REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S 325 of 2014

Between

THE CHIEF FIRE OFFICER
PUBLIC SERVICE COMMISSION

Appellants

And

ELIZABETH FELIX-PHILLIP AND OTHERS

Respondents

PANEL: **N. BEREAUX, J.A.**
P. MOOSAI, J.A.
P. RAJKUMAR, J.A.

APPEARANCES: **R. Martineau SC, A. Ramsaran, S. Julien for the appellants**
R.L. Maharaj SC, K. Walesby, N. Badal holding for V. Maharaj for the respondents

DATE DELIVERED: 17 July 2018

JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] This is an appeal from the decision of the High Court in which the judge granted the reliefs sought by the respondents in their judicial review application. The thirty-eight (38) respondents are all fire officers in the second division of the Fire Service of Trinidad and Tobago. They were granted permission to file for judicial review in respect of their non-promotion to certain posts in the fire service. The Commission made promotions to the ranks of fire sub-officer and fire sub-station officer in August 2010. The thirty-eight (38) respondents were not among them. The promotions were made on the basis of scores attained by fire officers under a new points system, devised under regulation 158(3) of the Public Service Commission Regulations. The judge granted various reliefs sought by the respondents, although, instead of the order of mandamus sought to compel the appellants to promote the respondents, the judge granted an order that the matter of the respondents' promotion be remitted for consideration.

[2] It is convenient to refer to the respondents as the claimants for the purposes of this appeal. I shall refer to the Public Service Commission Regulations by their full name or as 'the Regulations'.

[3] Under the Fire Service Act Chap. 35:50 the fire service is divided into two divisions, the first and second division. The claimants are all second division officers. The second division consists of the following ranks:

Fire Equipment Supervisor	(Grade 4)
Fire Station Officer	(Grade 4)
Fire Sub-Station Officer	(Grade 3)
Fire Sub-Officer	(Grade 2)
Firefighter	(Grade 1)
Apprentice Firefighter	(Range 13)

There appear to be some differences in the titles of the posts of "Firefighter" and "Apprentice Firefighter" in the Third Schedule as opposed to elsewhere in the Fire Service Act. However, these differences are not material to this appeal.

[4] The first appellant has the delegated power to, *inter alia*, appoint persons on promotion to offices in the second division of the Fire Service which are below the rank of fire station officer and to confirm the appointment of fire officers to such offices. On 30th August 2010, the first appellant by fire service order #23 of 2010 made sixty-eight (68) promotions to the rank of fire sub-officer and fifty-four (54) promotions to the rank of fire sub-station officer, with effect from 30th August 2010. None of the claimants was among them.

[5] The promotions were made pursuant to the new points system introduced by the appellants. The new points system was introduced by fire service order # 36 of 2009. It sought to incorporate the provisions of regulation 158(3) of the Regulations. Regulation 158(3) provides that the Commission, in considering the eligibility of a fire officer for promotion, shall take into account:

(a) his general fitness
(b) any special qualifications
(c) any special courses of training that he may have undergone (whether at the expense of Government or otherwise)
(d) the evaluation of the officer's performance as reflected in his performance appraisal report
(e) any letters of commendation or special report in respect of special work done by the fire officer
(f) the duties to be performed in the office of which the fire officer has experience
(g) demonstrated skills and ability relevant to the office
(h) any specific recommendation by the Permanent Secretary or Chief Fire Officer for the filling of the particular office
(i) any previous, relevant employment of his in the service, the public service, or elsewhere

(j) any special report for which the Commission may call

(k) his devotion to duty.

[6] The claimants seek the promotion of some fifteen (15) officers to the post of fire sub-officer and nineteen (19) officers to the post of fire sub-station officer. They contend that the new points system is irrational and that its introduction was contrary to the principles of procedural fairness because they were not, or their association was not, consulted before implementation. They also contend that the failure to treat the respective fifteen (15) and nineteen (19) officers as having been promoted to the offices of fire sub-officer and fire sub-station officer, was illegal because, in law, they had been appointed to the higher office. They make a number of other contentions which are quite diverse. It is, no doubt, for this reason, that they have in their joint affidavit divided themselves into nine groups, each with specific claims. Some of the respondents belong to more than one group.

[7] An excessive number of affidavits were filed in this matter. I have read and considered them all. I shall refer only to those which require discussion.

The claimants' evidence

[8] In their joint affidavit, which is quite long, the claimants have categorised their claims into nine groups and have deposed to their complaints as groups with each deponent personalising their particular complaint where necessary. I have summarised their evidence in relation to each group, as follows.

The first, second and eighth groups

[9] There are twenty-nine claimants in the first group, seven in the second group and three in the eighth group. These claimants complain that they were appointed to act in the next senior position from their substantive posts. They spent two years acting in that post and they were by-passed for promotion in 2010. They were not all appointed to act at the same time but all of the members

of these groups were appointed *"until further notice"* at varying times between April 2008 and August 2009. One member however, Kenneth Byer, admits to being appointed to act in the office of fire sub-officer from 16th June 2008 to 16th December 2008. He cannot succeed on this issue. His acting appointment was temporary and came to an end on the date specified for its conclusion (16th December 2008). The common complaint of the rest of the members of this group is that, by being appointed until further notice, they were appointed to act for an unspecified period and as such their appointments were for an indeterminate period. They say that they were not informed that the appointments were for fixed periods. They therefore understood their appointments to have been for an indeterminate period. The effect of being appointed *"until further notice"* was that they were permanently appointed to the higher substantive office and that their acting appointments were appointments that could only be terminated in accordance with the provisions of regulation 50 of the Public Service Commission Regulations. They further understood, from their acting appointments, that the first appellant was telling them that they had come top of a selection process applying the regulation 158 criteria. They say that, given that representation, they had a legitimate expectation that they would be preferred for promotion to the substantive role.

