of Trinidad and Tobago [2011] UKPC 22,*** wherein the Board at paragraphs 13 and 14 stated as follows;

"13. It is clear that the appellant was wrong to make his claim in Form 1. He should have made it in Form 2, as a fixed date claim, and have applied to the court under Rule 56.9(2)(b) for a direction that the whole application be dealt with as a claim and for directions for the filing of affidavits or witness statements, for the attendance of their makers for cross-examination if appropriate and for disclosure etc under Part 26. The Board does not accept the Attorney General's submission – which is not reflective of the treatment of the rule by the Court of Appeal – that Rule 56.9 applies only to claims wrongly made as a fixed date claim in Form 2. 14. But the appellant's error in that regard was, of itself, likely to be of no consequence. So far as material, Rule 26.8 provides as follows: "(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right." Had it been appropriate for the claim for declarations to remain as part of the appellant's claim, Rule 26.8(3) would, albeit probably on terms as to costs, surely have rescued him from his error."

63. The claimant further relied on ***Asiansky Television PLC v Bayer Rosin (2001)EWCA Civ 1792 at paragraph 49*** wherein Clarke LJ stated as follows;

"The essential question in every case is: what is the just order to make, having regard to all the circumstances of the case? As MayLJ put it [in Purdy v Cambran [200] Cp Rep 67 at para 51] it is necessary to concentrate on the intrinsic injustice of a particular case in light of the overriding objective. The cases to which I have referred emphasize the flexile nature of the CPR and the fact that they provide a number of sanctions short of the draconian remedy of striking out the action. It is to my mind important that the Master or Judge exercising his discretion should consider alternative possibilities short of striking out."

64. As such, the claimant submitted that his claim for constitutional relief herein is not fatal and can be cured under the Court's Case Management powers pursuant to Part 56.12(1) & (2) of the CPR which provides as follows;

"56.12 (1) At the case management conference the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply.
(2) The judge may allow the claimant to amend any claim for an administrative order or to substitute another form of application for that originally made."

65. The claimant submitted that in light of Part 56.12(2) of the CPR, if the institution of these proceedings was incorrect, it would not be an abuse to attract striking out or dismissal but rather one which attracts the curative powers of the court. The claimant further submitted that the issue of whether he deliberately used the form in which this action was filed requires evidence and an opportunity for him to respond to such an assertion.

Law and Analysis

66. ***Part 26.2(1) (b) of the CPR*** provides as follows;

"26.2 (1) The Court may strike out a statement of case or part of a statement of case if it appears to the Court –
...
(b) that the statement of case or the part to be struck out is an abuse of the process of the Court..."

67. The court agrees with the relevant law as set out by the defendants in relation to the approach that the court ought to adopt. Further, the court does not agree with the claimant that the matter is one to be simply resolved at this stage by conversion.

68. It is reasonable to conclude that prior to the initiation of proceedings, the claimant would have considered the true essence of his claim in order to determine whether constitutional

relief was most apt since it is clear that if there was a parallel remedy available, it would have been inappropriate to proceed by constitutional claim. It is the law that only in exceptional circumstances should an individual be allowed to use the originating motion (now called the Administrative Claim for constitutional relief) procedure provided by section 14(1) of the Constitution while a parallel remedy exists. There appear to be no exceptional circumstances in this case. Indeed none has been demonstrated or relied on by the claimant and the court can find none.

69. The crux of the claimant's claim is the Commissioner's failure and/or decision not to promote him retroactively to the rank of Corporal from the 23rd April, 2010. Consequently, upon an evaluation of the facts deposed by the claimant, the appropriate remedy available to him at the time was that of an application for judicial review pursuant to Section 5 of the JRA. The claimant in his submissions did not set out any facts to establish that an application for judicial review would not have sufficed to address his grievances. Indeed, it has been the accepted mode of such challenges in these courts over the years and remains so. On the contrary, the claimant submitted that in the event the court is minded to hold that his action should have been commenced by way of judicial review, then it has the power to make an order to convert the proceedings in accordance with section 13 of the JRA.

70. However, according to ***section 6 of the JRA*** no application for judicial review shall be made unless leave of the court has been obtained. Further, section 11 of the JRA provides as follows;

"11. (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
(2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant."

71. The claimant was reinstated to active duty on the 3rd September, 2014. Therefore, it would have been in or around this time that he would have come to the realization that he was not being retroactively promoted to the rank of Corporal. Within three months thereafter, he ought to have made his application for leave for judicial review, but he did not. It is to be noted that even if his leave application would be statute barred at the date of filing this claim, (which is a finding that this court does not make), the fact that the claimant's application for judicial review is statue barred does not mean a constitutional motion becomes automatically justified on an exceptional basis: ***See Gregory Rogers*** supra, paragraph 11, per Justice De Vignes (now Justice of Appeal).

72. The distinguishing feature between the facts of this case and ***Jaroo*** is that the law provides for a leave application for judicial review which must be brought within a specific time and which is subject to an extension if the court so finds. The effect of a conversion at this stage would essentially be that of extending the time for the claimant to apply for leave to file judicial review from 3rd September 2014 to the date of filing the present claim, namely the 8th March 2017. A court of course does have the jurisdiction to so extend the time but in this case, in any event, the claimant has failed to account for the delay between the 3rd September 2014 and his next item of correspondence to the first defendant made on the 18th January 2016, a year and almost four months after he would have come to the realization that he was not being promoted and that he could have applied to the court for leave for judicial review.

73. The absence of any explanation for this delay leaves a wide gap in the duty imposed on the claimant to explain his delay in applying for judicial review. It means that in the absence of reasons for the delay, the delay becomes undue delay in the making of the application outside of the three-month period set out in the **JRA**.

74. Consequently, the court finds that the claimant had available to him the alternative remedy of judicial review to challenge the actions and/or inactions of the Commissioner of Police

within three months from the 3rd September 2014. He failed so to do and has failed to provide any evidence upon which the court could at this stage act to extend the time for him to apply for judicial review. The court further finds that he having failed to do so, it would be an abuse of the process of the court to allow him to seek constitutional relief based on the facts as set out in support of his claim.

75. Having regard to the ruling of the court on this issue, it follows that the entire claim must be struck out and therefore the court will not make unnecessary orders in relation to the findings made on issues number one and number two as his entire claim must now go by the way.

Disposition

76. The order of the court is therefore as follows;

    i. The claim filed on the 8th March 2017 is struck out.
    ii. The claimant shall pay to the defendants the costs of the claim, to be assessed in default of agreement.

Dated the 23rd January, 2018

Ricky Rahim
Judge