

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. AXAHCV 2024/0075

BETWEEN:

KENNETH MILLETTE

Claimant

AND

THE ANGUILLA PUBLIC SERVICE COMMISSION

Defendant

Before: His Lordship, The Honourable Justice Ermin Moise

Appearances: Mr. Ivor Greene of counsel for the Defendants.
The Claimant is self-represented.

2025: April 14;
July 18

JUDGMENT

- [1] **MOISE, J.:** The Claimant has commenced these proceedings for judicial review. The claim concerns various decisions of the Public Service Commission (PSC) relating to promotions within the ranks of the Royal Anguilla Police Force (RAPF) which the Claimant states were adverse to him. Essentially, he asserts that he has been overlooked for promotions despite his seniority over those who have been appointed to permanent and acting senior positions within the RAPF during the period 21st June 2022 to 21st October 2024. The Claimant therefore seeks various declarations, orders of certiorari and compensatory and other damages from the Defendant.
- [2] Having examined the facts presented in this case and the submissions put forward by the parties, I have determined that the PSC has breached the provisions of **the Public Service Commission**

Regulations¹ and that the Claimant is entitled to a declaration of such. I have, however, decided that the Claimant is not entitled to damages as a result of the breaches. I have, also declined to make orders of certiorari quashing the various appointments. The reasons for my decision are outlined in the remainder of this judgment.

The Facts

- [3] The Claimant (hereinafter referred to as Insp. Millette) is an Inspector of Police within the RAPF. He commenced his career as a police officer in his native island of Grenada in 1991. After 16 years of service in that country, he migrated to Anguilla and was inducted into the RAPF on 1st August 2007. As stated in his claim, Insp. Millette joined the Regional Police Training Centre in Barbados as a training instructor and served two 6-month stints in that capacity, between 2015 and 2017. He states, in his evidence, that during this period he met and was involved in the training of several recruits from Anguilla, many of whom remain in service in the RAPF to this day. Insp. Millette was promoted to the rank of Sergeant of Police in October 2016 and served in various capacities, including the Professional Standards Department and Police Prosecution.
- [4] Insp. Millette states that in 2019 it was determined that Anguilla should have its own training facility for new police recruits. At that point the Anguilla Recruit Training Centre was established, and Insp. Millette was called upon to assist in that effort. He states that he was entrusted with the Training Centre's inauguration and operation and was appointed as Training Commandant of the facility with direct administrative and operational oversight of local recruits. He goes on to state that this training cohort also included a contingent of prison officers from Her Majesty's Prison.
- [5] Insp. Millette was promoted to the rank of Inspector of Police on 26th November 2018. He states in his evidence that from 2018 to 2020, and again from 2023 to the present, he served as Head of the Prosecution Department of the RAPF. He has therefore been responsible for the conduct of summary criminal and traffic matters in the Magistrates' Court. In addition to that, Insp. Millette's duties included leadership of the Professional Standards Department between 2020 and 2023. In his evidence it was stated that for a sustained period he had singular responsibility for the discharge of duties relating to

¹ R.S.A. c. P165

three separate portfolios, namely, Head of Prosecution, Commandant of the Anguilla Recruit Training facility and Head of Cohorts relative to the response to the COVID-19 initiatives.

- [6] Insp. Millette's main complaint is that, despite his experience and credentials, he has been overlooked for promotion to the rank of Superintendent of Police since his appointment to the rank of Inspector. His main concern relates to the promotion of 2 police officers ahead of him. These officers are Supt. Shem Wills and now Supt. Vydia Harrigan. Insp. Millette complains that these two officers were appointed to acting and, in the case of Supt. Wills, permanent senior positions within the RAPF in a manner which contravenes the **Public Service Commission Regulations** made under the **Public Service Commission Act**². Insp. Millette points to various sections within the regulations which highlight the value placed on seniority when considering promotions within the RAPF and public service in general. He complains that although Supt. Wills and himself were promoted to the rank of Sergeant and later Inspector on the same dates, he was inducted into the RAPF 2 years prior to Supt. Wills. As such, he is the more senior of the two. Insofar as it relates to now Supt. Harrigan, Insp. Millette complains that she was promoted to the rank of Inspector two years after him. She has nonetheless been placed in an acting superintendent position on many occasions. Since the filing and hearing of this claim, Ms. Harrigan has been permanently appointed to the post of Superintendent.
- [7] Insp. Millette states that there is a policy within the RAPF that every inspector is to participate in a junior command course. This course is designed to assist the newly appointed inspectors in the discharge of their duties. Likewise, every superintendent is given the opportunity to do the senior command course. He complains that, for reasons which have not been explained to him, Supt. Harrigan appears to have been the one among the more recent cadre of inspectors who has been given the opportunity to do the junior command course. In what was an incomplete appraisal which commenced in 2019³, it was recommended that Insp. Millette undertake this course. He complains that to date he has not been given the opportunity to do so.
- [8] As it relates to the various acting appointments of Supt. Harrigan, Insp. Millette asserts that whilst she was on probation in her rank of Inspector, she was selected on a number of occasions to act as

² R.S.A. c. P165

³ I note here that the draft of the appraisal tendered into evidence refers to the period 2020 to 2021, however, Insp. Millette refers to this as having commenced in 2019.

