

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2018-00122

In the matter of the Constitution of the Republic of Trinidad and Tobago

AND

And the application for redress by the Applicant pursuant to Sections 14 of the Constitution of the Republic of Trinidad and Tobago for the contravention of Sections 4 and 5 of the said Constitution in relation to the Application.

And in the matter of the decision to abolish and/or remove the Claimant's permanent established post from the staff establishment of the Ministry of the Attorney General and Legal Affairs and unconstitutionally transfer the Claimant to the Ministry of Works and Transport.

BETWEEN

ANTHONY NOEL EGBERT

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

1st Defendant

AND

**THE PERMANENT SECRETARY OF THE MINISTRY OF THE ATTORNEY
GENERAL AND LEGAL AFFAIRS**

2nd Defendant

THE CABINET OF TRINIDAD AND TOBAGO

Interested Party

THE PUBLIC SERVICE COMMISSION

Interested Party

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: July 15, 2020.

Appearances:

Claimant- Mr. F Masaisai and Mr. A. Egbert instructed by Messrs. Hove and Associates

Defendants- Ms. N. Moore instructed by Ms. K. Mark

First Interested Party- Ms. L. Khan instructed by Ms. M. Benjamin

Second Interested Party- Ms. K. Prosper instructed by Ms. A. Ramroop.

JUDGMENT

1. By fixed date claim filed on January 11, 2018 the claimant brought proceedings under section 14 of the Constitution of the Republic Trinidad and Tobago (“the Constitution”) seeking declaratory relief for alleged infringements of the rights guaranteed thereunder. In essence the claimant claims firstly that he was entitled to be promoted in accordance with the regulations and delegated powers of the Minister of Legal Affairs or the Attorney General. Secondly, that the abolition of his substantive post without notice to him amounted to a breach of his constitutional rights.
2. The claimant alleged that:
 - i. He was removed from his permanent post as an Estate Constable in the Ministry of the Attorney General and Legal Affairs and transferred to the Ministry of Works and Transport in breach of regulation 55 of the Public Service Commission Regulations (PSCR) (**section 4(a) breach**)
 - ii. He was denied the right to equality before the law and the protection of the law when his permanent post was abolished and/or secretly removed in breach of regulation 55 of the PSCR (**section 4(b) breach**).
 - iii. He was denied the right to equality of treatment when he was not offered promotion to an acting appointment on the basis of his qualifications and in accordance with the delegated powers of the PSCR (**section 4(d) breach**).
 - iv. He was denied the right to procedural fairness and natural justice when his permanent post was abolished and/or transferred

without being notified and in breach of regulation 55 of the PSCR (section 5(e) breach).

- v. The doctrine of separation of powers was violated when Cabinet agreed with and implemented the decision to transfer the claimant's office.

Factual History

Events prior to the claimant becoming an Attorney at law

- 3. The claimant who is now an Attorney at Law, had been appointed an Estate Constable in the public service with effect from January 11, 2012 and was assigned to the Ministry of Legal Affairs. That Ministry has from time to time been merged with the Ministry of the Attorney General so that reference to the MAGLA in this judgment should be taken to include the Ministry of the Attorney General and the Ministry of Legal affairs where applicable and the Ministry of Legal Affairs alone if so applicable at the material time. The appointment and notice of assignment of the claimant were all made by the Public Service Commission ("PSC").¹

Full pay study leave agreement

- 4. During his tenure at the MAGLA, the claimant pursued studies in law at the London Metropolitan University and obtained the Legal Practice Course (LPC) certificate. In this regard, by letter dated April 8, 2014 the claimant sought and on August 22, 2014, obtained leave of the Permanent Secretary ("PS"). That leave was categorized as a full pay study leave award.²

¹ See exhibit "A.N.E.1", the appointment letter in the affidavit of December 4, 2018.

² See "A.E.4" namely approval letter dated August 22, 2014 for full pay study leave.

5. Additionally, the full pay study leave award was defined in a written agreement between the claimant and the then PS executed on August 22, 2014 under which it was agreed that from October 31, 2014 to July 31, 2015 the government would pay the claimant the sum of \$41,591.40 being a sum equivalent to his salary for the period less statutory deductions although he was absent from work. It was also agreed by way of that document that upon completion of his studies the claimant was to continue in service to the government for a period on one year. Further, the said sums whether paid directly to the claimant or on his behalf were categorized as a loan from the government to be repaid with interest should the claimant fail to work with the government for one year after completion as agreed.
6. On November 2, 2015 upon completion of his studies, the claimant resumed duties at the MAGLA and worked for at least one year in fulfilment of his obligation under the contract. He was also admitted to practice as an Attorney at law. The series of events that thereafter occurred have led to the filing of these proceedings.

Subsequent events

Application and recommendation to the Judicial and Legal Services Commission (JLSC)

7. The claimant wished to be promoted to any vacancy for which he qualified as a lawyer so he visited the human resources department of the MAGLA and informed the Director, Dianne Thomas that he was a qualified Attorney and was advised to submit an application along with the relevant documents and certificates to the JLSC for promotion. He informed the Director of Human Resources at MAGLA of this, and he submitted an application with supporting documents to the JLSC for promotion/appointment. On December 1, 2016 the claimant

submitted the relevant documents and certificates for consideration for any available post to a legal officer within the Ministry.³ It is to be noted that the applications were in respect of several positions but were not with specific regard to any existing vacancy.