The third group

[10] The third group of officers consisting of applicants numbers 3, 4, 6, 20, 22, 34, 36 and 38 say that they were passed over for promotion despite the provision in regulation 160 of the Public Service Commission Regulations that they be informed of that fact and of the reasons for being by-passed. They were not informed and were not given an opportunity to make representations.

[11] They say that they sent letters complaining that they were not informed of their being by-passed and the reasons for it. Only three of them received acknowledgments but got no substantive response. In effect therefore all of the claimants in this group contend that they got no substantive response as to why they were not informed of their being by-passed and as to why they were by-

passed in the first place. They say that included in the list of promotions were officers who had served in the same office for a shorter period than they had served. Accordingly they met the criteria under regulation 160(1)(b)(i) of the Public Service Commission Regulations so as to require the first appellant to advise them, with reasons, of their omission from the list. Further, all of them (except for applicant number four (4), Billy Martin) had been acting in the more senior office for more than 6 months, and so also met the criteria under regulation 160(1)(b)(iii).

The fourth and fifth groups

[12] The common complaint of both these groups is that they allegedly achieved the same score as the least scoring promoted officer but were not promoted. The fourth group consists of two claimants, numbers one and twenty-five. They complain that despite having received the same points as the least scoring promoted officer, they were not promoted. They say that the reason they were not promoted was because the promoted candidates had greater experience. They say that they both had acted in the vacant office since 2008 and both achieved nine (9) points out of ten (10) under the heading *"Relevant and Relative Experience"*. The list of officers promoted ahead of them included officers who had less experience and officers who had not acted in the vacant office before promotion.

[13] The fifth group consists of seven (7) officers; applicants numbers two (2), three (3), five (5), eight (8), twenty-two (22), thirty-four (34) and thirty-eight (38), who say they achieved the same score as the least scoring promoted officer but were given no reasons for being passed over. They say that the appellants' failure to promote them is unlawful because:

(a) The first appellant has promoted other officers who achieved the same points total, or less. They have been treated differently for no fair reason; and no reason for treating them differently has been identified. Further, it is in breach of their constitutional right to equal treatment and procedural fairness, and is irrational.

(b) They have a legitimate expectation that they would be promoted, having achieved the points total needed for promotion.

The sixth group

[14] All of the claimants form the sixth group. They challenge the points system on two grounds: it is irrational and it was implemented without any proper consultation. The judge did not decide the second issue holding that the evidence was not satisfactory. The claimants did not cross-appeal on this question. It is not an issue in this appeal. As to irrationality they say it is irrational to award a mere five (5) points for on the job experience and it is also irrational to have permitted two different types of assessments for the promotion of officers. Between 2006 and 2008 promotions were conducted on the basis of seniority and the points system. This, they contend, resulted in some officers being treated more favourably.

The seventh group

[15] This *"group"* consists of claimant ten Kamalludin Ebrahim only. He complains about the failure to promote him with retrospective effect from the date when he started to act in the higher post. He says that it is unfair and unlawful. He alleges that fire officer Peter Neverson was promoted retroactively from 1st December 2008 and the failure to promote him retroactively was a breach of his right to equality of treatment. He also alleges that he had a legitimate expectation that he would be retroactively promoted from the date of his first acting appointment, that appointment being *"until further notice"*, which was for an indeterminate period.

The ninth group

[16] This group consists of claimants one (1), two (2), three (3) and nineteen (19). Claimants one, two and three complain that fire officer Crichlow was promoted ahead of them even though he was less senior and less qualified. He

was promoted to fire station officer in 2008 retroactive to 2007. As a result they were treated unequally and unfairly from 2008 retroactive to 2007. Claimant number nineteen (19) complains that fire officer Neverson in 2007 was promoted to fire sub-officer, fire sub-station officer and fire station officer retroactive from 1994, 1998 and 2004 despite the fact that fire officer Neverson was less experienced and less senior.

Acting allowances

[17] The affidavits indicate that this complaint relates to the claimants who had been appointed to act in more senior offices, the members of this category corresponding to the first, second and eighth groups. These claimants contend that they have not been paid the acting allowances (to which they are entitled by law) for the remainder of 2009, 2010 and 2011. They say that the failure to pay them their acting allowances from the time they first started to act in the vacant posts is a breach of the fire service regulations and they sought and obtained an order that the appellants pay to them such arrears of salary.

The appellants' evidence

Dawn Harding

[18] The allegations of the claimants were met primarily by the evidence of Dawn Harding, Deputy Director of Personnel Administration and Carl Williams, Chief Fire Officer (CFO). Ms. Harding in her principal affidavit sworn and filed on 6th July 2012 gave a comprehensive rebuttal of the claimants' allegations. She deposed that the points system was introduced by departmental order No. 36 of 2009 to assess officers for promotion to the ranks of fire sub-station officer and fire sub-officer in the fire service. The order gave full effect to regulation 158 of the Public Service Commission Regulations and resulted from an agreement among the Trinidad and Tobago Fire Service Association, the CFO and the Director of Personnel Administration ('the DPA') acting on behalf of the Public Service Commission ("the Commission").

[19] She said that the criteria set out in regulation 158 (3) are reflected in and related to the headings set out in the points based system as follows:

(i) regulation 158(3)(a) is reflected in the heading *"General Fitness"*;

(ii) regulation 158 (3)(b) and (c) are reflected in the heading *"Special Qualifications and Special Courses"*;

(iii) regulation 158(3)(d) and (k) are reflected in the heading *"Performance Appraisal"*;

(iv) regulation 158(3)(e) is reflected in the heading *"Commendation/Special Report (Service Medal)"*;

(v) regulation 158 (3)(f), (g) and (i) are reflected in the heading *"Relevant and Relative Experience"*;

(vi) regulation 158(3)(j) was reflected under the heading *"Any Special Report that the Commission may call for eg. Disciplinary Report"*;

(vii) regulation 158(3)(k) *"Devotion to duty"* is also reflected under the heading of *"Commendation/Special Report (Service Medal)"*. This is because commendations and medals are awarded in the Fire Service for number of years served;

(viii) regulation 158(3) (h), *"any specific recommendation of the Permanent Secretary or Chief Fire Officer ("CFO") for the filling of the particular office"* is not reflected in a heading because it involves officers who are considered to be specialists and this would only arise from time to time.