Superintendent of police. This is a privilege which Insp. Millette states was never afforded to him, even though he was substantively an Inspector of police who was senior in that position. Insp. Millette claims to have been subject to humiliation by Supt. Harrigan as a result of her exercise of authority over him whilst acting as a Superintendent in circumstances where she was in fact junior to him both in years of service and substantive rank within the RAPF. He presented in evidence examples of this humiliation in the form of warning letters and emails issued to him by then acting Supt. Harrigan. In addition to that, Insp. Millette claims that the numerous acting appointments of Supt. Wills and Harrigan have allowed them to amass more experience in a more senior position, whilst he continued to be overlooked.

- [9] Insp. Millette makes the observation that the current practice within the RAPF, at least in respect of acting appointments to posts above the rank of Inspector, is that once an acting vacancy arises, the Commissioner of Police would inform the Department of Public Administration of the vacancy either through the Permanent Secretary or other official within that Department and, in due course, without more, the members of the RAPF would be informed via official email broadcast that some particular officer has been appointed to act in the post in question. The communication would take the form of a "routine order" from the Corporate Development Department of the RAPF. Insp. Millette describes this process as opaque. He states that the process gives the impression that the decisions for appointments are made by the Commissioner of Police who then advises the PSC to act upon this decision.
- [10] Insp. Millette refers to a memo dated 3rd May 2023 in which the Commissioner of Police wrote to the Permanent Secretary, Mr. Larry Franklin, advising that certain acting appointments had been made. In that same memo the Commissioner states that he is seeking approval for Inspector Shem Wills to continue to act as Superintendent of Operations from the 1st April to 30th September 2023. The Commissioner goes on to state that approval of this recommendation is vital and will help maintain continuity within the Royal Anguilla Police Force. It was also stated that this is in keeping with the RAPF's succession planning and development of officers at the senior management rank. I note here that the copy of the memo exhibited in this case was unsigned. I take judicial notice of the fact that the current Police Commissioner in Anguilla was formally appointed to the post on 2nd May 2023.

- [11] Insp. Millette also goes on to raise concerns about a memo dated 2nd April 2023 and signed by then acting Supt. Shem Wills. That memo informed of a number of acting appointments within the RAPF, including that of Supt. Wills himself.
- [12] Being aggrieved, and in contemplation of taking legal action, Insp. Millette wrote to the Public Service Commission on 30th April 2024 seeking clarity on the procedure followed in appointments within the more senior ranks of the RAPF. He followed up on his letter on 29th and 31st May 2024. Insp. Millette also presented a table outlining all of the acting appointments of Supt. Wills and Supt. Harrigan, which he claims were in breach of the regulations as well as his own legitimate expectations. It is not necessary to repeat the entire list in full at this stage. I have, however, taken that evidence into account and will address it later on in this judgment.
- [13] In response to the claim, the Defendant led evidence from Ms. Monica Hodge (Ms. Hodge) who is the chairperson of the PSC. Ms. Hodge did not speak to the various acting appointments which took place over the years but gave evidence regarding the actual appointment of Shem Wills as Superintendent of Police. She states that a meeting of the PSC was held on 27th July 2023. During that meeting interviews were conducted with persons who applied for the post. Insp. Millette was one of the persons interviewed. In preparation for the interviews, the PSC received a mandate which outlines the duties of the post and was also briefed by the Commissioner of Police as to what to expect in the ideal candidate. She also states that the PSC was furnished with the résumé of all candidates for the post, including Insp. Millette. She goes on to say that all of the candidates were qualified for the post, but the selection of the successful candidate was based on answers to the six (6) questions asked during the interview process. Members of PSC and the Police Commissioner then graded the candidates based on their answers to these questions. This was done immediately after the interviews. The ranking was recorded by the Secretary to the PSC. Ms Hodge was of the view that the process was fair and transparent.
- [14] Permission was sought, and granted, for Insp. Millette to cross-examine Ms. Hodge during the judicial review proceedings. During the cross-examination, Ms. Hodge noted that the process of selecting a candidate for the post of superintendent involves the Commissioner of Police, as head of the department, making an actual recommendation of a choice in the filling of the post. She states that the Commissioner of Police should also present a write up on other candidates who qualify for the

post. The position is also advertised, and it is open for every inspector to apply. In the case of the appointment of Supt. Wills and the various acting appointments of himself and then Insp. Harrigan, the recommendations came from the Commissioner of Police.

[15] Ms. Hodge also confirmed that there should be a seniority list and that seniority is a factor to be considered in such an appointment. She noted, however, that although the PSC had the résumé of all candidates, no seniority list was presented during the interviews and deliberations for appointments to the post of Superintendent. It is also clear from Ms. Hodge's evidence that no appraisals, at least not in relation to Insp. Millette, were presented to the PSC prior to making its own recommendations. Insp. Millette insists that he has never actually been appraised since his appointment to the post of Inspector. One attempt at an appraisal commenced in 2019 and was not complete. No request was made by the PSC for any such appraisal during the rounds of interviews under review in this claim. It is worth noting that, although the Commissioner of Police makes an actual recommendation for the appointment, he also sat on the interview panel.

