

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**SAN FERNANDO**

**CV2021-03333**

**BETWEEN**

**CHERYL CLARKE WILLIAMS**

Claimant

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

First Defendant

**THE PUBLIC SERVICE COMMISSION**

Second Defendant

**THE MINISTRY OF NATIONAL SECURITY**

Third Defendant

**Before the Honourable Madame Justice K. Reid**

**Date of Delivery: 15 March, 2024**

**Appearances:**

Claimant: Shalini Sankar

First and Third Defendants: Keisha Prosper instructed by Kezia Redhead

Second Defendant: Sanjeev Lalla instructed by Brent James

**JUDGMENT**

## Brief introduction

1. The Claimant instituted these constitutional proceedings<sup>1</sup> against the Defendants alleging that she was bypassed for promotion to the post of Probation Officer III. She contends that she was the most senior and experienced officer and ought to have been promoted to the position prior to her compulsory retirement on 10 April, 2018 in preference to her junior Marian Taylor. She sought the following reliefs:

*a. A declaration that there has been a failure and/or omission and/or neglect by the Defendants more particularly the Third Defendant through its agents and/or servants by failing to recommend the Claimant for the vacancy of Probation Officer III which was in breach of the Claimant's right to due process and protection of the law as guaranteed under Section 4(d)<sup>2</sup> and 5(2)(h) of the Constitution of Trinidad and Tobago.*

*b. A declaration that there has been a failure and/or omission and/or neglect by the Defendants to account for the Claimant's seniority, experience, merit, ability and efficiency for the position of Probation Officer III in accordance with the Public Service Commission Regulations and that the Claimant has been deprived of such procedural provisions as are necessary for the purpose of giving effect and protection to the Claimant's right to equality of treatment by the Defendants through its agents and/or servants which was unconstitutional and in breach of the Claimant's fundamental rights as guaranteed and enshrined*

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<sup>1</sup> Fixed Date Claim Form and Statement of Case filed on 5 October, 2021 and Amended Fixed Date Claim Form and Affidavit in Support of Cheryl Clarke Williams filed on 7 February, 2022.

<sup>2</sup> This appears to be an error in the pleadings as the right to the "protection of the law" is guaranteed under section 4(b) of the Constitution and not section 4(d).

*under Section 4(d) and 5(2)(h) of the Constitution of Trinidad and Tobago<sup>3</sup>.*

- c. Compensation for breach of the Claimant's rights under Section 4(d) and 5(2)(h) of the Constitution of Trinidad and Tobago to be assessed and paid by the Defendants to the Claimant.*
- d. Exemplary damages to be assessed and paid by the Defendants to the Claimant.*
- e. Costs to be assessed and paid by the Defendants to the Claimant.*
- f. Interest*
- g. Such further or other relief as the Court may consider necessary."*

2. On 4 November, 2022, the Second Defendant filed an Affidavit in Response of Martel Waldron, Senior Human Resource Advisor of the

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<sup>3</sup> **Section 4(d) and 5(2)(h) of the Constitution** provide as follows:

*" 4.- 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;*

*5. - 1. Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared.*

*5(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not-*

...

*(h). deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."*

Service Commissions Department and a Supplemental Affidavit on 3 February, 2023.

3. On 18 November, 2022, the Third Defendant filed an Affidavit in Response of Deokie Sintra Maharaj, Chief Probation Officer, Probation Services Division, and Ministry of National Security.
4. The matter came up for first hearing on 6 February, 2023 at which time the Claimant was given leave to file an Affidavit in Reply by 13 February, 2023, directions were given for the filing of submissions by the Claimant by 3 March, 2023 with submissions in response to be filed by the Defendants by 31 March, 2023 and the matter was fixed for trial on 12 June, 2023.
5. The Claimant did not file any Affidavit in Reply neither did she file any submissions in support of her claim.
6. At the trial on 12 June, 2023, the Court considered whether, in light of the judgment of the Board in **Crick and Anor v Kurt Brown [2020] UKPC 32<sup>4</sup>**, the Claimant's claim ought not to be dismissed for non-compliance, the claim being a constitutional motion in which no application had been made for cross-examination so that the trial was to proceed on the legal arguments to be advanced by the parties on the affidavit evidence which had been filed. In the absence of such legal arguments, the trial could not proceed.
7. After hearing the parties on this issue, the Court determined that it would not dismiss the claim but that it would allow the Claimant an

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<sup>4</sup> The Board in **Crick and Anor v Kurt Brown [2020] UKPC 32** considered an appeal against the decision of the Court of Appeal to dismiss an appeal on the date of hearing where no legal submissions had been filed by the Appellant as had earlier been directed. The Board held at paragraphs 31-33 of the judgment that the Court of Appeal was entitled to refuse to adjourn the appeal and to instead dismiss it where the Appellants had failed to comply with the case management directions for the filing of submissions prior to the hearing of the appeal.

opportunity to file legal arguments. The Court then gave directions for the filing of submissions by the parties following which judgment was reserved.

### **The Claimant's Case**

8. The Claimant's case is that she was senior to another officer, namely Ms. Marion Taylor, who was promoted to the position of Probation Officer III in preference to her. She relied on the following facts:
  - i. The Claimant was appointed to act as a Nursing Assistant in the public service with effect from 1 January, 1989 whilst her purported comparator, Ms. Marian Taylor, entered the Public Service on 31 July, 2000.
  - ii. The Claimant acted as a Community Service Officer from 15 May to 15 September, 2000 before being appointed to act as a Probation Officer I from the date of her assumption of duty to 31 December, 2000. She assumed duty on 15 September, 2000. The Claimant was further appointed to act as a Probation Officer I from 1 January, 2001 and confirmed in the position with effect from 14 August, 2001.
  - iii. The Claimant was recommended to act as a Probation Officer II for various periods in 2003 and from 13 September, 2004 to 4 October, 2004 and later for other periods in 2009 and 2010.
  - iv. In or around 2003 to 2005, the Claimant queried the seniority list for the post of Probation Officer I complaining that certain officers with whom she had concerns were all employed after her.
  - v. On 31 October, 2011 she was appointed to the position of Probation Officer II with effect from 2 April, 2011.
  - vi. By letter dated 12 March, 2013, the Public Service Commission ("PSC") finally responded to the Claimant's letters of complaint regarding her seniority, advising that:

- a. Promotions are made in accordance with Regulation 18<sup>5</sup> of the Public Service Commission Regulations (“PSC Regulations”) but that at its meeting of the 2 July, 2002, the PSC promoted officers based on their dates of assumption as Probation Officer I and not in accordance with regulation 20(3)<sup>6</sup> of the PSC Regulations.
  - b. The error was corrected and the Claimant’s seniority as a Probation Officer I was restored.
  - c. The Claimant’s promotion to Probation Officer II was backdated from 2 April, 2011 to 19 May, 2007.
  - d. The Claimant now occupied position No. 5 on the Seniority List for Probation Officers II.
- vii. By memorandum dated 12 March, 2013 from the Director of Personnel Administration (“DPA”) to the Permanent Secretary, Ministry of Justice, the DPA advised of the amendment to promotions to the offices of Probation Officer II. The Claimant was then placed senior to Lila Bartholomew and Marian Taylor.
- viii. The Claimant was compulsorily retired in April 2018.
- ix. By pre-action letter dated 11 October, 2018, the Claimant made a complaint to the Comptroller of Accounts, the Service Commissions Department and the Probation Services Department regarding the calculation of her pension. She recited her employment history and stated that she had acted in the position of Probation Officer III for periods in 2014, 2015, 2016 and 2017 and as Assistant Chief Probation Officer from 20 November 2017 to 14 January 2018, when she proceeded on pre-retirement leave. She claimed that she had been promised

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<sup>5</sup> Which set out the criteria for promotion.