[20] The Commission conducted an assessment on ***all*** eligible firefighters and fire sub-officers for promotion in 2009 using the newly formulated points system. The assessment was conducted and completed on four hundred and sixty four (464) officers to wit: two hundred and sixty seven (267) firefighters and one hundred and ninety seven (197) fire sub-officers, to determine their suitability for promotion. Thereafter, the CFO under delegated authority promoted fifty-three (53) fire sub-officers (FSO) to the rank of fire sub-station officer (FSSO) and sixty-eight (68) firefighters to the rank of fire sub-officers (FSO) with effect from 30th August, 2010.

[21] The defendants in promoting officers were guided by regulation 158 as implemented through the points system. Seniority, qualification and experience are only some of the matters taken into account in promoting officers.

[22] She deposed that the acting appointments of the claimants which were made prior to the 2010 promotions were not made as a prelude to a substantive appointment and gave no claim to appointment on promotion to the higher rank, unless indicated. This is expressly stated in several of the departmental orders by which the acting appointments were effected. The fact that claimants had acted in higher ranks gave them no claim to that office. Their respective acting appointments as well as the length of time they acted within the senior office were taken into account in the assessment and they were awarded their respective points under the heading "Relevant and Relative experience".

[23] After the promotion exercise, the Commission *"received representations in relation to the promotion exercise from most of the Claimants"*. Twenty-Four (24) of the claimants submitted representations through their Attorney at Law and several of them submitted representations through both the DPA and their Attorney at Law. These included the claimants in the third group. Based on their representations, their points were reviewed. Elizabeth Felix-Phillip, who had previously obtained a score of eighty-four (84) points, had her score adjusted to eighty-three (83) points. Victor Bethelmy's points remained unchanged. Unlike the other claimants, Felix-Phillip and Bethelmy made no further representations to the second appellant.

[24] In their letters of representation, the claimants expressed whatever complaints or objections they had to the promotion exercise. The Commission considered all the representations.

[25] A list of all officers, including the claimants, who made representations was sent to the General Secretary of the Fire Service Association of Trinidad and Tobago. They were listed in order of merit. The list is exhibited as "CC" in the

claimants' affidavit filed 15th December, 2011. All of the claimants of the third group (who claim not to have been informed of their having been by-passed) appear on the list in order of merit, as having made representations. Further, all the claimants except claimant twenty-seven, Derrick Patterson, are listed as having made representations. Mr. Patterson made no representations.

[26] As a consequence of the representations made, the DPA requested that a monitoring and oversight unit conduct an audit of the assessment of all the officers who submitted representations and that a report be prepared. The audit was completed and a report was submitted on 11th August, 2011. The audit of the officers resulted in officers' points being either upgraded, downgraded or remaining unchanged. As stated before, the points for Elizabeth Felix-Phillip and Victor Bethelmy were previously reviewed by the CFO and as such, they did not form part of the audit since they made no further representations.

[27] At its meeting of 20th September, 2011, the Commission accepted the audit report and as a consequence, promoted a number of officers including claimant number ten, Kamaludin Ebrahim. By letters dated 23rd September, 2011 to all officers who submitted representations (including the claimants), the Director of Personnel Administration informed each officer that the Commission had considered a report on the assessment exercise. She also informed them of the outcome in relation to each officer, that is to say, whether his/her points were adjusted or remained unchanged. The lowest score under the points system of the promoted candidates among firefighters was 86 points. The lowest score under the points system of the promoted candidates among fire sub-officers was eighty-nine (89) points.

[28] As to the fourth group claimant number one, Elizabeth Felix-Phillip, is a firefighter. She was awarded eighty-three (83) points (disputed as eighty-four (84) points) and therefore on any basis received fewer points than the lowest score of the firefighters who were promoted. Curtis Mundaroy was a fire sub-officer. He was awarded eighty-six (86) points which were fewer than the lowest number of points received by FSOs who were promoted. Both these officers were not

promoted because of the relatively low points received by them and not because of their lack of experience. All those officers within the fifth group received fewer points than the officers promoted. The second defendant gave careful consideration to all representations made by the claimants and, pursuant thereto, the promotions were made. No officer with fewer points was promoted to the next senior rank above any of the claimants.

[29] As to the ninth group, claimant number 19, Surace Soondar is a fire sub-officer. Elizabeth Felix-Phillip, Egon Durity and Ramchand Gopaul are firefighters. They obtained fewer points than any firefighter who was promoted. Surace Soondar, a fire sub-officer, obtained fewer points than any fire sub-officer who was promoted. These officers were not treated unfairly. Rather, they were treated in accordance with regulation 158 as implemented through the points system.

[30] She added that all of the claimants now complain about the points system as did their representative association. The complaint of their association about the points system made on 22nd September, 2011 was made almost 2 years after the points system was agreed and acted upon and after the Association itself had expressed its satisfaction with the points system. There is nothing unfair about the points system. Moreover, thirty-seven (37) of the claimants made representations including representations through their attorneys at law. The Commission considered those representations. Quite apart from that, the Commission performed the audit to ensure that the claimants as well as all other officers who made representations received the correct number of points.