[16] I make just one observation prior to assessing the regulatory provisions which govern the functions of the PSC as it relates to promotions within the RAPF. Some of the allegations made by Insp. Millette in this case appear to be directed at the Police Commissioner. He claims a legitimate expectation based on an internal promotions policy document of the RAPF dated March 2020. In that policy, a number of factors were outlined as being part and parcel of the promotions process. Appraisals were highlighted as one factor to be taken into account. Of particular importance, however, is the policy that all Inspectors will be given an opportunity to act as Superintendent on a rotating basis if and when the post becomes vacant and the Senior Management Team agrees that the post should be filled depending on the operational needs at the time. Insp. Millette claims that this, among other provisions of the policy, created a legitimate expectation that he, along with other police inspectors, would be given an opportunity to act as Superintendent if the situation arose. He was, however, never afforded this privilege.

[17] As I indicated to Insp. Millette during the hearing, he has chosen to commence judicial review proceedings against the PSC. The internal police promotions policy does not govern the functions of the PSC and therefore, no legitimate expectation can arise against the PSC in relation to its content. The Commissioner of Police was not added as a party to these proceedings. After the trial and after

the court had reserved its decision, Insp. Millette filed an application to include the Commissioner as a party to the proceedings. This application was denied as this was too late in the process for such a request to be granted and the court did not consider it to be fair or desirable to do so at this late stage. Therefore, the court will go on to consider the provisions which govern the functions of the PSC to determine whether the commission has breached its duties under the regulations.

The Law

- [18] As it relates to promotions within the RAPF, the **Police Regulations**⁴ govern promotions up to the rank of Inspector of Police. With the exception of the office of Police Commissioner, the **Public Service Commission Regulations** apply to the appointments of members of the RAPF from the rank of Superintendent upwards. In accordance with section 10 of these Regulations, it is the duty of the PSC to make recommendations to the Governor regarding appointments, promotions, transfers and secondments of suitable officers within the public service. This includes the senior officers of the RAPF.
- [19] Section 11 of the Regulations states that “[w]hen it is known that a vacancy will occur, or has occurred in the public service, the Head of Department shall report the vacancy to the Director of Human Resource Management and shall make his recommendations regarding the filling of the vacancy.” To my mind, this section does not create an obligation on the part of the department head to recommend a specific candidate for the post. What is required is the reporting of the vacancy and any recommendations regarding the recruitment of a suitable replacement. It may be that a specific candidate or even a shortlist of candidates is recommended. It may also be the case that no replacement is recommended at all. That is however, a matter exclusively for the discretion of the department head.
- [20] In the case of the RAPF, it is therefore the duty of the Police Commissioner to inform the Director of Human Resource Management of any vacancy and to make any recommendation for the filling of the post which is or about to become vacant. The vacancy may then be advertised on the instruction of the PSC in accordance with section 12 of the Regulations.

⁴ R.R.A. A70-2

[21] Section 13 of the Regulations is perhaps most relevant to the issues raised by Insp. Millette in this case. The section starts off by stating that “[i]n considering the eligibility of officers for promotion, the Commission shall take into account the seniority, experience, professional and educational qualifications, merit and ability, together with relative efficiency of such officers and, in the event of an equality of 2 or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy. This subsection is written in mandatory terms. The PSC is therefore bound by this regulation to consider the factors which have been listed when making recommendations to the Governor for promotion within the public service and, by extension, the senior ranks of the RAPF. This subsection therefore incorporates seniority as one of the factors to be considered in determining the most suitable candidate for promotion. This does not make seniority the sole deciding factor, but it is an important one to take into consideration. The section, however, goes on to state the following in subsection 2:

The Commission in considering the eligibility of officers under subsection (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).**

[22] This is important in the promotion process because a distinction is drawn between work of a routine nature, which may not require particular skills or leadership qualities. The higher the rank one goes and the more peculiar the skills required for the performance of the task, it becomes more important for the PSC to consider the merit and ability of the candidate. Whilst a senior officer can have a legitimate expectation for consideration of promotion, he also has to display ability and merit in order to become eligible for progressively greater and higher responsibilities within the RAPF.

[23] The Regulations go on further in subsection (3) to outline the factors which the PSC should consider in fulfilling its mandate as outlined in the two previous subsections. It states that:

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

[24] It must again be observed that these provisions are written in mandatory terms. These are factors which the PSC must take into account. Of particular relevance to the current judicial review proceedings is the need for there to be a seniority list during the course of interviews or deliberations in order to ascertain where on the seniority list an officer falls. Further, it is also important for there to be an evaluation of the officer's overall performance as reflected in annual confidential reports by any Head of Department or other senior officer under whom the officer may have worked during his service. This, in my view, makes it important for annual appraisals to be conducted in order to assist this process. The evidence before me does not address the manner in which these reports are prepared. However, I would imagine that the annual appraisals are either part of or form the basis of what is reported in accordance with this subsection. Section 2.27 of the General Orders also mandates that annual appraisals be done.

