

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**Civil Appeal No S-247/2015
CV 2014-3005**

BETWEEN

COMMISSIONER OF POLICE

Appellant

AND

**BERTRAND ALLEYNE
AND OTHERS**

Respondents

**Panel: P. Jamadar JA
N. Bereaux JA
G. Smith JA**

APPEARANCES:

**Mr. N. Byam instructed by Mr. B. James
for the Appellant**

**Mr. R. L. Maharaj SC, Mr. K. Walesby,
Mr. R. Bissessar instructed by Mr. A. Ramroop
for the Respondents**

DATE DELIVERED: 31st May, 2017

I have read the judgment of Smith JA and agree with it.

.....
P. Jamadar
Justice of Appeal

I too, agree.

.....
N. Bereaux
Justice of Appeal

JUDGMENT

A. INTRODUCTION

1. The Respondents held the rank of Sergeant in the Trinidad and Tobago Police Service before the commencement of this action. They brought an application for judicial review to challenge the Appellant's failure to promote them to the rank of Inspector.

2. The trial judge recognized the merits of the Respondents' case on many far reaching grounds and granted them an order compelling the Appellant, Commissioner of Police (COP) to consider and if necessary, promote the Appellants to the rank of Inspector with retroactive effect. The trial judge also ordered that the COP pay the Respondent's damages to be assessed by a Master in Chambers and granted the Appellants the costs of the action.

3. I also recognize the merits of the Respondents' claim and grant an order for the COP to consider promoting such of the Respondents as may be possible.¹ I also order an enquiry into and

¹ See paragraphs 24-28 below

assessment of the damages of each Respondent according to his status as explained in this judgment.

4. A proper grasp of the background of this case is essential to understand my analysis and conclusions. These matters can dramatically be described as a series of unfortunate events.

For the sake of convenience I should set out the series of unfortunate events under 5 sub headings as follows:-

- a) The first set of promotions;
- b) The decision in the **Lucas** case;
- c) The revised Order of Merit List and the second set of promotions;
- d) The decision in the **Sherma James** case; and
- e) The current action.

B. THE BACKGROUND

a) The First Set of Promotions

5. The Police Service is divided into 2 divisions. The First Division comprises officers above the rank of Inspector. The Second Division comprises officers from the rank of Inspector and below; namely the following ranks:-

- Inspector
- Sergeant
- Corporal
- Constable

6. The COP is responsible for all promotions in the Second Division. In performing this function, he is guided by the provision of the Police Service Act (the Act) and the Regulations made under the Act. Specifically by **Section 16** of the Act, the COP shall take into account the recommendations of the Promotions Advisory Board (PAB) established under the Act.

In relation to promotions of candidates from the rank of Sergeant to Insepctor, the Act and Regulations specify that a candidate must:-

- (i) Pass a qualifying examination for promotion;

- (ii) Be recommended for promotion by the Officer in charge of the Division;
- (iii) Receive 50 points or more at a qualifying interview before the PAB;
- (iv) Be interviewed by the PAB and receive 60 or more points at the interview; and
- (v) Be placed on an Order of Merit list as determined by the PAB.

7. The ranking on the Order of Merit List is based on a points system compiled from the following criteria:-

- | | |
|---------------------------|----------------------------|
| (i) Performance appraisal | 40 points (Maximum) |
| (ii) Interview | 25 points (Maximum) |
| (iii) Examination mark | <u>35</u> points (Maximum) |
| | 100 points (Maximum) |

8. The Appellant deposed that even though the ultimate responsibility for promotion from Sergeant to Inspector rests with the COP, there is a settled practice that the COP makes promotions in accordance with a Sergeant's rank on the Order of Merit List.

9. Upon promotion from Sergeant to Inspector, an officer receives enhanced emoluments. He also becomes eligible to be promoted into the First Division.

10. On the 19th December, 2012 an Order of Merit List was published. That list had the names of 317 Sergeants allegedly ranked according to their scores from the criteria mentioned at paragraph 7 above.