<sup>6</sup> Which provides that: ***“(3) The seniority of an officer shall be determined by the date of his appointment to the particular grade within the range in which he is serving. The seniority of officers promoted to the same grade from the same date shall be determined by their seniority in their former grade.”***

by the Chief Probation Officer that if she accepted the acting position in June 2016 to Probation Officer III, she would officially be appointed to the position of Probation Officer III before she retired. The said pre-action letter sought an indication as to whether the Claimant would be so appointed.

- x. The Chief Probation Officer denied making any such promise and this was conveyed in the response to the Claimant's pre-action letter sent on behalf of the Permanent Secretary dated 19 November, 2018.
- xi. In the DPA's letter dated 11 December, 2018 responding to the Claimant's pre-action letter, the DPA advised that the seniority positions of probation officers were amended following representations from Probation Officers, which the PSC was duty bound to correct. The DPA's letter also advised that while the Permanent Secretary had delegated authority to make acting appointments, the Claimant would have previously been informed that such acting appointments gave the Claimant no claim to promotion and that promotions fell solely within the purview of the PSC. The DPA further advised that since the Claimant had retired, she no longer fell under the purview of the PSC and queries relating to the payment of increments and pensions ought to be directed to the Permanent Secretary, Ministry of National Security or the Comptroller of Accounts.
- xii. By memorandum dated 8 July, 2019 from the DPA to the Permanent Secretary, Ministry of National Security, the DPA advised that the PSC appointed a number of Probation Officers II to Probation Officer III, including Lila Bartholomew with effect from 2 January, 2018 and Marian Taylor with effect from 3 January, 2018.
- xiii. The Claimant alleged that positions of Probation Officer III were created during her tenure in 2017 and that Marian Taylor was recommended for promotion although she was junior to and

less experienced than the Claimant and had previously been reprimanded by the Claimant for the substandard quality of her work. She further alleged that although she had been placed at position five (5) on the seniority list for Probation Officers II, she was later fraudulently placed in position six (6) in an attempt to make Marian Taylor senior to her<sup>7</sup>.

- xiv. The Claimant further alleged that the PSC routinely made retroactive appointments and that the appointment of Marian Taylor as a Probation Officer III ahead of her was plainly wrong given the Claimant's seniority and experience and a breach of section 4(d) of the Constitution.
- xv. In response to the Claimant's pre-action letter of 4 September, 2020, the DPA advised that appointments to the office of Probation Officer I, being an entry level position, are done in accordance with PSC Regulation 18 and that seniority positions had been corrected; in March 2019 the Permanent Secretary, Ministry of National Security made recommendations for the promotion of Probation Officers II to Probation Officer III and the Claimant was not recommended for promotion; and that at the time those recommendations were received and considered by the PSC, the Claimant had already retired and no longer fell under the purview of the PSC.
- xvi. The Claimant rejected these explanations since the promotion of both Marian Taylor and Lila Bartholomew were done in July 2019 to take effect retroactively in January 2018, when the Claimant was still employed, and the creation of the post was in 2017 and so the Claimant ought to have been recommended for promotion in light of her seniority.

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<sup>7</sup> The Claimant gave no particulars of this alleged fraud and failed to include in her pleadings any basis for challenging the amendment to the seniority list.



9. The Affidavits in Defence of Martel Waldron filed on behalf of the Second Defendant state as follows:
- a. The Claimant entered the public service as a Nursing Assistant with effect from 1 January, 1989.
  - b. At its meeting of 2 July, 2002, the PSC appointed a number of persons to the office of Probation Officer I, including the Claimant with effect from 14 August, 2001, Lila Bartholomew with effect from 16 August, 2001 and Marian Taylor with effect from 17 August, 2001. The dates of appointment were staggered to reflect the seniority of each officer.
  - c. These effective dates of appointment were, however, an error since the effective dates of appointment were meant to determine seniority based on the length of time the various officers had been acting in the post of Probation Officer I, prior to their appointment. The Claimant began acting in that position on 15 September, 2000, while Lila Bartholomew had begun acting in the position on 3 March, 2000 and Marian Taylor had begun acting in the position on 31 July, 2000.
  - d. In order to correct that error, the PSC at its meeting on 19 August, 2003, changed the effective dates of appointment of Lila Bartholomew and Marian Taylor as Probation Officers I to 13 August, 2001, making them senior to the Claimant on the seniority list for Probation Officers I as they had both been acting as Probation Officers I prior to the Claimant.
  - e. On 11 October, 2011, promotions to the position of Probation Officer II were done by the PSC and continued the relative seniority of these three officers such that the Claimant was promoted to Probation Officer II with effect from 2 April, 2011, while Lila Bartholomew was promoted with effect from 20 May, 2007 and Marian Taylor was promoted with effect from 1 April, 2011.

- f. However, following the queries/complaints made by the Claimant and another officer relative to appointments to the position of Probation Officer I, the PSC reconsidered its earlier decisions in 1996 and in March and July 2002 and decided that:
- i. Promotions/appointments in the public service were made in accordance with regulation 18 of the PSC Regulations.
  - ii. In July 2002 the PSC appointed officers on the basis of their dates of assumption of duty as Probation Officer I pursuant to Regulation 31<sup>8</sup>, instead of regulation 20(3), which reckoned seniority from their date of appointment in their former grade.
  - iii. The PSC purported to rectify the error and restored the Claimant's seniority as a Probation Officer I by backdating her promotion to Probation Officer II to 19 May, 2007, making her senior to both Lila Bartholomew and Marian Taylor.
- g. The PSC also amended the Claimant's appointment/promotion as Probation Officer I to the 13 August, 2001 and changed the effective dates of appointment of Lila Bartholomew and Marian Taylor to 14 August, 2001 and 15 August, 2001, respectively.
- h. These decisions were communicated to the Permanent Secretary, Ministry of Justice and to the Claimant by correspondence dated 13 March, 2013.
- i. In 2017, representations were made by the Public Services Association ("PSA") on behalf of other Probation Officers I alleging that appointments to the position of Probation Officer

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<sup>8</sup> PSC Regulation 31 provides that:

**31. (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.*

I ought to be made in accordance with regulation 31. This led the PSC to reconsider all of its earlier decisions. It noted that previously, appointments to the position of Probation Officer I were made such that seniority was given to officers holding permanent appointments in the public service notwithstanding that officers holding temporary appointments to the office of Probation Officer I had been acting in that office for longer periods of time. The PSC decided that seniority should be based on the length of time that persons had been acting as Probation Officers I in accordance with Regulation 31 and so its earlier decision in 2013 ought to be cancelled.