- [25] The higher the rank of the officer within the RAPF the more important it is to ensure that his performance is periodically appraised. To my mind, this serves a number of useful purposes. Firstly, an appraisal system provides an opportunity for management to identify the strengths of senior officers and may serve as a form of encouragement for such officers to continue to perform. Secondly, an appraisal system also assists officers in identifying their areas of weakness. In doing so, an officer is given an opportunity to improve so that he can maintain or improve his eligibility for promotion whilst also improving on the quality of his contribution to the organisation. Thirdly, an appraisal system allows the officer an opportunity to challenge any wrongful perceptions which management may have of his performance or behaviour. It would therefore be wrong for a promotions process to be consistently undertaken without the officer having a formal and adequate process of knowing and understanding management's perception of his performance and having not been given an opportunity throughout the years to improve.
- [26] One other important point to be made is that the Regulations mandate that the Commissioner of Police is to make his own recommendation to the PSC in relation to the vacancy which exists. As I have stated earlier, this does not create an obligation to identify a specific candidate. However, it must be noted that the recommendations made by the Commissioner are not binding on the PSC. Insofar as the promotions process is concerned the PSC is not to be treated as a rubber stamp. It is in fact a body established by the constitution to perform an independent and impartial function. If the PSC is to therefore give a fair assessment of the candidates, it is important to have a clear picture of the candidate's performance over the years. An appraisal system assists with this, and it would be best practice for the PSC to demand proper appraisals when considering recommendations of the appointment of officers to higher ranks of the RAPF.
- [27] In fact, section 20 of the Regulations states that **"[i]n order to assist the Commission in performing its functions, Heads of Departments shall, in each year on or before the 15th day of January, furnish to the Director of Human Resource Management performance reports in respect of officers serving in their Departments. Such reports shall relate to the 12 months ended on the preceding 31st day of December."** Again, I imagine that these reports are informed by or are the actual annual appraisals conducted within the department.

[28] Section 13(5) of the Regulations goes on to state that “[r]ecommendations made to the Commission for promotion shall state whether the person recommended is the senior officer in the department or grade eligible for the promotion and, where this is not the case, reasons for the recommendation shall be given in respect of each person in the department or grade whom it is proposed should be superseded.” Section 14 of the Regulations states that “the Secretary shall keep up to date seniority lists of all officers holding offices in the several grades of the public service” and that “the seniority of an officer shall be determined by the date of his appointment or promotion to a particular grade. The seniority of officers promoted to the same grade on the same date shall be determined by their seniority in their former grade.” This outlines the importance of seniority to the process, which is determined by the date of appointment. The Regulations go as far as saying that the PSC, should be provided with reasons as to why the most senior officer is being bypassed for promotion by an officer who is more junior.

[29] It may also be the case that the exigencies of the police force would require a particular skill which the more senior officer does not have. This may make him unsuitable for the vacancy which exists at the higher rank and may be a legitimate reason for appointing a more junior officer. In fact, when considering a vacancy in the higher ranks of the RAPF, seniority does not take priority over ability and merit. However, in light of this, something may also be said of the need for heads of departments, where possible, to provide equal opportunities for officers of similar rank to gain the necessary qualifications and experience which may enhance their prospect of promotion. This would ensure that nepotism and favouritism do not underpin the promotions process and that even if these negative factors do not exist in fact, the perception of them would also be unjustified. This principle is underscored by section 19 of the Regulations which states that “[t]he principles of selection for promotion shall be followed where it is desired to select an officer for a course of training which is designed to fit him for a higher post or which may enhance his qualifications for promotion.” This means that even in considering opportunities for training and development the principles of seniority, among other factors, should feature in the decisions made by the head of the department.

[30] Insofar as the pleadings in this case are concerned, it is important to give consideration to the regulations regarding acting appointments. Sections 15 and 16 of the Regulations create a distinction between acting appointments as a prelude to appointments and those which are not. Section 15

states that “[t]he Director of Human Resource Management or Head of Department shall ensure that any recommendations made in relation to an acting appointment as a prelude to a substantive appointment shall be based on the principles prescribed in section 13.”

Therefore, in the context of the RAPF, if the Commissioner of Police recommends an officer for an acting appointment, he, as well as the Human Resource Director, must give consideration to the factors which I have already outlined in section 13. Section 15 goes on to state that “[w]here, in the exigencies of the public service, it has not been practicable to apply the principles prescribed in section 13, an officer selected for an acting appointment in consequence of a recommendation made under subsection (1) shall not thereby have any special claim to the substantive appointment.

[31] Section 16 of the Regulations states that:

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

- (a) as a general rule be the senior officer in the Department eligible for such acting appointment; and
- (b) assume and discharge the duties and responsibilities of the office to which he is appointed to act.

(2) In submitting any recommendation for an acting appointment, the Commission shall examine whether the exigencies of the service would best be served by transferring an officer from another Department next in line of seniority to act, when there is no officer in the Department who is capable of performing the duties of the higher grade.

[32] Again, we see value being placed on seniority in the regulations. However, this must be read in conjunction with section 13(2) of the Regulations when dealing with a vacancy for a post which is more senior. Here, merit and ability are to be given some measure of priority.