Based on vacancies within the Police Service at that time, the first 51 persons on the list were promoted to the rank of inspector with effect from 19th December, 2012.

b) *The decision in the **Lucas** case*

11. Soon after the 51 promotions, some 32 Sergeants who had not been promoted brought an application for judicial review (the **Lucas** case).² This application challenged the process used to promote the 51 Sergeants. In the Lucas case, it was shown that no examination had been held or designed for the 35 point "examination mark" criteria for promotions. The PAB had substituted a points system that was based on a Sergeant's grades in English at CXC/GCE levels or a Police

² *Wendell Lucas v Commissioner of Police and Others* CV2013-00355

English exam. Additionally, a candidate who had obtained a recognized University level degree in Law would be given the full 35 points. While he deprecated the failure of the PAB to set and hold the Promotions examination, the trial judge, Boodoosingh J, found that the candidates had been entitled to a legitimate expectation that they would all receive the full 35 points for the “examination mark” criteria. This expectation arose from representations made to them by the chairman of the PAB. Boodoosingh J declared that it was unreasonable and unfair not to award the full 35 points to all candidates for promotion and he directed the PAB to compile a new “Order of Merit List” to reflect the new rankings with the scores adjusted accordingly. Importantly, Boodoosingh J refused (i) to void or set aside the prior promotion of the 51 Sergeants and (ii) to grant any damages to the 32 applicants.

c) The Revised Order of Merit List and the Second Set of Promotions

12. The COP accepted the decision of Boodoosingh J in the **Lucas** case. In fulfillment of the trial judge’s directions, he compiled a new “Order of Merit” list.

At the hearing before us, an issue arose as to this so called “Order of Merit List”. The Court pointed out that a true Order of Merit list is only supposed to reflect the sequential priority of candidates who are eligible for promotion. Once a candidate has been promoted, his name ought not to be included on an Order of Merit list.

Pursuant to the order of Boodoosingh J in the **Lucas** case, a revised Order of Merit list was published on 20th December 2013. However this “revised Order of Merit” list contained the names of the 51 Sergeants who had already been promoted 1 year earlier. As such it was not a true or proper Order of Merit list but a list prepared specifically pursuant to the Order of Boodoosingh J in the **Lucas** case. Since the trial judge had specifically refused to annul the prior promotion of the 51 Sergeants, this list was really prepared to assist in the future promotions of Sergeants. Unfortunately, by including the 51 previously promoted persons on the list, it gave the impression that some of these 51 promoted persons were somehow lower ranked than others who had not been promoted. As I indicated earlier, since the 51 promoted persons were no longer “eligible” for promotion, their names were not properly on the Order of Merit list.

No issue was raised about this revised list but I find it necessary to state that even though it is referred to as a “revised Order of Merit” list; it is really a comparative list of rankings before 19th December 2012 (i.e before the 1st set of promotions of the 51 Sergeants).

As a result of this revised/comparative Order of Merit list, 27 Sergeants were promoted to the rank of Inspector. A notification of these promotions was published on 24th December 2013. The promotions took effect from different dates between 21st December 2012 and 26th December 2013. These promotions were all dated after the date of the earlier promotions of the 51 Sergeants (viz 19th December 2012).

Subsequent to this a further revised/comparative Order of Merit list was published on 14th May 2014, but it contained basically the same information as the first revised/comparative Order of Merit list of 24th December 2013. Also, 2 or 3 other Sergeants got promotions after successfully launching judicial review applications. In all, some 80 or 81 Sergeants had now been promoted to the rank of Inspector.

d) *The Decision in the Sherma James case*

13. On April 5th 2015, Boodoosingh J delivered a joint decision in 5 matters where 5 other Sergeants brought a similar complaint to those in the **Lucas** case, namely, the **Sherma James** case. In the **Sherma James** case,³ Boodoosingh J recognized that the complaints of these Sergeants arose from the same factual matrix as the earlier **Lucas** case which he had decided. He also made mention of the revised Order of Merit list and the 27 promotions. Importantly;-

i) He accepted the evidence of the COP that he was making promotions in accordance with the revised Order of Merit List but only as and when a vacancy arose; to quote from the judgment:

“16. What the Commissioner has done since then is to systematically promote the officers as and when vacancies arise in accordance with the Revised Merit Lists of December 2013/May 2014.”

ii) He also recognized that all the previous promotions could not be invalidated.

iii) He did not award damages for loss of a chance to gain promotion.