- j. The result of this was that the Claimant's seniority vis-à-vis Lila Bartholomew and Marian Taylor was wrong and the prior seniority position ought to have been restored. The PSC accordingly amended the seniority list for the office of Probation Officer II such that Lila Bartholomew, Marian Taylor and the Claimant reverted to occupying positions 4, 5 and 6 respectively and so the Claimant was no longer senior to them.
- k. In response to the Claimant's pre-action letter in 2018, the DPA in its letter of 11 December, 2018 advised the Claimant that the seniority lists were amended following their consideration of representations received from Probation Officers in the Public Service; that Permanent Secretaries/Heads of Department have no authority to promote public officers; that recommendations for promotion to the office of Probation Officer III had not been received from the Permanent Secretary so none were being considered, and that since the Claimant was now retired she no longer fell within the purview of the PSC.
- l. By memorandum dated 29 March, 2019, the Permanent Secretary, Ministry of National Security recommended persons for appointment to the position of Probation Officer III. There were only five (5) vacant positions thus the persons occupying

positions one (1) to five (5) on the seniority list were recommended. The Claimant had occupied position six (6) prior to her retirement.

- m. In the circumstances, not only had the Claimant retired on 10 April, 2018 from the public service, almost a year before the recommendations for promotion had been made, she was also not senior to either Marian Taylor or Lila Bartholomew or entitled to be considered for promotion ahead of those officers.
- n. At its meeting of 18 June, 2019, the PSC considered the recommendations for promotion of those five officers and promoted them accordingly, with the first three officers being promoted with effect from certain dates in 2014 and Lila Bartholomew and Marian Taylor with effect from 2 January, 2018 and 3 January, 2018 respectively.
- o. The PSC received the Claimant's pre-action letter of 4 September, 2020, which it considered at its meeting of 15 December, 2020 and decided that it could not accede to the request to retroactively appoint the Claimant to the position of Probation Officer III because:
  - i. As an entry level position, promotions/appointments to the office of Probation Officer I were to be made in accordance with PSC Regulations 18 and 31.
  - ii. The PSC were bound to correct matters brought to their attention which lead to the correction of the seniority list.
  - iii. Recommendations were made for promotion to the post of Probation Officer III by the Permanent Secretary, Ministry of National Security in accordance with PSC Regulation 13 and the Claimant had not been recommended for promotion.

- iv. At the time the recommendations were made the Claimant had already retired and no longer fell within the purview of the PSC.
  - v. In any event, there was no vacant position of Probation Officer III to which the Claimant could be appointed retroactively.
  - vi. Marian Taylor was senior to the Claimant consequent upon the PSC's decisions in 2017.
- p. Since the Claimant would have acted as Probation Officer III and Assistant Chief Probation Officer immediately prior to her retirement, she would have been paid the salary assigned to those offices for the periods she acted in the same.

10. The evidence of Deokie Sintra Maharaj, Chief Probation Officer, on behalf of the Third Defendant, was as follows:

- a. Ms. Maharaj acted as the Chief Probation Officer since 1 November, 2013 before being confirmed in that appointment on 24 February, 2014.
- b. She did have a meeting with the Claimant together with Assistant Chief Probation Officer, Frances Turton-Long to discuss the Claimant's acting appointment. However, neither she nor Mrs. Turton-Long made any promises, assurances or representations that the Claimant would be promoted to the post of Probation Officer III prior to her appointment.
- c. She could not make any such promises, assurances or representations since she has no authority to promote officers in the public service and her inability to make such assurances was conveyed to the Claimant in letter dated 19 November, 2018 to the Claimant's attorney.
- d. In 2017, Ms. Maharaj submitted a draft Cabinet Note through the Permanent Secretary, Ministry of National Security seeking the creation of additional staff within the Probation Services

Division. Although three (3) positions of Probation Officer III were recommended, only one (1) post was approved by Cabinet. The post had not been created for Marian Taylor as the Claimant alleges.

- e. At no time did Ms. Maharaj promise the Claimant that she would be appointed to that post. Her only interaction with the Claimant regarding that post was at a general staff meeting to inform all staff of the positions which had been created. No recommendations were made at that time for the filling of the newly created post.
- f. By memorandum dated 26 February, 2018, approval was granted to the Claimant to proceed on vacation leave until her retirement on 10 April, 2018.
- g. By memorandum dated 19 November, 2018, the DPA wrote to the Permanent Secretary, Ministry of National Security regarding the filling of offices for the posts of Probation Officer II and Probation Officer III. By memorandum dated 29 March, 2019 recommendations were made in accordance with PSC Regulation 13. There were five offices of Probation Officer III to be filled, one of which was vacant. The PSC appointed the recommended officers to those offices in accordance with the seniority list for Probation Officers II.

11. As set out before, no application was made by any party to cross-examine any deponent on the contents of their affidavits and the Claimant did not file any Affidavit in Reply to the Defendants' affidavits despite being provided an opportunity to do so.

## Preliminary Issues

### *Alternative remedy - Judicial Review*

#### **Law and Analysis**

12. Prior to the matter being transferred to this Court, Gobin J had directed the parties to file submissions on the issue of whether these constitutional proceedings were an abuse of process since the Claimant had not previously sought to challenge any of the PSC's decisions by way of judicial review. While submissions were filed by the First and Third Defendants on this issue, the Claimant filed none and following the transfer of the matter to this Court, I directed that the issue would be dealt with together with the substantive claim.
13. The First, Second and Third Defendants' submissions will be considered together as they canvassed essentially the same arguments. Their submissions all similarly contended that the claim was an abuse of process because the Claimant ought to have earlier filed an application for judicial review.
14. The law regarding whether the invocation of the Court's constitutional jurisdiction is an abuse of process is well-established as recited in this Court's earlier judgment in **CV2023-00153 Arnold Pinto v Attorney General** at paragraph 9. In particular, it is an abuse of process to bring constitutional proceedings in order to avoid applying for judicial review in the normal way.
15. Additionally, as it specifically relates to claims where the appropriate alternative means of redress was to proceed by way of judicial review, the Board in **Johnatty v Attorney General**<sup>9</sup> stated that the fact that such a remedy was available was fatal to a claim for constitutional

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<sup>9</sup> [2008] UKPC 55 at paragraphs 20 and 21.

relief, while the Board in **Durity v Attorney General**<sup>10</sup> held the following in relation to the appellant's claim that the decision to charge him for misconduct breached his constitutional right to protection of the law guaranteed under section 4(b) of the Constitution:

*“28. Whether this was a case for the appellant's immediate suspension is more open to question. But their Lordships agree with the Court of Appeal that it cannot be said that the appellant was deprived of the protection of the law when this step was taken against him. It was open to him to challenge the legality of the decision immediately by means of judicial review. Taken on its own therefore this complaint is not one that stands up to examination as an infringement of the appellant's constitutional rights. In any event, as a remedy by way of judicial review was available from the outset, a constitutional motion was never the right way of invoking judicial control of the Commission's decision to suspend him. The choice of remedy is not simply a matter for the individual, to decide upon as and when he pleases. As Lord Diplock observed in *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, 268, the value of the safeguard that is provided by section 14 will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In *Jaroo v Attorney-General of Trinidad and Tobago* [2002] UKPC 5, [2002] 1 AC 871, para 39, the Board said that if another procedure is available, resort to the procedure by way of an originating motion will be inappropriate and it will be an abuse of the process to resort to it. Their Lordships consider therefore that the decision to suspend the*

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<sup>10</sup> [2008] UKPC 59



*appellant is not a proper subject for relief by way of a constitutional motion under section 14.”*

16. The crux of the Defendants’ arguments is that:

- a. The Claimant had been notified by letter dated 11 December, 2018 that seniority positions were amended; that her acting appointment gave her no claim to substantive promotion; that the Permanent Secretary has no authority to promote officers; that she had not been recommended for promotion to Probation Officer III and that, having retired, she no longer fell within the purview of the PSC. The Claimant neither sought to obtain copies of the amended seniority lists nor did she institute any proceedings to challenge any of these matters. More particularly, the Claimant did not seek to challenge by way of judicial review the PSC’s decision to amend the seniority list for Probation Officers as they had indicated.
- b. Further details of the decision to amend the seniority list for Probation Officers were provided to the Claimant by letter dated 22 December, 2020 indicating the basis for the amendment and the fact that recommendations for promotion were made almost a year after her retirement. The Claimant again took no steps to seek judicial review of the decision to amend the seniority list, instead instituting these constitutional proceedings on 5 October, 2021 for relief in respect of alleged breaches of her right to equality of treatment as guaranteed by section 4(d) of the Constitution and her right to such procedural protections necessary to give effect to that right as guaranteed by section 5(2) (h) of the Constitution.

