THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 143 OF 2006

H.C.A. No. 2727 of 2004

BETWEEN

POLICE SERVICE COMMISSION

APPELLANT

AND

DENNIS GRAHAM

RESPONDENT

CIVIL APPEAL No. 8 OF 2008

DENNIS GRAHAM

APPELLANT

AND

POLICE SERVICE COMMISSION
THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENTS

APPEARANCES: Mr. A. Ramlogan for Dennis Graham
Mr. F. Hosein, S.C, Mr I. Roach, Ms. M. Ramroop and
Ms. A. Panchu for the Police Service Commission
Mr. N. Byam for the Attorney General

PANEL: A. Mendonça, J.A.
P. Jamadar, J.A.
N. Bereaux, J.A.

DATE OF DELIVERY: March 26th, 2010

JUDGMENT

Delivered by A Mendonça, J.A.

1. On October 26th, 2004 Dennis Graham (Graham) pursuant to leave granted on October 21st, 2004 applied for judicial review of a decision of the Police Service Commission (the Commission) made in 2004 to promote him to the post of Assistant Commissioner of Police. His complaint related to the effective date of the promotion. On November 14th, 2006, on an application by Graham the Judge granted leave to amend the judicial review proceedings to claim relief in respect of a decision made by the Commission in 1997 whereby it declined to promote him to the rank of Superintendent of Police. The Commission filed an appeal from that order. The Judge proceeded to hear the judicial review application and in respect of the 1997 decision made certain orders including an order for the payment of damages to Graham. He has appealed that order contending that the award of damages is too low. There are therefore two appeals before this Court; one is the Commission's appeal from the order granting leave to amend and the other is Graham's appeal against the award of damages. To put the appeals in proper perspective it is necessary to set out the relevant factual background.

2. Graham joined the Police Service in 1966 and was promoted through the ranks. In 1991 he held the rank of Assistant Superintendent.

3. By memorandum dated September 7th, 1993 it was brought to the attention of the Commission that Graham was facing a criminal charge of indecent assault. As a consequence the Commission interdicted Graham on three quarter salary until the charge of indecent assault was determined.

4. The indecent assault charge was dismissed on June 12th, 1995 after a full hearing before a Magistrate. As a consequence of the dismissal of the charge, the Commission lifted the order of interdiction and reinstated Graham as an Assistant Superintendent of Police. He was appointed to act as Superintendent of Police on June 3rd, 1996.

5. At a meeting on January 9th, 1997 the Commission determined that there were vacancies in the rank of Superintendent of Police and decided to promote 13 officers who were recommended for promotion. By February 6th, 1997 the Commission promoted 13 officers to the rank of Superintendent of Police with effect from December 23rd, 1996. Although Graham was one of the officers recommended, the Commission did not promote him. Eleven of the officers who were promoted were in the police service for a shorter period than Graham. In essence they were junior to Graham.

6. Graham felt aggrieved by the promotion of junior officers ahead of him and instructed his attorney at law to write to the Commission to complain that he had been by-passed for promotion. In a letter dated May 12th, 1997, addressed to the Chairman of the Commission, attorney-at-law for Graham complained that he ought to have been promoted to the rank of Superintendent of Police. He drew attention to several matters including the following:

> (a) that Graham became eligible for promotion since June 12th, 1995 when the indecent assault charge against him was dismissed;
>
> (b) that a request had been made of Graham by the Commission for the notes of the evidence of the proceedings relating to the indecent assault charge and that Graham had supplied a copy of the notes of evidence;
>
> (c) that Graham received the highest grades in his staff reports for the previous five years and had always been recommended for promotion.

The attorney concluded the letter as follows:

> *"Based on the above, I am of the respectful opinion that the denial of the promotion of my client to the post of Superintendent of Police is Unconstitutional and illegal in that my client is being discriminated against and not being given equality of treatment by your Commission.*
>
> *In the circumstances, I hereby request that my client be given a promotion to the post of Superintendant of Police whenever the post becomes vacant and that such promotion be made retroactive to the 23rd, December 1996 when he ought to have been appointed to the post."*

7. The Commission replied acknowledging receipt of the letter and indicated that the matter was receiving attention.

8. In June, 1997, while still acting as a Superintendent of Police, Graham became aware that another officer junior to him was promoted to the rank of Superintendant with effect from December 23rd, 1996. His attorney again wrote to the Commission by letter dated August 7th, 1999 indicating that he had been denied promotion to the rank of Superintendent of Police. The attorney requested that Graham be promoted when the next vacancy arose. On October 9th, 1997 the Commissioner replied stating that Graham's "claims for promotion will be considered by the Commission." However in November, 1997 six officers all of whom were junior to Graham were promoted to the rank of Superintendent.

9. This led to another letter from Graham's attorney at law. The letter which was dated January 27th, 1998 was a lengthy letter in which the attorney reiterated his position that Graham was eligible for promotion since the criminal charges were dismissed against him. The attorney again referred to the notes of evidence in the criminal proceedings that his client had been asked to provide. He stated that his client believed that the notes of evidence were considered by the Commission in relation to "any consideration that was given to Graham's promotion." The Commission did not reply to the letter but on July 22nd, 1998 Graham was promoted to the rank of Superintendent of Police with effect from July 16th, 1998 on one year's probation. He was however dissatisfied with the effective date of his promotion, as despite the promotion, he was now junior to those officers who, although initially junior to him, had been promoted ahead of him to the rank of Superintendent. He therefore complained to his superior officers about this. He was told that overtures would be made to the police administration and that he "should have some patience."

10. By letter dated October 8th, 1998 Graham himself wrote to the Commission complaining about the effective date of his promotion. In the letter he indicated that the date of his promotion "in effect allowed 18 junior officers to unfairly gain seniority" over him. He found it difficult to understand how his juniors were promoted ahead of him and were now senior to him. He therefore asked the Commission to reconsider the effective date of his promotion so that his seniority could be preserved. The Commission however did not change the effective date of his promotion and by letter of March 16th, 2000 confirmed Graham's appointment to the rank of Superintendent with effect from July 16th, 1998.

11. Graham was again promoted in 2001, this time to the rank of Senior Superintendent with effect from February 8th, 2001. He was grateful for his promotion but remained of the view that the unfair promotion of junior officers to the post of Superintendent was having "a domino effect" and a long term prejudicial impact on his career. On March 8th, 2002 he wrote to the Commission giving vent to his concerns. He stated that his complaint that junior officers were promoted ahead of him to the rank of Superintendent remained a source of "much grievance" as they now ranked higher than him on the seniority list despite his promotions. He complained that his position on the seniority list gave his colleagues a competitive edge over him in future promotions. He noted therefore that unless the effective date of his promotion to the rank of Superintendent or Senior Superintendent was adjusted he would continue to feel aggrieved. He called on the Commission to deal with the matter so that "justice will prevail." However the Commission did not alter the date of his promotion and confirmed his promotion to the rank of Senior Superintendent with effect from February 8th, 2001.