[33] It is important to also note that, insofar as it relates to the conduct of interviews, section 17 of the Regulations states that “[t]he Commission shall be responsible for the form and manner in

which applications are to be made for appointments to public offices within its purview and for the conduct of any examination for recruitment to such offices, and shall determine whether any candidate has the necessary qualifications for appointment to such offices.” The manner, form and conduct of interviews is therefore within the express purview of the PSC.

- [34] Having examined the provisions relating to appointments, I now consider the contentions raised by Insp. Millette in relation to the permanent and acting appointments of Supt. Wills and Harrigan as well as the general complaints of the manner in which he has been treated in the process.

Submissions and The Court's Assessment

- [35] Insp. Millette has made a number of significant allegations regarding his treatment within the RAPF after being appointed to the rank of Inspector. One allegation is that he has not been formally or properly appraised since his appointment in November 2018. I note, however, that an appraisal would have to be undertaken by the Head of the Department or a senior officer under whom Insp. Millette serves. The Police Commissioner was not a party to these proceedings and Ms. Hodge could not speak to the question of whether Insp. Millette was appraised at all during that relevant period. None-the-less, given the specific requirements of the Regulations, the Director of Human Resources was to be provided with annual reports on Insp. Millette's performance. This is specifically stated to be for the purpose of assisting in the performance of the PSC's functions.
- [36] There was nothing in the evidence to satisfy me that the reports outlined in section 20 were presented or considered during the interview or promotions process. The most that was stated by Ms. Hodge was that the process of interviews involved a write-up of each candidate being presented by the Police Commissioner. To my mind, that is not the same as what is required by section 20 of the regulations. Based on the evidence presented at the trial, therefore, and the fact that counsel for the Defendant conceded this point in his submissions, I find as a matter of fact that appraisal reports in keeping with section 20 of the Regulations were either unavailable or not considered in the interview process. In the case of a vacancy in a more senior post, the lack of appraisals can affect the PSC's proper evaluation of the merit and ability of the officer or officers who are being considered for the post.

- [37] Counsel for the Defendant submits that the PSC did not consider these documents because they were not presented to the commissioners during the interview process. Counsel specifically acknowledged in skeleton submissions that *“the procedure that was adopted as outlined in the Affidavit of Monica Hodge shows that section 13 was not completely followed and the information which was to be considered in the various subsections was not provided to the PSC.”*
- [38] In my view, although the reports are not prepared by and presented directly to the PSC, the fact that the Regulations require this as part of its process means that the PSC was and remains duty bound to request that the provisions of the Regulations be complied with. Given the numerous occasions on which Insp. Wills and Harrigan were called upon to act, I find that the PSC was in breach of its duty to ensure that the information required under the Regulations was presented to it in order to assist in the discharge of its responsibilities.
- [39] The second issue raised by Insp. Millette is that of seniority. Ms. Hodge acknowledged during the hearing that no seniority list was presented to the PSC when the interviews were taking place. She was, in my view, a forthright and honest witness. She took over as chairperson of the PSC in 2023, subsequent to some of the appointments complained of by Insp. Millette. Ms. Hodge was, however, quite prepared to acknowledge that there are weaknesses in the process which need strengthening. Counsel for the Defendant again argues that no seniority list was presented to the PSC. However, as I have stated earlier, the fact that this is a requirement of the Regulations means that the PSC was duty bound to request this list and was under no obligation to conduct the interview process without it. The RAPF is not the largest of organisations and the number of inspectors cannot be so significant that a list of inspectors and their seniority could not have been requested and obtained as is required by the Regulations.
- [40] Therefore, based on the evidence presented in this case, I am prepared to find that sufficient consideration was not given to the issue of seniority during the period under review. In addition to that, the lack of an annual appraisal report was also a requirement which had been breached throughout this process. As such I find that there was a breach of the Regulations in the acting and permanent appointments of Supt. Shem Wills and Vydia Harrigan for reasons which I am about to further explain.

- [41] Firstly, I note that the PSC had a résumé for each candidate which, it can be assumed, contained the dates of appointment of those applying for the post of Superintendent. Also, the PSC was furnished with a write-up of each candidate from the Police Commissioner prior to conducting interviews. It can be argued, therefore, that this information would have enabled the members of the PSC to know who was more or less senior during their deliberations and assess their résumés and the write-up of the Commissioner to ascertain their merit and ability to fill the vacancy. However, this is not what the Regulations require. A seniority list is mandated by the Regulations and should be presented at all times, when acting or permanent appointments of that nature are being considered.
- [42] Secondly, based on the evidence presented in this case, there is nothing to suggest that the Police Commissioner supplied the PSC with reasons for overlooking Insp. Millette's seniority during any of those appointments under review. In these judicial review proceedings, nothing was presented in evidence to suggest that these factors, as mandated by the Regulations, were even considered. These are matters which the PSC had a duty to consider. Despite the Police Commissioner not being a party to these proceedings, I am satisfied that the PSC had a duty to request and obtain this information and breached the Regulations in proceeding with the recommendations for appointment without them.
- [43] Something must also be said about the interview process itself. Counsel for the Defendant points to section 17 of the Regulations to state that the PSC was well within its rights to determine the nature of the interview process, inclusive of who was to sit on the panel and participate in the selection process. The Commissioner of Police was therefore a member of the panel on the basis of the authority of the PSC. For my part, I would stop short of suggesting that there is any general rule which prohibits the Police Commissioner from participating in the interview process in all cases. The PSC must be at liberty to make its own decision on such issues on a case-by-case basis and I see merit in the Head of Department being part of the process. This would ensure that someone with experience working in the department plays an evaluative role in the process. However, in doing so it is always important for the PSC, as a public body, to give consideration to the rules of natural justice to avoid any semblance of bias, unfairness and any potential conflict of interest. In the circumstances of the present case, there were 4 factors to be taken into account. These are:

