REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 35 of 2011
C.V. No. 2008-00264

BETWEEN

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

AND

RAVI DOODNATH JAIPAUL

Respondent

PANEL: **A. Yorke-Soo Hon J.A.**
R. Narine J.A.
P. Moosai J.A.

Appearances:

Mr. N. Byam, Mr. C. Sieuchand and Ms. K. Oliverie for the Appellant.

Mr. K. Ramkissoon, Mr. K. Samlal and Ms. S. Mohammed for the Respondent.

Date of delivery: **28th January, 2015**

I agree with the judgment of Moosai J.A. and have nothing to add.

A. Yorke – Soo Hon
Justice of Appeal

I too agree.

R. Narine
Justice of Appeal

JUDGMENT

Delivered by P. Moosai J.A.

I. Introduction.

[1] This appeal concerns a constitutional motion filed by the respondent alleging inequality of treatment contrary to ***section 4(d) of the Constitution of Trinidad and Tobago***[1] ***("the Constitution")*** and seeking constitutional redress pursuant to ***section 14*** thereof. The respondent claimed that the Public Service Commission ("PSC") breached established practice and procedure by promoting to the position of Customs and Excise Officer I, officers in the public service who were ranked lower than the respondent on the Order of Merit list, despite the fact that promotions in the public service are to be made in accordance with the placement or ranking of officers on the Order of Merit List. The trial judge, Madam Justice Dean-Armorer, held in favour of the respondent, concluding that there was inequality of treatment against the respondent by the PSC. She also granted a declaration in favour of the respondent against the State (which was the only named defendant to the proceedings) for the constitutional breach by the PSC, to the effect that the respondent was entitled to be appointed to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the Order of Merit list. The State (hereinafter "the appellant") now appeals the entirety of the trial judge's decision.

[2] Having regard to the issues canvassed, I find:

(a) The PSC performs core public functions. It is an authority within the meaning of ***sections 19(8) and (9)*** of the ***State Liability and Proceedings Act (SLPA)***[2]***. Sections 19(8) and (9)*** provide that proceedings against such authorities are deemed proceedings against the State. The Privy Council in ***Attorney General v Carmel Smith***[3] determined that in constitutional proceedings for redress pursuant to ***section 14 of the Constitution***, the Attorney General is to represent any statutory body which is deemed by ***section 19 (8) and (9***) to be part of the State. Thus, the appellant is the proper party to these proceedings. It may have been an option, however, to join the

[1] Chap. 1:01.

[2] Chap. 8:02.

[3] (2009) UKPC 50.

PSC as a second named defendant and interested party in the matter under ***rule 19.2 of the CPR***. I agree with this decision of the trial judge;

(b) There was a clear prima facie case that the respondent was treated less favourably than others similarly circumstanced, and that the appellant could not objectively justify the difference in treatment. Thus, the respondent could not have been criticised for continuing along the constitutional path. Moreover, on the facts of this case, it is doubtful whether judicial review, rather than a constitutional motion, would provide an adequate or effective remedy. Accordingly, and in agreement with the trial judge, it was proper for the respondent to commence proceedings by way of a constitutional motion;

(c) That ordering that the respondent be promoted to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the Order of Merit List, would serve no worthwhile purpose. The respondent had already been properly promoted by the PSC in the course of the proceedings. It was thus within the jurisdiction of the trial judge, in accordance with ***rule 26(1)(l) of the CPR***, to exclude this particular issue from determination, as substantive justice could be done between the parties on the other issues before the court;

(d) As regards his promotion, the respondent was treated differently from his comparators and the PSC failed to objectively justify the difference in treatment. Therefore, the trial judge was correct in finding that there was a breach by the PSC of the respondent's right to equality of treatment contrary to ***section 4(d) of the Constitution;*** and

(e) There is merit in the appellant's ground of appeal that the judge fell into error by granting a declaration that the respondent was entitled to be appointed and/or promoted to the position with retroactive effect in accordance with his position on the Order of Merit List.

II. Factual Background.

[3] In December 1994, the respondent was appointed to the post of Clerk 1 in the Ministry of Works and Transport. Three years later, in November 1997, a circular memorandum

was issued by the Director of Personnel Administration to Permanent Secretaries and Heads of Department in the government service, inviting applications from suitably qualified officers to fill the office of Customs and Excise Officer I, a post in the Ministry of Finance. The memorandum also stated that, upon successful completion of a three-year in-service training course, the salary of the Customs and Excise Officer I would be in Range 31. In response to the said memorandum, the respondent applied for the position of Customs and Excise Officer 1 with the Ministry of Finance.

[4] The PSC is guided in respect of the criteria for appointment by ***regulation 12 of the Public Service Commission Regulations ("the Regulations")***, which provides that candidates for permanent appointment shall be selected on the basis of written competitive examinations and interviews. Candidates are assessed on the required knowledge, skills and abilities and from this an Order of Merit List is compiled. It is the established practice and procedure of the PSC that promotions are made based on the ranking and placement of officers on the Order of Merit List.

[5] By letter dated 27 March 2000 the respondent was informed that he had been accepted as a candidate to write the supplemental Civil Service Entrance Examination for the said position. He wrote the exam, was successful and became qualified for the promotion interview. On 25 September 2000 the respondent was interviewed by a three-member panel for about thirty minutes. In his affidavit evidence, he deposed that the Chairman of the interview panel informed him that candidates would be promoted on the basis of a merit list which is compiled by reference to the candidate's performance and score in the interview. This evidence was consistent with the evidence of the appellant in respect of the criteria for appointment.

[6] Following the interview, nearly six years passed and the respondent had not received any feedback in respect of the status of his application for the position of Customs and Excise Officer I. Rather, in July 2006, the respondent was informed by another applicant that other officers had been appointed to the position of Customs and Excise Officer I. Among those appointed was Mr. Knux Laltah. Upon receipt of this information the respondent, convinced that his performance in the exam and interview was good, made enquiries as to his own status, but his efforts were futile. He then sought the advice of his attorney-at-law and was advised to make an

application to the PSC under the ***Freedom of Information Act*** [4] ***(the FOIA)***, in order to obtain a copy of the Order of Merit List which detailed his ranking among other applicants.

[7] The respondent made his first application for information under the ***FOIA*** on 19 July 2006, whereby he requested:

(i) a copy of the Order of Merit List of persons who passed the interviews held for Customs and Excise Officer I on 2/09/2000 at the PSC;

(ii) a copy of seniority list for the Customs and Excise Department; and

(iii) a copy of the list of names of all persons presently in training for appointment to the office of Customs and Excise Officer I at the invitation of the PSC.

[8] ***Section 15 of the FOIA*** specifies that the time limit for determining such applications for information is *"as soon as practicable but in any case not later than thirty 30 days after the day when the request is made"*. The statutory deadline for providing the requested information under the ***FOIA*** expired on 19 August 2006. Though the respondent's application was acknowledged by the PSC, the information sought was not supplied. On 21 August 2006, the respondent caused his attorney to issue a formal pre-action protocol letter to the PSC. The PSC then made partial disclosure of the Order of Merit List, showing the names of officers, but omitting their ranks or placement numbers as well as the scores and marks awarded to the various officers who were interviewed.

[9] This caused the respondent's attorney to file another application under the ***FOIA*** on 20 September 2006 specifically requesting a copy of the Order of Merit List, this time bearing the details which were excluded from the first list that the respondent received. It was further requested that the merit list be properly headed and include the actual scores of officers interviewed. In response to this application the PSC, by letters dated 25 August and 5 and 11 September 2006, indicated that it had responded to the respondent's ***FOIA*** application. However, by letter dated 16 October 2006, the PSC disclosed part of the Order of Merit List with the respondent's position *only*, and refused to disclose the entire list with the names of all the officers interviewed and their scores. The merit list which was disclosed was blank except for the respondent's name and position. It was the PSC's contention that the reason for editing the copy

[4] Chap. 22:02.

of the Order of Merit List to show only the respondent's name and position was because the list contained other person's marks which are private and confidential to them and, therefore, in accordance with ***section 30(1) of the FOIA***, that information was exempt from disclosure.

[10] The respondent persisted in his attempts to obtain disclosure of the full Order of Merit List. Pursuant to section ***38A of the FOIA***, an application which has been refused under ***section 23 of the FOIA*** may be referred to the Ombudsman, who is authorised to make recommendations with respect to the granting of access to documents as he thinks fit. Accordingly, by letter dated 13 November 2006, attorney for the respondent referred the matter for review by the Ombudsman in an effort to determine whether the Ombudsman was in agreement with the PSC's decision to deny access to the requested information. There was great delay in receiving a response from the Ombudsman.

[11] While awaiting a response from the Ombudsman, the respondent, on 9 March 2007, made his third application to the PSC under the ***FOIA***, seeking the criteria used to select officers for training and appointment to the office of Customs and Excise Officer I. On 26 March 2007 the PSC acknowledged receipt of his ***FOIA*** application. However, no further response was forthcoming. By letter dated 14 May 2007, the respondent's attorney issued a pre-action letter. The PSC responded by letters dated 9 and 22 May 2007 whereby it confirmed that the Order of Merit List was, in fact, used to select officers for appointment to vacant offices in the public service.

