

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2022/0022

**IN THE MATTER OF A DECISION BY THE RESPONDENT NOT TO PROMOTE AND CONFIRM THE
CLAIMANT TO THE RANK OF SERGEANT IN THE ROYAL VIRGIN ISLANDS POLICE FORCE**

AND

**IN THE MATTER OF AN APPLICATION FOR AN ADMINISTRATIVE ORDER IN THE FORM OF
DECLARATIONS AGAINST THE FIRST NAMED DEFENDANT PERTAINING TO HIS DECISION NOT TO
PROMOTE AND CONFIRM THE CLAIMANT TO THE RANK OF SERGEANT IN THE ROYAL VIRGIN
ISLANDS POLICE FORCE**

AND

**IN THE MATTER OF AN APPLICATION FOR AN ADMINISTRATIVE ORDER IN THE FORM OF
DECLARATIONS AGAINST THE DEFENDANTS FOR THE REFUSAL TO PERMIT THE CLAIMANT TO
PROCEED TO EARLY RETIREMENT HAVING ATTAINED THE AGE OF FIFTY**

BETWEEN:

NICHOLAS TRANQUILLE

CLAIMANT

AND

THE COMMISSIONER OF POLICE

FIRST DEFENDANT

THE ATTORNEY GENERAL

SECOND DEFENDANT

Appearances: Mr. Ruggles Ferguson, Counsel for the Claimant
Mr. Christopher Forde, Counsel for the Defendants

2020: October 16th & 22nd
2022: April 22nd

JUDGMENT

[1] **ELLIS J:** By Amended Fixed Date Claim Form filed on 20th April 2020, the Claimant seeks the following relief:

- i. A declaration that the failure of the First Defendant to promote and confirm the Claimant in the rank of Sergeant following his successful completion of the 2017 police promotion examination, his appointment to act as Sergeant over a cumulative period of 5 years between 2011 and 2019, and his several temporary promotions to act as Sergeant on eleven (11) different occasions during the period 2011 to 2019 is unreasonable and irrational.
- ii. A declaration that the claimant had a legitimate expectation to be promoted to the rank of Sergeant by the First Defendant upon sitting and successfully completing the 2017 police promotion examination.
- iii. A declaration that on a proper construction the Governor had the power pursuant to section 66(2) of the Police Act to grant the Claimant early retirement after he attained the age of 50.
- iv. A declaration that the decision of the First Defendant not to support the Claimant's application for early retirement was irrational, wholly unreasonable and made in bad faith.
- v. Damages
- vi. Further and or other relief this Honourable Court may deem just.
- vii. Costs.

[2] There are material facts in this case which are disputed, however, it is common ground between that the Claimant is a member of the Royal Virgin Island Police Force ("the RVIPF") who joined the RVIPF on 31st July 2002 and retired with effect from 1st November, 2020. In June 2011, the Claimant was first appointed to act in the rank of sergeant and seconded from the RVIPF for two (2) years, (in the first instance) to the Regional Police Training Centre, based in Barbados as an Instructor. In 2013 the secondment was extended for a further period of one (1) year.

[3] In April 2012, while in Barbados, a routine order, announcing a police promotional exam, which ordinarily initiates the promotion process was announced by the office of the Commissioner of Police. The Claimant contended that he would have satisfied all the eligibility requirements to be promoted to the rank of sergeant as outlined in the RVIPF promotional policy and was interested in being promoted. However, despite his interest and efforts no provisions were made for him to take the

police promotional examinations while on secondment at the Regional Police Training Centre, Barbados.