17. In the circumstances, the Defendants argue that the Claimant’s claim is an abuse of process and ought properly to be struck out.

18. As noted above, the Claimant did not file any legal arguments on the preliminary issue when previously ordered to do so by Gobin J on 29 September, 2022. However, her substantive submissions included the following arguments, which were devoid of any supporting legal authority:

*“33. The Claimant asserts that the Defendants’ actions, specifically their failure to account for the Claimant’s seniority, experience, merit, ability, and efficiency, and the deprivation of procedural provisions, constitute a breach of their fundamental rights as guaranteed by the Constitution of Trinidad and Tobago. Given the Claimant would have been the next candidate according to the Public Service Commission records who would have been considered for that position it was necessary to check the Claimant’s file properly to ensure the right person was promoted into the position.*

*34. In summary, the Claimant believes that the Defendants’ failure, omission, or neglect to account for their qualifications, as well as the denial of procedural provisions, constituted a violation of their constitutional rights to equality of treatment, fairness, and administrative justice as guaranteed by the Constitution of Trinidad and Tobago.*

*35. The Claimant has suffered damage for upon retirement her pension reflects that of a Probation Officer II than that of a Probation Officer III when she was the senior person that should have been recommended and promoted to Probation Officer III and these damages need to be assessed by a Registrar.*

*36. The issue of the matter is not only an administrative error under the Public Service Regulations to promote the Claimant but that due to the actions and inactions of agents of the*

*Attorney General of Trinidad and Tobago, the Claimant was not afforded an opportunity to be considered for the position, not being recommended, although she was senior to Ms. Marion Taylor.*

*37. As such there was no abuse in bringing the matter by way of Constitutional motion as there is an alleged violation of her fundamental right to equality of treatment which has materially affected the Claimant.*

*38. Further, there is no abuse of process as the actions of the Defendants don't only concern the use and implementation of sections of the Public Service Regulations but it concerns the failures of Ministry of National Security and Public Service Commission to provide procedural protections to ensure the Claimant's right to equality of treatment is protected and to protect her from persons acting in bad faith against her which has caused her to experience damage and loss."*

19. The above does not provide any real answer to the preliminary issue.

Mala fides, the failure to comply with the rules of natural justice and the failure to follow the provisions of the PSC Regulations are all grounds upon which a claim for judicial review can be made. Her plea of equality of treatment rests only on the claim that a junior officer was promoted in preference to her, which decision could appropriately have been the subject of judicial review proceedings.

20. It seems to me that the Claimant was aware since December 2018 that the seniority lists for Probation Officers were amended following the PSC's consideration of representations made by Probation Officers and she instituted these proceedings in order to get around the requirements of **section 11** of the **Judicial Review Act, Chap 7:08**, which provides that:

*“11. (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.*

*(2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.*

*(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.*

*(4) Where the relief sought is an order of certiorari in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision.”*

21. In the circumstances, no matter how her claim has now been couched, her real issue is with the PSC’s 2017 amendment to the seniority list, which she ought to have challenged since December 2018. In those circumstances, her constitutional claim is an abuse of process and ought to be struck out as being an abuse of process.

22. In the event I am wrong on this, I will go on to consider the merits of the Claimant’s constitutional claim.

### ***The Parties***

23. As a further preliminary issue, it was argued that the Third Defendant was not a property party to these proceedings. This was accepted by the Claimant and is the correct position in law. Accordingly, the Third Defendant is struck out as a party to these proceedings.

### ***The Constitutional Claim***

24. The Claimant claims her right to equality of treatment, protection of the law and her right to such procedural safeguards as are necessary to secure those rights have been breached. In my view, for the reasons that follow, the Claimant's claim cannot succeed.

### ***Appointments /Promotions in the Public Service***

25. Promotions, appointments and transfers of public officers are governed by regulations 11-33 of the PSC Regulations; of particular relevance to the present proceedings are regulations 13, 18, 20(3) and 31 of the PSC regulations<sup>11</sup>.

26. The Claimant bases her claim that she ought to have been promoted to the office of Probation Officer III on the following:

- a. She was senior and more experienced than Marian Taylor both in terms of the seniority list and because she was chosen to act as Assistant Chief Probation Officer; and

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<sup>11</sup> Regulation 13 sets out the manner in which recommendations for promotion are made, the advertising of vacancies and the publishing of lists of vacancies in the public service by the DPA.

Regulation 18 sets out the criteria for promotion.

Regulation 20 provides for the keeping of seniority lists and the determination of seniority.

Regulation 31 treats with the dates of appointment of officers, whether on assumption of duty or on promotion.

- b. She was promised by the Chief Probation Officer that she would be so appointed prior to her retirement.

27. Although the PSC appeared to consider the seniority of all Probation Officers together and, in particular, the Claimant's place on the seniority list, which was determined and amended in relation to a number of Probation Officers in the department, the Claimant seems to fixate only on Marian Taylor. In fact, although the amendment to the seniority list placed **BOTH** Lila Bartholomew and Marian Taylor prior to the Claimant in terms of seniority, the focus of the Claimant's ire is directed only to the movement of Marian Taylor. In that regard, she makes the bare statement that the additional position of Probation Officer III was created specifically for Marian Taylor whom she alleged to be a friend of the Chief Probation Officer and that Marion Taylor was fraudulently moved to position five (5) on the seniority list ahead of her. The Claimant makes these bare statements in support of her allegation of bad faith against the Chief Probation Officer and Permanent Secretary. Not only are these bare averments made without any evidence in support, they also cannot be supported in light of the evidence that is before the Court.

28. It must first be noted that there is not a single shred of evidence that Marian Taylor made any complaint regarding her place on the seniority list or made any representation that the seniority list ought to be amended, whether in relation to herself or otherwise. The Claimant's evidence is that the Claimant herself sought to have the seniority list amended sometime between 2003 and 2005, which the PSC considered and in fact did in 2013. The PSC's evidence is that in 2017 the PSA, on behalf of unrelated junior Probation Officers, made representations to have the seniority list for Probation Officers re-amended on the basis that the manner in which it was compiled was flawed and a breach of the regulations. In respect of both complaints –

the Claimant's in 2003-2005 and the PSA's in 2017 – the exercise affected the placement of **ALL** Probation Officers on the seniority list as it affected the PSC's whole approach to determining the effective dates of appointment for **ALL** Probation Officers and did not treat the effective date of appointment differently for any specific officer.