[12] Finally, in June 2007, the Ombudsman responded indicating that she had been liaising with the PSC as regards the respondent's application for disclosure of the full and detailed Order of Merit List, but that the matter had not yet been finalised. The Ombudsman promised to convey her decision to the respondent as soon as her discussions were completed. By letter dated 17 July 2007 addressed to the Ombudsman, the respondent's attorney complained about the long delay in resolving the matter and again forewarned that judicial review proceedings would be issued. The Ombudsman replied by letter dated 31 July 2007, again stating that the matter was not yet finalised, but this time advising that the respondent could take whatever action he deemed necessary.

[13] The respondent proceeded to institute proceedings for judicial review of the decision of the PSC to refuse disclosure of the merit list. By fixed date claim form dated and filed 15 October 2007, the respondent commenced proceedings CV No. 03565 of 2007 wherein he claimed as against the PSC:

(i) an order that he be entitled to a full and complete copy of the Order of Merit List containing the marks awarded to the persons interviewed, in accordance with the provisions of the ***FOIA***; and

(ii) an order of mandamus directing that the PSC provide the said document to the applicant within seven days.

[14] During the course of those proceedings the PSC finally provided to the respondent, by letter dated 6 December 2007, a complete Order of Merit List showing the ranks of the officers named therein. The list confirmed that the respondent was ranked at no. 53, whilst Knux Laltha and Tessa Greenidge, who had actually been appointed to the position of Custom and Excise Officer I, were ranked at nos. 81 and 82 respectively and were therefore of lower rank than the respondent. In essence the PSC, in breach of the established practice and procedure, unfairly and illegally bypassed the respondent for promotion to Customs and Excise Officer I and selected officers who placed lower on the merit list.

[15] The PSC, through its deponent, Gloria Edwards-Joseph (Director of Personnel Administration, PSC), readily admitted that the respondent had been bypassed for promotion to the position. It was their contention, however, that it was only upon perusal of the affidavit of the respondent in support of his claim for judicial review that they became aware, for the first time, that the respondent's applications to obtain the full and detailed Order of Merit List were related to his concerns that he had been bypassed for promotion to Customs and Excise Officer I. That being the position, according to Ms. Edwards-Joseph, inquiries were made relative to why the respondent's name was not submitted to the PSC. Those enquiries revealed that the respondent fell among a group of persons who were to be contacted in January 2003 in order to ascertain their interest in the post of Customs and Excise Officer I. Two persons, Ms. Nicolette Wallace and Mr. Victor Clauzel, who were among the group into which the respondent fell, placed at numbers 52 (a higher rank than the respondent) and 56 (a lower rank than the respondent) respectively. Both these persons were contacted in January 2003, were appointed to act in the position of Customs and Excise Officer I in October 2003, and eventually promoted/appointed to

that position in November 2006. However, it could not be ascertained from Ms. Edwards-Joseph whether the respondent was indeed ever contacted as per the established practice.

[16] Ms. Edwards-Joseph deposed at paragraphs 9 and 10 of her affidavit[5] that:

> *"When a post becomes vacant in the public service, the officers listed on the order of merit list for that post are contacted sequentially and are asked whether or not they are interested in an acting appointment to that post. If those officers indicate their interest in the acting appointment, their names would be submitted to the PSC to be considered for the said acting appointment.*
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> *During the month of January 2003 inquiries were made by the Service Commission Department of officers on the order of merit list for the post of CEO I as to whether they were interested in an acting appointment as a CEO I [Customs and Excise Officer I] in the Ministry of Finance. These inquiries were first made by telephone and, if telephone contact proved unsuccessful, in writing. The names of all the officers who indicated that they were interested in the said acting appointments were submitted to the PSC for consideration. There was no indication on record that the respondent was interested in the said acting appointment and, as a result, his name was not submitted to the PSC for consideration."*

[17] The respondent denied ever being contacted either via telephone or in writing, by any official or representative from the PSC, regarding any opportunity for an acting appointment as Customs and Excise Officer I. He emphasised that had he been given that opportunity he would have been only too happy to accept same as he wanted to pursue a career as a Customs Officer. To this end, the PSC conceded that no letter or record of phone call was located on the records at the PSC Department. Thus it was further conceded by the PSC that this could mean any of several things, including that the respondent had not been contacted at all.

[18] Thus, on 23 January 2008, the respondent, by fixed date claim form, initiated an originating motion claiming redress against the Attorney General of Trinidad and Tobago as the sole defendant under the ***SLPA***[6]. The PSC was neither made party nor joined to the proceedings, as the respondent contended that the Attorney General of Trinidad and Tobago (the appellant) was the proper party in these proceedings, the PSC being a public authority over which the State exercises control. The basis of the respondent's claim was that he had been treated differently and discriminated against, contrary to ***section 4(d) of the Constitution***, by reason of the PSC's

[5] Affidavit of Gloria Edwards-Joseph, sworn to on the 18 May 2009 and filed on the 19th May 2009 at pg. 295 of the Record of Appeal.

[6] Chap. 8:02.

arbitrary and irrational selection of officers ranked lower on the merit list, for promotion in priority to him; further that he was treated differently when compared to other officers who received their promotion in accordance with their positions on the merit list despite the similarity in the circumstances; and, additionally, that his career had been adversely affected by this discrimination in that he had lost seniority, income, valuable training opportunities and the opportunity to advance his career in the public service.

[19] The respondent claimed that the illegal bypassing of his name on the merit list caused him to lose acting allowances totalling $24,825.00. He also stated that he suffered great distress and anxiety as a result of the events complained, and further that the *'stoic and unhelpful silence'* of the PSC and its failure to provide an explanation for the act of discrimination made him feel frustrated and depressed. He complained that he could not understand why he was arbitrarily selected and targeted for different treatment and forced to undertake litigation which he could ill-afford to vindicate his rights in circumstances where the PSC ought to have resolved his problem without the need for litigation. Moreover, he expressed concern that unless his seniority was properly rectified, he would be deprived of acting appointments in future and be ranked below officers who should in the circumstance be lower than him on the merit list.

[20] The respondent claimed the following reliefs for illegal and discriminatory treatment contrary to the constitutional right to equality of treatment from a public authority in the exercise of its functions:

(i) a declaration that the he had been treated in an illegal and discriminatory manner contrary to the constitutional right to equality of treatment from a public authority in the exercise of its functions;

(ii) a declaration that the respondent is entitled to be appointed and/or promoted to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the Order of Merit List;

(iii) any further orders that might be necessary and/or appropriate to vindicate the respondent's constitutional right to equality of treatment as may be just and convenient;

(iv) damages;

(v) costs; and

(vi) any further relief as the court may think just and reasonable in the circumstances.

[21] In the absence of any evidence to show that the respondent was indeed contacted and allowed an opportunity to indicate whether he was interested in the acting appointment, and upon recognition of the error made by the PSC, and in an effort to remedy the wrong done to the respondent, a decision was taken by the PSC on 11 March 2008 to promote the respondent to the post of Customs and Excise Officer I, with effect from the date of his assumption of duty. The respondent's promotion was made subject, only, to his successful completion of the three years on-the-job training and the formal Customs and Excise training course. The respondent was therefore not required to act as a prelude to his appointment (as was the usual practice in the public service). During the course of the oral submissions, counsel for the respondent indicated (without objection by the appellant) that the respondent actually assumed duty on 1 May 2008.

[22] The appellant, prior to the filing of any affidavits by it, filed a Notice on 6 May 2008, seeking the dismissal of the respondent's claim, on the ground that it constituted an abuse of process. By that Notice, the appellant sought the following orders:

(i) an order that the relief sought by the respondent in respect of a declaration that the respondent was entitled to be appointed and/or promoted to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the Order of Merit List, be excluded from determination pursuant to ***rule 26.1(1)(l) of Civil Proceedings Rules 1998 (CPR)*** in so far as determining the issue related thereto would serve no worthwhile purpose;

(ii) an order that the respondent's statement of case be struck out pursuant to ***rule 26.2(1)(b) of CPR*** as the said statement of case was an abuse of process of the Honourable Court;

(iii) an order that the appellant cease to be party to these proceedings pursuant to ***rule 19.2(4) of the CPR*** as it was not desirable for the appellant to be party to these proceedings;

(iv) an order that the respondent's claim be dismissed pursuant to ***rule 26.1(1)(k) of the CPR***; and

(v) that the respondent pays the appellant's costs in this matter.