[31] As to claimant number ten, Kamaludin Ebrahim, he was promoted effective 30th August, 2010 pursuant to regulation 31 which states that the date of appointment to an office shall normally be the date on which the officer assumes, substantively, the duties to which he was appointed. Kamaludin Ebrahim had never complained about not having been promoted retroactively. Officer Neverson was previously on the 1987 Order of Merit List for the rank of FSO. When promotions were done, officers on that list were promoted to the rank of

FSO effective 29th December, 1994 and then further promoted to the next rank of FSSO effective 1st August, 1998. Officer Neverson was in that batch of officers who were promoted to the ranks of FSO and FSSO with the respective effective dates. However, through an administrative error, this was not done. This was subsequently rectified when the Commission met on 23rd October, 2007.

[32] As to the non-payment of acting allowances the Commission has nothing to do with the payment of allowances to the claimants. The first appellant is still in the process of finalizing arrangements for them to be paid the balance of their acting allowance. No one has denied their entitlement to be paid for acting in a more senior office.

[33] The documents exhibited by the claimants do not reflect any officer Crichlow being promoted ahead of the claimants referred to therein. Claimants 1, 2 and 3 never complained to the Commission about the promotion of any officer Crichlow. Sometime in May 2008, a firefighter, one Dennis Jones, complained about the promotion of firefighter Keith Crichlow to the rank of FSO and the Commission dealt with the matter.

Carl Williams

[34] Carl Williams, Chief Fire Officer, deposed to two affidavits. His evidence supported Ms. Harding's. It is not necessary to repeat all of his evidence. He stated that there was no retroactive countermanding of acting appointments in respect of any of the claimants. It was not true that once the claimants were chosen to act in the next higher vacant office they would ordinarily be preferred for promotion. He said if any of the claimants were passed over for promotion, that was because they obtained fewer points under the points system than persons in the same rank who were promoted. He added that if there were any officers who should have had notice of their omission from the list of persons to be promoted and did not receive such notice, those officers nonetheless made

representations to the defendants either themselves or through their attorney-at-law. Mr. Williams stated that he never told any of the respondents that they were not promoted because of relative lack of experience but because they did not obtain sufficient points.

[35] Any understanding by the respondents, that their selection for acting appointments meant that they had come top of a selection process applying regulation 158 criteria, was a misunderstanding on their part.

[36] As to the third group of officers, the officers who were promoted, even though they served in the same office for shorter periods they were, together with the officers in the third group, acting in those offices. The promoted officers gained more points than the officers in the third group under the points system. The claimants who have not been promoted, all had fewer points than officers who were promoted from the respective ranks.

[37] The claimants' claims for outstanding acting allowances are being processed and will be paid by the fire service when the process is complete.

[38] As to Officer Keith Crichlow, at the time of his promotion on 14th February, 2007 to the office of fire sub-officer (engineering) he had been assigned as firefighter in the engineering division for a period of some fifteen (15) years. He was promoted to the office of fire sub-officer (engineering) on the basis of his experience in engineering and being in possession of the job description requirements for the office, which required the incumbent to be in possession of both the National Examination Council Certificate in Auto and Craft Diesel or equivalent. He successfully completed the examination conducted by the Public Service Commission for promotion to the level of fire sub-officer. Officer Crichlow's appointment related to his special skills.

The claimants' response

[39] The claimants in a joint affidavit of 20th July 2012 responded to the evidence of the appellants' deponents. They allege that fire officer Keith Crichlow #2304 acted for a continuous period of two years in the next senior post prior to the list of promotions being made in the year 2007. Officer Crichlow had challenged the fact that he had been by-passed for promotion. He alleged that he had acted in the post for two years without any adverse reports having been made against him. Consequently, by fire service order #12 of 2008 Fire Officer Crichlow was retroactively promoted to the rank of fire sub-officer with effect from 14th February, 2007. Claimant Soondar repeats the allegation in relation to fire officer Neverson.

Further evidence

[40] Thereafter there was some back and forth in terms of allegations passing between the parties. The fourth and fifth groups challenged Ms. Harding's and Mr. Williams' assertion as to the scores they attained. They also exhibited a merit list which they contended showed that officer Neverson was never on a merit list. They also exhibited a document "TT" which they alleged was a list showing the points attained by firefighters and FSO's after the audit. The authenticity of both documents was challenged by respective deponents for the appellants. Document "TT" was ultimately rejected by the judge who was doubtful of its authenticity. They also challenged the appellants' position with respect to officer Crichlow. They asserted that there was no position of fire sub-officer (engineering) to which he could have been promoted. The judge declined to rule on the allegations raised by the claimants as they relate to officers Crichlow and Neverson and there was no appeal by the claimants from that decision.

Law and conclusions

The first, second and eighth groups

[41] The trial judge upheld the contentions of the claimants. She held, in agreement with the submissions of Mr. Maharaj, that an appointment to act *"until*

further notice" without an indication to the appointee of the period of that notice, the circumstances or the events which would trigger that notice amounted to an appointment for an indeterminate period pursuant to section 9 of the Fire Service Act Chap 35:50 (the Act) and the appointment could only be determined in accordance with section 16 of the Act. The claimants in these three groups having been appointed to act *"until further notice"* were therefore appointed for an indeterminate period pursuant to section 9 of the Act and their appointments could only be terminated in accordance with section 16 of the Act. In my judgment this conclusion is plainly wrong and is based on a misconstruction of the purport of the Act.

[42] In deciding whether the acting appointments were temporary appointments or permanent appointments the judge should have confined herself solely to the provisions of the Public Service Commission Regulations which govern the whole question of acting appointments to the fire service. Section 9 of the Fire Service Act Chap 35:50 is of no relevance.