29. Indeed, the determination of the PSC involved a consideration as to which regulation was the applicable regulation when fixing the effective date of appointment for seniority purposes and once that determination had been made, it applied the result to **ALL** Probation Officers equally. In the same way that the PSC initially reviewed its earlier determination in 2013 in response to the Claimant's complaint, it was entitled to review its decision again in 2017 in response to the PSA's complaint. If the PSC determined that they had made an error, they were entitled to correct it.<sup>12</sup> In any event, the Claimant in these

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<sup>12</sup> See **Sahadeo Maharaj v Teaching Service Commission et al [2006] UKPC 36, Privy Council Appeal No. 48 of 2005** at paragraph 11 where the Board stated as follows:

11. *“Their Lordships do not doubt that the appellant genuinely believed that he was entitled to seniority as a Teacher II as from 9 September 1976 and that he ought to have been promoted to the vacancy in the post of Vice-Principal instead of Mr Jones. But there is no getting away from the fact that the appellant's case is not supported by the evidence. There are concurrent findings of the courts below that the date stated in the letter of 29 April 1980 as the date with effect from which he had been appointed to the post of Teacher II was an error. Their Lordships are not persuaded that there is any flaw in these findings. Nor should the position of Mr Jones be overlooked. The appellant seeks an order directing the Commission to reconsider its decision to appoint Mr Jones as Vice-Principal. But there is no suggestion that the erroneous information that was communicated to the appellant can be attributed in any way to Mr Jones. Sir Fenton was unable to advance any argument which might justify the conclusion that Mr Jones ought to be deprived of his appointment as Vice-Principal to which, on the evidence, he was clearly entitled simply because the Commission made an error when it confirmed the date of the appellant's appointment in 1980. The unfairness of which the appellant complains may well attract sympathy. It is regrettable that he was so sadly misled for so long by the Commission's inaccurate record-keeping. But the law cannot provide him with the remedy which he seeks, to which he is plainly not entitled on the facts. The appeal must be dismissed.*”

The Board affirmed the decision of the Court of Appeal in **Civil Appeal No. 26 of 2003 Sahadeo Maharaj v Teaching Service Commission** where it was held at paragraphs 10-12 as follows:

*“[1] This case is about the ability of a public body to reverse a decision taken in error when a person affected has relied upon and enjoyed the benefit of that decision. The Teaching Service Commission erroneously confirmed the Appellant's appointment to the office of Teacher II on an effective date earlier than his date of first appointment*

proceedings has not sought to challenge or set aside the PSC's 2017 decision regarding the methodology to be applied in determining the issue of seniority such that their consequential decision as to the Claimant's place on the seniority list still stands. The Claimant appears to have ignored this decision entirely instead focusing her case entirely on the seniority list established by the earlier 2013 decision, which had been later corrected.

***Breach of section 4(d) of the Constitution– The right to equality of treatment***

30. Even if it could be said that a challenge has indirectly been made to the 2017 decision, the Claimant has not made a claim that the 2017 decision was wrong or that seniority ought to have been determined differently or in accordance with a different provision in the PSC Regulations. Instead, her claim is based on equality of treatment. In my view, no argument can be made that the Claimant was treated inequitably. The undisputed fact is that the same criteria for

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*to that office. The effect of that was to give him a seniority date ahead of persons who had been originally appointed before him. It had no power to do so. The appellant's claim of discrimination and inequality of treatment fails because the removal of a benefit to which he was not lawfully entitled cannot constitute discrimination or inequality of treatment.*

...

*[10] Neither reliance nor effluxion of time can alter the nature of an illegal act so as to confer a permanent substantive benefit or legitimate expectation. A public body cannot, by mistaking its own powers, enlarge them beyond what is conferred by statute. The Commission has an overriding duty to obey the statute. The doctrine of estoppel must give way to the principle of ultra vires. The fact that a decision of a public authority may remain effective until declared to be a nullity by the Court does not estop the authority from asserting lack of vires.*

*[11] Even if the doctrine of estoppel could apply, this is not the sort of case where, as a matter of exercise of discretion, a court would grant relief to the Appellant. If, for example, the Appellant had been given the acting appointment and Mr. Jones had complained, on what basis should he be refused relief? The fact that it is the Commission and not Mr. Jones that has sought to correct the error does not alter the principle.*

*[12] In fact, the interests of good administration may impose a duty on a public body to reconsider or correct a decision based on a mistake of fact when that mistake is discovered. That is especially so where failure to address the error would unfairly impact upon other persons in respect of whom similar powers are exercised. In this case a wrong confirmation date would unfairly place the Appellant ahead of other persons, including Mr. Jones, on the seniority list."*



determining seniority was applied to all Probation Officers. It was not that the Claimant or Marian Taylor was singled out for the application of a different criterion. Once the PSC determined how it was going to treat with seniority, it applied that methodology to all Probation Officers. There was simply no discrimination. Further, the Claimant's placement on the seniority list always affected **BOTH** Lila Bartholomew **AND** Marian Taylor. However, the Claimant elected to effectively ignore the alterations to the placement of Lila Bartholomew altogether.

31. In relation to the creation of the additional office of Probation Officer III in 2017, it is not disputed that although more offices of Probation Officer III were recommended to be created, Cabinet had only approved one. There is simply no basis for the Claimant's allegation that this office was created for Marian Taylor. In order for me to find this, I would have to find that there existed a conspiracy between Marian Taylor, the Chief Probation Officer, the Permanent Secretary, the whole of Cabinet and the PSC. Not only is this absurd, but Marian Taylor has been unfairly vilified by the Claimant in these proceedings when there is not one single shred of evidence that she was connected in any way to the decision to expand the Probation Services Division; nor is there any evidence whatsoever that Marian Taylor ever attempted on even a single occasion to query her placement on the seniority list, not even after it was altered in 2013 following the Claimant's own complaints.

32. I find, therefore, that there has been no discrimination against the Claimant. There is simply no evidence of discrimination, let alone evidence of discrimination in favour of Marian Taylor. As such, the issue as to whether there existed a similarly circumstanced comparator who was treated differently does not arise as all probation officers were treated in the same manner regarding seniority. The Claimant's claim in respect of a breach of section 4(d) of the Constitution fails.

***Breach of section 4(b) of the Constitution– The right to the protection of the law and section 5(2) (h) of the Constitution – Procedural safeguards***

33. The Claimant does not allege that any particular Regulations have been breached in relation to her. She states only that her seniority and experience were not taken into account in bypassing her for promotion; that the failure to recommend her for promotion denied her an opportunity to be considered for promotion; that she should have been recommended for promotion directly following the creation of the additional post of Probation Officer III in 2017; that the post should have been given to her because of her seniority to Marian Taylor; and that the post should have been advertised and her name submitted in light of her “superiority.”<sup>13</sup>

34. These arguments are largely based on the erroneous premise that the Claimant was senior to Marian Taylor. Although the Claimant entered the public service as a Nursing Assistant on 1 January, 1989 and began acting as a Probation Officer I on 15 September, 2000, Marian Taylor entered the public service when she began acting as a Probation Officer I on 31 July, 2000. It is evident that Marian Taylor began performing the duties of a Probation Officer I prior to the Claimant and the decisions of the PSC in 2003, 2011 and lastly 2017; establishing the seniority list for Probation Officers gave effect to that fact. The Claimant simply was not ultimately determined to be senior to either Lila Bartholomew, who began acting as Probation Officer I on 3 March, 2000, or Marian Taylor.