³ CV2013-01087, CV201301089, CV2013-01092, CV2013-01111, CV2013-02668

The claimants in the Sherma James case could not prove that they would in any event have been promoted ahead of the 51 original Sergeants. They were all ranked lower than the 51 on all the Order of Merit lists. Further, to grant any relief to the Sergeants in the Sherma James case would create inequities with respect to the Sergeants in the Lucas case. Accordingly they were given no relief except some partial relief for costs incurred after 12th June 2014.

Interestingly, Boodoosingh J recognized that there was no perfect solution to this unfortunate series of events but he wanted to achieve some consistency. He noted that sufficient time had passed to bring some balance to seniority issues and he hoped that he provided enough clarity *“to bring closure to the issue even though the claimants have not gotten exactly what they would have wanted from their claims.”*⁴

14. Unfortunately, this was not the end of the matter.

e) *The Current Action*

15. In this current action, 32 other Sergeants who had not been promoted to the rank of Inspector, have challenged the COP’s failure to promote them. The challenge arises out of the same factual background as the **Lucas** case and the **Sherma James** case. The current action was commenced after the decision in the **Lucas** case and after the filing of the **Sherma James** case. It was determined after the decisions in both the **Lucas** and **Sherma James** cases.

Unfortunately, for some unexplained reason, this matter was not docketed to Boodoosingh J.

16. Some of the Sergeants in the current action were ranked higher than some of the original 51 Sergeants who were promoted, but they do not challenge the validity of the earlier promotions.

17. After leave was granted to file the current action, but before the decision in the **Sherma James** case (4th April 2015), 4 of the Sergeants in the current action were promoted to the rank of Inspector.

⁴ Ibid at paragraph 33

18. These 32 applicants challenged the failure of the COP to promote them on a plethora of grounds. They sought multiple declarations; promotion retroactive to 19th December 2012 (the date of the promotion of the original 51 Sergeants); damages and costs. Once again, the court was faced with the almost identical factual background as in the **Lucas** and **Sherma James** cases.

19. Unfortunately, in this action the COP did not file any affidavits or submissions despite the numerous opportunities granted to him by the new trial judge. Counsel for the COP, openly admitted that this was due to his department's negligence.

The trial judge therefore treated the case as undefended and on 28th September 2015 erroneously granted all the declarations claimed by the 32 Sergeants. These declarations were far more extensive than those granted in the **Lucas** case. Further, unlike in the **Lucas** case, the trial judge also ordered the COP to consider promoting these Sergeants retroactively to 19th December 2012 (the date of the promotion of the original 51 Sergeants) and granted an order for damages to be assessed.

20. Even though both the **Lucas** and **Sherma James** cases had been decided before, and were based on similar factual backgrounds, there were now multiple actions with similar factual backgrounds, before different judges, yielding differing and to some extent, inconsistent results. These decisions could also have unintended implications for and effects on the parties in the **Lucas** and **Sherma James** matters.

21. This is not to say that the current applicants are not entitled to relief or that the neglect of the attorneys for the COP should go without consequence. But this multiplicity of actions by the Sergeants has now had the undesired effect of creating inconsistencies contrary to Boodoosingh J's intentions.

C. ANALYSIS

22. A good starting point for my analysis is the extensive orders of the trial judge in the current action. These were:

1. (a) An Order of mandamus “directing the COP to do all that is necessary to consider and, if necessary, to promote the Claimants (Respondents) to the rank of inspector with effect from 19th December 2012” (the date of the promotion of the first 51 Sergeants).

Declarations that the failure or refusal of the COP to promote the Respondents with effect from 19th December 2012 was:

1. (b) unlawful, illegal and of no effect.

1. (c) Contrary to their rights to (i) enjoyment of property.