[23] The trial judge, in her written ruling on the preliminary issues raised, dismissed the appellant's application on 23 January 2009 and gave directions for the filing of affidavits and

written submissions. In essence, on the preliminary issues the judge held that: (i) ***section 14 of the Constitution*** was sufficiently wide for her to grant relief necessary and provide redress in respect of the respondent's declaration that he was entitled to a backdating of his appointment; (ii) there was no parallel remedy at common law or under the Judicial Review Act which provides a remedy for discrimination, thus the respondent's claim was not an abuse of process; and (iii) the appellant was the proper party to the originating motion. The trial judge, on the hearing of the substantive issues, held that the respondent's constitutional right to equality of treatment by a public authority was contravened by the PSC. Thus, the trial judge granted the respondent the following relief:

(i) a declaration that he had been treated in an illegal and discriminatory manner contrary to the constitutional right to equality of treatment from a public authority in the exercise of its functions; and

(ii) a declaration that the respondent be appointed to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the Order of Merit List.

III. Grounds of Appeal.

[24] The appellant now appeals the decision of the trial judge on the following grounds:

(i) the learned judge erred in making findings of fact that Ms. Wallace and Mr. Clauzel were comparators for the purpose of the respondent's claim, as such findings were contrary to the weight of the evidence insofar as the said persons were not suitable comparators, their names having been submitted to the PSC for consideration;

(ii) the learned judge erred in making findings of fact that the respondent was treated differently from his comparators by the PSC, as such findings were contrary to the weight of the evidence since the allegedly differential treatment was performed not by the PSC as alleged by the respondent;

(iii) the learned judge erred in law in finding that by virtue of the facts and matters raised by the respondent, he was treated in an illegal and discriminatory manner contrary to the constitutional right to equality of treatment from a public authority in the exercise of its functions;

(iv) the learned judge erred in law in making the said declarations without naming the public authority impugned;

(v) the learned judge erred in law in allowing these proceedings to continue against the appellant who was not an appropriate party;

(vi) the learned judge erred in law in declaring that the respondent was entitled to be promoted with retroactive effect to the office of Customs and Excise Officer I in accordance with his position on the Order of Merit List in circumstances where the respondent never served or acted or otherwise performed the functions associated with the said office; and

(vii) the decision is contrary to law.

IV. Issues arising based on the Grounds of Appeal.

[25] The appellant usefully laid out the issues to be determined by the court, as follows:

A. whether it is desirable for the appellant to be a party to the originating motion in the instant matter;

B. whether the learned judge erred in law in finding that the respondent's right to equality of treatment from any public authority in the exercise of its functions pursuant to ***section 4(d) of the Constitution*** has been breached;

C. whether the filing of the originating motion is an abuse of process;

D. whether the granting of the relief by the trial judge that the respondent be promoted to the office of Customs and Excise Officer I with retroactive effect, in accordance with his position on the Order of Merit List, would serve any worthwhile purpose; and

E. whether the learned judge erred in law in declaring that the respondent is entitled to be appointed and/or promoted to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the Order of Merit List.

Issues (D) and (E) shall be dealt with jointly.

V. The Law and its Application to the Instant Appeal.

A. Was it correct for the appellant to be a party to the originating motion?

(i) Submissions

[26] The appellant contends that it is not required to be a party to these proceedings. Rather, the originating motion should have been brought directly against the PSC since the PSC is a public authority separate and apart from the State; a distinction necessary to preserve the independence of the PSC consistent with the doctrine of separation of powers. The PSC is neither a servant nor agent of the appellant, but an independent commission under the ***Constitution*** for which the appellant is not responsible. The appellant further contended that ***section 19(8) of the SLPA*** is a deeming provision which effectively deems proceedings against a service commission to be proceedings against the appellant. It was also contended that unlike ***section 19(2) of the SLPA***, ***section 19(8) of the SLPA*** does not require that proceedings against the PSC be instituted against the appellant. The appellant also submitted further that impracticality would result as the declaration awarded to the respondent would be directed to the PSC, an independent statutory authority established under the ***Constitution***, which is not a party to the instant constitutional motion.

[27] In response, the respondent submitted that ***section 19(2) of the SLPA*** provides that "*subject to this Act and to any other written law, proceedings against the State shall be instituted against the Attorney General"*. The State is defined in ***section 2 of the SLPA*** as *"The Republic of Trinidad and Tobago".* ***Section 19(8) of the SLPA*** provides: *"proceedings against an authority established by the Constitution or a member thereof arising out of or in connection with the exercise of the powers of the authority or the performance of its functions or duties are deemed to be proceedings against the State."* ***Section 19(9) of the SLPA*** provides *"In this section, "authority" means a Service Commission as defined in section 3(1) of the Constitution."* ***Section 3(1) of the Constitution*** defines *"Service Commission"* to include the PSC. Therefore, it follows that the appellant is the proper party against whom proceedings were to be brought. The respondent further submitted that although the PSC is seen as an independent organ, its decisions can lead to the violation of a person's constitutional rights and in such instances the State must carry the mantle of litigation. The position is analogous to a police officer violating the rights of an individual. In so doing, the liability will accrue to the appellant and not to the individual

officer or to the Commissioner of Police. Moreover, these proceedings are not brought by way of judicial review and there is nothing on the claim which challenges the decision of the PSC in itself. The proceedings seek remedies, declaratory in nature, that the respondent has been treated in an illegal and discriminatory manner, contrary to the ***Constitution*** and in particular, with respect to the right of equality of treatment from a public authority. Like the appellant, the respondent also relied, inter alia, on the decision in ***Carmel Smith***[7] in support of its contentions.

[28] The trial judge, by way of hearing as a preliminary issue, prior to the filing of any affidavits by the appellant in opposition to the substantive matter held that she was bound at that time by the Court of Appeal decision in ***Carmel Smith v Statutory Authorities Service Commission***[8]. She accordingly, inter alia, dismissed the appellant's preliminary submission and allowed the matter to proceed against the appellant as the proper party and sole defendant. The question arises as to whether the judge came to the right decision.

(ii) Law and application

[29] I agree with the respondent's and the trial judge's conclusion on this particular issue. The law clearly provides that the appellant in these circumstances is the proper party to constitutional proceedings. The ***Constitution*** is silent as to against whom proceedings for breach of a person's right are to be brought. It is natural, however, to assume that such proceedings will be brought against the body which is alleged to have breached that right. That body, in this instance, is the PSC. The PSC is an independent body, but is also a public authority established by the ***Constitution*** which performs core functions inextricably linked to the State. Therefore, once litigation is sought against the PSC, regard must be had to the provisions of the ***Constitution*** and to the ***SLPA*** in determining whether the PSC or the appellant would be the proper party to the proceedings.

[30] The material provisions of the ***Constitution*** provide:

> *"**14. (1)** For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be*

[7] **Carmel Smith** (fn 3).

[8] Civ App. 213 of 2007.

contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

(2) *The High Court shall have original jurisdiction-*

(a) *to hear and determine any application made by any person in pursuance of subsection (1); and*

(b) *to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4),*

and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(3) *The State Liability and Proceedings Act shall have effect for the purpose of any proceedings under this section."* [Emphasis added].

Section 76. (2) of the Constitution then provides:

76. (2) *The Attorney General shall, subject to section 79, be responsible for the administration of legal affairs in Trinidad and Tobago and legal proceedings for and against the State shall be taken-*

(a) in the case of civil proceedings, in the name of the Attorney General;

(b) in the case of criminal proceedings, in the name of the State. "

[Emphasis added].

[31] Commenting on these provisions of the Constitution, Lord Walker in ***Carmel Smith***[9] observed:

"In the Constitution the expression 'the State' is not defined (other than by reference to its geographical extent in s 1 (2). Nor is the expression 'civil proceedings' defined; in particular, there is no restrictive definition such as is found in the State Liability and Proceedings Act...."

[32] The ***SLPA*** is concerned with proceedings by and against the State. The material provisions of the ***SLPA*** are ***section 19(2), (8) and (9)*** which provide:

(2) Subject to this Act and to any other written law, proceedings against the State shall be instituted against the Attorney General.

[9] **Carmel Smith** (fn 3) [8].

> *(8) Proceedings against an authority established by the Constitution or a member thereof arising out of or in connection with the exercise of the powers of the authority or the performance of its functions or duties are deemed to be proceedings against the State.*
>
> *(9) In this section, "authority" means a Service Commission as defined in section 3(1) of the Constitution.* [Emphasis added].