35. Insofar as the Claimant fails to identify any procedure or provision which has been breached or which has not been provided to her, her claim in respect of a breach of section 5(2)(h) of the Constitution is misplaced. Bereaux JA, in the case of **Attorney General v Oswald**

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<sup>13</sup> Paragraphs 33, 34 and 35 of the Claimant’s affidavit filed on 7 February, 2022.

Alleyne and 152 others CA 52 of 2003<sup>14</sup>, gave the following analysis of section 5 rights:

**“[50] Section 5(2) (h) does not stand on its own as an individual fundamental right, it is directed at Parliament, which it prohibits from depriving a person of such procedural provisions as necessary to give effect and protection to their rights and freedoms under section 4 of the Constitution. But it is also a further and better particularisation of the rights set out in section 4; in this case, the due process provisions of section 4(a) and the right to the protection of the law in section 4(b). See Thornhill v The Attorney General (1974) 27 WIR 281 per Georges J speaking on the provisions of section 1 & 2 of the 1962 Constitution (the equivalent of section 4 & 5, respectively, of the 1976 Constitution) where at page 285 he said:**

*“The existence of the various rights having been proclaimed in s. 1, s. 2 protects them from legislative interference – subject to certain exceptions – and to make abundantly clear what it seeks to protect, spells out and particularizes aspects of these rights which are not in the large generalizations under s. 1. The phrasing is quite clear. No law shall abrogate, abridge or infringe any of the rights proclaimed in s. 1 ‘and in particular no Act of Parliament shall’ – followed by the specific prohibitions. I am satisfied therefore that the rights mentioned in s. 2(c)(i)-(iv) have been regarded by the Constitution makers as specific examples of the rights proclaimed in s. 1. There is no need to find the particular heading under which they may be subsumed. It is*

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<sup>14</sup> Delivered on 20 December, 2011. (Note - An appeal was made to the Board in [2015] UKPC 3, which concerned the decision of the Court of Appeal not to award compensation in respect of the breach of the appellants’ rights under sections 4(a) and (b) of the Constitution. The Board found that an award of compensation was appropriate.)

*enough that the Constitution has categorically set them out as particular aspects of the general heads.”*

*See also Lord Diplock in de Freitas v Benny (1975) 27 WIR 318:*

*“Chapter 1 of the Constitution of Trinidad and Tobago, like the corresponding chapter III of the Constitution of Jamaica (see Director of Public Prosecutions v Nasralla ([1967] 2 AC 238, [1967] 3 WLR 13, [1967] 2 All ER 161, (1967) 10 WIR 299)) proceeds on the presumption that the human rights and fundamental freedoms that are referred to in ss. 1 and 2 are already secured to the people of Trinidad and Tobago by the law in force there at the commencement of the Constitution...*

*Section 2 is not dealing with enacted or unwritten laws that were in force in Trinidad or Tobago before that date. What it does is to ensure that subject to three exceptions no future enactment of the Parliament established by chapter IV of the Constitution shall in any way derogate from the rights and freedoms declared in s. 1...*

**The specific prohibitions upon what may be done by future Acts of Parliament set out in paras. (a) to (h) of s. 2 and introduced by the words ‘in particular.’ are directed to elaborating what is meant by ‘due process of law’ in s. 1 (a) and ‘the protection of the law’ in s. 1 (b). They do not themselves create new rights or freedoms additional to those recognized and declared in s. 1. They merely state in greater detail what the rights declared in paras (a) and (b) of s. 1 involve”**

*(the provisions of section 5 of our present constitution are not introduced by the phrase “in particular” as in section 2 of the previous Constitution but in my judgment its absence from section 5 does not change the meaning of the section.) See also*

*Lord Diplock in Thornhill v Attorney General of Trinidad and Tobago [1981] AC 60 at page 70 approving the dictum of Georges J.*

*[51] A failure by the Executive to provide procedural provisions will thus amount to a breach of the due process provision and the right to protection of the law. Attorney General of Trinidad and Tobago v Whiteman [1991] 2 WLR 1200 at 1204 provides helpful guidance on the interpretation of the provisions of section 5(2) (h). That was a case in which the respondent, having been arrested, was not informed of his right to communicate with a lawyer and the question which arose was whether, in order to make that right effective, there shall be provision for a procedure whereby he was informed of his right to counsel. It was held that while section 5(2) (c) (ii) conferred on the person arrested the right to communicate with a legal advisor, that right would be ineffective in certain circumstances unless there was provision for a procedure by which he was informed of it and section 5(2) (h) gave him the right to a procedural provision such as that provided by paragraph 8(b) of the Appendix B to the Judges Rules 1964 and the right to have that procedure followed.*

*[52] The judgment of the Board was given by Lord Keith of Kinkel. At page 1204 he said:*

*“The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights. In this case, the right conferred by section 5(2)(c)(ii) upon a person who has been arrested and detained, namely the right to*

*communicate with a legal adviser, is capable in some situations of being of little value if the person is not informed of the right. Many persons might be quite ignorant that they had this constitutional right or, if they did know, might in the circumstances of their arrest be too confused to bring it to mind. Section 5(2) (h) is properly to be regarded as intended to deal with that kind of situation as well as other kinds of situations where some different constitutional rights might otherwise be at risk of not being given effect and protection. There are no grounds for giving a restricted meaning to the words “procedural provisions.” A procedure is a way of going about things, and a provision is something which lays down what that way is to be. Given that there are some situations where the right to communicate with a legal adviser will not be effective if no provision exists for some procedure to be followed with a view to dealing with these situations, there is a clear necessity that such provision should be made. So section 5(2) (h) gives a right to such provision. Their Lordships further consider that, by necessary implication, there is a right to have the procedure followed through. A procedure which exists only on paper, and is not put into practice, does not give practical protection.”*

*“Procedural provisions” therefore is to be construed broadly and purposively so as to give effect to the spirit and intention of the Constitution. **Section 5(2) (h) gives a right to a procedure by which effect is given to the individual’s rights and freedoms.** The rights and freedoms set out in sections 4 and 5 are also*

*manifested in statutes as rights and entitlements, as in this case.”*

*[53] The enactment of regulations under section 26 provides a procedure for the recognition of the representative association which can then pursue and enforce the respondents’ rights and remedies assured them under the SAA and the IRA. The non-promulgation of the regulations thus denies the respondents access to a procedure which would allow them to give effect to their rights set out in the SAA and the IRA, those rights and remedies being themselves manifestations of the respondents’ right to due process and to the protection of the law. The respondents are entitled to have that procedure followed through and the non-enactment of regulations under section 26 was breach of that procedural provision and a consequent breach of the protection of the law.”*

36. It is clear from the foregoing, therefore, that breaches of section 5 provisions will result in a finding of a breach of section 4(a) or (b) and will not occasion any separate relief for a breach of the section 5 provisions involved. Further, given that section 5 is directed at Parliament, in order to establish a breach of section 5(2) (h), a Claimant must point to a failure to enact and/or promulgate procedures and provisions to ensure that effect is given to the affected rights, which are set out in sections 4 and 5 and manifested in the rights and entitlements prescribed in other applicable legislation. The Claimant has failed to do so. Neither has the Claimant identified or particularised any procedure or provision that has not been followed through.