[43] The Fire Service Act is concerned with the establishment of the fire service (this Act came into effect on 27th August, 1966). References in sections 2, 3, 9, 10 and 16 (inter alia) to persons holding offices in the fire service are to offices in the permanent establishment of the fire service. This is all for the purpose, as the long title of the Act states, of classification of the fire service and for providing procedures for the settlement of disputes between the Government and the fire service. The Act thus establishes the fire service as consisting of those offices in the permanent establishment which are set out in its first schedule. It thereafter sets out the structure and objects of the fire service as well as the classification of its offices, the tenure of the office holders, the modes by which fire officers may leave the service, as well as the industrial relations processes for the settling of terms and conditions of employment of fire officers including grievance procedures.

[44] But the Act has no relevance at all to the claimants' acting appointments. These are governed by the Constitution and by the Public Service Commission

Regulations. By section 121 of the Constitution, the Commission is empowered to appoint persons *"to hold or act"* in all public offices including, in particular, offices in the Civil Service, the Fire Service and the Prison Service **(see section 121(1) and 121(7) of the Constitution)**. This includes power to make appointments on promotion. The Regulations are made pursuant to section 129 of the Constitution by which the Commission may, by regulation, regulate its own procedure.

[45] As can be seen from section 121, by empowering the Commission to appoint persons *"to hold or act"* in public offices, the Constitution itself distinguishes between a permanent appointment and an acting appointment. In any event, by its nature the acting appointment is temporary. But the Regulations put it beyond doubt. Regulation 2, the definition section, defines *"acting appointment"* to mean *"the temporary appointment of an officer to a higher office or otherwise whether that office is vacant or not".*

[46] The distinction between such a *"temporary"* appointment and a permanent appointment to the public service is made complete by the definition in regulation 2 of *"appointment"*, which follows immediately after the definition of acting appointment, as meaning *"the placing of a person in an office in the public service"*. *"Officer"* is defined in regulation 2 to mean (inter alia) *"a person employed in ... the Fire Service"* and the term *" 'public service' includes ... the Fire Service"*. Thus, both section 121 of the Constitution and regulation 2 of the Regulations make plain the Commission's power to appoint officers in the Fire Service to acting appointments, which are temporary, and to permanent appointments. The regulations thus make a distinction between temporary appointments to a higher office and appointments which permanently place a person in an office in the public service. Such latter appointments would include placing persons in a higher office on promotion. Regulation 2 makes no reference to *indeterminate* appointments.

[47] The claimants in these three groups say that by being appointed to act until further notice they were appointed to act for an unspecified period and as such

their appointments were indeterminate pursuant to section 9 of the Act. Even if this is correct, indeterminacy pursuant to section 9 of the Fire Service Act does not govern their appointment. Regulation 2 of the Regulations does and that makes it clear that acting appointments are temporary. Section 9 of the Act is irrelevant. In considering section 9 of the Fire Service Act, the judge took account of an irrelevant consideration.

[48] Further, in considering regulation 2, one must also consider regulation 50(b)(i). Regulation 50(b)(i) provides that the services of an officer holding a temporary appointment, (defined by regulation 2 to be an acting appointment) may be terminated *"on the expiry or other termination of an appointment for a specified period."* The regulation contemplates that, ordinarily, the period of the appointment will be specifically fixed by dates. The question is whether an acting appointment, which is not fixed by dates but which is made *"until further notice"*, is for a *"specified period"*. In my judgment *"specified period"* does not necessarily require that the period be fixed or closed by dates, provided that by the terms of the appointment it is clear that the appointment is temporary. In this case the term *"until further notice"* coupled with the fact that it is an acting appointment conveys that it is a temporary appointment which would be terminated upon the giving of formal notice. The giving of such notice concludes the period.

[49] Mr. Maharaj cited the decisions in **Mentor Melville v. Kenneth Lalla & Ors.**, **H.C.A. 1643 of 1998**, **Jhagroo v. Teaching Service Commission [2002] UKPC 63, (2002) 61 WIR 510**, **The Public Service Appeal Board and The Director of Personnel Administration v. Aldric Tudor**, **Civil Appeal No. 52 of 1985** and **In re Norma Gregory H.C.A. No. 3033 of 1988** in support of his submission that the claimants' appointments were indeterminate and could only be terminated in accordance with section 16 of the Fire Service Act.

[50] Neither **Melville** nor **Gregory** assists him. I gave the **Melville** decision. **Melville** did not decide that a temporary appointment made *"until further notice"* was for a specified period per se. But I accepted in principle that a specified

period can include a period governed by the occurrence of an event which triggers the end of the appointment. In that case the applicant was appointed to act until the return from study leave of the substantive holder of the office. The acting appointment was thus held to be for a specified period which came to an end upon the substantive office holder's return. In that regard I agreed with Deyalsingh J in **Gregory** that a *"specified period"* though not fixed by dates, may be governed by the occurrence of an event which brings the appointment to an end.

[51] In any event I hold that, where, as in this case, an acting appointment is made *"until further notice"* the serving of a notice which brings the appointment to an end will be such an event. In this case it cannot be said that the acting appointments were so inordinately long as to raise any issue of them becoming permanent.

[52] The decisions in **Jhagroo** and **Tudor** are distinguishable. **Jhagroo** turned on its own peculiar facts which rendered the appointment indeterminate (a consideration which does not arise here). **Tudor** is also distinguishable for the same reason. It was a decision which turned on whether Mr. Tudor's *"temporary"* appointment was indeterminate. The teaching appointment of Mr. Tudor was supposed to be temporary but he was seconded to an office which was on the permanent establishment in the Teaching Service and which required someone holding a permanent office to fill it. That was the primary (but not the only) reason for the appointment being found to be indeterminate and therefore permanent. Neither decision has any application here.

[53] Thus, when the claimants were appointed to act in the posts of fire sub-officer and fire sub-station officer, those acting appointments were temporary appointments by reason of regulation 2. Further, the temporary nature of the appointments was buttressed by the fact that the letters of appointment expressly stated that the acting appointments gave the claimants no claim to the substantive office. The trial judge was plainly wrong.

