

THE REPUBLIC OF TRINIDAD AND TOBAGO

DRAFT

IN THE HIGH COURT OF JUSTICE
SAN FERNANDO

CLAIM NO. CV 2007 – 00560

BETWEEN

GARTH NELSON

Applicant/Claimant

AND

COMMISSIONER OF POLICE

1st Defendant

AND

POLICE SERVICE COMMISSION

2nd Defendant

Before the Honourable Madam Justice Rajnauth-Lee

Appearances:

Mr. Anand Ramlogan instructed by Mr. Sheldon Ramnanan for the Claimant.
Mr. Russell Martineau S.C. leading Miss Karen Boodan, Miss Kavita Jodhan and Mrs.
Tinuke Gibbons-Glen instructed by Miss Lesley Gray for the Defendant.

Dated the 5th November, 2009

JUDGMENT

APPLICATION:

1. Garth Nelson (“the Claimant”) applied for and was granted leave to apply for judicial review against the Commissioner of Police (“the Police Commissioner”) and the Police Service Commission (“the Commission”). The Claimant sought to challenge the policy and/or procedure and/or system devised by the Police Commissioner for evaluating/assessing police officers for the purpose of making his recommendations for promotion under Regulation 15(1) of the Police Service Commission Regulations (“the Regulations”). He also sought to challenge the decision of the Commission as contained in a letter dated the 5th July, 2005 concerning the decision of the Police Commissioner to bypass the Claimant for promotion to the office of Police Sergeant. These proceedings were commenced on the 16th February, 2007.

RELIEF SOUGHT:

2. The Claimant sought the following relief against the Defendants:
 - (i) *An order pursuant to section 8(1) (d) of the Judicial Review Act directing the Public Service Commission to reserve one of the existing vacancies for the office of Corporal to which retroactive promotion with effect from 8th September, 2005 is possible, pending the hearing and determination of this matter;*
 - (ii) *A declaration that the Claimant was treated unfairly, contrary to the principles of natural justice and Section 20 of the Judicial Review Act by the Commissioner of Police and/or the PSC.*

- (iii) *An order of certiorari to remove into this Honourable Court and quash the decision of the Police Service Commission (“PSC”) not to promote the Claimant as set out in a letter dated 5th day of July, 2005;*
- (iv) *A further order directing the PSC to reconsider the Claimant’s claim for promotion to the office of police inspector with retroactive effect and/or in accordance with the findings of the court;*
- (v) *A declaration that the PSC has acted irrationally, illegally, unfairly and unreasonably in refusing to promote the Claimant;*
- (vi) *A declaration that the system/procedure devised by the Commissioner of Police for evaluating/assessing police officers for the purpose of making his recommendations for promotion under Regulation 15 (1) of the Police Service Commission Regulations is unfair, illegal and unreasonable;*
- (vii) *A declaration that the practice policy and/or procedure and/or policy of the PSC to forward representations of police officers made pursuant to Regulation 15 (3) to the Commissioner of Police for his comments without informing them of the precise nature and/or gist of these comments and giving them an opportunity to rebut any adverse comments is illegal, unfair and contrary to the principles of natural justice.*
- (viii) *An application of mandamus to compel the Defendants to provide the Applicant with the information requested in his application made under the provisions of the Freedom of Information Act dated 6th October, 2006.*

- (ix) *A declaration that the Applicant is entitled to the information set out in the said application.*
- (x) *An Order directing the Defendants to provide the Applicant with the requested information free of charge within seven (7) days hereof.*
- (xi) *Alternatively, on order directing the Defendants to forthwith prepare and supply notice in accordance with Section 23 of the said Act.*
- (xii) *A declaration that there has been unreasonable delay on the part of the Defendants in making a decision on the Applicant's request under the Freedom of Information Act.*
- (xiii) *Costs;*
- (xiv) *Such further or other relief including all such order, Writ and directions as may be appropriate for enforcing or securing the enforcement of the rights of the Claimant and as the nature and justice of the case may require.*

THE GROUNDS:

3. The Claimant relied on the following grounds:
- (i) *That the system and decision was unauthorized or contrary to law;*
 - (ii) *Failure to satisfy or observe conditions or procedures required by law;*

- (iii) *Breach of the principles of natural justice. The Claimant in all the circumstances of this case was treated unfairly and unjustly;*
- (iv) *Unreasonable, irregular or improper exercise of discretion;*
- (v) *Failure to take relevant considerations into account namely, the written representations made by the Claimant pursuant to Regulation 15 and to accord sufficient weight to them;*
- (vi) *Conflict with the policy of an Act;*
- (vii) *Deprivation of a legitimate expectation that the Claimant would be properly assessed in accordance with the Police Service Commission Regulations; and/or*
- (viii) *Deprivation of a legitimate expectation that the Claimant would be properly assessed in accordance with the guidelines set out in this government manual “Shaping Performance” which sets out the Performance Appraisal System (“PAS”) to be adopted by the public service, in consequence of which the Claimant was treated unfairly and arbitrarily;*
- (ix) *The PSC ignored and/or failed to take into account and/or failed to attach sufficient weight to the Claimant’s long and outstanding period in the police service (27 years) in consequence of which he was treated unfairly;*
- (x) *An exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power;*