[33] The PSC is one such Service Commission which is expressly provided for in the definition at ***section 3(1) of the Constitution*** (the others being the Judicial and Legal Service Commission, the Police Service Commission and the Teaching Service Commission). That section provides:

> *3(1) In this Constitution –*
>
> *"Service Commission" means the Judicial and Legal Service Commission, the Public Service Commission, the Police Service Commission or the Teaching Service Commission."* [Emphasis added]

[34] In ***Carmel Smith***[10] the claimant sought constitutional redress under ***section 14 of the Constitution,*** contending that the Statutory Authorities Service Commission ("SASC") had discriminated against her and treated her unequally in violation of her rights under ***section 4(b) and (d) of the Constitution***. The Attorney General was the sole defendant to the originating motion. He objected on the basis that, although he was entitled to be given notice of the proceedings under ***section 3 of the Supreme Court of Judicature Act***, he could not be made a party without his consent, and that the proper defendant was the SASC. The procedural issue that fell for determination concerned the proper party to a claim for constitutional redress under ***section 14 of the Constitution***. In addressing this procedural issue, their Lordships distinguished between the four Service Commissions (the Judicial and Legal Service Commission, the Public Service Commission, the Police Service Commission and the Teaching Service Commission) which were given constitutional status, and the SASC which was not, the latter being established by statute, namely the Statutory Authorities Act Chap. 24:01. Reference was also made to the two other commissions established under the Constitution, namely the Integrity Commission and the Salaries Review Commission, which the Board felt were commissions with more limited and specialised functions.

[10] **Carmel Smith** (fn 3).

[35] Their Lordships (in ***Carmel Smith***[11]) were of the view that the resolution of the procedural issue was one of statutory construction which depended on the language of the Constitution and the ***SLPA*** construed in a purposive and practical way. The Board held that upon a proper construction the scheme and language of the ***SLPA*** were clear. The Attorney General was to represent the State and also to represent (except in judicial review proceedings) statutory bodies which were deemed by ***section 19 (8) and (9)*** to be part of the State. Other statutory bodies, even if public authorities amenable to constitutional redress proceedings under ***section 14 of the Constitution,*** were not part of the State and were not deemed to be part of the State. The Board further held that it was inconceivable that Parliament had not had it well in mind, when the ***SLPA*** was amended in 1998, that they were making an important procedural distinction between the four Service Commissions, on the one hand, and the Integrity Commission, the Salaries Review Commission and the SASC, on the other hand. At paras. [18] and [24] Lord Walker stated:

> *"When the new Constitution was being drafted and considered the Service Commissions were already in existence, carrying out the important functions described by Lord Diplock in* ***Thomas v A-G of Trinidad and Tobago****. SASC was already in existence carrying out similar functions in relation to statutory authorities. The fact that the former but not the latter were given constitutional status may reflect Parliament's view that the functions of the Service Commissions are closer to what is sometimes called 'core functions'. That view would tend to be confirmed by the amendments to s 19 of the State Liability and Proceedings Act made by Parliament in 1998. But whether or not that is correct… it is inconceivable that Parliament did not have it well in mind, in making the amendments, that they were making an important procedural distinction between the four Service Commissions, on the one hand, and the Integrity Commission, the Salaries Review Commission, and the SASC, on the other hand.*
>
> .....
>
> *In the Board's opinion the scheme and language are clear. The Attorney General is to represent the State (in effect, Central Government). The Attorney General is also to represent (except in judicial review proceedings) statutory bodies which (presumably because of their core functions) are deemed by s 19 (8) and (9) to be part of the State. Other statutory bodies, even if public authorities amenable to constitutional redress proceedings under s 14 of the Constitution, are not part of the State, and are not deemed to be part of the State."*

[36] The PSC, as a public body, performs core public functions with respect to the appointment, promotion, transfer and disciplining of officers in that part of the public sector for

[11] Ibid.

which the Constitution gives them exclusive responsibility. Pursuant to ***section 19(8) and (9) of the SLPA***, the PSC is one of the bodies for which proceedings in connection with the exercise of the powers of the authority or the performance of its functions will be deemed to be proceedings against the State. ***Carmel Smith***[12] establishes that, in constitutional proceedings for redress pursuant to ***section 14***, the Attorney General is to represent any statutory body which is deemed by ***section 19 (8) and (9***) to be part of the State. Accordingly, this being a constitutional motion in connection with the exercise of the powers of the PSC, which is a service commission as defined under ***section 3(1) of the Constitution***, and therefore an authority within the meaning of ***sections 19(8) and (9) of the SLPA***, it follows that the proper party against whom proceedings are to be brought is the appellant. It may have been an option, however, to join the PSC as a second named defendant and interested party in the matter under ***rule 19 of the CPR***.

[37] Therefore there is no merit in this ground of appeal.

B. Whether the learned judge erred in law in finding that the respondent's right to equality of treatment from any public authority in the exercise of its functions pursuant to section 4(d) of the Constitution has been breached.

(i) Submissions

[38] The appellant submitted that in order to establish a breach of the constitutional right to equality of treatment, the respondent must show that he was treated differently to persons similarly circumstanced. The appellant's case is that it is abundantly clear that the PSC did not have the respondent's name before them for consideration for promotion, unlike the other persons who were considered and promoted by the PSC and, therefore, these other persons cannot be considered actual comparators, similarly circumstanced. Moreover, it is submitted that even if this Honourable Court were to find that the respondent had been treated differently to other persons similarly circumstanced, which is not admitted, that alone is insufficient to establish a breach of the constitutional right to inequality of treatment. Relying, inter alia, on the authority of ***Attorney General v KC Confectionery Ltd***[13], the appellant submitted that there was

[12] **Carmel Smith** (fn 3).

[13] (1985) 34 WIR 387..

an obligation on the respondent to prove a deliberate and intentional exercise of power, not in accordance with law, by the PSC, against the respondent.

[39] The appellant further submitted that the Court of Appeal's decision in ***Police Service Commission v Dennis Graham; and Dennis Graham v Police Service Commission and anor***[14], contrary to the judge's interpretation, also establishes that the alleged discriminatory act must be deliberate. However, there was no evidence put before this Court by the respondent to show that his name was submitted to the PSC for consideration and that he was rejected for promotion. In fact, there was no evidence of any intention to refuse his promotion on any grounds whatsoever. Rather, Ms. Edwards-Joseph's affidavit discloses cogent evidence from which the irresistible inference can be drawn that the omission of the Service Commission Department to submit to the PSC the respondent's name for consideration for promotion was nothing more than an oversight or, at most, negligence in the performance of what can only be described as an administrative function.

[40] It was submitted that the respondent did not show any deliberate treatment at all. For that reason, no burden could have shifted to the Service Commission Department to justify any decision as there was no decision to justify. This was simply an unfortunate and clear case of negligence. Further, no malice arises from the non-disclosure of the merit list which the PSC believed to be exempt under the ***FOIA***, as a result of the confidential information contained therein in respect of other officers. Moreover, the appellant contended that when the error was brought to the attention of the PSC, steps were taken to promote the respondent as soon as reasonably practicable. In the circumstances, it was submitted that the respondent had failed to establish that his constitutional right to equality of treatment had been breached at all.

[41] On the other hand, the respondent submitted that it was instructive to note that the appellant had admitted bypassing him for promotion. The respondent contended that the learned judge came to the correct conclusion that the comparison occurred when *"persons falling within the respondent's group were contacted to ascertain whether or not they were interested in the post."* The appellant contacted those persons who fell in that group, but failed to contact the respondent. Furthermore, the appellant also admitted that those persons who fell within the

[14] Civ. App. 27 of 2006 and Civ. App. 8 of 2008.

respondent's group, but who ranked lower than the respondent, were also promoted. The respondent emphasised that the courts can no longer take the view that a failure to prove mala fides will preclude a respondent from successfully challenging unequal treatment. While the case law has offered different interpretations of the test to be applied when considering inequality of treatment, it was the respondent's contention that Mendonca JA, in the case of ***Graham***[15], outlined one of the more recent and comprehensible interpretations of the law, to the effect that *"in view of subsequent developments however it is at least safe to say that proof of mala fides is not always necessary."* It was therefore submitted that proof of mala fides was not necessarily a prerequisite to a successful claim for inequality of treatment. Instead, the initial onus is on the respondent to show that he was similarly circumstanced and that he was treated less favourably than the person(s) who were similarly circumstanced to him. It is submitted that the respondent has discharged this onus.

[42] Relying on ***Graham***[16], the judge concluded that to establish a ***section 4(d)*** breach ***of the Constitution*** all that is required is: (i) proof by an aggrieved party that he was less favourably treated than other similarly circumstanced persons, and/or that they were more favourably treated than he was; and (ii) once a prima facie case of violation of the right to equality of treatment is raised, the onus shifts to the public authority to explain or justify its decision and show that there is no breach of the right. In other words, there must be a lack of any legitimate or lawful reason for the treatment. As a result the judge held that Ms. Wallace and Mr. Clauzel, identified in the affidavit of Ms. Edwards-Joseph, were comparators and the point of comparison occurred when they were contacted by the PSC to ascertain whether or not they were interested in the post of Customs and Excise Officer I, but the respondent, through nothing more than an error, was not similarly contacted and, therefore, had been treated differently from his comparators. This surmounted the first hurdle of proving that he was treated differently from his comparators. In accordance with ***Graham***[17], the burden then shifted to the PSC to explain or justify its decision and to show that there was no breach of the right. The trial judge held that the appellant had failed to discharge the burden of explaining and justifying its failure to contact the respondent to ascertain his interest in the post of Customs and Excise Officer I. Accordingly, the

[15] **Dennis Graham** (fn 14).