- (a) The Police Commissioner had made a specific recommendation for the post of superintendent in keeping with what was required of him by the regulations.
- (b) His recommendation was for the appointment of an officer who was junior to Insp. Millette and who had been given numerous opportunities to act in that capacity for an extended period of time;
- (c) There appears to have been no reasons given for the bypassing of the more senior officer for the post in keeping with the regulations; and
- (d) The lack of annual performance appraisals was a cause for concern.

[44] In the circumstances of this case, it would have been best if the Police Commissioner had not sat on the interviews prior to the PSC ensuring that all of the other obligations under section 13 of the Regulations were complied with. When added to the various breaches of the Regulations in this process, his presence at the interview adds to the general sense of unfairness when so many of the other obligations had remained unfulfilled.

[45] I have given consideration to the various acting appointments which Insp. Millette claims were adverse to him. I have carefully considered his list of dates of the acting appointments of Insp. Wills and Harrigan. However, with the exception of the memo of 3rd May, 2023 to Mr. Larry Franklin, I am unable to determine whether these appointments were made as a prelude to a substantive post or not. In such circumstances, I am unable to find that section 13 of the Regulations applied to those acting stints. However, three points are to be made here.

[46] Firstly, as it relates to the acting appointment of Supt. Shem Wills as contained in the memo of 3rd May, 2023, I find that, based on the terms of the Police Commissioner's note to Mr. Franklin, this was a recommendation of an acting appointment as a prelude to a permanent one. In such circumstances, and contrary to the submissions of counsel for the defence, the provisions of section 13 ought to have applied. This was not done. There was no evidence that seniority was considered or that reasons were given as to why the more senior officer was not recommended.

[47] Secondly, even if the acting appointment was not done as a prelude to a substantive one, section 16 of the regulations mandates that the officer appointed to act must **as a general rule be the senior officer in the Department eligible for such acting appointment.** There is no explanation here as

to why this rule was not complied with or what would have been the reasons for selecting the more junior officer.

- [48] Thirdly, all these factors must be taken with the specifics of section 13(2) of the Regulations in mind. Here we are dealing with a more senior post within the RAPF, and merit and ability are factors which are more important than seniority.

Conclusions

- [49] In the circumstances, I am prepared to find that Insp. Millette is entitled to a declaration that the acting and permanent appointments of Supt. Shem Wills and Vydia Harrigan were done in breach of the provisions of the **Public Service Regulations**. I am also of the view that Insp. Millette would have had a legitimate expectation that the PSC would follow the Regulations in making recommendations for promotions to the Governor. This expectation was breached.
- [50] Insp. Millette sought, in his claim, an order from this court, quashing the various acting appointments and the permanent appointment of Supt. Wills and Harrigan. As I have already explained to Insp. Millette during the course of the hearing, the court is not inclined to grant such a remedy. My reasons for denying this remedy are three-fold. Firstly, the issue of delay in commencing these proceedings should be taken into account and, following on from the first, to effectively quash the appointment of Supt. Wills would be unfair and against the principles of good administration. Thirdly, the court is not in a position to judge whether Insp. Millette would have been appointed to the post of Superintendent in any event. Given the priority to be placed on merit and ability in the appointment to such a post, the breaches do not put the court in a position to interfere with decisions which have already been made, if to do so would have a negative impact on the functions of the RAPF.
- [51] In Rule 56.4 the CPR states that “[i]n addition to any time limit imposed by any enactment, the judge may refuse to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.” Subsection (2) goes to state that “[w]hen considering whether to refuse to grant relief because of delay the judge must consider whether the granting of relief would be likely to – (a) be detrimental to good administration; or (b) cause substantial hardship to or substantially prejudice the rights of any person.