12. Graham continued to complain. On December 27th, 2002 he wrote to the Commission asking that his seniority be adjusted. The Commission replied by two letters both dated March 16th, 2004 (one of which was replaced by a similar letter dated June 29th, 2004). The position of the Commission as stated in the letters was that:

> (1) It backdated his promotion to the rank of Superintendent of Police from July 15th, 1998 to July 23rd, 1997.
>
> (2) It was unable to backdate the promotion to the office of Senior Superintendent of Police because there was no earlier vacancy to accommodate the backdating of his appointment.
>
> (3) Consideration was to be given to his relative seniority when next promotions to the office of Assistant Commissioner of Police were being considered.

13. On May 25th, 2004 Graham was promoted to the rank of Assistant Commissioner of Police with effect from September 19th, 2003. He however remained of the view that his relative seniority had not improved "so as to rectify the unlawful erosion of same when junior officers were promoted ahead of him to the rank of Superintendent." He made written

representation to the Commission on June 1st, 2004 as a consequence of which, the Commission on June 29th, 2004 backdated the promotion to the rank of Assistant Commissioner of Police to July 15th, 2003. Graham however, remained of the view that the backdating of that promotion failed to rectify "the unlawful erosion of his seniority" that occurred when junior officers were "unlawfully and unfairly" promoted ahead of him. This was detrimental to him as seniority was an important factor in promotions. As a consequence on October 21st, 2004 Graham sought and obtained leave to apply for judicial review in respect of the Commission's decision to backdate his promotion to the rank of Assistant Commissioner of Police with effect from July 15th, 2003. In the judicial review proceedings he sought, inter alia, an order for certiorari to quash the decision, and an order directing the Commission to reconsider the backdating of his promotion to the rank of Assistant Commissioner of Police. He also sought a declaration that he had been treated unfairly and illegally contrary to the principles of natural justice and an award of damages.

14. Although the judicial review proceedings were served on the Commission in or about October 2004, it was not until October 2006 that the Commission filed any evidence. On October 10th, 2006 three affidavits were filed on behalf of the Commission: one affidavit was sworn by Dawn Harding (Harding) then the acting Deputy Director of Personnel Administration, one was sworn by Trevor Paul and the other by Glen Roach who were the then Commissioner of Police and Deputy Commissioner of Police respectively. Counsel for Graham objected to the use of the affidavits on the basis of their lateness. The Judge on November 10th, 2006 ruled that only the affidavit of Harding could be used. The other affidavits of Trevor Paul and Glen Roach were ruled inadmissible.

15. Harding in her affidavit referred to the Commission's decision in 1997 to promote thirteen officers who were junior to Graham to the rank of Superintendent. She stated that Graham was one of the officers recommended for promotion but the decision was taken by the Commission that before it decided whether or not to promote him, it should review the notes of evidence in the proceedings pertaining to the charge of indecent assault.

16. The Commission therefore obtained the notes and decided "having regard to the nature, facts and circumstances of the charge" preferred against Graham it would not

consider him for promotion on that occasion. When representations were made on behalf of Graham by his attorney, Harding indicated that the Commission decided in September, 1997 to consider Graham for promotion when next it was considering filling vacant offices of Superintendent of Police. She stated that:

> *"The Commission ruled that while integrity of character was an essential ingredient in determining one's suitability for promotion, the applicant had nothing adverse on his record."*

17. Harding noted that while the Commission was authorized to appoint an officer to a vacant post, it cannot create a new post. That is the province of Cabinet. According to Harding, the appointment to the ranks of Superintendent of Police and Assistant Commissioner of Police were backdated to the earliest possible date when there was a vacancy in these positions. However, the Commission could not backdate the appointments any further because there were no vacancies in respect of an earlier date. It was therefore not possible to change Graham's appointment to an earlier date without demoting other officers or changing the effective date of their appointments. This according to Harding was "not only an administratively chaotic exercise requiring the demotion [of officers] or alteration of dates of appointment in reverse order, it would open the Commission to an onslaught of legal action." Harding emphasized that the decision to promote several officers who were then junior to Graham to the rank of Superintendent ahead of him was made several years before and to grant relief after "an inordinate period of delay" would not only prejudice the rights of third parties but would be detrimental to good administration.

18. On November 3rd 2006, while the application objecting to the use of the affidavits filed on behalf of the Commission was still pending, Graham filed an application to amend his statement filed pursuant to O. 53 of the Rules of the Supreme Court, 1975, "in the event leave was granted to the Commission to use the affidavit of Harding", to seek redress for the violation of his constitutional right to equality of treatment. Graham sought to amend the relief claimed by adding the following:

> *"(a) a declaration that the continuing refusal and/or omission to promote the Applicant to the position of Superintendent and continuing refusal and/or omission to backdate his seniority to the date of the promotions to the position of Superintendent and subsequent positions has contravened*

his rights to equality of treatment from a public authority in the exercise of its function under section 4 (d) of the Constitution;

(b) Further or alternatively an order that damages (including aggravated and/or exemplary damages) and/or compensation be paid by the State to the Applicant in respect of the said contraventions of the Applicant's fundamental rights."

He also sought to add the following ground on which the amended relief was claimed:

"The established practice, policy and procedure of the [Commission] has been to reserve a vacancy for officers who are entitled to or in line for promotion pending the outcome of their disciplinary or criminal charges. Once such an officer is acquitted, he is reinstated and promoted to the vacant office with retroactive effect. This practice, policy, procedure was not followed in the Applicant's case. He was treated differently to other officers who were similar circumstanced over the years in contravention of his right to equality of treatment from a public authority in the exercise of its functions under Section 4(d) of the Constitution."

19. The effect of the amendment was therefore to seek relief in respect of an alleged contravention of Graham's right to equality of treatment under section 4(d) of the Constitution. The Judge made an order granting Graham leave to amend the proceedings *"de bene esse."* The Court further ordered that the Attorney General be joined as a respondent and a copy of the amended proceedings be served on him. The Judge also gave directions for the filing of affidavits by the Attorney General. However no affidavits were filed.

20. The Judge proceeded to hear the substantive application and in a reserved judgment stated that he was of the view that Graham's "problem" started with his promotion to the rank of Superintendent with effect from July 23rd, 1997. He was satisfied that had it not been for the charge of indecent assault, Graham would have been promoted to the rank of Superintendent with effect from December 23rd, 1996. The Judge was of the view that the Commission was entitled to look at the notes of evidence of the proceedings with respect to the criminal charge and take them into account in deciding whether or not to promote Graham. It was however not entitled to do so without giving Graham the opportunity to be heard. This was not done. Graham was therefore denied his right to natural justice.