8. The claimant subsequently enquired into the status of his application for promotion and was informed by the human resource officer, Ms. Singh that there were no vacancies at that time. Thereafter, the claimant visited the Service Commissions Department for an update and was informed by the Executive Secretary of JLSC that as a permanent officer, the application for a promotion ought to be submitted by the MAGLA together with its recommendation to the JLSC. By letter dated March 8, 2017 the claimant wrote to the PS and enquired as to why the MAGLA failed to recommend him for promotion or consider him for any acting positions whatsoever. The MAGLA subsequently wrote to the claimant informing him that it had in fact submitted his applications for promotions one day after his letter of enquiry namely on March 9, 2020.⁴ That letter did not state whether the MAGLA sent recommendations with the applications.
9. It is the claimant's case that there was no acting appointment during the period of the office of Examiner of Title when it became vacant on September 18, 2017, as a result of the promotion of Russell Seebaran to Assistant Registrar. Thus, the claimant may have been the most senior person eligible and/or suitably qualified person for the post since the prerequisite was that of being a qualified Attorney at Law.

³ See "A.E.9" namely the claimant's applications dated February 15, 2017- On the employment application form (state solicitor 1, state counsel 1 (criminal), legal research officer 1, law reform officer 1; On the application for promotion in the public service- state counsel 1 (civil), examiner of title.

⁴ See "A.E. 12" namely a letter dated March 20, 2017, where the MAGLA informed the claimant that his applications for promotion were submitted to the JLSC on March 9, 2017.

Further it is to be noted that one of the posts for which the claimant had applied since February 15, 2017 was that of Examiner of Title. However he received an acknowledgment that his general applications for promotions were received by the Director of Personnel Administration on January 4, 2018 but that the offices for which he applied including Examiner of Title had not yet been advertised and that he should submit his application when next an advertisement of vacancy was issued.⁵

10. The evidence shows that two vacancies for Examiner of Title had been filled between the date the vacancies were first advertised in October 2015 and the date upon which the claimant applied in February 2017. Those vacancies had been filled by person who applied in direct answer to the vacancies that were advertised as opposed to the claimant's general application. Nowhere in the evidence of MAGLA or the PSC are specific dates of appointments provided.
11. It is the claimant's case that the PS of the MAGLA failed to notify him of the vacancy for an acting appointment in the office of Examiner of Title thereby denying him the opportunity to be considered for the position, and that it was the duty of the said PS to circulate an internal memo advertising same which she failed to do.
12. He further argued that that Seebaran and Karim both were granted study leave awards and upon qualifying as Attorneys at Law, were given the opportunity to act in the office of Examiner of Title on secondment in staff establishment of MAGLA. As such, he claims that

⁵ See "A.E.20" namely letter dated October 3, 2017 from the Service Commissions Department informing the claimant that his applications for promotions (examiner of title, parliamentary counsel I, legal research officer I and law reform officer I) was not yet advertised.

he was unfairly treated and that he was the victim of discrimination based on his non promotion.

13. The defendants contend that under the full pay study leave agreement, there was no obligation on the part of the PS of the MAGLA to grant the claimant any promotion or acting appointment in the legal field of the MAGLA. This is an argument which the court accepts as the terms of the study leave agreement make it clear that the obligation that lay with the claimant was one that required him to work in the government service for a period without qualification or promise on the part of the defendants as to a posting.

Process for promotion in the Public Service

14. It is helpful at this stage to set out the process for promotion before moving on.

15. Chapter III of the PSCR provides a comprehensive scheme for the filling of vacancies in the Public Service. Of particular relevance in this case is Regulations 13 through 18. Regulation 2 of the PSCR defines "promotion" as the appointment of an officer to an office in a grade carrying a higher remuneration whether such office be in the same Ministry or Department or not. The process is 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.

14. Whenever in the opinion of the Commission it is possible to do so and it is in the best interest of the particular service within the public service, appointments shall be made from within the particular service by competition, subject to any Regulations limiting the number of appointments that may be made to any specified office in the particular service.

15. 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.

16. (1) *The Commission may from time to time appoint one or more Selection Boards to assist in the selection of candidates for appointment to the public service and the composition of any such Board and the form in which its reports are to be submitted shall be in the discretion of the Commission.*

(2) *On consideration of any report of a Selection Board, the Commission may, in its discretion, summon for interview any of the candidates recommended by such Board.*

17. (1) *All examinations to be held under these Regulations shall be set and the papers marked by such Examination Board as may be appointed for the purpose.*

2) *The Director shall be responsible for the conduct of examinations set under subregulation (1).*

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 subregulation (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 subregulations (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 subregulations (1), (2) and (3), the Commission shall consider any specifications that may be required from time to time for appointment to the particular office.

16. In Smart v DPP, [2019] UKPC 35,⁶ the Board interpreted the Public Service Commission Regulations concerning the process of appointments to the Judicial and Legal Service Commission. The Board also agreed with the courts below that regulation 15, which governed the advertisement of vacancies, stood alone. The Commission could advertise a vacancy even if it did not consider that there was a lack of suitable internal candidates, and it did not have to apply the criteria in regulation 18 to candidates who responded to the advertisement. Its duty was to secure a level playing field between all candidates, whether internal or external.

17. Lord Carnwath at paragraph 6 of the judgement cited the case of Sankar v Public Service Commission [2011] UKPC 27, in which Lord Mance stated;

.....in the context of regulation 18 the Board has no doubt that the word 'eligibility' is the equivalent of 'suitability', and relates to the final decision whether or not to promote. Otherwise, the Regulations would contain no criteria at all regarding the basis for final decisions whether or not to promote. The Board therefore agrees with the Court of Appeal that regulations 14 and 18 must be read together. Where a promotion is to be made from within the public service, it should be by competition, but the decision which of the competitors to promote should be made taking into account the criteria set out in regulation 18."