The judge also found that the termination of the acting appointments of the

officers of the second group (and by extension of the first and eighth groups) was illegal and *ultra vires* because their appointments were for *"indeterminate"* periods. That finding is also wrong in light of my conclusion. Given that the claimants were appointed to act until further notice, their acting appointments came to an end when such notice was served.

[54] The judge went on to consider the provisions of regulations 158 and 154. Regulation 154(2) provides that an officer who is selected for an acting appointment due to exigent public service requirements rather than under regulation 158 criteria, was not to be given preference over eligible officers for a substantive promotion. She reasoned therefore that the converse must also be true and, therefore, an officer who was appointed to act pursuant to regulation 158 must be given preference over other eligible officers for the substantive appointment. She held that it was for the appellants to show that the claimants had been appointed to act pursuant to regulation 154 as opposed to regulation 158 and, since they had not, she accepted the claimants' contention that they would have been appointed to act pursuant to regulation 158 considerations. They should have been given preferential consideration for promotion to the higher post.

[55] I do not agree. In the normal course, persons appointed to act in an office, on the basis of substantive promotional considerations, would normally be expected to be appointed to the substantive post, ahead of other aspirants to the office, if they have been performing at or above the required standard. In that sense it may be that they are to be preferred. What regulation 154 seeks to prohibit is that preference be given to an officer simply on the basis of appointment to the acting position when the appointment is based on urgency and need, due to the peculiar circumstances then existing in the public service. But it does not follow that an acting appointment effected by applying regulation 158(3) criteria, requires that those appointees be preferred when permanent promotions are to be made to the substantive post. Express provision to that effect is required. In the absence of such express provision, a substantive appointment can only be based on regulation 158(3) criteria, in which experience in the acting appointment is taken into account (but not preferred). In this case, experience was factored in

and specific points allocated for it.

[56] The judge also found that the CFO, while being delegated the power to appoint to acting appointments, had no power to terminate. This too is plainly wrong. I agree with the submission of Mr. Martineau that the power of appointment given to the CFO by delegation of the Commission is deemed, by section 39(1)(a) of the Interpretation Act Chap 3:01, to include the power to remove the officers so appointed by him.

[57] The judge next held there was a breach of the first group's legitimate expectation of promotion. She found that the claimants all acted in the next higher post for a period of two years and they had been pre-qualified so to act pursuant to regulation 158. She found that the statutory framework, i.e. regulation 154(1) and 158 together with sections 9 and 16 of the Fire Service Act operated to confer a substantive benefit upon the claimants. This benefit was that they would get preferential consideration for the substantive post. She held that if the points system operated to the prejudice of the officers previously preferred, then the procedure for promotion applying that system was unfair and in breach of their legitimate expectation for promotion. She held that having regard to the provisions of regulation 154(1), regulation 158 and sections 9 and 16 of the Fire Service Act there was a clear and unambiguous representation to the claimants that they would be preferred for promotion.

[58] The judge was plainly wrong. In the first place, as already held, regulations 154(1) and 158 did not give any entitlement to preferential treatment to the officers. Secondly, as I have also held, the Fire Service Act has no bearing whatever on the powers of the Commission and sections 9 and 16 are irrelevant to the acting appointments. Thirdly, the mere fact of an acting appointment cannot, without more, amount to a representation that the appointee would get the substantive appointment. These claimants say that from their acting appointments they concluded that the first appellant was telling them that they had come out top of a selection process applying the regulation 158(3) criteria. They say that given that *"representation"* they had a legitimate expectation they would be preferred

for promotion. As the first appellant said in his evidence any such conclusion could only have been a misunderstanding. There was no specific representation to that effect by him. A legitimate expectation cannot be founded on a misapprehension. Further, the claimants were told in their letters of appointment that the acting appointments gave them no claim to the substantive office.

The sixth group

The points system

[59] All of the claimants challenged the points system on the basis that it was irrational and that it was implemented without any proper consultation. They say that it was irrational to award a mere five points for *"on the job"* experience. The judge declined to rule on the issue of consultation. She held however, that it was permissible for the appellants to implement a system of assessment for promotion once the system was fair and rational and reasonably related to achieving the statutory objectives of the Regulations and the Fire Service Act. She added that, in this case, where regulation 158 operated to pre-qualify the claimants, great weight had to be given to previous acting appointments in the substantive office. The appellants' failure to take the previous acting appointments of the claimants into account was irrational and unfair and the implementation of the points system, in so far as it pertained to the respondents, was also unfair and irrational.

[60] In my judgment the judge in coming to that conclusion again fell into error. There was no *"failure"* to take account of the claimants' experience. It was taken into account by the application of a maximum of five points. The claimants' complaint is that five points were insufficient. The thrust of their complaint is that insufficient weight was given to their experience.

[61] To the extent that the judge's finding was in effect that insufficient weight was given to experience, she was also in error. As Mr. Martineau submitted, the question of what weight is to be given to the individual factors set out in regulation 158(3) is a matter for the decision maker. It is in the best position to

decide the weight to be ascribed to each factor. It is familiar with the duties of fire officers and can understand how significantly a factor such as experience counts in the performance of the job. See **Tesco Stores Ltd v Secretary of State for the Environment & Ors.** [**1995**] **1 WLR 759**. See also **Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd [2017] UKSC 66** at paragraph 54, and **R (on the application of the Assisted Reproduction and Gynaecology Centre) v The Human Fertilisation and Embryology Authority [2017] EWHC 659 (Admin)** at paragraph 86.