21. With respect to the constitutional relief which was introduced by Graham by the amendment the Judge held as follows:

> *"Thirteen officers including the Applicant were qualified for promotion to the office of Superintendent of Police in 1996. Twelve officers were promoted with effect from December 23rd, 1996. The Applicant was not promoted for the reasons stated and which I have found were not justified and unlawful. The Applicant was not therefore, accorded 'the equality of treatment' to which he was entitled."*

22. The Judge accepted the Commission's position that it could not backdate the appointment of Graham to the rank of Superintendent with effect from December 23rd, 1996 or to any date where there was not a vacancy in that particular rank "since to do so would be to open difficulties, all of which could not be foreseen including the very important factor" that the tenure of officers promoted ahead of Graham would be jeopardized. This, the Judge noted would be contrary to good administration. The Judge further added:

> *"The [Commission] to its credit has recognized the merit in the Applicant's representation from time to time and has on two occasions backdated his appointments when the facts were brought to its attention. It feels, however, that its hands are tied by the lack of appropriate vacancies and has been unable to remedy the wrong done to the Applicant."*

23. In the circumstances the Judge directed the Commission to determine, based on the assumption of Graham's promotion to the rank of Superintendent of Police on December 23rd 1996, what his "present rank in office and seniority" would be. Having so determined, such determination shall be taken into account in any decision to be made in the future which involves Graham's seniority. The Judge further awarded Graham damages in the sum of $35,000 for breach of his constitutional right.

24. The orders made by the Judge at the substantive hearing as well as on the interlocutory applications relating to the use of the affidavits filed on behalf of the Commission and the amendment of the proceedings led to several challenges by way of appeal. First the Commission filed an appeal in which it challenged the refusal of the Judge to permit the use of the affidavits of Trevor Paul and Glen Roach and the grant of leave to

amend the proceedings. Secondly Graham appealed from the award of damages contending that it was too low and thirdly the Attorney General in Graham's appeal cross-appealed from the award of damages on the substantive grounds, including, inter alia, that the Judge's findings that the Commission acted in breach of the principle of natural justice when he held that Graham was entitled to be heard before being denied the position of Superintendent of Police and that he was denied his constitutional right to quality of treatment were wrong.

25. Before this Court however, the Commission did not pursue and abandoned the appeal challenging the Judge's order denying the use of the affidavits of Trevor Paul and Glen Roach. Further, the Attorney General withdrew its cross-appeal from the award of damages. This left two appeals before this Court namely; the appeal by the Commission on the amendment and Graham's appeal from the award of damages.

26. I will first refer to the appeal by the Commission from the order granting Graham leave to amend the proceedings.

27. Under O. 53 r. 5(2) of the Rules of the Supreme Court, 1975 the Court may grant leave to an applicant to amend his statement by specifying different or additional grounds or relief. The Court therefore has a discretion whether or not to permit an amendment. The Court of Appeal will only interfere with the exercise of the discretion of the Judge where it is of the view that he is proven to be plainly wrong. The Court will ordinarily review the Judge's reasons to ascertain whether he wrongly directed himself on fact or law and whether the decision exceeds the generous ambit within which reasonable disagreement is possible and is in fact plainly wrong. In this case however there are no reasons for the Judge's decision on the amendment. We therefore do not know on what basis he exercised his discretion. In such a case the Court of Appeal is entitled to look at the matter afresh and form its own opinion as to whether the amendment should have been granted **(**see **Inniss v The Attorney General** (2008) UK PC42 and Civ. App. 154 of 2006 **Romauld James v The Attorney General).**

28. Counsel for the Commission made two broad submissions. He submitted that the application to amend should be treated as if it were a new application for leave to apply for

judicial review. Graham therefore needed to satisfy all the matters that an applicant for judicial review would need to. In the context of this case therefore Graham would have to satisfy the Court that: a) that the application was made promptly within section 11 of the Judicial Review Act and b) at the time of the amendment he had an arguable case. Counsel submitted that the application in this matter was not made promptly and there was no good reason to extend the time for the making of the application and in any event there was no arguable case. Secondly Counsel submitted that in any event the application to amend the claim for constitutional relief was an abuse of process.

29. With respect to Counsel's first submission it has to be emphasized that when leave was originally granted to Graham in October, 2004 it was to challenge the Commission's decision made in 2004 with respect to the date of his promotion to the office of Assistant Commissioner of Police. Although the amendment is not felicitously worded, it is common ground that what Graham sought to do by the amendment was to challenge the decision made by the Commission in 1997 when it declined to promote him to the rank of Superintendent of Police. The amendment therefore sought to challenge a completely different decision than what Graham was seeking to have judicially reviewed by the proceedings as originally commenced. In such circumstances the application to amend should be approached as if it had been an application for leave to apply for judicial review (see **R v Institute of Chartered Accountants, ex parte Bruce** October 22nd, 1986, unreported, and **Fan Kin Nang and Yau Lai Man v Commissioner of Inland 2009 Revenue** [2009] HKCU 1866**).**

30. In an application for leave to apply for judicial review the applicant must demonstrate that there is an arguable case and that grounds for seeking judicial review exist. For leave to amend to have been properly granted therefore, Graham would have had to have demonstrated that he had an arguable case. I also agree with Counsel for the Commission that in the context of this case given the lateness of the application he would also need to have satisfied section 11 of the Judicial Review Act.

31. There was some discussion in the course of argument really initiated by the Court whether the test in this case should be a higher standard than an arguable case. This was informed by the fact that the order of the Judge granting the amendment was expressed to be

made by *de bene esse*. The parties were uncertain what the Judge meant by such an order. To do a thing *de bene esse* means to do it provisionally or in anticipation of the occasion when it may be needed. Such an order is usually seen as applying to the reception of evidence so that evidence received *de bene esse* may be used or disregarded according to the Judge's view as to its admissibility when considering his decision. Such an order is not made in the context of an amendment. The question was therefore asked, what did the Judge mean by it? Did he mean to say that he would make a final decision on the amendment if he found that Graham had made out the amended case at the substantive hearing of the judicial review application that the Commission had contravened his right to equality of treatment in the exercise of its function under section 4(d) of the Constitution. If so, as the Judge found that the Commission had acted in breach of section 4(d), perhaps the correct approach should be to determine whether the Judge's substantive decision was correct and not whether the application to amend was properly made. In those circumstances the Court, of course, would not consider whether there was merely an arguable case.

32. I do not however think that that approach is appropriate in this case. There is no appeal from the final order of the Judge that there was a breach of the right to the equality of treatment. As the correctness of that order has not been challenged, the appeal should not become one that seeks to do so. Of course the position of the Commission is one that inferentially challenges the final order. Its position is that there was no arguable case at the time of the amendment so that the order granting Graham leave to amend should be set aside. What this means in practical terms is that if the amendment is set aside the orders of the Judge which are in effect in respect of the 1997 decision must go. However I do not understand any of the parties to be contending that the test should be higher than an arguable case.