- (xi) *Failure by the PSC to exercise an independent discretion and/or judgment on the representations made by and/or on behalf of the Claimant;*
- (xii) *The system/policy/procedure devised by the Commissioner of police for evaluating and/or assessing police officers for the purpose of making recommendations for promotions under Regulation 15 (1) of the PSCR is unfair and contrary to the policy, intent and purpose of Regulations 20.*
- (xiii) *The practice and/or policy and/or procedure of the PSC of forwarding the representations made by officer pursuant to Regulation 15 (3) to the Commissioner of Police for his comments without informing them of the precise natures and/or gist of these comments and giving them an opportunity to rebut any adverse comment is illegal unfair and contrary to the principles of natural justice.*
- (xiv) *The omission and/or continuing failure of and/or refusal by the PSC to make a decision on or determine the Applicant's request for information under the Freedom of Information Act ("FOIA").*
- (xv) *The Police Service Commission and the Commissioner of Police public authorities as defined by Section 4 (d) of the FOIA.*
- (xvi) *This application for Judicial Review is made as of right under section 39 of the Act.*
- (xvii) *The FOI Act seeks to promote accountability, transparency and increased public participation in the development of national*

policy by extending to members of the public a general right of access of official documents in the possession of public authorities.

(xviii) By Section 14 of the Act the Defendants are under a statutory duty to take all reasonable steps to assist the Applicant so as to ensure that his request is one that complies with the requirements of Section 13 (2) so that it can be fulfilled.

(xix) By Section 15 the time limit for determining requests is “as soon as practicable” but in any case not later than thirty (30) days after the day when the request is made.

(xx) By Section 23 the Defendants are obliged to specify, in a ‘written notice’ the reasons for any decision taken to deny, defer or otherwise limit access to the requested information. No such notice has been given to the Applicant.

(xxi) The Defendants have illegally failed and/or refused and/or omitted to perform its statutory duties under Sections 14 and/or 15 and/or 23 of the FOIA.

(xxii) The grounds upon which this challenge is based under Section 5 of the Judicial Review Act 2000 includes:

(a) Failure to satisfy or observe conditions or procedures requires by law;

(b) Unreasonable, irregular or improper exercise of discretion;

(c) Conflict with the policy of the FOIA;

(d) *Breach of or omission to perform a duty;*

(e) *Unreasonable delay.*

(xxiii) *The Applicant requested the following information from the PSC by application dated the 6th day of October, 2006 under the Freedom of Information Act (“FOIA”):-*

- i. *Copies of his staff report for the period 2000 to present;*
- ii. *Copies of any correspondence from the Commissioner of Police (“COP”) to the Police Service Commission regarding his claim for promotion since 2004;*
- iii. *A copy of the letter containing the scores regarding the evaluation of his claim for promotion conducted by COP;*
- iv. *Copies of any/all documents on his personnel file.*

(xxiv) *The Applicant requested the following information from the Commissioner of Police by application dated the 9th day of January, 2007 under the Freedom of Information Act (“FOIA”)*

- i. *Copies of his staff report for the period 2000 to present;*
- ii. *Copies of any/all documents on his personnel file.*

(xxv) *The Proposed 2nd Defendant did not determine the said application in accordance with the provision in the FOIA in particular under section 23 by issuing a notice whether access was granted or denied. Instead it*

illegally purported to refer the application to the the Proposed 1st Defendants.

(xxvi) The 1st Defendants have also failed and/or refused to determine the said application and no notice was issued to indicate access to the requested information was going to be granted or denied and the reasons thereto.

(xxvii) The 2nd Defendant is mandated by it's regulations (Regulations 31-33) to maintain an up to date seniority list, receive annual staff reports and consider officers staff reports as part of the mandatory statutory criteria promotion in the Police Service. The Proposed 2nd Defendants was therefore obliged as a matter of law to have copies of the Applicant's reports.

(xxiii) The denial of access to the requested information by the Defendant is illegal, unfair, irrational and/or unreasonable.

(xxix) The requested information is important to the Applicant's career as he has been unfairly bypassed for promotion and he wishes to challenge same. In the circumstances, there is a grave risk that he will suffer and/or continue to suffer a grave injustice unless he is granted access to the requested information.

THE AFFIDAVITS:

4. The following affidavits were filed on behalf of the Claimant:

- The affidavit of the Claimant sworn to and filed the 16th February, 2007.
- The affidavit of Raymond Hunte sworn and filed on the 23rd February, 2007.

- The affidavit of the Claimant in reply sworn to and filed on the 14th May, 2007.
- The affidavit of Cindy Bhagwandeem sworn to and filed on the 22nd April, 2008.