- [52] In my view, it was open to Insp. Millette to bring this claim for at least 2 years prior to Supt. Will's actual appointment. Some of what he complains about date all the way back to an incomplete appraisal in 2019 and the acting appointments which took place over an extended period of time. To quash the appointment of Shem Wills now will be detrimental to good administration, given that he has been operating in the post for a number of months now. Ultimately, judicial review remedies are discretionary, and the court must give consideration to the issues of practicality, fairness and justice in making such orders.
- [53] I note also that the acting appointments are now spent. The officers have served on a temporary basis and there is nothing practical about quashing these appointments retrospectively. As it relates to the permanent appointment, there is nothing here to suggest that Supt. Wills has engaged in any behaviour which warrants an adverse decision being made against his current status in the RAPF. This is especially the case as he is not a party to these proceedings and would not have been given an opportunity to address the court on a decision which would be adverse to him. To quash his appointment would inherently impact his income and future within the RAPF. I am therefore disinclined to interfere with the current leadership of the RAPF and Supt. Wills' employment in this way. Supt. Harrigan was appointed after the hearing of this claim and this is therefore not up for review.
- [54] As it relates to the issue of damages, counsel for the Defendant argues that Insp. Millette was not automatically entitled to acting positions on the basis of seniority given the language of section 16 of the PSC Regulations. He states that the Regulations provide discretion to the Head of the Department to recommend persons for acting positions based on exigencies of the service and not merely seniority. It is argued that the same situation arises with regard to the selection of the candidate for the substantive post of Superintendent. The fact that the PSC did not completely follow section 13 of the PSC Regulations does not mean that the only recommendation that could have been made was the appointment of the Claimant to the position of superintendent.
- [55] In light of this counsel submits that the principles regarding the award of damages in Judicial Review are not satisfied in this case. Mr. Greene goes on to refer the court to the sixth edition of the text

“Judicial Review”⁵ where it was stated that “[t]he mere fact that there has been a breach of a public law duty does not normally give rise to a cause of action for a money or restitutionary claim ...” The text goes on to state that:

' Certain public bodies which act in breach of statutory duty will be held liable in damages if the duty under the statute was owed to individuals. In such cases the courts have, in effect, held that their supervisory jurisdiction is not enough to vindicate the Claimant's rights, and that the Claimant in vindication of his rights may in certain circumstances invoke the court's ordinary jurisdiction to award damages. However, in such cases the Claimant will have to establish loss in the ordinary way'

'In the examples just given the link between the claim to a money or restitutionary remedy and the public law duties of the Defendant is very strong - the former will be determined by the latter; albeit on occasion with qualification. In other cases, however, the strength of the link will depend on the facts of the case and principles of substantive law in the money or restitutionary claim, such principles often being different from those governing the public law duty'

- [56] This touches on a long-standing principle in common law jurisdictions as highlighted in the case of *R. (On The Application of Quark Fishing Limited) v Secretary of State For Foreign and Commonwealth Affairs*⁶ where it was noted that ***“[t]he fact that our courts were able to strike down the Secretary of State’s instruction as wrong in law is not enough. Our law does not recognise a right to claim damages for losses caused by unlawful administrative action (although compensation may sometimes be available to the victims of maladministration). There has to be a distinct cause of action in tort or under the Human Rights Act 1998.”*** In 2013, the UK Supreme Court also noted the following in the case of *The Financial Services Authority (a company limited by guarantee) v Sinaloa Gold plc and others and Barclays Bank plc*⁷:

⁵ Sir Michael Supperstone, James Goudie QC and Sir Paul Walker

⁶ [2005] UKHL 57

⁷ [2013] UKSC 11

“Other than in cases of misfeasance in public office, which require malice, and cases of breach of the Convention rights within section 6(1) of the Human Rights Act 1998, it remains the case that English law does not confer a general remedy for loss suffered by administrative law action. That is so, even though it involves breach of a public law duty.”

- [57] Generally, therefore, damages is not a remedy which is available in judicial review, except if the actions of the public body are so egregious that it amounts to misfeasance in public office or the Claimant would have been entitled to claim damages in tort or some other civil law cause of action. However, consideration must also be given to Rule 56.6(2) of the CPR2023 which states that:

“if the – (i) Claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or (ii) facts set out in the Claimant’s affidavit or statement of case justify the granting of such remedy or relief; and (iii) the court is satisfied that, at the time when the application was made the Claimant could have issued a claim for such remedy.”

- [58] What normally confronts most public servants, including police officers, in relation to actions affecting their employment, is that they serve at the pleasure of the crown. As such, the normal civil law route for breaches of employment contract is not typically available to them. In fact, section 2 of the **Labour Relations Act**, for example, states that that act does not apply to police officers and employees of the Crown whose employment is governed by General Orders for the Anguilla Public Service. As such, it is my view that the terms and conditions relating to appointments, promotions, conditions of work, discipline and termination of employment are contained in the General Orders and the Public Service Commission Regulations. These do in fact create statutory obligations on institutions like the PSC on the one hand and legitimate expectations on public servants, like police officers on the other.

- [59] As such, where the actions of the PSC breach the terms of the Regulations, the Claimant may be entitled to damages if he can prove that he has suffered losses as a result of this breach, in much the same way he would have been able to claim in a civil suit for breach of statutory duty. He may also claim damages if the actions of the PSC amount to misfeasance in public office.

[60] As it relates to the tort of misfeasance the test was outlined in the case of **Three Rivers District Council v. Governor and Company of the Bank of England**⁸ as follows:

“The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in this tort, first in his pleading then at trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden – the balance of probabilities – but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence.”

[61] I find that there is no evidence here of dishonesty or bad faith sufficient to find that there is misfeasance in public office. As was noted in the case of **Attorney General v. Kenny D Anthony**⁹ ***“[t]here is no gainsaying the gravity of the allegation of bad faith, and the evidential burden on the respondent is commensurate with the seriousness of the allegation.”*** Despite Insp. Millette’s deep sense of injustice, he has not discharged the burden of proving that there was dishonesty or bad faith in the process of acting and permanent appointments to the post of Superintendent of Police.