[16] Ibid.

[17] Ibid.

judge held that the respondent had established a breach of ***section 4(d) of the Constitution*** and granted the declarations sought. In relation to the claim for damages, the trial judge found that there was neither evidence nor submissions in support thereof and therefore refused the claim.

[43] I shall therefore consider whether the judge erred in finding that the respondent's constitutional right to equality of treatment from a public authority in the exercise of its functions pursuant to ***section 4(d)*** have been violated.

(ii) Law and application

[44] ***Section 4 of the Constitution*** provides, among other matters:

> *"It is hereby recognised 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…"*

Section 14 (1) of the Constitution provides:

> *"For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."*

[45] Equality is a comparative concept. In a constitutional setting not all differential treatment would be discriminatory. The concept is neither Orwellian nor Utopian. Rather, the constitutional right to equality before the law connotes the right to equal treatment with others in similar circumstances. In ***Bhagwandeen v Attorney General***[18] Lord Carswell propounded the test for inequality of treatment:

> *"A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in* ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** *[2003] 2 All E R*

[18] PC App No 45 of 2003 [18].

> *26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same or not materially different in the other."*

Onus of proof.

[46] In formulating a two-stage approach to the onus of proof, both Mendonca JA and Jamadar JA relied in ***Graham***[19] on the Privy Council decision of ***Bishop of Roman Catholic Diocese of Port Louis v Tengur***.[20] In ***Tengur***[21] the court held that the giving of preference to one group of applicants (Roman Catholic pupils) necessarily worked to the disadvantage of any group of applicants to whom preference was not given. Such differentiation, however, did not necessarily amount to discrimination. The differentiation of which the father of an eleven-year-old Hindu child complained, appeared to be discriminatory since it was based on creed, a ground prohibited under the Mauritian Constitution. Lord Bingham referred to authorities from several jurisdictions including the Strasbourg court in propounding what was required to be proved in establishing discrimination:

> *"Where apparently discriminatory treatment is 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 the aim sought to be realised."*[22]

[47] In ***Graham***[23] Mendonca JA propounded the following:

> *"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."*

[19] **Dennis Graham** (fn 14).

[20] [2004] UKPC 9.

[21] Ibid.

[22] Ibid [19].

[23] **Dennis Graham** (fn 14) [55].

[48] In that same matter, Jamadar JA asserted[24]:

> *"I therefore remain convinced, that in order to establish a section 4(d) breach of the Constitution all that is required is proof by an aggrieved party that he was less favourably treated than other similarly circumstanced persons and/or that they were more favourably treated than he was. This determination is to be undertaken by a court on a consideration of all of the evidence, both of the claimant and of the respondent. The duty of all parties is of candour. The presumption of bona fides is facilitative of full disclosure by a public authority which has nothing to hide and is genuinely interested in accountability and transparency and in achieving good public administration. Once a prima facie case of the violation of the right to equality of treatment is raised, the onus shifts to the public authority to explain and justify its decision and to show that there is no breach of the right...."*

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[49] Thus ***Graham***[25] can be said to have established that once a claimant who is alleging a breach of his ***section 4(d)*** right has raised a prima facie case that he was treated less favourably than one similarly circumstanced, the onus then shifts to the public authority to justify the difference in treatment. There must be objective justification for such differential treatment.

Mala fides.

[50] While in some cases there may be evidence of mala fides, proof of mala fides is not a prerequisite before inequality of treatment can be established.[26] The constitutional prohibition is directed towards the discriminatory result and not the discriminatory intent.[27]

Conclusion.

[51] In my view the judge was correct in adopting the test for equality established in ***Graham***[28], namely that where a claim is brought for inequality of treatment under ***section 4(d) of the Constitution***, a claimant need only raise a prima facie case that he was treated less favourably than one similarly circumstanced. The onus then shifts to the public authority to justify on an objective basis the difference in treatment.

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[24] fn 18 [25].

[25] **Dennis Graham** (fn 14).

[26] Ibid [37] to [58], Mendonca JA.

[27] **Re Canadian Odeon Theaters Ltd v Saskatchewan Human Rights Commission** [1985] 18 DLR (4th) 93 [68] Justice Vancise; see also **Andrews v Law Society of British Colombia** [1989] 1 SCR 143 [19] Mc Intyre J.

[28] **Dennis Graham** (fn 14).

[52] I also agree with the trial judge that Ms. Wallace and Mr. Clauzel were actual comparators. Both were similarly circumstanced as they too had applied for the vacant post of Customs and Excise Officer I, were selected on the basis of written competitive examinations and interviews, were placed on the Order of Merit List and were to be contacted sequentially in accordance with established practice and procedure. Both Ms. Wallace and Mr. Clauzel were ranked at numbers 52 and 56 on the Order of Merit List, which was within close proximity to the respondent who ranked at number 53 thereof. The judge was therefore correct when she held that the point of comparison arose when those two individuals were contacted by the PSC to ascertain their interest in the post of Customs and Excise Officer I, whereas the respondent, through nothing more than an error, was not similarly contacted. This surmounted the first hurdle of raising a prima facie case that he was treated differently from his comparators. It was then for the PSC to objectively justify the difference in treatment. In my view the judge was also correct when she found the following at paras 7 and 8 of her judgment:

> *"7. The Defendant in the instant case has failed altogether to offer any explanation. Far from providing an explanation, the deponent for the Defendant has invited the Court to speculate. At paragraph 22 of her affidavit, Ms. Edwards-Joseph suggested that the Defendant's inability to find a record of a letter to the claimant "... could mean one of several things." The deponent then proceeded in her affidavit to identify three possible scenarios, the last of which was that the Claimant was not contacted at all.*
>
> *8. In my view, this falls far short of the explanation envisaged by the Court of Appeal in* ***Graham****. The Defendant has failed altogether to discharge its burden to explain and justify their failure to contact the Claimant to ascertain the Claimant's interest in the post."*

[53] Thus, the appellant has failed to discharge the onus cast on it to objectively justify such differential treatment. It adds nothing to the point to say that the failure to contact the respondent was due to nothing more than an error. The constitutional prohibition of ***section 4 (d)*** is directed towards the discriminatory result, and not to the discriminatory intent. Its purpose is not to punish the discriminator, but rather to provide redress to a claimant who has suffered inequality of treatment. In the instant case such discriminatory treatment has the potential, in addition to financial loss including possible disruption of his pension benefits, to seriously prejudice promotional prospects and career advancement, moreso in a highly competitive environment.

[54] Accordingly, the trial judge was correct in finding that there was a breach by the PSC of the respondent's right to equality of treatment contrary to ***section 4(d) of the Constitution***.

C. Whether the filing of the originating motion is an abuse of process.

(i) Submissions

[55] Regarding this issue, the appellant contended that the originating motion is an abuse of process as there was an alternative remedy available to the respondent, that is, judicial review. In support of this, the appellant submitted that the true nature of the respondent's case was not based on any genuine breach or infringement of the respondent's constitutional rights, but was in fact a challenge to the exercise of the PSC's discretion not to promote him and/or its failure to submit his name to the PSC for consideration. It is the appellant's case that the respondent was at all material times entitled to, and ought to have applied for, judicial review in order to obtain the reliefs sought in the originating motion. Insofar as the failure of the PSC to promote the respondent was a result of the omission of the Service Commission to put his name before them, he was entitled to bring a private action for negligence against the appellant. The appellant therefore submitted that the respondent's case lies in judicial review and/or negligence. The appellant was adamant that there existed neither points of pure constitutional merit nor any exceptional circumstances which would make it appropriate for the matter to have been initiated by way of originating motion.

[56] In opposition, the respondent submitted that it is clear that the principal issue in this case is the violation of his right to equal treatment by a public authority. There is a prescribed and transparent process of promotion in order to ensure equality and fairness. The PSC cannot act ultra vires to the regulations. Since the appellant has acted in direct contradiction to the supreme law in using its discretion in an arbitrary and obscure fashion, directly violating the respondent's fundamental rights by placing him on unequal footing with his comparators, such action has to be rendered void and corrective measures must be implemented. In response to the appellant's submission that there was the alternative remedy of judicial review available to the respondent, hence making the instant originating motion an abuse of process, he submitted that the appellant failed to appreciate the supremacy of the Constitution. ***Section 14(1) of the Constitution*** provides that proceedings under the Constitution may be brought to the High Court

for redress *"without prejudice to any other action with respect to the same matter which is lawfully available."* The respondent contended that the "alternative remedy argument" operates in judicial review proceedings but not in constitutional proceedings.

[57] The judge, in her written ruling on the preliminary issue[29], held that the respondent was entitled to continue his claim under ***section 14 of the Constitution*** as:

(i) there was no parallel remedy at common law or under the ***Judicial Review Act (JRA)***[30] which provides any remedy for an allegation of discrimination; and

(ii) relying on ***Jaroo v Attorney General***[31], a claimant who approaches the court under ***section 14*** is justified in seeking constitutional redress where there is no dispute as to the facts.