- [4] In October 2013, the Claimant returned to the British Virgin Islands having completed a 2 years 4 months secondment stint in Barbados. Within days of his return the Claimant received notice in writing that he had been reverted to the substantive rank of constable. The Claimant was aggrieved by this development and he subsequently applied to the Commissioner to exercise his power under extant standing orders and waive the requirement that he participate in the promotional examination and that he be considered for promotion. The Commissioner took the view that he did not have that power and his refusal to give consideration to the exercise of his power to waive participation in the examination process became the subject matter of a legal action - **BVIHCV CLAIM No. 382 of 2013**.
- [5] In November 2014, the High Court handed down a judgment in the Claimant's favour to the effect that the Commissioner had the discretion to waive the examination requirement and the Court ordered him to give proper consideration to the request. In December 2014, the Commissioner notified the Claimant that his request for waiver had been considered and denied. The Commissioner however represented to the Claimant that it would be in his interest, to participate in the next round of examination. That examination process commenced in August 2017. By then the Claimant had received 9 acting appointments in the position of sergeant since instituting the aforementioned court proceedings.
- [6] In August 2017, the written aspect of the police promotions examination commenced. A total of sixty-three (63) constables participated in the written examination. Fifty-six (56) constables, including the Claimant, secured passes at that level.
- [7] Due to the passage of Hurricane Irma the entire process inclusive of interviews was completed on May 16, 2018. The Claimant was notified that he was one of 30 persons who had successfully completed the overall process. He was advised that he had attained an overall score of 73%. Despite this several months passed during which the Claimant continued to act in the rank of sergeant and eventually reverted to the rank of constable.

- [8] By letter dated 4th September 2018, the Claimant wrote to the Governor of the Virgin Islands seeking approval to retirement from the RVIPF pursuant to section 66 (2) of the Police Act¹. This application was premised upon the Claimant's desire to pursue a degree in law at the University of Essex and upon the fact that he would have attained the age of 50.
- [9] By letter dated 26th September 2018, the Claimant was advised that his request had been forwarded to the Police Service Commission for consideration in accordance with section 97 (1) of the Virgin Islands Constitution. Eight (8) months following his application, the Claimant was by letter dated 16th May 2019, advised that his application for early retirement has been refused. The refusal erroneously represented that the Claimant application has been made pursuant to section 66 (1) of the Police Act and was said to be based on the following: (i) that the Claimant has only served the RVIPF for a period of 17 years and did not qualify for retirement under section 66 (1) of the Police Act and (ii) that the request to retire to pursue a law degree would not qualify him to retire under section 66(1) of the Police Act.
- [10] On January 29th 2020 the Claimant filed his claim which was subsequently amended. At the time of filing his claim the Claimant's substantive rank was constable but the Claimant was subsequently promoted to sergeant as of June 1, 2020. The Claimant contends that the First Defendant departed from the promotions policy and overlooked him for promotion in favour of persons who had either not qualified for promotion or who had placed after him on the list of successful candidates. The Claimant argued that this was wholly unreasonable and irrational given his vast experience in having acted as a sergeant on many occasions, and given the promotions policy by which the First Defendant professed to be guided. The Claimant further argued that based on the combination of utterances by the holder of the office of the First Defendant in 2014 and 2015 and the existence of the Promotions Policy, there was a clear, unequivocal, unambiguous and unqualified representation to him that, should he sit and pass the examination, he would be promoted in accordance with the promotions policy based on his performance in the examination. The Claimant contends that his legitimate expectation was frustrated when he was kept in the position of constable while persons who were not entitled to be on the promotions list, having failed the competency test, were promoted before

¹ The Police Act was revised as on 30th June 2013 with the result that section 66 has now become 79. The provisions are however identical. For ease of reference only the Court has maintained the numbering as referenced in the Claim.

him. His legitimate expectation was also frustrated because he was entitled to be promoted either on 1st September 2018 or 1st October 2018 but he was not.

[11] The Claimant also asks that the Court find as a fact that the First Defendant did not support his application for early retirement. He further invites the Court to find that the First Respondent sought to force him to make a choice between losing his placement at University and losing his pension. In these circumstances he argued that it was irrational and wholly unreasonable and in bad faith for the First Respondent not to support his application for early retirement and to seek to force him into a corner where he would have to choose between losing his right to a pension.