[62] As it relates to the claim for damages, I am also not satisfied that the breaches are sufficient to ground a claim for damages on the test outlined in the case law regarding breach of statutory duty. It is important to take a close look at the test in order to properly explain the court’s decision. This test was outlined in the case of **X (Minors) v Bedfordshire County Council**¹⁰ where Lord Browne-Wilkinson noted the following:

“The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was

⁸ [2001] UKHL 16 paragraph 161

⁹ SLUHC VAP 2009/031

¹⁰ [1995] 2 AC 633

imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. ... If a statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory duty was intended to be enforceable by those means and not by private right of action:... However the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.”

- [63] As mentioned earlier, these regulations, along with the General Orders, govern the obligations and expectations of public servants, such as police officers and the authorities or public bodies who make decisions regarding their employment. There is no remedy available in the **Public Service Commission Act** or the Regulations which stem from section 6 of that Act. Typically, a public servant who is aggrieved by a decision of the PSC commences an action for judicial review. In these circumstances, I find that the test as laid out in case law also applies in judicial review cases, and a Claimant, such as an inspector of police, is part of a class of persons upon whom direct rights are conferred by statute. If he has suffered damages in such circumstances, he is entitled to be compensated for his loss.
- [64] One difficulty which arises, however, is that Claimants in such cases tend to claim a plethora of entitlements when it comes to damages, whilst providing very little to no evidence of actual losses and a factual or legal basis for claiming such awards. In this case Insp. Millette has claimed an entitlement to a compensatory award for any loss of earnings and for any emotional pain or distress. He goes on to claim that any award should take into consideration, and appropriately reflect in the computation, any pension payable or paid to him. In addition to that he seeks awards of aggravated and vindicatory damages.
- [65] As it relates to the specific damages pleaded, I agree with the submissions of counsel for the Defendant where it is argued that seniority alone would not guarantee that Insp. Millette would have been appointed to the post of Superintendent. The most which can be said is that he was not given

a fair opportunity due to the procedural irregularities which took place in this process. As such, I find that loss of income on the basis of a substantive appointment and future pension emoluments are not damages which have been sufficiently proven in this case. I share a similar view as it relates to the acting appointments. Notwithstanding the provisions of section 16, seniority alone does not provide any legitimate expectation to be appointed to act in a senior position within the RAPF. Merit and ability are the most important factors here and the court is not in a position to assess Insp. Millette's ability when balanced against Supt. Wills and Harrigan. An entitlement to compensatory damages has therefore not been proven in this case.

[66] Insp. Millette also claims aggravated damages. Such damages are awarded for “... **mental distress, where the manner in which the Defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the Claimant. Such conduct or motive aggravates the injury done to the Claimant, and therefore warrants a greater or additional compensatory sum.**”¹¹ In **Commissioner of Police of the Metropolis v Shaw**¹² it was stated that the factors to be considered in determining an award of aggravated damages include (a) the manner in which the tort was committed, (b) the motive for it; and (c) the Defendant's conduct subsequent to the tort but in relation to it.

[67] In considering this test I find that the breaches complained of in this case were not malicious breaches on the part of the PSC. As I have stated, I found Ms. Monica Hodge to be a forthright and honest witness whose tenure at the PSC had only recently commenced when Supt. Wills' appointment came for consideration. No malice or ill-intend can be ascribed to the members of the PSC in the manner in which the appointments and interviews were conducted. It may be that from here on this decision may allow for proper procedures to be put in place but there is nothing to suggest that these breaches were deliberately designed by the PSC to cause any distress to Insp. Millette. I therefore find that there was no improper motive to be ascribed to the PSC. There is nothing presented in evidence regarding the conduct of the PSC subsequent to the breaches. I find therefore that a claim for aggravated damages has not been made out.

¹¹ See **Phonographic Performance Ltd v Ellis (t/a Bla Bla Bar)** [2018] EWCA Civ 2812

¹² [2012] ICR 464

[68] As it relates to vindictory damages, this is a head of damages which has emerged primarily in the realm of breaches of the constitution. It is not generally a remedy available in private law and by extension, judicial review, unless it can be shown that the actions of the PSC were so egregious so as to warrant an additional award of a vindictory nature. I am not satisfied that these circumstances exist in the present case.

[69] In the circumstances I make the following orders and declarations.

- (a) It is declared that the procedures adopted by the Public Service Commission in the approval and recommendations for the various acting appointments of then Inspector Shem Wills and Inspector Vydia Harrigan during the period 21st June 2022 to 21st October 2024 were in breach of the Public Service Commission Regulations.
- (b) It is declared that the procedure adopted by the Public Service Commission resulting in the recommendation of the appointment of then Inspector Shem Wills to the post of Superintendent of Police on 21st October 2024 was in breach of the Public Service Commission Regulations.
- (c) The claim for an order quashing the appointments in (a) and (b) above is denied;
- (d) The claims for damages are also denied;
- (e) Given that there is partial success on both sides, the Defendant will pay costs to the Claimant in the sum of EC\$4,000.00.

Ermin Moise
High Court Judge



BY THE COURT

REGISTRAR