5. The following affidavits were filed on behalf of the Defendants:

- The affidavit of Yolande Charles-Mottley sworn on the 8th May, 2007 and filed on the 9th May, 2007.
- The affidavit of Dawn Harding sworn on the 8th May, 2007 and filed on the 9th May, 2007.
- The affidavit of Larry Alexander sworn on the 4th May, 2007 and filed on the 9th May, 2007.
- The affidavit of Ingrid Seerattan sworn on the 8th May, 2007 and filed on the 9th May, 2007.
- The affidavit of Glen Roach sworn on the 4th May, 2007 and filed on the 9th May, 2007.
- The supplemental affidavit of Glen Roach sworn on the 6th June, 2007 and filed on the 8th June, 2007.

UNDISPUTED FACTS:

6. The Claimant joined the Police Service of Trinidad and Tobago on the 19th January, 1981. On the 20th July, 1993, he was promoted to the rank of Corporal. He was promoted to the rank of Sergeant on the 13th September, 2001.
7. On the 10th May, 2004, he was suspended from duty because of a pending charge of assault which had been laid against him.
8. On the 15th August, 2005, he was served with a letter dated the 5th July, 2005 signed by the Police Commissioner which read as follows:

In accordance with Regulation 15(2) of the Police Service Commission (Amendment) Regulations, 1995, I wish to advise that you were omitted from the list of persons selected for promotion to the rank of Inspector as a result of the undermentioned pending Criminal charge(s) preferred you.

- ***Assault by Beating.***

You may make representation to the Police Service Commission within fourteen (14) days upon receipt of this notification in accordance with Regulation 15 (3) of the Police Service Commission (Amendment) Regulations 1995.

9. By memorandum dated the 16th August, 2005 and addressed to the Commission the Claimant responded to the above letter as follows:

On Monday August 15th 2005 around 7.15 pm. I was served with a Notice by Police Superintendent King. That Notice indicated that I was omitted from the list of persons selected for promotion in the Police Service to the rank of Police Inspector.

The reason given for such omission was because there is a pending charge against me. At this stage I agree that I have a charge pending, however, in accordance with Regulation 15 (3) of the Police Service Commission (Amendment) Regulations 1995 I am making the following representation:

That based on the statement in the Notice, than the only reason for my omission is because of the pending charge. Barring such a charge then it would mean that I am qualified for promotion. Therefore, I am representing that a vacant position for the rank of Police Inspector should be made available to me should the charge result in my favour. (Copy of the said Notice is attached).

I anticipate an early and favourable response.

10. By letter dated the 18th August, 2005, the Chairman of the Commission acknowledged receipt of the above memorandum and informed, the Claimant that the Director of Public Administration (“the Director of Public Administration”) had been directed to submit the matter to the Commission for its consideration.
11. By letter dated the 27th September, 2005, the D.P.A. informed the Claimant that the Commission had considered his letter of representations with respect to being passed over for promotion to the rank of Inspector and had requested the comments of the Police Commissioner. The Claimant was also informed that the Commission, had not filled some vacancies pending its final decision on his representation.
12. By letter dated 14th November, 2005, the Director of Public Administration informs the Claimant:

Correspondence ending with my letter of even reference dated 27th September, 2005 refers.

Police Service Commission has further considered your letter of representations with respect to being omitted from the list of officers recommended for promotion to the rank of Inspector.

However, after re-examination you have still not attained the score needed for promotion at this time and the Commission is therefore unable to accede to your request.

The Court wishes to say at this stage that it agrees with Mr. Martineau's analysis of the correspondence which passed between the Police Commissioner, the Commission and the Claimant. In effect, the letter of the 14th November, 2005, was a response to the Claimant's request that a vacant position for the rank of Police Inspector be held for him should the criminal charge pending against him be dismissed.

13. Some time after, the Claimant received a breakdown of his scores. He had been awarded a total of sixty-eight (68) points. The breakdown is set out in full as Appendix A attached to this judgment.

There is a dispute as to how the Claimant received these scores. The Court will refer to the later in the judgment.

14. By letter dated the 30th November, 2005 addressed to the Director of Personnel Administration the Claimant complained inter alia as follows:

My particular area of concern is that of the Performance Appraisal in which I was granted twenty (20) points out of possible thirty (30) points. I made enquires at the Police Administration Branch and was informed that I had received an adverse rating (Grade 3) in my appraisal for 2003. I

requested a copy of the said Appraisal but was told that there was none available.

Sir, during my twenty (25) five years service I have never received an adverse rating neither have I ever been informed verbally or in writing of any shortcomings in the performance of my duties.

It passes strange that on Tuesday, July 5th 2005 I was omitted due to my being on a Criminal Charge while on Monday, November 14th 2005 my situation has deteriorated to the point where I have not attained the score needed for promotion.

This disparity in reasoning is quiet worrying and I am kindly requesting your assistance and intervention in resolving this matter please.