33 Further I think that the Judge intended to and did grant the amendment. If the Judge did not intend to grant the amendment but to defer it until his final determination it is difficult to explain his consequential order directing the Attorney General be joined as a party to the proceedings and to file affidavits. It may be argued that he wanted the Attorney General before him so that if he decided to grant the amendment all the parties he considered as necessary parties would be before him. But that could have been achieved by other means

and not an order directing that the Attorney General be joined as a respondent. The only reason for the Attorney General to be made a party was that the amendment raised questions of a constitutional breach and damages therefor. This conclusion is further reinforced when it is considered that had the Judge intended to make the order provisional on the determination of whether there was a constitutional breach one would have expected him to return to the question of the amendment in his judgment and make the appropriate order but there is nothing like that in the judgment. Instead the Judge makes reference to "the amended" application for judicial review. He stated at paragraph 4 of his judgment that "the original application for judicial review was filed on October 15th, 2004 and subsequently amended." When he refers to the relief sought by the application he includes the amended relief.

34. In the final analysis it seems to mean that the words "*de bene esse*" appearing in the order for the amendment have no relevance and meaning to this appeal. In the circumstances I think it is appropriate in this case to apply the test of an arguable case and ask whether at the time of Graham's application to amend there was an arguable case on the proposed amended case that a ground for seeking judicial review existed.

35. By the amendment Graham was alleging a breach of his fundamental right to equality of treatment guaranteed by section 4(d) of the Constitution. This section is as follows:

> *4. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex the following fundamental human rights and freedoms, namely:*
>
> > *(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions.*

36. A person who alleges that his right under section 4(d) has been breached by the administrative action of a public authority must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons described as actual or hypothetical comparators (see **Mohanlal Bagwandeen v The Attorney General** [2004] UK PC 21).

37. Until very recently there were several cases in which it was accepted that proof of mala fides was also necessary, and these included cases out of the Court of Appeal (see for example Civ. App. 102 of 1999 **Boodhoo and another v The Attorney General;** and Civil Appeal 23 of 2001 **The Attorney General v Mohanlal Bhagwandeen)**. In view of subsequent developments however it is at least safe to say that proof of mala fides is not always necessary.

38. The first case in which section 4(d) was considered in detail is **Smith and another v L. J. Williams Ltd.** (1982) 32 WIR 395. In that case it was held that there was a presumption that public officers will discharge their duties honestly and in accordance with the law. The existence of that presumption led to the conclusion in that case that it could only be discharged by proof of mala fides on a balance of probabilities.

39. The **Smith** case was considered by the Court of Appeal in **The Attorney General v K.C. Confectionery Ltd.** (1985) 34 WIR 387. In that case the Court of Appeal accepted that there is a presumption of regularity in the acts of public officials. It was therefore to be presumed that public officials will discharge their duties honestly and in accordance with the law. To Persaud, JA it did not however follow that in every case proof of mala fides was necessary. He stated that (at p. 404) two situations may arise: one where proof of mala fides was necessary and the other where it was not. Proof of mala fides was necessary in cases where it was alleged that the official had been dishonest in the discharge of his duties or that he had acted out of spite towards the complainant. Persaud, JA stated that in such cases *"clearly mala fides is alleged in which event it must be proved"* and the onus of proof rested on the complainant. Persaud, JA then referred to the situation where proof of mala fides was not necessary. These were cases where the allegation was that the official had *"merely contravened the law in the discharge of his function."* In such cases mala fides will not necessarily form part of the complainant's case and so the question of its proof does not arise. He stated that:

> *"All that needs to be proved in such a case is the deliberate and intentional exercise of the power, not in accordance with law, which results in*

the erosion of the complainant's right the entitlement to which may become vested in him either from the Constitution itself or from an Act of parliament."

40. Bernard, JA did not agree that proof of mala fides was not necessary; he stated that (at p. 414):

> *"Having held that the presumption of regularity in the acts of public officials exist in this jurisdiction, I entertain the view that it can only be discharged by proof of mala fides on a balance of probability."*

41. Kelsick, CJ expressed his agreement with both Persaud, JA and Bernard, JA. He entered into no specific discussion whether the presumption of regularity need to be discharged by proof of mala fides. However he concluded *"that the onus of proof of mala fides is on the Respondents and this has not been discharged."*

42. **Bhagwandeen v The Attorney General** [2004] UKPC 21 also dealt with an alleged section 4(d) breach. The issue in that case was whether the Commissioner of Police treated the appellant contrary to section 4(d). The Privy Council held that the Appellant had failed to establish a true comparator and that was sufficient for it to dismiss the appeal. The Privy Council did not consider whether it was necessary for the appellant to establish mala fides. The Board however made a few observations that indicated it was leaning to the view that proof of mala fides was not necessary to establish a claim for unequal treatment under section 4(d). Lord Carswell who gave the judgment of the Privy Council indicated that there may have been "a degree of confusion between two distinct concepts, the presumption of regularity and the necessity for proof of deliberate intention to discriminate in a claim of inequality of treatment." He pointed out that proof of mala fides was not required in discrimination cases in the United Kingdom (see **James v Eastleigh Borough Council** [1990] 2 AC 751) and noted that Deyalsingh, J at first instance in the **K. C. Confectionery** case "reasoned cogently that both the presumption of regularity and the necessity for proof of mala fides rested on unsatisfactory foundations and should not be accepted as correct." The Privy Council however stopped short of deciding the issue whether proof of mala fides was necessary saying that it would wish to give further consideration to the Indian authorities on which the Court of Appeal relied in the **K. C. Confectionery** case.

43. Shortly after the **Bhagwandeen** decision, the issue of whether proof of mala fides was necessary came before the Court of Appeal in Civ. App. of 2004 **Central Broadcasting Services Ltd. and Sanatan Dharma Maha Sabha of Trinidad and Tobago v The Attorney General.** The parties however did not seek to challenge the correctness of the **KC Confectionery** case and accepted that the Court of Appeal was bound by its own decisions. The case therefore turned on what the Court of Appeal had decided in that case.

44. All the Judges (of whom I was one) accepted that in the **K. C. Confectionery** case the Court of Appeal had maintained the existence of the presumption of regularity. It was also accepted that Persaud, JA had postulated that mala fides was not always necessary to rebut the presumption. I however did not think that the facts in that case came within the second category of case envisaged by Persaud, JA where proof of mala fides was not necessary as no law was contravened. I therefore held that proof of mala fides was necessary and that it could and should be inferred from the intentional and irresponsible act of the public authority in giving preferential treatment to an entity which was similarly circumstanced as the appellant.

45. Hamel-Smith, JA did not "depart" from my findings. However he did not think there was a need to displace the presumption with proof of mala fides.