(ii) protection of the law.

(iii) equality of treatment.

1. (d)(i) in breach of the principles of natural justice and procedural fairness.

(ii) Deprived the Respondents of their legitimate expectation.

(iii) Failed to observe the conditions and procedures as required by law.

(iv) Were a capricious and unfair use of the powers of the COP.

(v) Actions with improper purposes and irrelevant considerations.

(vi) Unreasonable, capricious, irrational actions and or actions in bad faith.

2. An order for damages to be paid to the Respondents

3. An order for the Respondents’ costs fit for senior and 2 junior counsel.

23. I find that most of these orders were unwarranted and/or too extensive given the factual background to this current action.

Instead I find that the following are the proper orders to be made in this case :-

1. That the COP is to consider, and if necessary, promote those Respondents/Claimants who are so entitled, to the rank of Inspector in accordance with:

(i) The relative ranking of any person so entitled under the revised/comparative Order of Merit list published on the 14th of May 2014.

(ii) Vacancies as they arise in the rank of Inspector.

2. That there be an inquiry as to any damages that any of the Respondents/Claimants is entitled to.

3. An order for the payment of such damages pursuant to the Inquiry at 2 above.

The Respondents Are To Be Considered For Promotion

24. In analyzing this issue of the promotions of these Respondents; 2 points must be mentioned at this stage.

25. Firstly, the Respondents do not contest the validity of the more than 85 promotions made to date. We are aware of 51 promotions made pursuant to the first Order of Merit list; 27 more following the **Lucas** case; 2 or 3 following other specific cases; 4 more from these Respondents.

There may even be more for, as was acknowledged in the **Sherma James** case, the COP has been making promotions in accordance with the revised Order of Merit list since the **Lucas** case.

The Respondent has expressly indicated that they were not challenging the original 51 promotions. While they were silent as to the rest, they have not asked for any of those promotions to be nullified, and rightly so. It would be highly irregular to reconsider promotions that have been made without at least giving notice to or joining those persons who were already promoted since their property rights and seniority would be affected without hearing from them. Further, any order that would necessarily and adversely affect such a large number of serving Inspectors could be detrimental to good administration.

26. Secondly, the Public Service is not an amorphous body with the capacity to absorb employees at will. Promotions and appointments can only be made where there is a vacancy. It would be an ultra vires act to promote or appoint a person to a post where no vacancy exists.

27. As stated before, in the **Sherma James** case, Boodoosingh J stated that the COP had been systematically promoting the Sergeants to the rank of Inspector “*as and when vacancies arise in accordance with the Revised Merit Lists of December 2013/May 2014.*”⁵

28. Therefore as at April 2015 (the date of the **Sherma James** Decision) there was a presumption that the COP had been acting legally and with propriety in respect of promotions.

However, because of the failure of the COP to file evidence and submissions before the high court in this matter, there was no direct proof that he has acted with propriety since that date. Therefore, an order that he at least considers these applicants for promotion is appropriate.

⁵ See paragraph 13(i) above

That is not to say that there is proof of or a presumption that the COP is acting improperly, but his failure to partake in the proceedings in the High Court makes it difficult to refuse this relief to the applicants.

The Order for Retrospective Promotions is Not Appropriate

29. The trial judge ordered the COP “*to consider, and if necessary, to promote the Claimants (Respondents) to the rank of Inspector with effect from 19th December 2012.*”(my emphasis)

This order is not appropriate here for the following 3 reasons:

- a) It can and in some cases, will improperly affect the seniority of the other promoted Sergeants without giving them an opportunity to be heard;
- b) It would be contrary to good administration; and
- c) In some cases it may be ultra vires.

a) *Seniority Issues*

30. The original promotion of the 51 Sergeants to the rank of Inspector was made on 19th December 2012. This is more than 4 years ago. Since that time those 51 Inspectors have performed the substantive functions of Inspector and may even have acted in or been promoted to higher posts. To promote any of these 32 applicants retroactively to the same date as the original 51 will at least put them on par with persons who have been performing at higher levels than them for a substantial period of time. A fortiori, where some of these current 32 applicants may now have to be ranked higher in the post of Inspector than some of the original 51 due to the new rankings in the “revised/comparative Order of Merit List”; all this without giving a hearing to those who may be affected by the change in seniority the opportunity to state their case and/or to resist this new change in seniority.