[58] In the instant case, after many months, no explanation was forthcoming for the apparent discrimination. Accordingly, the issue arising for determination is whether the filing of the originating motion was an abuse of the process.

(ii) Law and application

[59] Bona fide resort to rights under the Constitution ought not to be discouraged: ***Ahnee v DPP***[32]. However, *"frivolous, vexatious or contrived invocations of the facility of constitutional redress are certainly to be repelled"*: ***Observer Publications Ltd v Matthews***[33]. In ***Johnatty v A-G of Trinidad and Tobago***[34] Lord Hope provided a useful summary of the learning in this area:

> *"The fact that these alternative remedies [judicial review and breach of contract] were available is fatal to the appellant's argument that he ought to have been allowed to seek a constitutional remedy. In* ***Harrikissoon v Attorney General of***

[29] CV.2008-00264, Judgment of Dean-Armour, J dated 23 January 2009.

[30] Chap. 7:08.

[31] [2002] UKPC 5.

[32] [1999] 2 AC 294 at 307 Lord Steyn.

[33] [2001] UKPC 11 [53].

[34] [2008] UKPC 55 [22].

> ***Trinidad and Tobago*** *[1980] AC 265, 268 Lord Diplock warned against the misuse of the right to apply for constitutional redress when other procedures were available. He said that its value would be seriously diminished if it is allowed to be used as a general substitute for the normal procedures for invoking judicial control of administrative action. This warning has been repeated many times..... In* ***Jaroo v Attorney General of Trinidad and Tobago*** *[2002] UKPC 5; [2002] 1 AC 871, para 39 Lord Hope of Craighead said that before he resorts to this procedure the applicant must consider the true nature of the right that was allegedly contravened and whether, having regard to all the circumstances of the case, some other procedure might not more conveniently be invoked. In* ***Attorney General of Trinidad and Tobago v Ramanoop*** *[2005] UKPC 15, [2006] 1 AC 328, para 25 Lord Nichols of Birkenhead said that where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made includes some feature which makes it appropriate to take such a course."*

[60] Moreover, in ***Jaroo***[35], Lord Hope stressed the appropriateness of the use of the procedure afforded by ***section 14(1) of the Constitution*** where the facts are not in dispute and questions of law only are in issue. His Lordship reasoned as follows:

> *"[31] For the reasons which their Lordships have just indicated, the appellant may have had sound reasons at the outset for thinking that his constitutional rights were being infringed by the police. This is because they were continuing to detain the vehicle which he had handed over to them voluntarily without giving any reasons for doing so, and because they had declined to answer his requests for it to be returned to him. All the signs were that they were abusing their common law powers in a manner which was no longer lawful and which could properly be described as arbitrary. Section 14(1) of the Constitution declares that, without prejudice to any other action with respect to the same matter which is lawfully available, a person may apply to the High Court for redress by originating motion in such circumstances. This procedure enables the person who seeks a quick judicial remedy to avoid the delay and expense which a trial of the case by means of an ordinary civil action will involve. As the appellant had received no reply to his solicitor's letter of 22 April 1988, their Lordships are disposed to think that he could not reasonably have been criticised at the outset for regarding the constitutional route as the best way to make rapid progress in his efforts to obtain the return of the motor car."*[36]

[61] Thus, correctly analysed, the authorities establish that it is only when a constitutional motion is properly to be regarded as an abuse of the court's process, that it would

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[35] **Jaroo** (fn 31) [31].

[36] Ibid [31].

be dismissed by reference to the availability of some other remedy: ***Independent Publishing v Attorney General***[37].

[62] In the instant case the respondent responded to a circular memorandum issued in November 1997 inviting applications to fill the office of Customs and Excise Officer I. The respondent was successful in the examination and became qualified for the promotion interview. At that interview he was informed that candidates would be promoted on the basis of a merit list compiled by reference to the candidate's performance and score in the interview. Nearly six years had elapsed (2006) before the respondent was informed by another applicant that officers had been appointed to the position of Customs and Excise Officer I. In July 2006 the respondent applied pursuant to the ***FOIA*** for material information with respect to the appointment of officers to the post of Customs and Excise Officer I, including scores and placement on the Order of Merit List.

[63] Dissatisfied with the responses, the respondent's attorney issued a pre-action protocol letter on 14 May 2007 complaining of a violation of his right to equality of treatment. He followed this up by commencing proceedings on 15 October 2007 for judicial review of the decision of the PSC to refuse disclosure of the merit list. While those proceedings were pending, the PSC in December 2007 provided a complete merit list showing the ranks of the officers named therein. The list revealed that officers who had been placed lower on the merit list had been promoted ahead of the respondent. However, no explanation was proffered as to the failure to appoint the respondent. In January 2008 the respondent instituted these proceedings against the appellant for constitutional redress.

[64] In my view the respondent acted reasonably by commencing proceedings by way of a constitutional motion for violation of his constitutional right to equality of treatment by a public authority. At that juncture, in January 2008, the respondent: (i) was now seized of information that for a period of some four and a half years he was being bypassed for promotion to the post of Customs and Excise Officer I by persons who were ranked lower than he was on the Order of Merit List; (ii) had spent some eighteen months securing information material to his appointment; and (iii) had not been given any explanation or reason for being bypassed. It would

[37] [2004] UKPC 26 [76].

have been tenable for him at that stage to form the subjective view that the intention to discriminate was deliberate.

[65] In ***Graham***[38]**,** the appellant was appointed to act as Superintendent on 3 June 1996. In January 1997 thirteen police officers (eleven of whom were junior to the appellant), were promoted ahead of him from Assistant Superintendent to Superintendent with retrospective effect from December 1996. A few months later a similar position was adopted with respect to another officer (All fourteen officers and the respondent had been recommended for promotion at the material time). In July 1998 the appellant was promoted to Superintendent. However, his promotion had limited retrospective effect, the respondent refusing to accord him treatment similar to the previously promoted officers by backdating his appointment as Superintendent to December 1996. His appointment was backdated to 23 July 1997. Effectively Graham had suffered a loss of seniority of seven months. The Court of Appeal held, inter alia, that the refusal to backdate his appointment as Superintendent to December 1996 violated his right to equality of treatment under ***section 4 (d) of the Constitution***. Mendonca JA considered the other police officers appropriate comparators and held that, at the time that the appellant had sought the amendment to include the constitutional violation, he had an arguable case that his right to equality of treatment guaranteed by ***section 4 (d)*** had been infringed. On the issue as to whether the constitutional proceedings were an abuse, Mendonca JA stated[39]:

> *"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..... With respect to (a) there is no doubt that the 1997 decision was susceptible to judicial review under 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....."*

[66] In the instant case, even after the appellant filed their affidavits, there were no factual disputes requiring resolution. What essentially emerged is that there was no mala fides. However, there was a clear prima facie case that the respondent was treated less favourably than others similarly circumstanced, and that the appellant could not objectively justify the difference

[38] **Dennis Graham** (fn 14).

[39] Ibid [83].

in treatment. Thus, the respondent (as ***Jaroo***[40] makes clear) could not have been criticised for continuing along the constitutional path. Moreover, on the facts of this case and on the authority of ***Graham***[41], it is doubtful whether judicial review, rather than a constitutional motion, would provide an adequate or effective remedy. Accordingly, and in agreement with the trial judge, it was proper for the respondent to commence proceedings by way of a constitutional motion.

D. Whether the granting of the relief by the trial judge, that the respondent be promoted to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the order of merit list, would serve any worthwhile purpose; and

E. Whether the learned judge erred in law in declaring that the respondent was entitled to be appointed and/or promoted to the position with retroactive effect in accordance with his position on the order of merit list.

(i) Submissions

[67] It was the appellant's submission that the PSC, upon recognition of the error made, and shortly after the proceedings were filed, did all that could have been done to correct its error. The PSC had in fact promoted the respondent to the position of Customs and Excise Officer I, with effect from the date of his assumption of duties. This was consistent with the powers of the PSC in light of the law which specifies at ***section 42 of the Interpretation Act***[42] that *"an appointment (however described or designated) under a written law may be made to have effect retrospectively from the date upon which the person appointed in fact first performed any of the functions of his appointment."* Therefore, it would be ultra vires the powers of the PSC to appoint the respondent with retrospective effect from a date upon which he was not serving in that capacity. Such order would be detrimental to good administration as it would mean that the respondent, who never performed the functions of the office, would be ranked senior to persons who had been performing those functions for years. Further, it would convey to the respondent a benefit which he had not yet earned.

[40] **Jaroo** (fn 31).

[41] **Dennis Graham** (fn 14).

[42] Chap. 3:01.

[68] The appellant also contended that the retrospective order of the judge was wrong. It was submitted that the PSC was not a party to this action, so that any order made by any court for retrospective promotion might be impossible to comply with; on the contrary it might be possible to comply with an order to amend the seniority list to reflect the relative seniority of the respondent. Further, if the court were minded to grant relief, the court could order damages from the date the respondent should have been appointed to the time when he was actually appointed.