⁶ See paras. 21-24 (regulations 14 and 15) of the judgment and 25-28 (regulation 18); also para 25 of the HC decision per Jones J (as she then was at para. 25, 26).

**The Recommendation for acting appointment and equality of treatment
[section 4(d) breach]**

18. Section 4(d) of the Constitution provides for the right of the individual to equality of treatment from any public authority in the exercise of any functions.

19. The claimant relied on the decision of Furlonge v The Permanent Secretary Ministry of Health, (HCA CV 2098 of 2003, p.9) in which the Court held that the decision by the defendant to bypass the claimant was ultra vires and went against the Public Service Commission Regulations. At p. 9, 10 Jamadar J, as he then was stated;

“This regulation provides, with respect to all acting appointments, that all officers who are eligible for consideration ‘shall’ be notified of same [see, regulation 25(1)].”

Whether this regulation is mandatory or directory will be dealt with later. Regulation 25(2) provides that after notification is given a period of seven (7) days shall be allowed to elapse before forwarding any recommendations, ‘for the purpose of allowing the officers ... to make representations on the filling of such vacancy.’

Regulation 25(3) provides that where representations have been made by any officer, ‘the Permanent Secretary or Head of Department shall forward such representations in their original form.’

In my opinion, the procedure contemplated by regulation 25 is one which requires that all officers who are eligible for consideration to be appointed to an acting post be notified of same. Further, that such officers are entitled to make independent representations with respect to the appointments. These representations, when submitted, are to be forwarded to the DPA. In my opinion, because

all of the above regulations must be followed (see v. below), fairness demands that even if officers are entitled to make representations prior to the submission of recommendations, generally, if an officer is passed over the reasons (regulation 28) should be given to that officer sufficiently well in advance to afford him/her an opportunity to be heard and/or to make representations on same prior to a decision by the PSC.”

20. This issue can be readily determined before proceeding to the others. Regulations 25 and 26 of the Public Service Commission Regulations (“PSCR”) provide;

25. (1) Where an acting appointment falls to be made whether as a prelude to a substantive appointment or not, the Permanent Secretary or Head of Department shall notify those officers within the Ministry or Department who are eligible for consideration.

(2) The Permanent Secretary or Head of Department shall, after notification as required by subregulation (1), allow a period of seven days to elapse before forwarding any recommendations in relation to such acting appointment, for the purpose of allowing the officers of the Ministry or Department to make representations on the filling of such vacancy.

(3) Where representations have been made by or on behalf of any officer in the Ministry or Department, the Permanent Secretary or Head of Department shall forward such representations in their original form to the Director.

(4) Where a vacancy occurs in an office and an acting appointment falls to be made for a period not likely to exceed twenty-eight days as a result of sudden illness or other very

special circumstances, the Permanent Secretary or Head of Department may appoint an officer to act for such period and the provisions of subregulations (1), (2) and (3) shall not apply to such acting appointment.

26. (1) Where an acting appointment falls to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall—

(a) as a general rule be the senior officer in the Ministry or Department eligible for such acting appointment;

(b) assume and discharge the duties and responsibilities of the office to which he is appointed to act.

(2) In submitting any recommendations for an acting appointment, the Commission shall examine whether the exigencies of the particular service would best be served by transferring an officer from another district next in line of seniority to act when there is an officer in the same district who is capable of performing the duties of the higher grade, and in such examination the question of additional Government expenditure for travelling and subsistence allowances and other expenditure shall be borne in mind.

21. In Ramoutar v Commissioner of Prisons and another, [2012] UKPC 29, Their Lordship held that the Public Service Commission of Trinidad and Tobago acted unlawfully in treating the appellant as ineligible to be considered for appointment as acting Chief Prisons Welfare Officer by reason only that he did not have a degree in social work from a recognised institution or equivalent. Lord Sumption stated the following;

[13] Normally the word “eligible” imports a threshold condition of appointability. It does not normally mean “suitable”. It means capable of being appointed if found suitable. The position is, however, complicated by the fact that the Regulations do not consistently use the term in its normal sense. In the introductory words of Regulations 18 and 172, it is clear that the draftsman intended “eligibility” to mean the same as “suitability”, for the criteria of eligibility which follow all relate to the assessed qualities of the candidate. On the other hand, it is equally clear that Regulation 25, which requires the Permanent Secretary or Head of Department to notify forthcoming acting appointments to all officers within his service “who are eligible for consideration”, is referring to eligibility in its normal sense. In the Board's opinion, “eligible” in Regulation 26(1)(a) is used in the same sense. It is a threshold condition of appointability. Otherwise, appointment on seniority would hardly count as the general rule that it is clearly intended to be. But it does not matter, for it is only on the footing that “eligible” in Regulation 26(1)(a) imports a threshold condition of this kind that the decision of the Public Service Commission in this case can be defended. If it meant “suitable”, then it would have been incumbent on the Commission to assess Mr. Ramoutar's suitability, which it never did.

[14] On the footing that eligibility in Regulation 26(1)(a) is a threshold condition, what are the relevant criteria of eligibility? None are specified in Regulation 26, except that that the person appointed must be a current officer of the prison service. Nor is there anything in the Regulations which can be described as a criterion for eligibility for acting appointments generally. The Respondent Commission submits, as it has to, that the possession of a degree in social work was a threshold condition. But the only basis for that submission is that it was part of the Job Specification and Description for the corresponding

permanent appointment. The Board rejects this submission for three reasons.