46. Warner, JA was also of the view that proof of mala fides was not necessary. Indeed she found that the appellant had not proven mala fides. She however noted that the public authority had dealt with the comparator with expedition but had not applied the same standard to the appellant. She concluded that that "type of situation had always come within the sweep of section 4(d) as Persaud, JA had demonstrated."

47. It can be stated with some confidence that two things were decided in the **Central Broadcasting** case. First the Court recognized that **K. C. Confectionery** had maintained the existence of the presumption of regularity and that it was bound by that decision. Secondly proof of mala fides was not always necessary. However, it is subject to some debate as to when proof of mala fides would not be necessary.

48. All three Judges made reference to Persaud's, JA second category of case where proof of mala fides is not necessary. Hamel-Smith, JA and Warner, JA felt that the facts in the **Central Broadcasting** case came within that second category of case so that they amounted to a deliberate and intentional exercise of the power not in accordance with law which resulted in the erosion of the complainant's right. The facts in the **Central Broadcasting** case therefore provide an illustration of what may come within the second category postulated by Persaud, JA where proof of mala fides is not necessary. There is however nothing in the judgments of the majority which stipulate that in order to displace the presumption it is necessary to bring the case within the express words of Persaud's, JA second category of case.

49. Hamel-Smith, JA referred to the observations of the Board in **Bhagwandeen** as to the existence of the presumption of regularity. He thought that the observations were "well placed."

> *"… because inherent in the presumption is the absence of the evidence, one way or the other. Once cogent evidence of discrimination is placed before the Court, whether or not the presumption operates in the official's favour, the onus shifts to the official to show that his action was justified or reasonable. The presumption in those circumstances would have been of little or no use to the official."*

50. Hamel-Smith, JA therefore recognized that the presumption of regularity existed but thought it of little or no use to the public official where there was cogent evidence of discrimination. He favoured the test as set out in such cases as **Bishop of Roman Catholic Diocese of Port Louis and Other v Tengur and Others** Privy Council Appeal 21 of 2003, where once apparently discriminatory treatment has been shown it is for the alleged discriminator to justify it as having a legitimate aim and as having a reasonable relationship of proportionality between the means employed and aim sought to be realized.

51. Warner, JA stated that proof of mala fides was "one way" that the presumption of regularity could be displaced. She also accepted that another way is where the case came within the second category envisaged by Persaud, JA. However it is not clear whether the learned Justice of Appeal thought that to be the only other way in which the presumption could be displaced.

52. Although the **Central Broadcasting** case went on appeal to the Privy Council, whether or not or when proof of mala fides is necessary in a section 4(d) breach was not considered.

53. Since the **Central Broadcasting** case the question of what is necessary to establish inequality of treatment has been interpreted differently by different Judges. For example, in High Court Action No. 1680 of 2003 **Dindial v The Attorney General,** Dean-Armorer, J seemed to be of the view that:

> *"Proof of mala fides continues to be necessary where it has been alleged by the Applicant. Where mala fides have not been alleged, the Applicant may succeed by proving "the deliberate and intentional exercise of power not in accordance with the law……."*

54. In High Court Action No. 3562 of 2003 **Webster and others v The Attorney General,** Moosai, J stated that it was held in the **Central Broadcasting** case that proof of mala fides "was not a prerequisite to establishing a case of infringement of the right to equal treatment." After a review of that case and other authorities he concluded:

> *"It would follow that a person who alleges a violation of his constitutional right to equality of treatment from a public authority in the exercise of its functions would ordinarily be entitled to redress if the action of the public authority unintentionally results in him being arbitrarily or capriciously or irrationally discriminated against."*

55. Given the current state of the law, it is arguable that an applicant who alleges a breach of his section 4(d) right need only show that he was treated less favourably than one similarly circumstanced. It is for the public authority to justify the difference in treatment on some legitimate or reasonable basis. If it is thought that mere difference in treatment would not be sufficient to displace the presumption of regularity, consideration should be given to what Justice de la Bastide, the President of the Caribbean Court of Justice, said in his address on 'Developments in Judicial Protection of Human Rights in the Commonwealth Caribbean" delivered on November 9th 2009 at the Inaugural Symposium on Current Developments in Caribbean Community Law:

> *"Hamel-Smith, JA has pointed out that the requirement of proof of mala fides can be regarded as a fetter on the right to equality of treatment, particularly as those who practise discrimination are often at pains to conceal their motive.* T*his lends weight to the argument that it should be sufficient for an aggrieved party to prove that he was less favourably treated than other persons who were similarly circumstanced, or that someone similarly circumstanced was more favourably treated than him. This argument could be accepted without abandoning the presumption of regularity if it was accepted that the burden on the aggrieved party is not only to prove difference in treatment, but also at least to negative on a prima facie basis the existence of any reasonable or legitimate reason for the difference. This could be regarded as necessarily involved in proving that the persons who were differently treated were similarly circumstanced."*

56. In view of the current state of the law it is not surprising that Counsel for the Commission did not seek to argue that assuming there was evidence of a comparator that Graham would not have an arguable case that his section 4(d) right was infringed. Counsel however submitted that Graham had pointed to no one similarly circumstanced who received different treatment. The other officers who were considered for promotion and promoted to rank of Superintendent of Police at the same time Graham was considered were not proper comparators. Counsel contended the appropriate comparator would be someone who was on charges for indecent assault or other criminal offences and who following the dismissal of those charges was promoted without delay. It was contended that Graham produced no evidence of such a person.

57. Counsel for Graham on the other hand submitted that the 13 officers who were promoted were similarly circumstanced as Graham. Graham, like the others, was eligible for promotion and occupied the same rank as the others just prior to their promotion and had no pending or disciplinary charges against him.

58. As I have already mentioned the person or persons who an applicant alleges for the purposes of section 4(d) of the Constitution has been treated differently must be similarly circumstanced as the applicant. This does not mean that the comparison must reveal no differences between them. What it does mean is that the comparison must be such that the relevant circumstances in the one case are the same or are not materially different in the other (see **Bhagwandeen v The Attorney General,** supra, at (para. 18).

59. In this case when the Commission in 1997 decided to promote thirteen officers to the rank of Superintendent, Graham was one of the officers considered for promotion. As Counsel for Graham has submitted all the officers including Graham were then equal in rank, i.e. Assistant Superintendent, and all the officers including Graham were recommended for promotion. The only difference that arises on the evidence is that Graham at one time had criminal charges brought against him. The question therefore is whether that is a relevant circumstance so that the other officers were not appropriate comparators.