[69] In response, the respondent contended that the main issue in respect of the inequality of treatment remained, despite his subsequent and delayed promotion by the PSC. Regarding the nature of the trial judge's retroactive declaration, the respondent further contended that it is well known that retroactive promotions in the public service are routinely made. The very length of the administrative process dealing with promotions lends itself to retroactivity. Further to this, the respondent contended that ***section 14(2) of the Constitution*** provides the court with a power to grant wide and all-encompassing remedies. The justice of the case, in the face of cogent evidence of discrimination, demanded that an order of retroactive promotion be made. The respondent maintained that in view of the wide panoply of remedies available to the court in a constitutional application, his retroactive promotion could not be deemed to lie beyond the powers of the learned trial judge.

[70] It is noteworthy that while the parties' written submissions on appeal did not address the question of damages as redress, no doubt because of the manner in which the issues had been joined on appeal, both attorneys were probed on the issue during their oral arguments. Thus, both sides were afforded the opportunity to address the issue of damages.

[71] On the basis of its contentions, the appellant, by way of the preliminary issue, sought an order of the court that the declaration being sought by the respondent to the effect that he is entitled to be appointed and/or promoted to the office of Customs and Excise Officer I with retrospective effect in accordance with his position on the Order of Merit List, be excluded from determination in accordance with part ***26.1(1) of the CPR*** in so far as determining the issue related thereto would serve no worthwhile purpose. The trial judge refused to grant the order, holding that ***section 14 of the Constitution*** was wide enough to provide the relief necessary to provide redress; it was no answer to say that the respondent had been appointed from the date of

his assumption of duty when, by his contention, his appointment should have been effective around the same time as his comparators, one of whom occupied a lower rank on the merit list. The judge proceeded at trial to grant the respondent declarations in respect of: (i) a breach of his constitutional right to equality of treatment from a public authority in exercise of its functions; and (ii) his retroactive appointment to the position of Customs and Excise Officer I, in accordance with his place on the Order of Merit List. However, as to the claim for damages, the judge refused to award damages as she was of the view that there had been neither evidence nor submissions in support thereof.

[72] These two issues in respect of whether there was worthwhile purpose in the grant of a declaration that the respondent be appointed with retrospective effect and whether the judge had the power to grant such a declaration in retrospective terms, are essentially concerned with the determination of the appropriate remedy available to the respondent, bearing in mind that I have concluded that the PSC breached his right to equality of treatment.

(ii) Law and application

[73] Having concluded that there is a contravention of the right to equality of treatment, the issue that arises for consideration is as to the constitutional remedy to which the respondent is entitled. I bear in mind that the fundamental human right is not to a legal system that is infallible, but to one that is fair. In my view the constitutional redress that would be appropriate in the circumstances is to grant the respondent: (i) a declaration as to a violation of his right to equality of treatment; (ii) a declaration that the PSC consider his relative seniority; and (iii) a compensatory award.

[74] ***Sections 14(1) and (2) of the Constitution***[43] are concerned with remedies. ***Section 14(2)*** confers on the High Court jurisdiction to hear and determine any application made by any person in pursuance of subsection (1), and to make such orders, issue such writs and give such declarations as it may consider necessary for the enforcement of the entrenched rights and freedoms. The Privy Council in ***Attorney General v Ramanoop***[44] interpreted ***section 14*** as follows:

[43] See [29] of this judgment.

[44] (2005) UKPC 15 [17] to [19].

*"**.....**Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.*

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under s 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."[Emphasis added].

[75] Where a vindicatory award is appropriate, its purpose is not punitive. In ***Merson v Cartwright***[45] the Privy Council stated:

"The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of

[45] (2005) 67 WIR 17 [18].

damages, including substantial damages, may seem to be necessary." [Emphasis added].

[76] Additionally, the Privy Council has made it clear that damages may also be awarded in appropriate cases where a claimant has suffered distress, anxiety and depression as a result of a constitutional breach. Lord Kerr in ***James v Attorney General***[46] stated:

> *"[27] In any event, the very fact of discrimination having occurred can inflict damage on those who have been discriminated against. The sense of having been wronged, the uncertainty over one's status as a consequence of the discriminatory conduct and the distress associated with having to resort to litigation in order to have the discrimination exposed and corrected can all be recognised as damage, perhaps not in the conventional personal injury sense, but damage nonetheless.*
>
> *[28] An injury suffered as a result of discrimination is no less real because it does not possess tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognising its compensatable potential. This concept was well expressed by Mummery LJ in* ***Vento v Chief Constable of West Yorkshire Police*** *[2003] IRLR 102 at [50]–[51]…"* [Emphasis added].

[77] In considering the evidence, the PSC first discovered the respondent's concern relative to him having been bypassed for promotion from the grounds and affidavit in support of the claim for judicial review to obtain material information pursuant to the ***FOIA*** (the claim was filed on 15 October 2007)[47]. Upon enquiries being made with respect to the bypassing of the respondent for promotion, the evidence suggests that this was due to nothing more than an administrative error. The PSC, in the absence of any positive evidence that the respondent was contacted in January 2003 (as he should have been), took the decision in March 2008 to promote him to the post of Customs and Excise Officer I with effect from the date of his assumption of duty, subject to completion of three years on-the-job training and the formal Customs and Excise Training Course. The PSC therefore took the decision to promote the respondent to the office of Customs and Excise Officer I without him having acted in office as is customary in the public service. The respondent assumed duty on 1 May 2008.

[46] (2011) 2 LRC 217 [27] to [28].

[47] Affidavit of Gloria Edwards-Joseph [20], sworn to on the 18 May 2009 and filed on the 19th May 2009 at pg. 295 of the Record of Appeal

[78] It is manifest from the evidence that there was no question of mala fides or deliberate wrongdoing given that the PSC took steps (approximately four months after discovery of the error) to remedy the situation by promoting the respondent. This was no more than an administrative error. Accordingly, in granting constitutional relief in the instant case, an award of vindicatory damages is not called for to reflect any sense of public outrage, to emphasise the importance of the constitutional right, the gravity of the breach or the need to deter future breaches[48]. The vindication of the respondent's constitutional right can be achieved by granting him other relief bearing in mind that the ambit of the protection conferred by ***section 14*** is wide enough to provide effective relief for violations of entrenched rights and freedoms, including the power to fashion a new remedy[49].

[79] In considering whether there ought to be further relief for the vindication of the right other than a declaration as to its breach, the question arises as to whether the trial judge was correct to make the retrospective appointment and whether she ought to have excluded the issue of damages.

(a) Declaratory relief aimed at accounting for the respondent's loss of seniority caused by his appointment four and a half years after he should have been properly appointed with his comparators.

[80] Of uppermost importance in the granting of effective relief in this matter, is ensuring that the respondent is granted a remedy for his loss of seniority. There was substantial evidence that the respondent was materially disadvantaged by his appointment four and a half years after his comparators. The respondent at paragraph 8 of his affidavit dated 22 June 2009 explained:

> *"8. I am concerned that unless my seniority is properly rectified, I will miss acting appointments in the future and be ranked below officers who I "beat" on the Merit List. Had the established practice, procedure and policy adopted by the PSC been followed, I would have been appointed to act and confirmed in accordance with my placement on the Merit List. There is no real explanation as to why this was not done."*

[48] **Ramanoop** (fn 44) [19].

[49] **Gairy v Attorney General of Grenada** (2001) UKPC 30 [23].

Indeed, his late appointment had the effect that some of his 'juniors' had become his 'seniors', and moreover, his future opportunities at acting appointments and promotions would be significantly affected if his relative seniority were not to be taken into account.

[81] Thus, the respondent, by his claim, sought relief for the loss of his seniority by seeking a declaration in the following terms:

> *"A declaration that the [respondent] is entitled to be appointed and/or promoted to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the Order of Merit List."*

That declaration, as noted at paragraph 20 of this judgment, was just one of the six forms of relief sought by the respondent in respect of his claim. The PSC having promoted the respondent to Customs and Excise Officer I a short while after the filing of the respondent's clam, applied for an order of the trial judge that this particular relief be excluded for determination on the basis that it would serve no worthwhile purpose. However, as previously noted, the judge dismissed that order and, on conclusion of the substantive matter, granted the declaration in the same terms claimed for by the respondent.

[82] Notably, there is no issue that the respondent has indeed suffered a loss of seniority as a result of his appointment four and a half years after his comparators. Rather, it is the form and effect of that declaration, which requires the backdating of the respondent's appointment, which is at the basis of the appellant's appeal in respect of this issue.

[83] There being no evidence to support the respondent's broad assertion that retroactive promotions in the public service are routinely made, I agree with the appellant that the trial judge erred in declaring that the respondent's appointment was to have retroactive effect in accordance with his position on the Order of Merit List. The PSC's reaction to the claim was to promote the respondent in accordance with his place on the Order of Merit list, from the date of his assumption of duties. The PSC did so in accordance with its powers of retrospective appointment as provided at ***section 42 of the Interpretation Act***[50] as follows:

[50] Chap 3:01.