31. The situation is even more acute with respect to the 33 or more persons who have been promoted since the **Lucas** case. None of these later promotions pre-date the first promotion of the 51 Sergeants. Further, according to the findings of Boodoosingh J in the **Sherma James** case, these 33 or more later promotions have been made sequentially in keeping with the revised Order of Merit list.

Some of these 33 persons who were promoted after the original 51 were actually senior to the original 51 according to the revised/comparative Order of Merit list. However, none of those 33 or more promoted Sergeants got seniority over the 51 original promotions. If these current applicants are given promotions retroactive to 19th December 2012, they may wrongly skip over persons who should be their seniors according to the revised/comparative Order of Merit list. The 33 or more promoted persons may now be subjected to the further inequity of losing seniority twice over, and without being given an opportunity to be heard.

b) *The Order for Retroactive Promotion is Contrary to Good Administration*

32. The order for retroactive promotion to 19th December 2012 will create further serious inequities. In fact any order for retroactive promotion will create disquiet among those who have previously been promoted and who will thereby lose seniority.

It cannot be in the interest of good administration to have a retroactive order that will itself create inequities and disquiet among a substantial number of Police Inspectors who, through no fault of their own, have been validly promoted and who have had no chance to put their cases forward.

While the court does not condone the original error, that error ought not to be used as a basis for creating inequity, or disquiet in the rest of the service.

Further, the piecemeal or fractioned nature of the litigation exacerbates the situation. All the Sergeants and Inspectors are represented by the same Union and it is difficult to understand why litigation is being brought by different persons and groups at different times when the issues are the same or very similar; and also when different orders or retroactive orders will affect all.

This state of confusion and inconsistency that a retroactive promotion will create is contrary to good administration.

c) *Retroactivity May Be Ultra Vires in Some Cases*

33. **Section 42** of the Interpretation Act Ch. 3:01 provides that “*An appointment....may be made to have retroactive effect from the date upon which the person appointed in fact first performed any of the functions of his appointment.*”

In **AG v Ravi Jaipaul** Civ App 35 of 2011, the Court of Appeal concluded that it would be ultra vires, and a court cannot lawfully validate an appointment to a date prior to when the litigant first performed the duties of that office.

34. There is no evidence that any of these Respondents have acted as inspectors since 19th December 2012 (the date of the 51 original promotions). In fact, while there is a blanket statement that some of the applicants were acting in the post of Inspector, there is no indication as to when any specific Respondent acted as an Inspector and for how long such a person so acted. The order of the trial judge, as framed, would permit a retroactive appointment to December 19th 2012 of anyone who is now entitled to a promotion. This may quite possibly accommodate an ultra vires, retroactive promotion of persons who had never acted in the post of Inspector on or before 19th December 2012. It may even entitle a person who acted very infrequently in the role of Inspector to such a retroactive promotion ahead of some of the more than 81 Sergeants who have already been promoted and would have performed the functions of Inspector continuously.

Orders 1(b) (c) and d) of The Trial Judge Are Unwarranted

35. As a prelude to this discussion I need to refer to certain evidential issues that both Counsel relied on. A lot of their submissions were unnecessarily focused on these evidential issues. But they are not as far reaching as either side submitted.

36. In summary, the Respondents submitted that the failure of the COP to file affidavits in opposition to their case meant that there was no evidence to contradict anything said by the Respondent. The trial judge cannot therefore be faulted for treating the case as undefended and granting basically all the reliefs that the Respondents claimed.

37. The COP submitted that he need not have any filed any affidavits in response because the Respondents failed to discharge the required onus of proving the essential elements of their case, such as, the existence of vacancies for promotion and the date that any of the Respondents acted as an Inspector so as to enable retroactive promotion.