37. Notwithstanding this, inasmuch as the First and Third Defendants addressed the applicability of certain regulations, I will consider whether any of the allegations made by the Claimant could support a

finding that any of the PSC Regulations was breached, or in other words, not followed through.

38. In her affidavit, the Claimant says that she was not recommended for promotion to the post of Probation Officer III even though she was senior to Marian Taylor<sup>15</sup> and as a result she was not provided the opportunity to be considered. She also complained that she ought to have been recommended for promotion as soon as the post had been created or the post ought to have been advertised as soon as it was created so that she could have applied for the same. She says further that her merit and ability was not considered and that she ought to have been appointed to the post because she was the most senior officer and had acted as Assistant Chief Probation Officer. She alleged that the normal procedure of checking the seniority of officers was not followed<sup>16</sup> and that her name ought to have been included in the list of prospective candidates for promotion as she was *“actively serving as a Probation Officer III at the time and Acting Chief Probation Officer.”*<sup>17</sup>

39. In Cabinet Minute No. 1568 of August 24, 2017, Cabinet agreed to the creation of a number of offices in the Probation Services Division as follows:

- a. One Probation Officer III, seven Probation Officers II, ten Probation Officers I, one Administrative Assistant, one Accounting Assistant and one Chauffeur Messenger, all of whom were to be permanent and pensionable offices on the establishment.
- b. Three Children’s Probation Officers III, six Children’s Probation Officers II and eighteen Children’s Probation Officers I, which

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<sup>15</sup> Which assertion was factually incorrect having regard to the PSC’s 2017 amendment to the seniority lists for Probation Officers.

<sup>16</sup> Although she does not identify what procedure this would be.

<sup>17</sup> Paragraph 34 of the Claimant’s affidavit filed on 7 February, 2022.



were new permanent and pensionable offices to be created and to be classified by the Chief Personnel Officer (“CPO”).

- c. While the positions at (b) were awaiting classification by the CPO, two Juvenile Probation Officers III, four Juvenile Probation Officers II and twelve Juvenile Probation Officers I were to be hired on contract on terms and conditions to be determined by the CPO and approved by the Minister of National Security.
- d. One Business Operations Assistant I was also to be hired on contract on terms and conditions to be determined by the CPO.
- e. One Programme Manager was to be hired on contract on terms and conditions to be determined by the CPO.

40. The Cabinet Note also advised that the contract positions only were to be advertised, the Ministry of National Security in consultation with the Ministry of Finance was to identify the funds estimated at \$6,126,984.00 to be allocated to meet the salary and related costs of the new staff and there was to be consultation regarding any legislation that would need to be amended that would impact “structure and staffing”.

41. It is clear, therefore, that the expansion of the Probation Services Division was a holistic exercise that encompassed more than just the creation of one additional post of Probation Officer III. Further, that exercise involved the creation and classification of new positions and the identification and allocation of funding to meet the expenditure that the new offices would require. In the circumstances, it is not reasonable to suggest that as soon as the additional post of Probation Officer III was created by Cabinet, that this single post was to be excised and immediately filled.

42. Ms. Deokie Sintra Maharaj, who gave evidence on behalf of the First and Third Defendants, did not provide any information regarding how

long the process of identifying funding and classification took but said only that following Cabinet's decision in August 2017, no recommendations were made to fill the post of Probation Officer III.

43. In any event, the Claimant proceeded on pre-retirement leave on 26 February, 2018 and retired on 10 April, 2018. The request for recommendations to fill the offices of Probation Officers II and III was sent by the DPA to the Permanent Secretary on 19 November, 2018 and recommendations were made by the Permanent Secretary memorandum dated 29 March, 2019.

44. Regarding promotions, regulations 13 and 18 of the PSC Regulations are applicable and provide as follows:

*“13. (1) As soon as it is known that a vacancy will occur the Permanent Secretary or Head of Department shall communicate to the Director in writing and shall make his recommendations regarding the filling of the vacancy.*

*(2) Where a vacancy exists for more than three months and no request has been made by the Permanent Secretary or Head of Department for the filling of the vacant post, the Director shall send to each Permanent Secretary or Head of Department a statement of existing vacancies in his Ministry or Department requesting early recommendations for filling vacancies.*

*(3) If recommendations, or satisfactory explanations for a lack thereof, are not received within a month, the Director shall report the fact to the Commission and the Commission shall require the Permanent Secretary or Head of Department to inform it of the reasons for failure to request the filling of the vacancy.*

*(4) The Director shall, from time to time by circular memorandum or by publication in the Gazette, give notice of vacancies which exist in the particular service and any officer may make application for appointment to any such vacancy. Such application shall be forwarded through the appropriate Permanent Secretary or Head of Department to the Director, but the failure to apply shall not prejudice the consideration of the claims of all eligible public officers.*

**18.** *(1) In considering the eligibility of officers for promotion, the Commission shall take into account the seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such officers, and in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy.*

*(2) The Commission, in considering the eligibility of officers under sub regulation (1) for an appointment on promotion, shall attach greater weight to—*

*(a) seniority, where promotion is to an office that involves work of a routine nature, or*

*(b) merit and ability, where promotion is to an office that involves work of progressively greater and higher responsibility and initiative than is required for an office specified in paragraph (a).*

*(3) In the performance of its functions under sub regulations (1) and (2), the Commission shall take into account as respects each officer—*

*(a) his general fitness;*

*(b) the position of his name on the seniority list;*

- (c) any special qualifications;*
- (d) any special courses of training that he may have undergone (whether at the expense of Government or otherwise);*
- (e) the evaluation of his overall performance as reflected in annual staff reports by any Permanent Secretary, Head of Department or other senior officer under whom the officer worked during his service;*
- (f) any letters of commendation or special reports in respect of any special work done by the officer;*
- (g) the duties of which he has had knowledge;*
- (h) the duties of the office for which he is a candidate;*
- (i) any specific recommendation of the Permanent Secretary for filling the particular office;*
- (j) any previous employment of his in the public service, or otherwise;*
- (k) any special reports for which the Commission may call;*
- (l) his devotion to duty.*

*(4) In addition to the requirements prescribed in sub regulations (1), (2) and (3), the Commission shall consider any specifications that may be required from time to time for appointment to the particular office.”*

45. It is clear from the foregoing that Permanent Secretaries are tasked with forwarding recommendations for the filling of vacancies to the DPA for the PSC’s consideration in accordance with the regulation 18 criteria. Given the proximity of the creation of the additional posts to the Claimant’s retirement, I am entirely unable to find that the provisions of regulation 13 were breached in relation to her. Although regulation 13 (1) requires recommendations to be made as soon as a

vacancy will be known to occur, the creation of a new post of Probation Officer III, was not an ordinary vacancy. While Cabinet had agreed to the creation of a number of new posts, this was in the context of the restructuring of the Probation Services Division as a whole and required the classification of certain new offices and the identification of funding to support the proposed expansion of the division. This Court is not blind to the reality that the reallocation of public funding is sometimes a long and tedious process. This Court is, therefore, not prepared to find that it would have been reasonable to expect the Permanent Secretary to excise only the one post of Probation Officer III, immediately reallocate funds for the filling of that one post only and then make recommendations to fill the same prior to the Claimant's retirement.