> ***42.*** *An appointment (however described or designated)under a written law may be made to have effect retrospectively from the date upon which the person appointed in fact first performed any of the functions of his appointment.*

[84] While I agree with the respondent that the power of the court in Constitutional proceedings is wide enough to grant effective relief, a court cannot direct a body or authority to act ultra vires. When a court makes a declaration in cases such as this, it is to guide the public authority as to its proper decision-making powers. In this case, the respondent's position on the Order of Merit list entitled him to be considered for promotion sequentially. Once the error had been recognised, the respondent was promoted with the advantage that he would not be required to first act in the position (as was required by others who had been promoted before him). The most conceivable reason for waiving the requirement to act, was to place the respondent in as close a position as he would have been had the error not been made. This was within the power of the PSC. Yet, as it appears from ***section 42 of the Interpretation Act***, the PSC was limited to appointing the respondent from the date of his assumption of duties as a Customs and Excise Officer I. Therefore, to backdate the respondent's appointment to a date when he had not performed any of the duties of that position would indeed be contrary to ***section 42 of the Interpretation Act***, and thus ultra vires.

[85] I have concluded that the court cannot lawfully backdate the respondent's appointment to a date prior to when he first performed the duties of Customs and Excise Officer I. The lack of power of the judge to backdate the respondent's appointment in the instant circumstances meant inevitably that the issue of a declaration of retroactive appointment should have been excluded from determination in accordance with part ***26.1(1)(l) of the CPR.***

[86] However, I acknowledge that the respondent's intended purpose of that declaration would have no doubt been aimed at rectifying the loss caused to his seniority. Although the respondent was eventually promoted in 2008, he still suffered a material four and half years loss of seniority. Thus, I have concluded that in light of the wide powers of the court to grant an appropriate remedy for the breach of the respondent's right to equality of treatment, a declaration ought to be granted to the respondent so as to ensure that the PSC gives consideration to the respondent's relative seniority (in respect of the lost four and a half years) when next acting opportunities and/or promotions to offices for which the respondent is eligible are being

considered. Such remedy is granted specifically in respect of the respondent's successful claim for breach of equality of treatment by the PSC. In ***Graham***[51] an order to a similar effect was made by the trial judge. It is clear that the genesis of such an order came from the Police Service Commission itself[52].

[87] Further, it seems to me that in addition to the two declarations granted herein, an order for a compensatory award would be appropriate. In that regard, and in light of the evidence before the court, the respondent ought to be compensated for his actual loss of earnings and damages for the distress, anxiety and frustration occasioned by the constitutional breach.

(b) Compensation for loss of earnings

[88] In the instant case, despite the fact that the respondent was promoted from 1 May 2008, the evidence reveals that two of his comparators, Ms. Wallace (ranked 52) and Mr. Clauzel (ranked 56), were contacted by letter in January 2003 and asked to indicate their interest in the acting appointments to the post of Customs and Excise Officer I while the respondent, ranked 53, was not similarly contacted. Both comparators were appointed to act with effect from the date of assumption of their duties (13 October 2003 and 17 October 2003 respectively). Ms. Wallace was promoted to the post of Customs and Excise Officer I with effect from 7 November 2006 while Mr. Clauzel was appointed to the said post on the same date[53]. Accordingly, both comparators would have been appointed to act as Customs and Excise Officer I (mid-October 2003) for a materially significant period of time, namely, approximately four and a half years before the respondent assumed duties as Customs and Excise Officer I on 1 May 2008. A reasonable inference must be that the respondent would also have received a similar acting appointment around mid-October 2003 and eventually appointed to the post of Customs and Excise Officer I with effect from 7 November 2006. This, therefore, would entitle him to compensation equivalent to his loss of acting allowances during the period mid-October 2003 to end April 2008.

[89] The respondent in his grounds set out that his career had *"been adversely affected by the discrimination and he has lost seniority, income, valuable training opportunities and the*

[51] **Dennis Graham** (fn 14).

[52] Ibid [12].

[53] Affidavit of Gloria Edwards-Joseph [21], sworn to on the 18 May 2009 and filed on the 19th May 2009 at pg. 295 of the Record of Appeal.

opportunity to advance his career in the public service"[54]. In his affidavit dated 22 June 2009 the respondent particularised the detriment and prejudice he had suffered and noted his calculated loss of earnings:

> *"5. In response to paragraph 24 I say that I was not aware of the rationale for the decision of the PSC. It is clear that I was treated differently to other officers on the merit list as I was never offered an action appointment in consequence of which the effective date of my substantive appointment placed me at a great disadvantage.*
>
> *6. I should have been appointed together with Ms. Nicolette Wallace or Mr. Victor Clauzel [in October 2003]. The illegal bypassing of my name on the Merit List caused me to lose acting allowances totaling $24,825.00. There is now produced and shown to me a true copy of my statement of loss of acting allowances which is hereto annexed and marked "R.D.H.1"."*[Emphasis added].

[90] It is noteworthy that there was no challenge in the High Court to the monetary loss claimed to have been suffered by the respondent in the sum of $24,825.00, representing loss of income from the time he should have been appointed to the time when he was actually appointed. Notwithstanding the great depths to which the respondent had gone in particularising a claim for damages, the judge held that there was neither evidence nor submissions in support thereof. As a result, she refused any claim for damages. In my respectful view the judge fell into error in determining the substantive issues without considering the arguments or evidence as to damages. Not only was there evidence on the issue of damages, but there were substantial submissions by the parties on same.

(c) Damages for the anxiety, distress and frustration caused by the constitutional breach.

[91] Moreover, the respondent deposed in his affidavit evidence and repeated in his submissions the anxiety, distress and frustration caused to him by the constitutional breach. At paragraph 7 of his affidavit dated 22 June 2009 the respondent deposed:

> *"7. I suffered great distress and anxiety as a result of the events complained of herein. I was in the dark as to why I was treated differently when compared to my colleagues despite being similarly circumstanced. The stoic and unhelpful silence of the PSC and its failure to provide an explanation for this act of discrimination made me feel frustrated and depressed. I could not understand why I was arbitrarily selected/targeted for different treatment. I was forced to undertake litigation which I could ill-afford to vindicate my rights in circumstances where*

[54] Fixed Date Claim Form dated 23 January 2008 [(b). 9] at pg. 38 of the Record of Appeal.

the PSC ought to have resolved my problem without the need for this litigation."[Emphasis added].

[92] It was made clear in ***James***[55] that *"an injury suffered as a result of discrimination is no less real because it does not possess tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognising its compensatable potential."* Thus, the non-pecuniary anxiety, distress and frustration deposed to by the respondent can all be taken into account in computing a compensatory award.

[93] I am of the view that the respondent is entitled to a compensatory award and it seems to me that its assessment is better left to be determined by a Master.

VI. Disposition.

[94] In my judgment the appellant is entitled to succeed in its appeal *in part*. It succeeds on only one of the seven grounds of appeal which are noted at paragraph 24 of this judgment. The trial judge erred in declaring that the respondent be appointed with retroactive effect in accordance with his place on the Order of Merit List, as such declaration would have caused the PSC to act ultra vires. As the court could not lawfully backdate the respondent's appointment to a date prior to when he first performed the duties of Customs and Excise Officer I, inevitably the issue of a declaration of retroactive appointment could have been excluded from determination in accordance with part ***26.1(1) of the CPR.*** On this basis, this Court sets aside the order of the trial judge that *"The [Respondent] is entitled to be appointed to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the Order of Merit List."*

[95] The appellant, however, fails on the other six grounds of appeal as I have concluded that the appellant was indeed the proper party to the origination motion in the instant matter; the filing of the originating motion by the appellant was not an abuse of process; and that the PSC was in breach of the respondent's right to equality of treatment by a public authority in exercise of its functions. This entitled the respondent to the declaration as to the inequality of treatment by the PSC and further entitled the respondent to appropriate relief including damages.

[55] **James** (fn 46) [28].

[96] In light of the foregoing, I am of the view that the following orders will be appropriate:

i. an order setting aside the declaration of the trial judge that the respondent be appointed to the office of Customs and Excise Officer I with retroactive effect in accordance with his position on the Order of Merit List;

However, I affirm the order of the trial judge granting:

ii. a declaration that the respondent had been treated in an illegal and discriminatory manner contrary to the constitutional right to equality of treatment from the PSC in the exercise of its functions;

Additionally, in light of the breach of the respondent's right to equality, there will be:

iii. a declaration that the PSC gives consideration to the respondent's relative seniority (in respect of the lost four and a half years) when next acting opportunities and/or promotions to offices for which the respondent is eligible are being considered.

iv. an order that the respondent is entitled to a compensatory award, such sum to be assessed by a Master.

[97] We shall hear both parties on the question of costs.

P. Moosai

Justice of Appeal