[62] The holding in **Tesco Stores** is to the effect that weight is a matter for the decision maker. **Tesco** remains good law. In **Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd (supra)**, Lord Hodge giving the decision of the Supreme Court stated at paragraph [54]:

> ***"In Tesco (above) Lord Hoffmann pointed out (780F-G) that the law has always made "a clear distinction between the question of whether something is a material consideration and the weight which it should be given". The former is a question of law; the latter is a matter for the planning judgement of the planning authority. Accordingly, a failure by a planning authority to have regard to relevant guidance as a material planning consideration would be an error of law. A decision, after considering the guidance, not to follow it, would (absent another ground of challenge in administrative law) be a matter of planning judgement, in which the courts have no role."***

In **R (on the application of the Assisted Reproduction and Gynaecology Centre) v The Human Fertilisation and Embryology Authority (supra)**, O'Farrell J noted at paragraph 86:

> ***"The question of what is a material or relevant consideration is a***

question of law, but the weight to be given to it is a matter for the decision maker: R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council [2010] UKSC 20 per Lord Collins Para.70. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit and the courts will not interfere unless he has acted unreasonably in the Wednesbury sense: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1WLR 759 per Lord Keith of Kinkel p.764; R (Lynch) v Secretary of State for the Home Department [2012] EWHC 1597 per King J Para.10."

Mr. Maharaj contended that the award of only five points for experience was irrational or *Wednesbury* unreasonable. But the award of five points is of course a matter of weighting and given that the court has no role in that exercise I am not prepared to find that the five point award is so inordinately low as to be unreasonable. Experience and seniority can go only so far. Merit and ability will always trump them.

[63] Indeed, the Trinidad and Tobago public service has been much criticised for placing far too much weight on experience and seniority, and far too little on actual merit and ability. This it is argued has led to an inability of the public service to attract, or to keep, talented officers and has also led to the stagnation and demotivation of more capable but junior officers, to the detriment of the public service. No doubt the points system is an attempt to address such criticism. The judge herself, while saying that *"great weight"* should be given to experience (given, as she put it, that regulation 158 operated to *"prequalify"* the claimants), did not say how much such weight should be. Nor could she. It was for the Commission to ascribe such weight to experience as it considered fit. The judge by concluding that great weight ought to be given to experience, imposed her own judgment on an issue on which she was not competent. The decision of the

Commission to award five points for experience was therefore not irrational.

[64] In **Gopichand Ganga & Ors. v. Commissioner of Police and The Public Service [2011] UKPC 28** and **Ranjan Rampersad v. Commissioner of Police and Police Service Commission [2011] UKPC 25**, the Privy Council reviewed similar points systems in respect of the police service. The points system in **Ganga** was upheld by both the high court (per Rajnauth-Lee J as she then was) and the Court of Appeal. In **Rampersad**, the Court of Appeal (reversing the High Court) held that the points based system was not irrational and had not been applied inflexibly. The Board in agreement with the Court of Appeal, in both cases, held that while the system was not perfect and contained flaws, it was not irrational and did not entail any procedural unfairness. It was enough that the Commission was prepared to entertain the representations of disappointed police officers and to be flexible in applying the system. See paragraphs 25 and 26 of the **Ganga** decision.

[65] Ms. Harding's evidence in this case has shown the same thing. Her evidence demonstrated that, overall, the claimants were treated fairly. When representations were made about the scoring, an audit was undertaken and the scores of all who made representations were reviewed and re-assessed. As a result of the review, the scores of several officers were adjusted upwards. Additional officers, including claimant 10, were promoted. No doubt, adjustments will have to be made. It may well be that too little credit is given to actual experience on the job. But that requires consultation and discussion. In any event, the same standard was applied fairly to all candidates. The Commission has the difficult task of trying to administer a policy of promotion in respect of a work force in which there is intense competition for the posts available. It must seek to promote the best and most capable officers but by a process which is fair and yet selective. There will be errors. There will be flaws. Adjustments will be required as justifiable criticism is made. It may well be that too little weight has been given to experience. This may have been an over-reaction to criticism. It is for the Commission to take note of such complaints and make adjustments, if anecdotally, they are justified. The Commission has demonstrated that it is

prepared to do so. The cases of Neverson and Crichlow, relied on by the claimants, are themselves examples of this. They also demonstrate the thanklessness of the Commission's task. Each adjustment in favour of an officer seems to have a ripple effect with other officers seeking adjustments as well and alleging discrimination.

[66] These claimants also contended that it was irrational to have permitted two different types of assessment, one in 2006 and one in 2008. This, they say, resulted in some officers being treated more favourably. The contention is devoid of merit. In the first place, the points system is based on regulation 158(3). To that extent it is not entirely distinct from the system which previously applied. What is new is that the specific weighting has been given to specific factors. There is the added benefit to the participants of transparency in that they are now able to discern the areas of difference in their performance and can query it (as they obviously have done in this case). Secondly, there must be a cut-off point for the introduction of any new system. Once that system is introduced the only consideration must be that it be applied fairly and consistently across the entire catchment of officers to whom it relates.

The third group

[67] This group contends that they were not told that they had been by-passed for promotion as required by regulation 160(2), nor were they provided with reasons for being by-passed. Regulation 160(2) provides that the CFO shall advise an officer who has been omitted from the list for promotion, of his omission and the reasons why he had been omitted. Thereafter the officer, within seven days of the date of being advised, may make representations to the Commission (per Regulation 160(3)) and the Commission may invite the officer for an interview on the basis of his representations. The judge held that the officer is required to be provided with reasons so that he can determine whether he has any valid objections for being by-passed and so that he can raise those objections with the appellants. She held that the fact that the claimants made representations in the absence of reasons being furnished did not cure the breach of the statutory duty.

She held that this duty amounted to a right to reasonably and rationally argue a case for them to be reconsidered for promotion. The failure to provide these officers with reasons deprived the officers of the opportunity to make out a proper case for review. The failure also deprived the court of an opportunity to assess whether the reasons for bypassing these officers were procedurally fair and rational.