Copies of all the documents mentioned above are attached for your scrutiny.

15. On the 3rd August, 2006, the assault charge against the Claimant was dismissed.
16. On the 6th October, 2006, the Claimant made an application to the Commission and to the Police Commissioner under the Freedom of Information Act, Chapter (“the FOIA”) for the following information:
 - i. *Copies of my staff report for the period 2000 to present;*
 - ii. *copies of any correspondence from the Commissioner of Police (“COP”) to the police service Commission regarding my claim for promotion since 2004;*

- iii. *A copy of the letter containing the scores regarding the evaluation of my claim for promotion conducted by COP;*
- iv. *Copies of any/all documents on my personal file.*

17. Further, by letter dated the 6th October 2006, Mrs. Joan Furlonge, his Attorney addressed to the Chairman of the Commission complaining inter alia that he was treated unfairly and unequally because he was not given a breakdown of his scores when same was made available to other police officers. Attorney also complained that the Claimant was deprived of the opportunity to make proper representation to the Commission because he was not made aware of the reason(s) for his omission.
18. The Chairman of the Commission wrote to Attorney Mrs. Furlonge on the 18th October, 2006 acknowledging receipt of her letter of the 6th October, 2006 and informing him that the Director of Personnel Administration had been directed to submit the matter to the Commission for its consideration. Not having heard from the Commission further, on the 16th November, 2000 the Claimant's Attorney, Mr. Sheldon Ramanan sent a further letter to the Commission.
19. The Claimant was informed by the Director of Personnel Administration by letter dated the 31st October, 2006, that the Commission had lifted the order of interdiction imposed on him from the 21st October, 2004 and had restored the one-quarter salary which was withheld during the period of interdiction. The Claimant was instructed to report to the Commissioner for duty with immediate effect.
20. By letter dated the 27th November, 2006 Attorney Ramanan again wrote to the Chairman of the Commission noting that the criminal charge had been dismissed and stating inter alia as follows:

“In the light of the fact that it was inferred that, but for the pending criminal charge, he would have been selected for promotion there is then no reason why my client should not be promoted.”

21. The Chairman of the Commission responded to Mr. Ramanam by letter dated the 5th December, 2006, which read as follows:

Re: Police Sargeant Garth Nelson No. 11131

I write with reference to your correspondence on the question of the promotion of the above mentioned Officer.

I am advised that the matter is being investigated by our relevant departments. The disciplinary concerns pertaining to the Officer have been resolved and the comments from the Commissioner of Police for the Officer are being awaited.

When this information becomes available his case will be submitted before the Police Service Commission for consideration.

THE REGULATORY FRAMEWORK

22. The procedure for the promotion of Police Officers is regulated pursuant to the Constitution of the Republic of Trinidad and Tobago by the Police Service Commission Regulations Chapter 1:01 (“the Regulations”).
23. Regulation 15 of the Regulations set out the procedure for promotion to an office in the Second Division. It reads as follows:

- “15. (1) *The Commissioner shall, after taking into account the criteria specified in regulation 20, submit to the Commission a list of the officers in the Second Division-*
- (a) *whom he considers suitable for promotion to an office; and*
 - (b) *who are not being considered for promotion yet but who have served in the Service for a longer period in an office, or who have more experience in performing the duties of that office, than the officers being recommended.*
- (2) *The Commissioner shall also advise those officers referred to in subregulation (1) (b) of their omission from the list for promotion, together with the reasons for such omission.*
- (3) *An officer who is advised under subregulation (2) may make representations on his own behalf to the Commission within fourteen days of being so advised and the Commission may invite him for interview on the basis of his representations.*
- (4) *The Commission shall advise those officers making representations under this regulations of the outcome of their representations.*
- (5) *The Commission may, after considering the representations made, endorse, or otherwise, the recommendations of the Commissioner when promoting an officer.”*

24. Regulation 20 of the Regulations sets out the principles or factors to be taken into account when the Commission is considering officers for promotion. Regulation 20 reads as follows:

- “20. (1) When considering officers for promotion, the Commission shall take into account the experience, the merit and ability, the educational qualifications and the relative efficiency of such officers.
- (2) In the performance of its functions under subregulation (1), the Commission shall in respect of each police officer take into account-
- (a) his general fitness;
 - (b) any special qualification that he possesses;
 - (c) any special courses of training that he may have undergone, whether at the expense of Government or otherwise;
 - (d) the evaluation of his overall performance as reflected in his performance appraisal reports;
 - (e) any letters of commendation or special reports in respect of any special work done by him;
 - (f) the duties of which he has had knowledge;
 - (g) any specific recommendation of the Commissioner for filling the particular office;
 - (h) any previous employment of his in the Service or otherwise;
 - (i) any special reports for which the Commission may call;
 - (j) his devotion to duty;
 - (k) the date of his entry into the Service;
 - (l) the date of his appointment in his present office.”