[15] The first is that it is apparent from Chapter III of the Regulations read as a whole that the criteria for making permanent appointments and acting appointments as the prelude to permanent appointments have no application to acting appointments where the person appointed is simply standing in for permanent office-holder. Appointments of the latter kind are subject to a distinct regime. In the case of permanent appointments and appointments intended as the prelude to permanent appointments, seniority is one factor among many in the assessment of candidates, but it is never conclusive, and for the more responsible appointments it may be of very limited weight; whereas for purely acting appointments it is stated to be the general rule. This reflects significant differences in the nature of these appointments. The appointment of a stand-in on an acting basis is essentially an internal reallocation of the duties of existing staff to meet the exigencies of the service. It is temporary. It may fall to be made at short notice and sometimes for short periods. Those who are chosen will necessarily be within the prison service already and have satisfied the criteria for appointment to an office at the next level down. This is, as it appears to the Board, the reason why the Regulations require acting appointments which are the prelude to permanent appointments to be made on the same principles as permanent appointments, but impose no corresponding requirement for the appointment of stand-ins on a purely acting basis.

[16] Second, the Job Specification and Description has no statutory status. It is a government document, agreed with the relevant professional association for the prison service. It was suggested to the Board on behalf of the Commission that it had statutory force under section 15 of the Prison Service Act, which provides that it is the duty of the service's Personnel Department to "provide for and establish

procedures for consultation and negotiation between the Personnel Department and an appropriate recognised association or associations in respect of... (iv) the terms and conditions of appointment." But this simply means that they must consult upon and negotiate the terms of the contract of service. The Job Specification and Description appears to have been the result of consultation and negotiation between the Personnel Department and the relevant association, but it does not record of the terms of the contract of service. It is exactly what it says it is: a job description, including a statement of qualities required to perform the duties.

[20] The courts do not sit as a court of appeal from the decisions of the Commissioner of Prisons or the Public Service Commission, and are in no way concerned with the merits of candidates for promotion or the micro-management of personnel decisions in the prison service. The courts are, however, concerned to ensure that public bodies carry out the functions that the relevant legislation assigns to them. The difficulty in this case has arisen from the fact that the Prisons Commissioner and the Public Service Commission treated the possession of a degree as a matter of threshold eligibility when it was not. They therefore never performed their statutory function of considering Mr. Ramoutar's application on its merits. They neither applied the general rule of selection by seniority prescribed by their Regulations, nor considered whether to depart from the general rule in all the circumstances of this case.

22. The effect of regulation 25 (the gravamen of this aspect of the claim) is that where a vacancy occurs (as a result of sudden illness or very special circumstances) and an acting appointment falls to be made for a period not likely to exceed twenty-eight days the Permanent Secretary (PS) can of her own volition make such an acting appointment without notice to those entitled to act or representations

from them. Where however, the period is likely to exceed twenty-eight days then the PS is duty bound to notify the eligible officers within the department or Ministry as to the existence of the vacancy and allow a period of seven days to receive representation from those officers and thereafter forward such representations to the Director of Personnel Administration ("DPA") of the PSC who then makes the appointment to act.

23. The claimant has deposed that he was not informed by the PS or his Head of Department that the vacancy of Examiner of Title had arisen in September 2017 and therefore he was deprived of the opportunity to make representation as to why he should have been appointed to act/deemed eligible to act.
24. The claimant identified Russel Seebaran and Sharlene Karim as persons similarly circumstanced in the past, who upon qualifying as Attorneys were appointed as Examiners of Title while in their acting positions some time before. However, an important distinction between these two comparators and the claimant is that the former were already working in the conveyancing field, albeit not as lawyers, whereas the latter was not in any field related to examiner of title of conveyancing, or even law at the specific time.
25. There is no evidence that the claimant was informed of the vacancy when it arose and the inference therefore and finding of the court is that he was not so informed. The evidence of MAGLA from the Acting Deputy PS is that the claimant had never been appointed to any post within the purview of the JLSC and was at the time appointed as an Estate Constable. Further, the evidence is that the two other persons had in fact been appointed to act as Conveyancing Clerks would have had the relevant experience and would therefore been eligible to be notified of the vacancies. So that in the view of the MAGLA the

claimant was not one of those who would have been eligible to act in the vacant post of Examiner of Title and so he was not informed of such a vacancy.

26. The court finds firstly that it would have been within the knowledge of the MAGLA that the claimant was granted a Study Leave Award and had successfully completed same and was admitted as an Attorney at law. The fact that he had not acted in any post under the purview of the JLSC before or had not gained experience in other posts associated with the relevant disciplines of Title are matters which were not relevant in determining whether the claimant should have been notified of the vacancy he being an Attorney at law employed in the Public Service albeit as an Estate Constable at that time. The fact remained that he was at the time an officer in the Public Service.
27. As stated by Lord Sumption (*supra*), the appointment of a stand-in on an acting basis is essentially an internal reallocation of the duties of existing staff to meet the exigencies of the service. It is temporary. It may fall to be made at short notice and sometimes for short periods. Those who are chosen will necessarily be within the prison service already and have satisfied the criteria for appointment to an office at the next level down. The complaint of the claimant is however that he was deprived of the opportunity to act as a prelude to a permanent appointment and not simply to act as a stand in.
28. In that regard the issue of whether he was eligible to be notified of the vacancy for the post of Acting Examiner of Title must be resolved in his favour as he was at the time a qualified attorney at law and therefore would have met the basic requirement at the least.