46. In relation to the alleged promise made by the Chief Probation Officer that the Claimant would be promoted to the post of Probation Officer III prior to her retirement, I do not accept that such a promise was made and even if it was, it could not entitle the Claimant to the promotion. In the first place, this allegation is wholly unsupported in the evidence advanced by the Claimant and was denied by the Chief Probation Officer, who swore an Affidavit in Answer to the claim and, in respect of whom, the Claimant neither filed an Affidavit in Reply nor made an application to cross-examine. Secondly, neither the Chief Probation Officer nor the Permanent Secretary can promote any public officer. This power is vested solely in the PSC and neither the Chief Probation Officer nor the Permanent Secretary could unlawfully arrogate this power unto themselves. Finally, the Claimant was advised in relation to every acting appointment, that such acting appointment gave the Claimant **no claim** to a substantive promotion so the alleged promise would be entirely inconsistent with this long-standing and well-known condition regarding any acting appointment that was not to be a prelude to substantive appointment. I therefore reject this allegation entirely.

47. There is also no merit in the Claimant's claim that the post ought to have been immediately advertised since regulation 15<sup>18</sup> only requires vacancies to be advertised where the PSC is of the view that there is no suitable candidate within the service to be appointed to the vacant position. Further, although regulation 13(4) requires the DPA to periodically give notice of vacancies within the public service, there is no requirement that this has to be done whenever any vacancy occurs, nor is it prescribed how frequently such notice of all existing vacancies is to be given.

48. In relation to the recommendations themselves, and the consequent failure of the PSC to consider the Claimant for promotion, I am also unable to find that the regulations were breached in relation to the Claimant. The main thrust of her complaint is that her seniority was disregarded and she was bypassed for promotion. As set out above, the foundation for this is the misapprehension of her seniority vis-à-vis Marian Taylor. Of the five posts of Probation Officer III that were to be filled, the five most senior officers were appointed in accordance with regulation 18(1). The 2017 decision of the PSC, and the consequent amendment to the seniority list, were never previously challenged by the Claimant. Neither does the Claimant seek to have the 2017 decision set aside or to have her seniority restored in these proceedings. Consequently, even if promotions had occurred prior to the Claimant's retirement, she could not establish that she was bypassed for promotion or that her seniority was disregarded.

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<sup>18</sup> **Regulation 15 of the PSC Regulations** provides that:

*"Where the Commission considers either that there is no suitable candidate already in the particular service available for the filling of any vacancy or that having regard to qualifications, experience and merit, it would be advantageous and in the best interest of the particular service that the services of a person not already in that service be secured, the Commission may authorise the advertisement of such vacancy."*

49. Regarding the other regulation 18 factors, the Claimant attempted to cast aspersions on the competence of Marian Taylor. However, there was absolutely evidence advanced by the Claimant to corroborate her bare allegation at paragraph 20 of her affidavit that *“Ms. Taylor directly reported to me and on many occasions I had to reprimand her for providing substandard quality work to the courts, being late and for not following up with clients’ matters within the department”*. I consider it would be manifestly unfair to make any finding relative to the competence, merit or ability of Marian Taylor vis-à-vis the Claimant as there is simply no material before the Court to enable me to do so. The Claimant has, therefore, failed to establish that she possessed any superior merit or ability to Marian Taylor to support a claim that she ought to have been considered for the post in preference to Marian Taylor. In any event, it appears from the earlier promotions and appointments in the department that all Probation Officers of a similar rank were considered to be of similar merit, such that, the determinative factor for promotion was the relative seniority of the officers concerned.

50. Finally, in my view, at the time recommendations had been made for promotion to the post of Probation Officer III and at the time those recommendations were being considered by the PSC, the Claimant was no longer an eligible officer as she had already retired. The Claimant appears to believe that because the PSC selected effective dates of appointment for the promoted officers that were during a period in time prior to her retirement, this meant that those promotions had been made while the Claimant had still been employed. This is not the case.

51. Appointments and promotions in the public service have long been plagued by delays leading to the unfortunate practice of having continuous and lengthy acting appointments and the making of

substantive appointments that are given retroactive effect. Indeed, while regulation 31(1) requires the PSC to make the date of first appointment to the public service the date on which the officer began performing the substantive duties of the office, regulation 31(2) allows the PSC to specify whatever effective date of appointment they determine when it comes to promotions. This practice has also unfortunately led to many officers retiring without ever being confirmed in the higher positions in which they had been acting.

52. The existence of this practice, unfortunate though it may be, does not entitle persons who are no longer officers to make a claim for promotion. Indeed, the PSC can only consider applications or recommendations in respect of eligible “officers” and regulation 2 of the PSC Regulations defines an “officer” as a person “employed” in the public service and subject to the jurisdiction of the PSC. In the circumstances, notwithstanding the effective dates of promotion to the office of Probation Officer III chosen by the PSC in respect of Lila Bartholomew or Marian Taylor, the Claimant was not an eligible officer at the time promotions to the post of Probation Officer III were being considered or made in 2019 and she could have no claim to be considered for promotion at that time. To find otherwise would produce the absurd and unworkable result that each and every time a Service Commission is considering promotions to any post in the public service, it must consider every former officer who had ever been employed in the lower grade regardless of whether they have retired, resigned or otherwise left the service.

53. On the foregoing, I do not find that any of the PSC Regulations were breached in relation to the Claimant and accordingly I do not find that she was deprived of any procedural protections giving effect to her rights. The Claimant’s claim in respect of a breach of section 5(2) (h) of the Constitution fails.



54. Similarly, I find that the Claimant's claim that her right to the protection of the law under section 4(b) of the Constitution also fails.

55. The Board has repeatedly noted that the right to the "protection of the law" is to be given a liberal and wide interpretation, with the scope of the right being so broad and pervasive that it defies definition.<sup>19</sup> It is generally understood, however, to encompass access to the courts and other judicial bodies established by law, procedural protections against the arbitrary exercise of power, including natural justice considerations and the particulars contained in section 5 of the Constitution such as whether adequate measures were put in place to protect the rights enshrined in section 4.

56. The same reasons and arguments were advanced in respect of a breach of section 4(b) of the Constitution as were advanced in respect of the Claimant's claim in respect of a breach of section 5(2) (h). Having already rejected them above, I do not propose to traverse them again save to re-iterate that I do not find that any of the PSC Regulations were breached in relation to the Claimant. The Claimant was not the more senior officer in line for promotion to the post of Probation Officer III, and the Claimant could not be considered for promotion to the said post in 2019 having already retired. The Claimant was not treated unfairly or in any manner differently from all other Probation Officers when it came to the determination of seniority by the PSC.

57. The main basis of the Claimant's claim was her perceived entitlement to seniority over Marian Taylor and admittedly, the PSC twice reconsidered the metric by which seniority was determined. However, notwithstanding the errors that had been made, which were subsequently corrected, this does not give rise to a breach of the

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<sup>19</sup> See for example *Commissioner of Prisons and Anor v Seepersad and Anor* [2021] UKPC 13.

Claimant's constitutional rights. The Claimant is not entitled to a perfect or infallible system and it was clear that when complaints and representations were made regarding the manner in which seniority was determined, the PSC considered those complaints and representations and made decisions which they believed, in good faith, were what the PSC Regulations required of them.

**Disposition:**

58. In light of the foregoing this Court orders as follows:

- (1) The Claimant's claim is dismissed.**
- (2) The Claimant shall pay to the First and Second Defendants their costs to be assessed by a Registrar in default of agreement.**

**Karen Reid**  
**Judge**