ISSUES:

25. The main issues which fall for determination by the Court are as follows:

- (1) Whether the points system is unfair, illegal and unreasonable.
- (2) Whether the Claimant was treated unfairly by the Commissioner or the Commission or stated another way, whether the Commission has acted irrationally, illegally, unfairly or unreasonable towards the Claimant.
- (3) Whether the Claimant is entitled to the information requested under the FOIA.

ISSUE 1 – THE POINTS SYSTEM

26. In the reported case of CV2006-01420 **Gopichand Ganga and others v the Commissioner of Police**, this Court examined the points system as it applied to First Division Police officers. The Court concluded that the points system was fair, lawful, and reasonable. The Court found:

- *That there was no rigidity in the system; that the system allowed for flexibility; the Claimants were given the opportunity to make representations to the Commission.*
- *That there was nothing unfair or illegal in the system.*
- *That the recommendations of the Police Commissioner did not determine any of the rights of the Claimants. The ultimate decision on promotion rested solely with the Commission. The*

Court was satisfied that any recommendations made by the Police Commissioner had to be evaluated and considered by the Commission and not merely “endorsed” or rubber-stamped.

- *That the weight attributed to each category was a matter properly for the decision maker alone. It was for the Commissioner to assess the facts and weigh all the consideration. The Court should not interfere unless the decision maker has acted unreasonably in the Wednesbury sense.*

27. In **Ganga**, the Court traced the history of the points system. Of great importance was Departmental Order No. 188 dated the 5th July, 2004, which notified members of the Police Service of a decision taken in March 2002 by a Committee appointed by the Police Commissioner, comprising members of the Executive, the Human Resource Manager of the Police Service and the representative of the Police Social and Welfare Association, the representative Association for Second Division officers, including the Claimant. According to this Departmental Order, the Committee agreed on a method, based on the criteria specified by Regulation 20 of the Regulations. The process provided for the evaluation of qualified officers which was endorsed by the Police Commissioner and implemented as the core criterion for the assessment of all qualified officer eligible for promotion.

28. The Claimants in **Ganga** appealed the Court’s decision but the Court of Appeal dismissed the appeal [Civil Appeal No. 211 of 2007]. Hamel-Smith J.A. who delivered the judgment of the Court of Appeal made several interesting observations. At paragraph 12 he observed that there was a certain duality in the application of Regulation 20. The Police Commissioner was required to take the criteria in it into account when making his recommendations to the Commission in respect of Second Division officers and the Commission must repeat the exercise before making a final decision on promotion. Hamel-Smith J.A. went on

to observe that the regulation did not make any provision as to what weight was to be attached to each factor. That was left to the Police Commissioner and the Commission.

29. Hamel-Smith J.A. went on to state at paragraphs 38-40 of his judgment:

What in effect the respondents have accomplished is a formula to evaluate the criteria in regulation 20. Regulation 20 is itself a rigid stipulation of the matters to be considered because it fails to direct the Commission as to the weight to be attached to each criterion. That is a matter left to the Commission and to the Commissioner (when acting under regulation 15(1)). The points system is therefore a mechanism for analyzing the criteria in Regulation 20 without identifying the weight to be attached to them.

As mentioned earlier, the Commissioner based his recommendations on the highest scores received but it does not necessarily follow that the Commission will do the same. It is an assumption on the part of the appellants that because the Commissioner made recommendations it inexorably meant that the Commission had abandoned its statutory duty to assess the criteria in regulation 20 and had accepted the recommendations without more. That assumption was not open to them without a challenge to the Commission's actions. And without such a challenge there was no evidential burden placed on the Commission.

It seems that the resolution of the second aspect of the criticism of the appellants (the lack of discretion of the Commission) takes care of the criticism of the first (the flaws in the points system).

Counsel for the respondents has in my view correctly submitted

that the recommendations did not decide the rights of any officer being considered for promotion and the Commission was free to attach whatever weight it deemed necessary to any of the criteria that had been assessed by the points system in making its final decision. From this submission I understand the position to be that the Commissioner (at the request of the Commission) had exercised his discretion in making his recommendations having taken into account the criteria in regulation 20, but this was no cause to conclude that the Commission had or would relinquish its weight to exercise its own discretion. It was free to attach whatever weight it deemed fit to the recommendations and to the individual scores that reflected each criterion in regulation 20 and did not necessarily have to arrive at a final decision based on the highest overall scores.

30. The Court wholly adapts the reasoning of the Court of Appeal in **Ganga** and finds that the points system is fair, lawful and reasonable. There is nothing in this case to suggest that the Commission did not exercise an independent discretion. In addition, the Court agrees with Mr. Martineau that there is nothing on the evidence to support the contention that the points system was unfair, unlawful and irrational.