[68] Before addressing the judge's reasons, I must state that these claimants did not disclose to the court at the permission stage that they did make representations even though they received no notice. It was left to Ms. Harding to reveal this fact. Mr. Martineau raised no issue as to non-disclosure but I must state that I was taken by surprise when this fact was revealed by Ms. Harding in her affidavit. The impression was given by the claimants that they were unable to, and did not, make representations in the absence of reasons.

[69] In my judgment on the facts of this case these claimants cannot complain that they have been treated unfairly. Ms. Harding did not deny that the claimants in this group were not informed of their being omitted from the list of promotions. She asserts however that all the claimants in this group made representations, an assertion which is not denied by the claimants but which did not find favour with the judge.

[70] It is therefore correct that there was a failure to inform the claimants that they had been omitted from the promotions list and that this was in breach of regulation 160(2). The question is whether that failure was fatal given that they did make representations. I do not consider that it was. While the claimants were not informed of the reason for their non-promotion, it is apparent from the evidence that the reasons for the non-promotion of all of the claimants were known to them and it was because they had failed to achieve the required score under the points system. Further, the Commission conducted a comprehensive review of the allocation of points by an audit using a team of public officers for that purpose. The result was an adjustment of the points allocated to various officers and the promotion of additional officers in consequence of the audit. The

claimants in this group, although reviewed, did not receive any adjustments sufficient to permit promotion. In all the circumstances, they cannot complain. Judicial decisions are not to be made in a vacuum, without regard to the practicalities. I can see no point in directing the Commission to issue notices to the officers in this group. Given that an effective right to be heard on the issue of non-promotion had already been afforded, the result is unlikely to differ. It would be a waste of the time and resources of an already burdened Commission.

The fourth and fifth groups

[71] There was a conflict of fact which needed to be resolved in respect of this group. The claimants in this group claimed to have attained the same score as that of the least scoring promoted officer. This was denied by Ms. Harding. The claimants then pointed to correspondence from Mr. Williams, CFO, as confirming their evidence. Mr. Williams in his affidavit also denied it. But he did not explain why correspondence allegedly coming from him appeared to support the claimants' position. The trial judge, faced with this conflict of fact, found that it was not necessary for her to determine the issue of the actual points attained by these claimants having regard to her decision in relation to the first group. That decision has now been overturned but the claimants lodged no cross-appeal against her refusal to decide this issue. In my judgment the conflict of fact required at least the cross-examination of Mr. Williams. But in the absence of a cross-appeal by the claimants it does not now fall to be decided.

The seventh group

[72] The tenth claimant Kamalludin Ebrahim is the sole member of this group. He claimed that his promotion should have been retroactive to the date that he assumed his acting appointment. Regulation 31 of the Regulations provides:

(1) The date of appointment to an office in a particular service within the public service shall normally be the date on which the officer assumes substantively the duties of the office to which he has been appointed.

(2) The date of appointment on promotion shall be such date as the

Commission shall specify.

(3) …

[73] The judge held that having found that *"until further notice"* appointment was for an indeterminate period which amounted to a permanent appointment, the officer was entitled to be promoted retroactively from the date he was appointed to act in the post. She also found that he had a legitimate expectation that he would be promoted retroactively from the date that he first acted in the substantive post. She held that the retroactive appointment of officer Ebrahim was consistent with the provisions of regulation 31. The judge was wrong. In the first place if officer Ebrahim's acting appointment was permanent from the beginning it was unnecessary to make any declaration that it be retroactive. I have already found that his appointment was temporary, for the reasons I have given. Therefore officer Ebrahim, because he held an acting appointment, could not be said to have assumed the substantive position on the date he assumed the acting appointment. Neither could he assume the substantive position until appointed by the Commission. Regulation 31(2) leaves it to the discretion of the Commission to specify the date of promotion. That was a matter for the Commission and there is nothing on the face of it to suggest that a prospective date of assumption was irrational or unreasonable in this case.

The ninth group

[74] The trial judge also chose not to decide the issues specifically raised by this group in view of her earlier findings that these claimants' acting appointments were permanent. The claimants had raised issues as to breaches of section 4(d) of the Constitution, in relation to the promotions of fire officers Neverson and Crichlow, which to my mind stood to be decided irrespective of her positive findings in their favour. But there was no cross-appeal from that decision and the issues do not therefore fall for me to decide.

Acting allowances

[75] The judge held that "*the Claimants (and all similarly circumstanced fire officers) are entitled to acting allowances for the periods in which they have been acting…"*. She directed the appellants to pay all arrears of acting allowances due and owing to them. The second appellant's position is that it does not pay public servants. The first appellant's evidence was that administrative arrangements were being addressed. Neither appellant in my view can be held responsible. The decision of the Privy Council in **Endell Thomas v. The Attorney General of Trinidad and Tobago [1982] AC 113** makes it clear that while the Commission is responsible for appointments, promotions and disciplinary matters concerning public officers, the contract of employment is between the public officers and the State. Payment of salaries is not within its remit. The same can be said of the first appellant. As CFO he is not responsible for the actual payment of allowances.

[76] In my judgment this is a dispute to have been pursued with the Personnel Department under the grievance procedures set up by the Fire Service Act. No fault can be ascribed, on the facts of this case, to the appellants. The trial judge was plainly wrong to have directed them to pay the arrears.

[77] In the result the appeal must be allowed. The judge's order is set aside. This includes her order for costs. The claimants/respondents must pay the appellants' costs of this appeal and the costs of the trial in the high court. Pursuant to Part 56.14(5) the assessment of the costs of the trial are referred to the judge. The costs of this appeal shall be two thirds of the assessed costs of the trial.

Nolan P.G. Bereaux
Justice of Appeal

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

P. Moosai
Justice of Appeal

I too agree.

P. Rakjumar
Justice of Appeal