38. As my prior analysis has shown, there was enough substratum of undisputed facts to show that the case of the current 32 Respondents arose out of a similar background to other previous cases. The findings in those cases are matters of record and a court can take notice of those findings. This is especially true of the findings of Boodoosingh J in the **Lucas** case and the **Sherma James** case, the forerunners to this current case. Specifically, there were the important findings from the **Sherma James** case that the COP had been systematically promoting officers as and when vacancies arose and in accordance with the revised/comparative Order of Merit list. In other words the COP has been scrupulously complying with the order of Boodoosingh J in the **Lucas** case.

The trial judge erred by not taking these facts into account. She could not properly “bury her head in the sand” and come to conclusions, which on the undisputable factual background were unfounded and even ultra vires.

39. Therefore, as stated before, there was no justification for finding that the Respondents should be considered for promotion retroactively to 19th December 2012 (See paragraphs 29-34 above).

Nor for that matter was any alleged failure to promote the Respondents with effect from 19th December 2012 shown to be unlawful, illegal and of no effect (See Order 1(b)).

In fact, the COP had been complying systematically with the order of Boodoosingh J in the **Lucas** case by promoting Sergeants to the rank of Inspector in accordance with the revised/comparative Order of Merit list and only when a vacancy arose; in these circumstances he had been acting lawfully and in accordance with a prior court order from the **Lucas** case at least up to April 2015. There was no proof that the COP was deviating from the revised/comparative Order of Merit list or making appointments where there were no vacancies or disregarding the order of Boodoosingh J or acting unlawfully in any other way. Therefore an order that his actions were unlawful, illegal and of no effect (Order 1(b)) was unwarranted.

40. Similarly, criticisms can be made of the trial judge’s orders in 1(c) (i), (ii), (iii) namely that the continuing failure and refusal to promote the Respondents with effect from 19th December 2012 was contrary to the Respondents’ constitutional rights.

Counsel for the Respondents withdrew the submission that there was a breach of the right to enjoyment of property. (See Order 1(c) (i)).

41. With respect to Order 1(c) (ii), a declaration that the failure to promote the Respondents retroactively to 19th December 2012 is a breach of their rights to the protection of the law contrary to **Section 4(b)** of the Constitution; there was no discussion of this breach in the judgment. Neither did Counsel address this specific breach in their submissions. Indeed it is difficult to grasp how this right was breached on the present facts, especially since many (if not all) of the affected persons have been able to challenge the alleged failure to promote them.

42. At the hearing before us, Counsel for the Respondent urged that his most substantial complaint was that there was a breach of the right to equality of treatment as guaranteed by **Section 4(d)** of the Constitution (See Order 1(c) (iii)). This argument is unfounded on the facts as it proceeds upon a faulty premise. The Respondents did not challenge the validity of any promotions that were made. The argument is advanced upon a presumption of entitlement to promotion that stems from the revised/comparative Order of Merit list. As stated before, this later revised/comparative Order of Merit list was not a true Order of Merit list. The names of persons already promoted should not properly be reflected on an existing Order of Merit list. This revised/comparative Order of Merit list was prepared specifically as a result of the Order of Boodoosingh J in the **Lucas** case. It was for the purpose of future promotions of persons who had not already been promoted and never for the purpose of affecting promotions already made.⁶ That list could not properly grant parity to persons who had already been promoted. Therefore, to use the names on that list of previously promoted Sergeants who were now in the post of Inspector as comparators to persons who were in the post of Sergeant is a flawed process.

43. Further, at the time of the promotion of the original 51 Sergeants, there was no breach of the equality provisions. These 51 Sergeants at the time were ranked higher than all the others because of their relative scores on the grading scale and were therefore, at the time, properly promoted.

It was only after the declaration in the **Lucas** case that the scores were overturned. But by then, the 51 Sergeants had become Inspectors for some time and were no longer proper comparators to the other Sergeants or, a fortiori, the Respondents.

⁶ See paragraph 13 above

There has been no proof that since the new scoring and the creation of revised/comparative Order of Merit list a Sergeant with a lower score has been promoted ahead of another Sergeant with a better score so as to invoke any argument of inequality of treatment.