ISSUE 2 – UNFAIRNESS

31. Several issues can be subsumed under this head. The Court will deal with each.
- (i) *Whether the Commission has made a decision not to promote the claimant as set out in a letter dated the 5th July, 2005.*

(ii) *Whether the Commission has failed to reconsider the Claimant's claim for promotion.*

32. The Claimant has sought inter alia an order of certiorari to remove into this Court and to quash the decisions of the Commission not to promote the Claimant as set out in a letter dated the 5th July, 2005. The letter of the 5th July, 2005 had been set out in full at paragraph 8 of the judgment.

33. Having regard to the clear terms of the letter and the Court of Appeal judgment in **Ganga** the order of certiorari cannot be granted. The letter is not the decision of the Commission but the recommendation of the Police Commissioner to the Commission and the notification to the Claimant of his omission from the list for promotion pursuant to Regulation 15(2). In fact, the letter advised the Claimant that he could make representations to the Commission upon receipt of this notification in accordance with Regulation 15(3).

34. Indeed, there is no evidence before the Court that the Commission had failed to reconsider the Claimant's claim for promotion. The last words from the Commission prior to the commencement of the proceedings was that the matter was being investigated by its relevant departments and that the comments from the Police Commissioner were being awaited [see letter of the 5th December, 2006 at paragraph 21 of the judgment]. According to the letter, when the information became available the case would be submitted to the Commission for consideration.

35. Accordingly, the Claimant's claim for relief claimed in the Claim Form Relief at (iv) is premature. It is clear on the evidence that the Commission had not concluded its deliberations and that there was no decision by the Commission not to promote the Claimant.

(iii) *Whether the Claimant was fairly informed of the fact that he had been evaluated and scored 68 points and whether he was afforded a fair opportunity to make representation on his scores.*

36. In his affidavit filed on the 16th February, 2007, the Claimant alleged that having been informed by letter dated the 18th November, 2005 that he had not attained the score needed for promotion, and being confused by this response since he had never been told that he was evaluated and had never been given any scores, he went to the Police Administration Branch to inquire whether, he was evaluated. According to the Claimant, he was given scores by Corporal Alexander who handed him a sheet with a breakdown of his points which indicated that he had been awarded a total of sixty-eight (68) points. The breakdown is set out at paragraph 13 of this judgment.

37. Corporal Larry Alexander in his affidavit filed on the 9th May, 2007 deposed that he never gave the Claimant a sheet with the breakdown of his points (paragraph 11). According to Corporal Alexander the Claimant visited the Human Resource Unit at the Police Administration Building and was personally served by him with the evaluation letter dated 5th July, 2005. (paragraph 5).

38. Deputy Commissioner of Police, Glen Roach by his affidavit filed on the 9th May, 2007, deposed that he had informed the Claimant of his scores by the letter of the 5th July, 2005 (paragraph 5). However, at paragraph 6, he deposed that on reviewing the Claimant's personal file he discovered a letter dated the 5th July, 2005 addressed to him, advising him that he was omitted from the list of persons selected for promotion to the rank of Inspector. According to Deputy Commissioner Roach, the original of that letter was still in the Claimant's file and appeared not to have been served on him.

39. Although this evidence leaves the Court with some disquiet the Court accepts the submissions advanced on behalf of the Defendants that the Claimant's own evidence was that he received the information. It is undisputed that not only did the Claimant have knowledge of his scores but more importantly that he had made representations to the Commission. The relevant portion of the Claimant's letter of the 30th November, 2005 bears repeating:

On Monday 28th November, 2005 I received a correspondence from the Director of Personnel Administration which stated that I had not attained the required points needed for promotion. I sought and obtain a breakdown of my point which indicated that I was awarded a total of sixty-eight (8) points.

My particular area of concern is that of the Performance Appraisal in which I was granted twenty (20) points out of a possible thirty (30) points. I made enquires at the Police Administration Branch and was informed that I had received an adverse rating (Grade 3) in my appraisal for 2003. I requested a copy of the said Appraisal but was told that there was none available.

Accordingly, the Claimant was afforded a fair opportunity to make representation on his scores.

40. Mr. Ramlogan has also submitted that the Claimant was treated unfairly in that other officers were given an opportunity to make representations before their scores were sent to the Director of Personnel Administration. Since the relevant letter, such as the letter of the 5th July, 2005, instructs the concerned officer to submit his representations to the Commission, it must be that the Commission sees the officer's scores either before or at the same time as the officer's representations are received.

41. The Court finds that although the circumstances in which the Claimant was made aware of his scores were less than satisfactory, there is no unfairness established. What is important is that the Claimant knows of his scores and made representations to the Commission without being invited. I agree with Mr. Martineau that judicial review is about substance and not form.

42. In addition, Mr. Martineau has submitted that the Claimant was only entitled to be given an opportunity to make representations on the scores if the scores were the reason given for his not being recommended for promotion. The parties never arrived at that stage. According to Mr. Martineau therefore it may well be that when the comments of the Police Commissioner were received that the Police Commissioner may very well point to the scores, at which stage the Claimant would be invited to make representations. The Court whole-heartedly accepts these arguments.