29. The consequence of the failure so to inform him is another matter altogether in relation to the substance of the claim on this issue, namely inequality of treatment due to failure to notify.
30. In relation to his comparators, there were important differences between the claimant and his comparators. Amongst other matters, there is no satisfactory evidence that both Seebaran and Karim were notified of the relevant vacancies under regulation 25. In fact, the evidence of Dianne George Thomas is that their appointments were made when the vacancies arose but she does not give any evidence as to how they came to be made aware of the vacancies.
31. The defendants and the Cabinet both argued that the evidence shows there are no comparators that were similarly circumstanced. The claimant was an Estate Constable carrying out a specific function. His comparators who were appointed Examiner of Title were already working in the Registrar General Department in positions that required knowledge of processes relating to suitability of title and they were appointed as vacancies arose internally. Suffice it to say that the court accepts these arguments above as being a correct reflection of the weakness in the comparators used by the claimant.
32. The defendants further submitted that the claimant's documents were received by the Human Resources Department, certified and forwarded to the Public Service Commission under cover of the Ministry in a timely manner with a recommendation for consideration.⁷ The evidence in this regard is clear.

⁷ See the exhibit "D.G.T.3" namely a memorandum from the PS of MAGLA to the DPA dated March 9, 2017- Application for Employment and Promotion in the JLSC
Mr, Anthony Egbert, formerly Mr. Anthony Hosein, Estate Constable attached to the Ministry of the Attorney General and Legal Affairs has submitted the attached letter and applications for promotion and employment in the under mentioned offices in the Judicial and Legal Service. Enclosed also for your perusal are copies of a Protocol of Deeds regarding his name change,

33. The dicta of Lady Hale in Annissa Webster and ors v Attorney General of Trinidad and Tobago, [2015] UKPC 10 sets out the current approach to breaches of section 4(d) of the Constitution. Her Ladyship commented at para 14;

It is difficult because open-ended constitutional guarantees of equal treatment by public authorities, such as that in s 4(d), are few and far between. This limits the help which can be gained from other well-known authorities in the field. Thus in Matadeen v Pointu [1999] 1 AC 98, [1998] 3 WLR 18, [1998] 3 LRC 542, the Board was concerned with s 16 of the Constitution of Mauritius, which prohibits discrimination both by the laws and by public authorities, but only on defined grounds. The Board held that there was no general constitutional right to equal treatment by the law or by the executive. Again, in Ong An Chuan v Public Prosecutor [1981] AC 648, [1980] 3 WLR 855, [1981] Crim LR 245, the Board was concerned with art 12(1) of the Constitution of Singapore, which provides that "All persons are equal before the law and entitled to the equal protection of the law." It was thus a case about the equivalent of s 4(b) of the Constitution of Trinidad and Tobago and not about s 4(d).

34. At paragraph 24 Lady Hale outlined that the situations of those treated differently had to be comparable, analogous, or broadly similar, but need not be identical. She stated;

birth certificate and academic qualifications. Please be advised that the noting of the officer's change of name has not yet been processed by this Ministry.

Application for Employment and Application for Promotion

State Counsel 1 (criminal); State Counsel 1 (civil); State Solicitor 1; Legal officer 1; Parliamentary Counsel 1; Legal Research Officer 1; Law Reform Officer 1; Law Reform Officer 1; Examiner of Title.

- (1) *The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment.*
- (2) *Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment.*
- (3) *To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*
- (4) *Weighty reasons will be required to justify differences in treatment based upon the personal characteristics mentioned at the outset of s 4: race, origin, colour, religion or sex.*
- (5) *It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged).*

35. By letter dated October 4, 2018, the DPA responded to claimant's FIOA request. The court has extracted the following responses.⁸

During the period 2017 to 2018, there was one (1) officer "appointed on transfer" to the Judicial and Legal Service. Mr. Russel Seebaran was appointed on transfer as Assistant Registrar and Deputy Marshal, Judiciary with effect from the date of his assumption of duty, that is 18th September, 2017.

In promoting officers to offices under the purview of the Judicial and Legal Service Commission, the Commission is guided by Regulation 18 of the Public Service Commission Regulations as adopted mutatis mutandis by the Public Service Commission Regulations. These regulations provide for the principles of selection for the promotion of officers in the Judicial and Legal Service.

⁸ See exhibit "A.N.E.10" namely a letter dated October 4, 2018, Request under the Freedom of Information Act 1999

The Commission is unable to confirm the above as "Charlene Bissessar" and Mr Russel Seebaran were not "promoted" to the office of Examiner of Title (Group L7B), Registrar General's Department.

36. The DPA provided further responses by letter dated May 7, 2019.

The Permanent Secretary, Ministry of the Attorney General and Legal Affairs, forwarded your applications for employment to the Judicial and Legal Service Commission; however, the Permanent Secretary, Ministry of the Attorney General and Legal Affairs did not recommend him for an acting appointment or appointment on secondment as Examiner of Title, Registrar General's Department.

Mr. Russel Seebaran submitted an application dated 29th November, 2012 in response to the Advertisement of Vacancy for the office of Examiner of Title, Registrar General's Department but was not an appointed officer in the Judicial and Legal Service Commission and, therefore, he was required to submit an Application for Employment Form and not an Application for Promotion Form. Mr. Seebaran completed the appropriate form in response to the advertisement.

In accordance with Regulation 15 of the Public Service Commission Regulations as adopted by the Judicial and Legal Service Commissions, the office of Examiner of Title (GroupL7B), Registrar General's Department was advertised within and outside of the Service with a view to establishing an Order-of-Merit List from which acting/temporary appointment to the office could be made. The office was advertised within and outside of the Service with the closing date for the receipt of applications being 30th November 2012. Mr Seebaran was interviewed and placed at No.3 on the Order-of-Merit List. Based on this position, he was selected for the office. In the absence of an outright vacancy and based on the need for a replacement, Mr.

Seebaran was appointed on secondment by the Judicial and Legal Service Commission.