60. Regulation 20(1) of the Police Service Commissions Regulations mandates the Commission in considering police officers for promotion, to take into account their experience, educational qualifications, merit and ability and relative efficiency. Regulation 20(2) lists specific factors that the Commission shall take into account. The Commission on the evidence in this matter did not identify any relevant factor under Regulation 20 that made Graham ineligible for promotion or that put him at a disadvantage when compared to the others. More particularly, the Commission pointed to nothing arising out of the charges against Graham that made him ineligible for promotion. Indeed, as the charges against Graham were dismissed, the Commission conceded that while integrity of character "was an essential ingredient in determining one's suitability for promotion [Graham] had nothing adverse on his record." This is entirely consistent with the policy of the Commission, to which Graham had given evidence, that where an officer was subject to criminal charges which were dismissed the mere fact that he was the subject of the charges would not prejudice his promotional prospects.

61. On the evidence in this case it is certainly arguable that the fact that Graham was at one time subject to criminal charges is not a relevant circumstance as to differentiate him from the other officers. It is therefore arguable that the other officers were appropriate comparators. In the circumstances, at the time of the amendment Graham had an arguable case that his right to equality of treatment guaranteed by section 4(d) of the Constitution had been infringed.

62. I turn next to consider section 11 of the **Judicial Review Act**. It is the simple submission of Counsel for the Commission that as the application to amend should be treated in the same way as a new application for leave to apply for judicial review, Graham, as he had to, did not satisfy the requirement of promptness in section 11 and there was no good reason to extend the time.

63. For the purposes of this matter sub-sections (1), (2) and (3) of section 11 are relevant and these provide 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 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."*

64. Therefore under section 11 an application for judicial review shall be made promptly and in any event within three months. Time runs from the date when the grounds of the application first arose and not when the claimant first learnt of them. If the application is not made promptly the Court may refuse leave to apply for judicial review. The Court however has a discretion to extend the time for the making of the application if there is good reason for so doing (11 (1)). Notwithstanding that there may be good reason for overriding the lack of promptness, the Court may still refuse leave if it considers that the grant of the leave will cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration (11(2)). In forming its opinion whether there is good reason for overriding the lack of promptness or in arriving at a decision to refuse leave on the grounds that because of undue delay the grant of relief would cause substantial hardship or substantial prejudice to the rights of any person or would be detrimental to good administration, the Court has a wide discretion to take any relevant matters into account

including the time the applicant became aware of the making of the decision (11(3)) (see also Civil Appeal 106 of 2002 **Fishermen and Friends of the Sea v The Environmental Management Authority and Another**).

65. In this case the application was made several years after the decision which it seeks to have judicially reviewed. The application clearly was not made promptly. The question that therefore arises is whether in the circumstances the Court could properly have exercised its discretion to extend the time.

66. Counsel for Graham submitted that it was a proper exercise of the Court's discretion to extend the time for basically two reasons. First, it was only when the affidavit of Harding was filed in 2006 on behalf of the Commission that Graham become aware for the first time of the reasons why he was not promoted. Before this he had no basis to complain that his constitutional right to equality of treatment under section 4(d) was infringed. On becoming aware of the reasons the application to amend to claim relief in respect of the alleged infringement was filed less than a month thereafter. The other reason is that the Commission had all along held out that Graham's claims for promotion would be considered and consideration would be given for backdating his appointment. Accordingly Graham was justified in waiting to see the Commission's response before initiating proceedings to review the decision.

67. To take the second submission first, litigants should always be encouraged to seek a legitimate way of resolving disputes without litigation. If an applicant in judicial review proceedings engages in discussion with the decision maker in a reasonably expeditious manner during which time there appears to be a realistic prospect that the matter would be resolved, such discussions should ordinarily provide a good reason to overcome the lack of promptness in making the application for leave to apply for judicial review. The question therefore is whether the communications between Graham and the Commission met that standard.

68. The communications that took place between the parties were not conducted with expedition in mind. Shortly after Graham discovered in April, 1997 the promotion of

officers junior to him to the rank of Superintendent of Police he had his attorneys write to the Commission in May, 1997 complaining of the failure to promote him. The Commission replied in that same month acknowledging receipt of the letter and indicating that the letter is receiving attention. There was however no further response to the letter.

69. In June, 1997 Graham learnt of a further promotion of someone junior to him to the rank of Superintendent. This time he complained through his attorneys by letter of August 7th, 1997. He received a reply from the Commission dated October 9th, 1997 that his claims for promotion will be considered. Notwithstanding that indication, the Commission in November 1997 promoted six officers to the rank of Superintendant, all of whom were junior to Graham. By that time approximately seven months had elapsed since Graham became aware of the decision not to promote him to one of the thirteen vacancies but yet no action was taken and the Commission had not taken any step to improve his seniority.

70. He was eventually promoted to the rank of Superintendent on July 22nd, 1998 with effect from July 16th, 1998. That promotion did not fully address his concerns relating to the erosion of his relative seniority. Graham complained of this in October, 1998, but the Commission's response which came only in March, 2000 was to confirm his appointment with effect from the very same date. There was no correspondence from the Commission that suggested that it would give any further consideration to backdating his appointment to the post of Superintendent of Police. However in March, 2004 the effective date of his promotion to the rant of Superintendent was backdated. It was however backdated to a date that did not fully meet Graham's concerns and even then judicial review proceedings were not commenced for another seven months approximately.

71. There was however an indication given to Graham in a letter dated March 16th, 2004 from the Commission that consideration would be given to his relative seniority when next promotions to the office of Assistant Superintendent of Police were being made. Graham was promoted to that rank on May 25th, 2004 with effect from September 19th, 2003. Although further complaints from Graham led to the backdating of his appointment to the rank of Assistant Commissioner there was nothing after his promotion to that rank to indicate to Graham that any further consideration would be given to the adjustment of his relative

seniority. After May, 2004 it was another five months approximately before these proceedings were commenced.

72. On the evidence, the discussions between the parties were therefore not conducted with any degree of expedition nor were these proceedings commenced promptly. Even if it might be considered reasonable for Graham to have waited for a response from the Commission when he was told in October, 1997 that his claims for promotion will be considered, he knew by July, 1998 that the effective date of promotion to the rank of Superintendent did not meet his concerns. Yet he did not commence proceedings but attempted to change the mind of the decision maker when there was no apparent prospect that he would succeed in doing so. Indeed it was not until 2004 that the date of promotion to the rank of Superintendent of Police was adjusted and then to a date that did not meet Graham's concern. There was no justification to withhold action up to that point more so for any longer period. It is true that he was told in March, 2004 that consideration would be given to his relative seniority when he was promoted to the rank of Assistant Commissioner of Police. Even if one were to look at the matter afresh from that point however, the fact is that by May, 2004 he knew that the promotion he received to the rank of Assistant Commission of Police did not fully address his concerns. There was then no real prospect that the matter would be resolved without litigation, but even then proceedings were not commenced promptly. In the circumstances I do not think that the discussions between the parties provide a good reason to overcome the lack of promptness

73. With respect to the other reason advanced by Counsel to extend the time, it is good reason to extend the time where the claimant lacked information required for the purpose of knowing whether the decision was reviewable (see **R v The Licensing Authority ex parte Novartis Pharmaceuticals Ltd.** [2000] COD 232 and **R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd.** [1995] W.L.R. 386)

74. Harding in the affidavit filed on behalf of the Commission disclosed that when the Commission in 1997 was attempting to fill the 13 vacancies to the rank of Superintendent, it requested and received the notes of evidence relating to the charges against Graham.