In any event, there is no proof that the COP had been acting contrary to the Court order in the **Lucas** case. In fact, based on the findings in the **Sherma James** case, one may presume that he has attempted to scrupulously comply with the court order in the **Lucas** case. If there has been any unequal treatment, it stems from the COP's proper obedience to an unchallenged court order and not from the independent or unsolicited acts of the COP. The COP cannot be faulted for complying with a court order that he must obey. His actions cannot properly form the basis of a case for unequal treatment.

44. Similarly, the factual background negates any of the findings at Order 1(d) which deal with the continuing failure of the COP to promote the Respondents retroactively to 19th December 2012.

45. *1 (d) (i) Breach of natural justice or procedural fairness.*

This is based on an unwarranted assumption that the COP unfairly failed or refused to promote the Respondents and/or that he has not been acting in accordance with the revised/comparative Order of Merit list. As stated before this is not the case here.

46. *1 (d) (ii) Deprivation of a legitimate expectation.*

Again this is a misconceived finding. The **Lucas** case established a breach of the expectation to be given a perfect score of 35 points for the examination component of the ranking scores due to the failure to set exams. The COP accepted the findings of the court and gave effect to this expectation by revising the scores, publishing a revised/comparative Order of Merit list, and making promotions in accordance with this list. There has been no continuing breach of this expectation. Further, there is no challenge to the validity of any promotions to date.

Given these facts there is now no proven breach of the expectation to be promoted according to the revised / comparative Order of Merit list. The COP is acting in accordance with the legitimate expectation of the Sergeants and necessarily too, of the Respondents as dictated by the court.

47. *I (d) (iii) Breach of conditions and/or procedures required by law.*

As stated before the COP had been complying with the **Lucas** decision and there is no proven breach of any condition or procedure required by law.

48. *I(d) (iv), (v), (vi) Allegations of matters like bad faith, conspicuous unfairness; unreasonable or even capricious behavior are unfounded.*

The COP had been scrupulously complying with the directions of Boodoosingh J in the **Lucas** case. There is no proof of any deviation from that process in respect of these Respondents. If the COP were to promote these Respondents from 19th December 2012, and without regard to the revised/comparative Order of Merit list, he would then be acting unfairly, or capriciously and abusing his powers. His desire to follow the unchallenged order of the court cannot be an abuse of process or unfair or capricious action etc.

Damages

49. The reliefs the trial judge granted at paragraphs 1(a)-(d) of her order dealt with the failure of the COP to promote the Respondents retroactively to 19th December 2012. The Respondents also claimed and were awarded damages by the trial judge. I agree with that decision but I find that it is necessary to indicate the bases of my decision for any assessment of damages that may follow.

50. **Section 8(4)** of the Judicial Review Act provides that,

“On an application for judicial review, the court may award damages to the applicant if-

(a) The applicant included in the application a claim for damages arising from any matter to which the application relates; and

(b) The court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making the application, the applicant could have been awarded damages.”

51. In the present case there is no issue with **Section 8(4)(a)** because the Respondents made a claim for damages in their application.

52. I am satisfied that the requirements of **Section 8(4)(b)** above have been met for some of the Respondents since at the time of the making of the application some Respondents could have been awarded damages.

This is because the undisputed facts are that the COP had made an error by not awarding the full 35 points for the examination component of the ranking score of the Sergeants. The COP accepted the findings of Boodoosingh J in the **Lucas** case; namely that this error caused a breach of the legitimate expectations of the Sergeants who were eligible for promotion to the rank of Inspector. As a result of that breach some of these Sergeants had not been promoted when they were so entitled and as a result have lost inter alia, the enhanced salary that they would have otherwise have received. Those who could prove this loss would be entitled to damages.

53. A point to note is that in the **Lucas** case, Boodoosingh J felt that the applicants were not entitled to an award of damages since their claim was too speculative. Promotions are a matter for the COP and one could not be certain whether those Sergeants would have been promoted. At the time of that decision there were similar findings by the Court of Appeal in other cases that such losses were too speculative. However, the Privy Council has reversed those findings and has decided that even in cases like these, an award of damages can be made on the basis of a loss of a chance.⁷

Further, in this present case, the loss is not as speculative for the following 2 reasons.