Ms. Sharlene Karim (formally Sharlene Karim-Bissessar) submitted an application in response to the advertisement of the office of Examiner of Title (Group L7B), Registrar General's Department, Ministry of Legal Affairs. All recruitment procedures were followed for the appointment on secondment of Mr. Russel Seebaran and Ms. Sharlene Karim for office of Examiner of Title (Group L7B), Registrar General's Department.

37. The court therefore finds that notwithstanding there was a breach of regulations 25 or 14 and 15, there were no breaches of the claimant's constitutional rights. The cases of both Seebaran and Karim were far different to that of the claimant in that they were persons who were posted within the relevant department and had responded to external advertisements. Further and in any event, Seebaran was not promoted but was appointed by the JLSC and transferred. Broad comparability between the comparators has not been demonstrated and so this aspect of the claim must be dismissed.

Abolition or transfer, due process, equality before and protection of the law (sections 4(a) and 4(b))

Was the post abolished or transferred and was abolition or transfer lawful

38. It is the claimant's contention that his removal from his permanent post in the MAGLA to the MOWT amounted to an infringement of his constitutional right contrary to section 4(a) of the Constitution and of which he ought not to be deprived thereof except by due process of law.

39. In Thomas v Baptiste [2000] 2 A.C. 1, the Board defined *the due process clause excludes legislative as well as executive interference with the judicial process*. Lord Millett went on to state at p.22;

*But the clause plainly does more than this. It deliberately employs different language from that found in the corresponding provisions of the Universal Declaration of Human Rights and the European Convention on Human Rights. They speak merely of "the sentence of a court of competent jurisdiction." The due process clause requires the process to be judicial; but it also requires it to be "due." In their Lordships' view "due process of law" is a compendious expression in which the word "law" does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law: see the illuminating judgment of Phillips J.A. in *Lassalle v. Attorney-General* (1971) 18 W.I.R. 379 from which their Lordships have derived much assistance.*

40. In Independent Publishing Company Ltd v The Attorney General of Trinidad and Tobago and another and Conjoined Cases, [2004] UKPC 26 Lord Brown stated:

[88] In deciding whether someone's s 4(a) "right not to be deprived [of their liberty] except by due process of law" has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental human right, as Lord Diplock said, is to "a legal system ... that is fair.

41. The Cabinet Note reads; *Cabinet (a) agreed to the transfer, with immediate effect, of the under-mentioned positions on the Staff Establishment of the Ministry of the Attorney General and Legal Affairs*

to the Staff Establishment of the Ministry of Works and Transport (Minute No.59 (2nd session) of October 1, 2015 refers): One (1) Estate Corporal (Item No.211) (Salary Range 24C) (Registrar General Department South Quay); Two (2) Estate Constable (Item No.212) (Salary Range 17/20C) (Government Campus Plaza);

42. In the court's view, the natural and ordinary meaning of the terms employed in the note demonstrate clearly the posts still exists but for the purpose of efficiency in the use of human resources in the service, the manpower is deployed elsewhere.

43. Section **75(1)** of the Constitution confers wide powers on the Cabinet. It reads;

There shall be a Cabinet for Trinidad and Tobago which shall have the general direction and control of the government of Trinidad and Tobago and shall be collectively responsible therefor to Parliament.

44. The defendant explained Cabinet's involvement in the transfer of the claimant's office. On July 13, 2017 the Human Resources Department of MAGLA prepared a Cabinet Note regarding the transfer of the posts to be sent to the Public Management Consulting Division of the Ministry of Public Administration and Communications (PMCD) for comments. The Cabinet Note was sent back to MAGLA to make changes, returned to the PMCD, was approved on October 26, 2018 and sent to Cabinet. Cabinet then reviewed the Cabinet Note and the recommendations from MAGLA and the PMCD and thereby agreed with the transfer of the posts out of the Ministry. The PMCD is responsible for the organizational design, restructuring and development of the public sector.

45. The Cabinet therefore submitted that it merely exercised its power under section 75(1) to operate the government service efficiently and

the decision was an administrative one in substance. The court agrees with the submission and would add that the transfer of the post from one Ministry to another would have followed a similar decision made prior to the subject decision namely, the decision to align the Ministry of Legal Affairs with the Ministry of the Attorney General. This is the context that must be applied to the decision to deploy the post of the claimant elsewhere.

Transfer

46. The claimant deposed that he obtained information that he would be transferred from his permanent position and wrote to the PS of the MAGLA stating that any impending transfer would be unfair to him. On January 5, 2018 he attended a meeting with Ms. Thomas, the administrative officer IV and Estate Corporal Philbert. At the meeting the claimant was informed that the MAGLA wrote to the Director of Personnel Administration (“DPA”) to “*take back*” three Estate Constable posts within the MAGLA but retain two posts of Estate Corporal.
47. According to the claimant, the MAGLA failed to consult with him before approaching the DPA and did not give him the opportunity to make representations. The claimant argued that the office at the MAGLA belonged to him and he could only be removed by one of the conditions under regulation 50 of the PSCR. Therefore, Cabinet cannot transfer an office whilst it was occupied. Further the MAGLA had the option to transfer him to another department within the said Ministry.
48. The defendant argued that the claimant’s reliance on regulation 55 was misplaced and maintained that the defendant was transferred by the Public Service Commission. The appropriate regulation is 29. The

claimant disagreed with the defendant that regulation 29 applies only to officer requests for a transfer.

49. Martel Waldron deposed that the Commission received the claimant's letter regarding the review of his transfer. The Commission considered the claimant's letter of representation and informed him that although regulation 29(1) required an officer to be given one month's notice, the exigencies of the service did not permit him to be so informed and the decision to transfer him stood.