Harding stated that the Commission having considered the notes decided that having regard to the nature, facts and circumstances of the charges preferred against Graham it would not consider him for promotion. Counsel for Graham contended that it was only then, on the filing of Harding's affidavit, that Graham knew his right to equality of treatment was infringed.

75. Counsel for the Commission took issue with that assertion. He argued that Graham had provided the notes of evidence and letters were written by Graham's attorneys on his behalf and on his instructions in which reference was made to the notes and that the Commission had considered them. Counsel further submitted that in any event the knowledge was not necessary to form an opinion that Graham's right to equality of treatment was infringed. The fact that Graham knew that officers junior to him were promoted ahead of him was sufficient.

76. Although Graham provided the notes of evidence to the Commission and suspected that the Commission considered them, the evidence in my judgment does not establish that Graham knew the reason why he was not promoted in 1997. It is not in dispute that at no time prior to the Harding affidavit did the Commission disclose the reason that Graham was not promoted to one of the 13 vacancies in 1997.

77. The question that now arises is whether that information was vital for the purpose of knowing of whether the 1997 decision was reviewable. Without that information Graham knew 13 officers some of whom junior to him were promoted. He would also have known that whether or not an officer was promoted would depend on a consideration of a variety of factors outlined in Regulation 20 of the Police Service Commission Regulation. It is of course possible that on a consideration of these factors there was a legitimate reason not to promote him. He could not have known, unless he was told (and he was not), why he was not promoted. He could not be expected to assume that it was for an illegitimate reason. The reason as disclosed in Harding's affidavit pointed to an arguable case that there was no legitimate reason to treat him differently from officers who were similarly circumstanced (as I have discussed above) and every reason to favour Graham to those who were junior to him.

The facts disclosed in Harding's affidavit pointed for the first time that Graham had an arguable case that his right to equality of treatment was infringed.

78. Until the filing of the Harding affidavit therefore, Graham lacked information required for knowing whether the 1997 decision was reviewable. As the application to amend to review that decision was filed very promptly thereafter there was in my judgment good reason to override the lack of promptness in challenging the 1997 decision. .

79. I do not believe in this case there is any question that any relief granted would cause substantial hardship or prejudice to the rights of any person or would be detrimental to good administration. Graham by the amendment was seeking damages for the infringement of his constitutional right and a declaration that in essence the continued refusal or omission to promote him to the position of Superintendent or backdate his seniority contravened his right to the equality of treatment under section 4(d). He was not asking that anyone appointed to a position be removed so as to prejudice any third party. Although the Judge did not grant the declaration, he in essence gave effect to it. He decided that Graham's seniority be determined as if he had been promoted to the rank of Superintendent with effect from December 23rd, 1996 and that such determination be taken into account in any decision made involving Graham's seniority. There was no argument before this Court that the Judge's order was detrimental to any third party and it would seem that it could only be to the benefit of good administration. That this is in fact so, I think is evident from the position taken by the Commission in choosing not to also challenge the decision of the Judge made at the substantive hearing of these proceedings.

80. In my judgment therefore, there was good reason to extend the time for the making of the application to challenge the 1997 decision notwithstanding that it was made several years thereafter.

81. Counsel for the Commission further submitted that the delay in applying for constitutional redress in this case is a misuse of the constitutional jurisdiction of the Court. Counsel relied on the following passage in the judgment of the Privy Council, i**n** Privy Council Appeal 52 of 2000 **Felix Durity v The Attorney General** (at para. 35):

> *"When a Court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the Court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's jurisdiction.*

82. In my judgment however to grant the amendment would not amount to an abuse of the constitutional jurisdiction of the Court. For one thing this judgment has held that there is an arguable case of a constitutional breach that was only known when the Harding affidavit was filed in these proceedings. There has in fact been a finding of a constitutional breach and no challenge has been made to that substantive finding. The amended claim therefore ought not to be treated as frivolous, vexatious or contrived and as has been observed a *"bona fide resort to rights under the constitution ought not to be discouraged"* (see **Ahnee v DPP** [1992] 2 AC 294,307)**.**

83. Secondly, in considering whether the constitutional proceedings are an abuse, as is evident from the above quoted passage from the **Durity** case, it is important to consider a) whether the impugned decision was susceptible of adequate redress by a timely application under the Court's non-constitutional jurisdiction and b) if it was and such application was not made and would be out of time, is there a cogent explanation for failing to do so. With respect to a), there is no doubt that the 1997 decision was susceptible to judicial review on ordinary principles without the implication of any constitutional redress. But it is doubtful whether that would have provided adequate redress as Graham in such an event would not have been entitled to damages. Having answered a) in the manner that I have b) does not arise. But on the basis that an application for judicial review on ordinary principles would have provided adequate redress, the obvious reason that it was not made as discussed earlier, is that Graham was only aware that he had a basis for reviewing the 1997 decision, when the Harding affidavit was filed and that provides a cogent explanation for the application not having been made earlier.

84. In the circumstances, in my judgment a Court properly directing its mind to the relevant principles was entitled to grant the amendment. It follows that the Commission's appeal from the order granting leave to amend the proceedings to introduce a claim for redress for a breach of section 4(d) of the Constitution fails. Consequently the order made by the Judge awarding damages to Graham on the amended case for breach of that right stands. I therefore turn to consider Graham's appeal from the award of damages.

85. As I have mentioned earlier the trial Judge assessed damages for breach of Graham's constitutional right in the sum of $35,000. Counsel for Graham submitted that this award is too low. He contends that the appropriate award should contain a sum to compensate Graham for loss suffered as well an additional amount by way of vindicatory damages. He contended that the appropriate award would be in the region of $200,000. Counsel for the Respondent on the other hand submitted that there is no basis on which the award could be increased.

86. Unfortunately the trial Judge did not explain the basis for the award he made. In those circumstances I must make my own assessment of what should be an appropriate sum due to Graham (see Privy Council Appeal No. 29 of 2007 **Inniss v The Attorney General of Christopher and Nevis** and Civ. App. 154 of 2006 **Romauld James v The Attorney General of Trinidad and Tobago**).