- (i) Since the **Lucas** case the revised/comparative Order of Merit list now makes it possible to know who was entitled to be promoted according to the comparative rankings.
- (ii) On the uncontested evidence of the Respondents, there is an established practice that promotions are made strictly on the rankings in the Order of Merit list.

Even though I have stated that this revised Order of Merit list is not a true Order of Merit list but really a comparative one, this “flaw” does not affect the claim for damages. In fact, because it is a comparative Order of Merit list, one can now readily compare relative rankings and ascertain when a promotion ought to have been made and pursue a claim for damages from such time.

54. However, only some of these applicants will be entitled to damages; namely:

⁷ See *Alleyne and Ors v The Attorney General of Trinidad and Tobago* PCA No 0052 and *Sam Maharaj v The Prime Minister of Trinidad and Tobago* PCA No 0056 of 2015

(a) Those who can prove that they are ranked higher than the original 51 promoted Sergeants on the revised/ comparative Order of Merit list.

(b) Those who can prove that contrary to the findings of Boodoosingh J in the **Sherma James** case, they are ranked higher than any of the other Sergeants who were promoted after the original 51 (all other facts being equal).

Since these categories are not readily ascertainable particularly category (b), there needs to first be an inquiry as to damages, to ascertain who of these 32 applicants are entitled to damages.

55. Further, in assessing any damages payable, the following three points should be noted.

56. First, this was a case where an administrative error resulted in the loss and the COP has been making genuine attempts to rectify the error. Hence this is a case for compensatory damages. The evidence does not establish a case for vindicatory damages.

57. Second, with respect to those Respondents who were not ranked above the original 51 promotions according to the revised/comparative Order of Merit list, it may be unlikely that they can claim for damages. This is because there has been a finding in the **Sherma James** case that the COP has been making promotions sequentially when vacancies have arisen. If the enquiry proves this to be untrue then such aggrieved persons may have claims for damages.

58. Third, the COP submitted that he cannot be legally liable to pay damages to these Respondents. The Attorney General would have to be a party to the proceedings to enable the Respondents to access the public purse. This, however, is not an insurmountable problem. In the case of **Vinode Jhagroo v The Teaching Service Commission**,⁸ the Privy Council considered a similar argument and stated that the Attorney General can be joined on the assessment of damages with directions for pleadings on damages. If it becomes necessary, the Respondents can make such an application on the inquiry for damages and, following the **Vinode Jhagroo** case, there is no reason why the Attorney General ought not to be joined as a party for this purpose. A fortiori, in this case where the COP is being represented by the Chief State Solicitor and the Solicitor General in this litigation, both of whom fall under the office of the Attorney General.

⁸ 2002 UKPC 63

59. Though the loss of seniority cannot now be corrected, the award of damages ought to bring some compensation, though not perfect, for the fallout from the original error. Further, we hope that the COP and those responsible have been aiming to correct the original error of not having the requisite promotion examinations and that in keeping with our observations, it may now be time for the COP to prepare a proper Order of Merit list which excludes the names of those persons who have already been promoted.

D. CONCLUSION

60. While I agree with the core findings of the trial judge, I shall allow the appeal in part so as to retract only the unwarranted orders of the trial judge.

I would therefore set aside the orders of the trial judge and order as follows:

1. That the COP is to consider, and if necessary, promote those Respondents/Claimants who are so entitled, to the rank of Inspector in accordance with:
 - (i) The relative ranking of any person so entitled under the revised/comparative Order of Merit list published on the 14th of May 2014.
 - (ii) Vacancies as they arise in the rank of Inspector.
2. That there be an inquiry as to any damages that any of the Respondents/Claimants is entitled to.
3. An order for the payment of such damages pursuant to the Inquiry at 2 above.

We will hear the parties on the question of costs.

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G. Smith
Justice of Appeal