50. Regulation **50** of the PSCR reads;

The services of an officer may be terminated only for the reasons stated hereafter—

- (a) where the officer holds a permanent appointment—*
 - (i) on dismissal or removal in consequence of disciplinary proceedings;*
 - (ii) on compulsory retirement;*
 - (iii) on voluntary retirement;*
 - (iv) on retirement for medical reasons;*
 - (v) on being retired in the public interest;*
 - (vi) on resignation without benefits payable under any written law providing for the grant of pensions, gratuities or compensation;*
 - (vii) on the abolition of office;*

51. In relation to the claimant's submission under Regulation 50, the court is of the view that same is unsustainable. The court accepts that the said regulation in general terms prohibits the removal of the officer

from an office so long as he holds same permanently unless one of the grounds set out therein are satisfied. However, Regulation 50 treats with removal of an officer from the service and does not prohibit the transfer of the officer with the office to another department. In this case, the services of the claimant were not terminated. His termination would have meant that his service in the public service, regardless of where he was assigned would have been brought to an end and his pension benefits would have accrued. This was not the case here. In the court's view the claimant was not terminated and no attempt was made to terminate him. In that regard the claimant appears to be equating the permanent character of his tenure with permanence of department in which he is posted but they are two entirely distinct matters.

52. Logic would dictate that if the both are to be equated, then at no time will the PSC be empowered to transfer offices from one Ministry to another when those offices are filled with permanent appointees. This does not accord with good administration which is the duty of the PSC. In that regard it is well known that when new governments are elected and sworn entire Ministries are sometimes merged with others or abolished altogether. In such a case, offices that would have previously been assigned to those Ministries are reassigned to other Ministries and the officers transferred accordingly.
53. The court therefore finds that the argument of the claimant on the import and applicability of regulation 50 is misconceived.
54. Regulation **29 (1)** of the PSCR reads;

29(1) Where the Commission proposes to transfer an officer, the Commission shall, except where the exigencies of the particular service do not permit, make an order of transfer in writing and shall

give not less than one month's notice to an officer who is to be transferred.

(2) An officer who is aggrieved by an order under subregulation (1) may make representation to the Commission for a review of the order in accordance with subregulation (3).

(3) Where an officer desires to make representation to the Commission for a review of an order made under subregulation (1), he shall give notice in writing to the Permanent Secretary or Head of Department within seven days of the receipt of such order and shall submit, with the notice, his representations in writing.

(4) The Permanent Secretary or Head of Department shall, within seven days, forward any representations made to him in writing under subregulation (3), together with his comments thereon to the Commission.

(5) The Commission shall consider the representations of the officer and the Permanent Secretary or Head of Department submitted to it under subregulations (3) and (4) and shall communicate its decision in writing.

55. The requirements of this regulation are clear. Firstly, the PSC makes its decision to transfer and makes the order of transfer. It then notifies the office holder who has one month should he be aggrieved by the decision to transfer, to make representations to the PSC through the PS or Head of Department who themselves also forward their comments to the PSC. The PSC then considers the representation and determines what if any steps it then takes. In the court's view one of those decisions post representations may be to hold on the implementation of the order of transfer until a later time or to offer another post to the office holder (whether acting or otherwise)

amongst others. One such decision may also be that of carrying through its original order of transfer.

56. The regulation makes it clear that there is no duty to consult the office holder prior to the PSC making the decision to transfer so that the claimant's argument that no proper investigation was conducted prior to the transfer being made must fail as there was no duty to conduct such an investigation in the first place. The first step is taken by the PS of the MAGLA in the case where he is of the view that the office is no longer needed at the Ministry which was done in this case. As such the recommendation is made by the PS.
57. The evidence of Rohanie Singh Beharry, a Public Management Consultant of the Public Management Consulting Division (PMCD) of the Ministry of Public Administration is that the MAGLA would have made the recommendation by way of drafting a cabinet note and forwarding same to her department. The consultant then liaised with the Human Resource Department of MAGLA and conducted an investigation and verified the information received. It was confirmed that the request was justified. The results of the investigation were forwarded to cabinet together with the Cabinet note. The PSC plays no part in the investigation process. It follows that the claimant was not denied due process as there was no duty to consult him before the decision was taken.
58. The evidence before the court is therefore clear and the court finds that the substance of the decision when all is considered was that of a transfer of the post of the claimant for reasons which were on the face of it justified and not an abolition of the office.
59. Therefore, the court having found that there was in fact a transfer and not an abolition, the grounds as relied on by the claimant in support

of beaches of sections 4(a) and 4(b) must fail. In addition, the court is fortified in its view by the fact that the claimant's office remained in existence, but elsewhere (MOWT), his service in the public service having remained unbroken.⁹ As such, his pension and leave entitlement were not affected and he remained a member of the Public Service.

Procedural fairness, natural justice, knowledge of transfer (section 5(e))

60. The argument of the claimant is that the PMCD ought to have consulted with him before making its recommendation to the PSC to transfer upon investigation. That the failure so to consult was unfair and in breach of the process established under regulation 55 of the PSCR. This argument is also one that is with the greatest of respect an ill-conceived argument. Regulation **55 PSCR** reads;

(1) Where an office, being one of a number of like offices, has been abolished but one or more than one such office remains, the Permanent Secretary or Head of Department shall make a report thereon to the Director for consideration by the Commission, and shall recommend with his reasons therefor, which officer shall be retired or removed from the public service in consequence of such abolition.