87. The function of constitutional damages was reviewed by the Privy Council in Privy Council Appeal 13 of 2004 **The Attorney General v Siewchand Ramanoop**. The Board stated that section 14 of the Constitution recognizes and affirms the Court's power to award remedies for contravention of a person's fundamental rights. Section 14 presupposes that the Court will provide effective relief in respect of the State's violation of a constitutional right. In so doing the Court is concerned only to vindicate or uphold the constitutional right which has been infringed. A declaration may in some case be sufficient but in most cases more will be required. If the person, whose right has been contravened, has suffered damage the Court may award compensation. In assessing the level of compensation the common law measure of damages is a useful guide. An award of compensation however might not always vindicate the infringed right. Where that is the case an additional award which need not

necessarily be substantial, but may be depending on the circumstances, can be awarded to reflect a sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and to deter further breaches.

88. Since **Ramanoop** was decided it has been applied in a number of cases. One such case is Privy Council Appeal 61 of 2003 **Merson v Cartwright and the Attorney General.** In giving the advice of the Board, Lord Scott of Foscote stated (at para. 18):

> *"…..the nature of the damages awarded may be compensatory but should always be vindicatory and accordingly the damages may in an appropriate case exceed a purely compensatory amount."*

89. Although vindicatory damages has much in common with exemplary damages at common law (see **The Attorney General v Siewchand Ramanoop,** supra, and **Takitota v The Attorney General** [2009] UK PC 11) its purpose is different. The purpose of vindicatory damages is not to punish. It is not to teach the executive not to misbehave (see **Merson** at para. 19). It is to vindicate the complainant. Whether an additional award is required to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches will depend upon the nature of the particular right and the circumstances relating to the infringement,

90. In this case it is clear from the order the Judge made that he came to the conclusion that Graham ought to have been promoted to the rank of Superintendent of Police with effect from December 23rd, 1996 and not July 23rd, 1997 as he eventually was. I think it is also clear that the Judge concluded that the failure to promote Graham to the rank of Superintendent with effect from December 23rd, 1996 could have impacted on his promotion to other ranks. Had Graham been promoted with effect from December, 1996 he would have had a very good chance of being promoted earlier than he was to the rank of Senior Superintendent and Assistant Commissioner of Police. The failure also impacted on Graham in other areas. One such area is that of acting appointments. Such appointments are based on seniority. Having lost his relative seniority by the failure to promote him it meant that he may have been denied acting appointments and the benefit to earn an increased income.

91. Another area is that of training opportunities. According to the evidence of Graham, officers in the rank of Senior Superintendent are normally sent on overseas training courses at international institutions. He was never sent, he claims, because of the erosion of his seniority. Such training courses were likely to give him a competitive edge in the promotion process. This is another way that the erosion of his seniority might have affected his promotional claims.

92. Graham does not seem however to be contending that he could have occupied any higher substantive post had he been promoted with effect from December, 1996 to the rank of Superintendant since he deposed:

> *"If my seniority was adjusted and I was given my rightful place on this list I would either be the third-most senior ACP … or the most senior ACP overall."*

93. In those circumstances it is clear that Graham had suffered damage and the circumstances called for at least a compensatory award. Graham would have lost salary because of the failure to promote him with effect from December 1996 and this would have impacted on the chance to earn at higher levels in substantive positions earlier than he did and in acting appointments. There may also be an issue relating to the possible loss of pension had he attained the substantive posts earlier than he did. There should also be considered the hurt feelings and the distress that Graham would have experienced in the normal course of things in seeing those junior to him promoted ahead of him and his consequent diminution of status.

94. The difficulty however in arriving at a compensatory award in this case is that there is no evidence on which the Court can come to any assessment of what Graham may have lost. There is no evidence of what salary the various ranks attracted so that one could begin to determine what monetary sum he might have lost. So too there is no evidence of what acting appointments he might have been appointed to and over what period so that it could be determined what he might have had a chance to earn. Nor is there any evidence of how all this might have impacted, if it did, on Graham's pension. The onus was upon Graham to produce and provide this evidence.

95. The question then is whether the circumstances in this case should attract the additional award in vindicatory damages. In this case at the end of the substantive hearing there was no finding of mala fides. In coming to its conclusion that there was breach of section 4(d) the Court seemed to act on the basis simply that Graham had been treated differently from other similarly circumstanced persons. The Judge was of the view that the Commission could consider the notes of evidence in relation to the charges against Graham but could not take them into account without hearing from Graham. This is not suggestive of any mal intent towards Graham but of administrative error. It is also relevant that the Commission appeared to have accepted its error and took steps to attempt to improve Graham's relative seniority. It twice backdated his promotion, but it came to the view that nothing further could have been done because there were no vacancies that existed prior to the date to which his promotion was made - a view with which the Judge agreed and with which I also agree (see High Court Action No. S 50 of 2002 **Sahadeo Maharaj v The Teaching Service Commission and another).**

96. The facts in this case are very different from the cases in which an additional award was made by way of vindicatory damages. For example in **Ramanoop** the offending conduct of the police officer was described as "quite appalling misbehaviour," - the complainant had been assaulted repeatedly by the police officer. In **Merson** the police were also guilty of misbehaviour characterized by the Court of Appeal of Bahamas as "callous, unfeeling, highhanded, insulting, malicious and oppressive" and as "Gestapo-type". In **Inniss,** supra, which dealt with the unlawful removal from office of a registrar, the executive chose to ignore the constitutional right of the appellant because it was an obstacle to removing the appellant from her post quickly. Similarly in Privy Council Appeal 116 of 2006 **Horace Fraser v Judicial and Legal Services Commission** the respondent commission did not comply with its own procedures in order to secure the summary removal of a magistrate.

97. In my judgment on the facts of this case an additional award was not called for. The circumstances and facts of this case do not demand an award to reflect a sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach or to deter further breaches. What was required was an appropriate compensatory award.

However on the evidence it was not possible to arrive at an appropriate figure or to say that the sum awarded by the Judge is not that figure. If consideration is given to distress and hurt feelings I think that the award is more than adequate to compensate for this. Of course no consideration is to be given to a reduction of the award as there is no appeal in this regard. However I see no basis on which the award can be reviewed upwards. In these circumstances the award of the Judge will remain as it is. This however means that Graham's appeal fails and must be dismissed.

98. On the question of costs the Commission has not succeeded on its appeal and neither has Graham. Put another way both have failed on their appeals, which so far as the Commission is concerned includes the appeal from the order of the Judge refusing the use of the affidavits of Trevor Paul and Glen Roach that it did not pursue. The Attorney General has also withdrawn its appeal on the substantive orders made by the Judge and on that basis would ordinarily be liable for Graham's costs incurred in connection with that appeal up to the stage of the withdrawal. On the other hand the Attorney General would be entitled to his costs in Graham's appeal from the award of damages. In all the circumstances I think in this case that each party should bear his/its own costs. I therefore make no order as to costs.

Dated the 26th day of March 2010.

A. Mendonça
Justice of Appeal

I agree with the judgment of Mendonça, JA and have nothing to add .

N. Bereaux,
Justice of Appeal