(iv) *Whether the Claimant acted illegally, unfairly and in breach of natural justice in forwarding the representations of the Claimant to the Police Commissioner for his comments and whether the Claimant was entitled to respond to the comment of the Police Commissioner.*

43. Mr. Ramlogan has submitted in the Claimant's written submissions filed on the 28th May, 2008 that the practice of allowing the Police Commissioner to respond to the representations made by the Claimant pursuant to Regulation 15 without informing him of this fact and/or giving him an opportunity to address same is patently unfair and contrary to the statutory procedure set out in Regulation 15. Mr. Ramlogan argued that the Police Commissioner having already submitted his reasons for by passing the Claimant under Regulation 15 would be allowed a "second bite at the cherry" without the Claimant's being given a further opportunity to be heard.

44. On the other hand, Mr. Martineau contended that there was no evidence that the Commission sent the Claimant's representations to the Police Commissioner for his comments and did not inform the Claimant of those comments nor give him an opportunity to rebut any adverse comments. Mr. Martineau argued that on the evidence the Commission was still awaiting the comments of Police Commissioner before making a final determination in the question of promotion.

45. In addition, Mr. Martineau relied on the several authorities including the text of **De Smith's Judicial Review** (6th edition) page 387 where the learned author stated:

Moreover, in general , there is no duty to re-consult unless there is a "fundamental difference" between the proposals consulted on and those which the consulting party subsequently wishes to adopt, or if, after consultation has concluded, the decision-maker becomes aware of some internal material or a factor of potential significance to the decision to be made.

46. The Defendants also placed reliance on the case of **R. v Secretary of State for Education and Science** ex parte S. [1994] WL 10660611 (CA(Civ Div)). In that case, the Secretary of States appealed against the decision to grant the application of S's parents for judicial review and to question his decision that S's learning difficulties were not sufficient to require the local authority to make special education provision for him. The judge had held that the Secretary of State should have disclosed to S's parents the essence of the expert report which he had received and on which he based his decision. The Court of Appeal held that the Secretary of State was under no duty to disclose the advice he had been given during the consultation exercise which he undertook with an educational psychologist and an inspector of Schools. The interests of fairness did not require

disclosure except where a new point had been considered on which the parents had had no opportunity to make representations.

47. The Court agrees with Mr. Martineau's submissions. There is no inherent unfairness in the Commission to forwarding the Claimant's representations for the comments of the Police Commissioner. I have seen nothing on the Regulations or in the law which would prevent this. In addition, it could not be said that the Commission failed to afford the Claimant an opportunity "to comment on the comments" of the Police Commissioner since the Commission was still awaiting those comments. Further, there is not an absolute right to see further comments and to make representations on them. The interest of justice only required disclosure and the right to make representation where a new point, and one adverse to the Claimant was raised by the Police Commissioner.

(v) *Whether there was a breach of natural justice on the part of the Commission in refusing to consider the Claimant's performance appraisals which had been submitted to the Commission.*

48. By his letter dated 30th November, 2005, set out at paragraph 14 of this judgment the Claimant complained that his score under Performance Appraisal where he was granted twenty (20) points out of a possible thirty (30) points. The Claimant further stated that having made enquiries at the Police Administration Building, he was informed that he had received an adverse rating (Grade 3) in his 2003 appraisal. He further stated that he requested a copy of the appraisal but was told that there was none available.

49. In her letter to the Chairman of the Commission dated the 6th October, 2006, the Claimant's Attorney, Mrs. Furlonge, indicated that the Claimant had brought to the Commission's attention that his most recent and relevant staff report for 2003 was missing. In fact, she complained that there were no staff reports for the Claimant for the period 2002 – 2004 and that the Claimant was

advised that he should make every effort to have the missing staff reports redone and replaced so that his claim for promotion could be genuinely and properly considered. According to Mrs. Furlonge, the Claimant had the missing staff reports re-done and re-submitted to Police Administration. Copies of the staff reports were attached to the said letter.

50. By his affidavit filed on the 9th May, 2007, Deputy Commissioner Roach deposed as follows at paragraph 8:

As Chairman of the Promotions Evaluations Committee which deals with recommendations for promotion of police officers, I saw the Performance Appraisal Report of the Claimant for the year 2003 which was the relevant year in respect of the promotion exercise of which the Claimant complains. According to that Performance Appraisal Report he was entitled to 20 points under the heading Performance Appraisal since the rating was “good”. That Performance Appraisal Report form has mysteriously disappeared and cannot be found. I have never advised the Claimant that he should make every effort to have missing staff reports redone and replaced. Further, in fact, I signed the certificate as Head of Department for that Performance Appraisal Report having read the same.

51. In response, the Claimant deposed that he was never consulted on and had never seen any staff report for the year 2003 that rated his performance as “good”. According to him his staff report for the year 2003 was prepared by Ag. Inspector Bertrand who supervised him at the Traffic and Highway Patrol Branch in Port of Spain where he was stationed for duty for the majority of 2003. According to him, prior to the filing of this case, he had never had access to his personnel file and did not know how his staff report had simply disappeared. He stated that it was a mystery to him as well.