(2) Where it is necessary to retire or remove an officer from the public service for the purpose of facilitating improvement in the organisation of a Ministry or Department in order to effect greater efficiency or economy, the Permanent Secretary or Head

⁹See the following exhibits; "D.G.T.7" namely a memorandum from the Director of Personnel Administration to the PS of MALA dated February 22, 2018- transfer of officers from the MAGLA to the MOWT as a result of the re-alignment of Ministerial portfolios and "D.G.T.8" namely a letter from the DPA to the claimant dated February 22, 2018 stating that the claimant has been transferred in his substantive office of Estate Constable from MAGLA to the MOWT with effect from November 16, 2017.

of Department shall make a report thereon to the Director for consideration by the Commission, and shall recommend with his reasons therefor, which officer shall be retired or removed from the public service in consequence of such reorganisation.

(3) Where the Permanent Secretary or Head of Department makes any recommendation under subregulation (1) or (2), the Permanent Secretary or Head of Department shall at the same time notify the officer concerned in writing of his recommendations, and such officer may, within seven days of the receipt of the notification, make representations thereon.

(4) Where an officer makes representation in respect of recommendations made under subregulation (1) or (2), the representations shall be forwarded in their original form to the Commission by the Permanent Secretary or Head of Department together with such comments as the Permanent Secretary or Head of Department thinks fit.

61. It is clear that the regulation treats with the removal or retirement of an office holder consequent upon the abolition of one of a number of like offices. In this case, there was no recommendation that the claimant be removed from the public service as a consequence of the abolition of the office of Estate Constable at MAGLA. This was not the stated intent of MAGLA or of the PMCD. The letter of August 11, 2017 is pellucid in that the recommendation was that of a redeployment of the offices from the MAGLA to the wider public service¹⁰. That was in fact the recommendation eventually made to the PSC and the claimant was transferred to the office so redeployed.

¹⁰ See rubric of Letter of August 11, 2017 from PS of MAGLA to PS of Ministry of Public Administration and Communications, under which the PMCD was established

62. In fact, to the contrary of that submitted by the claimant, the effect of the actions of the MAGLA or of the PMCD PS in not invoking the provisions of regulation 55 augured to the benefit of the claimant and was not inimical to his interest or posting in the public service.
63. It can be reasonably interpreted that the purpose of regulation 55 is to ensure that in the case where the office has been abolished and the office holder is to be removed from the public service in its entirety as a consequence, he is given a fair opportunity to be heard as the effect of removal from the public service is likely to be deleterious to most. It would be manifestly unfair to such an officer to pull the rug from under him without affording him the protections that principles of natural justice provide. This is why regulation 55(5) vests the power in the PSC to transfer instead of remove from the public service. When viewed from this angle, the difference in the case of the claimant comes into sharp focus. For regulation 55 to apply, the claimant must first of all demonstrate that he falls within one of the categories set out at 55(1) and he has failed so to do. His arguments predicated on regulation 55 must therefore fail and the court so finds. It follows that his claim of breach of section 5(e) of the Constitution must also fail.

Separation of Powers

64. The claimant submitted that the Cabinet acted unlawfully and in breach of the doctrine of separation of powers in transferring the post of estate constable to which the claimant was appointed from the MAGLA to the MOWT.
65. Section 121(1) of the Constitution provides that;

"Subject to the provisions of this Constitution, power to appoint persons to hold or act in offices to which this section applies, including

power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices and to enforce standards of conduct on such officers shall vest in the Public Service Commission.

66. In the case of Director of Personnel Administration and anor. v. Eusebio Copper and ors, Civil Appeal No. 10 of 2004, Sharma CJ explained that:

[28] In all Constitutions, based on the Westminster system of government, there is in operation the doctrine of the separation of powers. By this doctrine, the autonomy of each branch of government is presumed to be immune from undue encroachment from which is presumed free from influence from each other's sphere.

[29] While in the popular sense it may be convenient to divide the powers of government into three (3) spheres, in practical reality such rigid classification is neither desirable nor possible. On the basis of the doctrine as initially formulated by French jurist Montesquieu, what is desired is not that the different organs such as the Legislature and Executive should have no influence or control over the acts of each other but rather that neither should exercise the whole power of the other. In essence: "Its value lies in the emphasis placed upon those checks and balances which are essential to prevent an abuse of the enormous powers which are in the hands of rulers."

67. Kangaloo JA in the same case added;

[20] I also think that the potential for interference must exist once there is this overlap of powers and that at the end of the day it becomes a question of the degree of influence or interference that

is permissible in a functioning democratic society with proper regard for the rights of individuals. A proper balance has to be struck between these competing estates of government and once the evidence does not reveal undue influence by one estate over another, any questioned acts ought to pass constitutional muster.”

68. To insist, as the claimant does, that there must be an iron-clad separation of powers is in this case to ignore the reality of the duty of the executive to create and define its Ministries and provide the necessary human resource posting where necessary. The exercise of such power traverses the fine line between the purely administrative which must be insulated from executive interference and the duty imposed on the elected executive. To state that there must be constant vigilance to ensure that one does not interfere or usurp the function of the other is to state the obvious.
69. However, both the constitution and jurisprudence in this territory recognise and accept that there is bound to be some degree of overlap to give fruition to effective governance. The court is of the view that this is one of those cases. The court is also of the view that such necessary overlap is not tainted by the undue influence by one estate over another but is a necessary component of the coexistence and symbiotic relationship of the three estates. The court therefore finds that the Cabinet did not breach the doctrine of the separation of powers in making the transfer of the office from the MAGLA to the MOWT.
70. The claim is therefore dismissed and the claimant shall pay to the defendants the costs of the claim to be assessed by a Registrar in default of agreement. In relation to the costs of the Interested Parties, they have appeared at the behest of the court and the court is thankful for their assistance throughout the proceedings. By virtue of the

genesis of their appearance in this case however, the order for court that is just would be that they bear their own costs and it is so ordered.

Ricky Rahim

Judge.