52. The relevant performance appraisal reports were annexed to the affidavit of Cindy Bhagwandeem. The report for the period 1st January, 2003 to the 31st December, 2003. Having been re-done was countersigned by Acting Superintendent Rajendranath Maharaj and certified by reporting officer Jadoonanan Peack (Acting Inspector).
53. Mr. Martineau objected to the reports on the ground that they were manufactured. According to Mr. Martineau, the dates which the Claimant gave concerning the reports while his Attorney had forwarded to the Commission were different to the reports annexed to the Bhagwandeem's affidavit. Further, Mr. Martineau contended that the 2003 report was not signed by Ag. Inspector Bertrand who supervised him at the Traffic and Highway Patrol Branch in 2003, but by one Acting Inspector Peack, without explanation. Further, Mr. Martineau submitted that staff reports signed in 2006 could not be considered for the 2005 decision which the Claimant had alleged. In addition the Court accepts the evidence of Deputy Commission Roach that Sarah Bedasie who was a clerk employed at Police Administration had no authority to ask the Claimant to prepare new staff reports. According to Mr. Roach, only the Director of Human Resources and Mr. Roach were the only persons with the authority to ask officers to prepare staff reports.
54. The Court agrees with the above submissions. In addition the Court finds as Mr. Martineau had contended that the Commission had not at the filing of these proceedings completed its consideration of the Claimant's representations. It therefore could not be contended that the Commission had refused to consider the Claimant's re-done appraisal reports. Accordingly, there had been no breach of natural justice on the part of the Commission.
55. Further, Mr. Ramlogan has submitted that in these circumstances the Claimant was "by passed" without appraisal report for the relevant period. The Court wishes to reiterate its view that the Commission had not concluded its

deliberations concerning the Claimant's promotion. In the circumstances, it cannot be contended that the Claimant was by passed for promotion without his relevant staff report.

56. The Court wishes to make two (2) short observation at this stage. Firstly, it cannot be contended as the Claimant's Attorney has sought to do , that the case of **R v Westminster City Council ex parte Ermakov** [1996] 2 ALL E.R. 302 applied to this case. The Court finds that the principles of Ermakov are not applicable in this case. In any case, there is not a case where the decision maker seeks to change the reasons given for the decision in the decision letter where the matter reaches the Court.

57. Secondly, Mr. Ramlogan has made observations, that in the Commission's letter dated the 5th December, 2006, the Commission referred to "disciplinary concerned", which it appeared were being raised for the first time. The suggestion was that the Claimant knew nothing of disciplinary concerns. Mr. Martineau has rightly submitted that Chapter viii of the Regulations provide the disciplinary procedure for the Police Service Regulations 79 and 30 there are the relevant regulations which deal with the powers of the Commission where a criminal offence has been committed. Criminal proceedings have been instituted against a police officer.

58. In all the circumstances, the Court concludes that there is no unfairness, irrationality or unlawful in the actions of the Commission.

DELAY

59. Having regard to the findings of the Court, it is not necessary for the Court to determine for the issues of delay or misrepresentation. It is the view of this Court however, that judicial review is a discretionary remedy and in the exercise of its discretion the Court can refuse relief on the ground of undue delay.

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60. At the commencement of these proceedings, the Claimant had received all but the copies of his staff reports from 2000 to present and the copies of all documents on his personnel file. By letter dated 7th December, 2006, the Commission had advised him that he should direct his enquiries for those documents to the Police Commissioner.
61. On the 16th November, 2009 the Claimant's personal file (2 volumes) were produced in Court by Attorneys for the Police Commissioner. The Claimant was allowed full access to his file and was allowed to photograph the document.
62. In the circumstances, it is not necessary for the Court to grant any relief and the Freedom of Information Act.

COSTS:

63. On the issue of costs, Mr. Ramlogan has submitted that the Defendants had breached the pre-action protocol and that an award of costs should be made against them, even if the Claimant were unsuccessful in these proceedings.
64. On the other hand, Mr. Martineau has argued that (i) the Attorney's letters of the 6th October, 2006 and the 27th November, 2006 did not comply with the pre-action protocol for administrative orders and (ii) in any case, the Commission's letter of the 5th December, 2006 was a proper response. The Court agrees with Mr. Martineau's second submissions. I find that in the context of the several letters which passed between the parties that the Commission acted properly to respond as it did.

65. On the 26th November, 2007, the Court fixed a costs budget of \$125,000. In all the circumstances, having regard to the budget, the issues on which the parties have been successful or not, the Court will order that the Claimant do pay to the Defendants costs in the sum of \$100,000.00.

ORDER:

IT IS HEREBY ORDERED:

- (i) that the Claimant's claim be dismissed.
- (ii) that the Claimant do pay to the Defendants costs in the sum of \$100,000.00.

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Maureen Rajnauth-Lee
Judge