[12] In defending the Claim, however, the Defendants state that the failure to promote the Claimant was not irrational and unreasonable but was due to the limited amount of general positions available, the fact that the Claimant has not applied for any specialist positions and the Claimant's position in the promotion order based on the score he obtained. Further, the Defendants deny that the decision to not support the Claimant's application for early retirement was not irrational and unreasonable and they have denied that there is any bad faith against the Claimant.

ISSUES FOR DETERMINATION

[13] The following issues arise for determination:

- (a) Was the decision of the First Defendant not to promote the Claimant prior to 1st June 2020 following his successful completion of the 2017 promotions exams in keeping with the RVIPF promotions policy?
- (b) If the answer to (a) is yes, was the decision of the First Defendant not to promote the Claimant prior to 1st June 2020 unreasonable and irrational?
- (c) Did the Claimant have a legitimate expectation to be promoted in accordance with the promotions policy upon sitting and successfully completing the 2017 police promotion examination?
- (d) Did the Governor have the power pursuant to section 66 (2) of the Police Act to grant the Claimant early retirement after he attained the age of 50?
- (e) Did the First Defendant fail to support the application of the Claimant for early retirement?

(f) If the answer to (e) is yes, was the decision of the First Defendant not to support the Claimant's application for early retirement irrational, wholly unreasonable and made in bad faith?

(g) Is the remedy of damages available to the Claimant?

Was the decision of the First Defendant not to promote the Claimant prior to 1st June 2020 following his successful completion of the 2017 promotions exams in keeping with the RVIPF promotions policy?

If the answer is yes, was the decision of the First Defendant not to promote the Claimant prior to 1st June 2020 unreasonable and irrational?

GENERAL

[14] It is common ground between the Parties that in 2012, the RVIPF developed and put in place a written Promotions Policy ("the Policy") to govern the promotion of officers within its ranks. The stated aim was to create a fair and transparent and efficient process for promoting individuals into the specified ranks. Paragraph 1 of the Policy makes the following clear:

"Promotion from rank to rank is not as of right but will be based on competence, skills and merit not according to gender or nationality but is proven by such factors as the successful passing of professional written examinations and the recommendations of interviewing selection boards after the candidate would have progressed through the remaining phase.

The procedure for selecting personnel for promotion to the ranks of Sergeant to Chief Inspector inclusive will be held every three (3) years, or upon exhaustion of the promotion list, if sooner.

The selection procedure consists of Written Stages, Basic Competency Tests, Panel Interviews and Performance Reviews which has been inclusive of reviews of sickness records and disciplinary records."

[15] Paragraphs 2 – 4 of the Policy provides for the appointment of a Police Promotion Selection Board which is responsible for reviewing all aspects of the selection process to ensure transparency objectivity and fairness of the system. The Board is also tasked with recommending to the

Commissioner of Police the names of candidates who have successfully passed the promotion process making them eligible for promotion to the respective ranks.²

[16] Importantly, at paragraph 4 (c) of the Policy the following is noted:

“In all cases, it is intended that promotions will be in order of priority based on the overall rating achieved to meet the required standard. However, for **specialist posts**, the following additional provisions will apply:

- i. Vacancies will be advertised and officers who have passed the promotion process and existing officers at the advertised specialist rank may apply;
- ii. The interview for specialized post will be focused on the Job Description/Requirements for the specific post and objectively scored for each applicant;
- iii. The applicant that scores the highest during the interview process will be the successful candidate selected for that post.”

[17] The procedure governing promotions from the rank of sergeant, inspector and chief inspector is set out in sections 14 to 24 of the policy. It reiterates that the promotion process is made up of four (4) stages: Stage 1 - Performance Assessment; Stage 2 - Written Examinations; Stage 3 - Basic Competency Test and Stage 4 - Interview Panel.

[18] Paragraph 17 of the Policy details the assessment of Stage 3 - Basic Competency Test. Paragraph 17 (a) provides that it takes the form of a practical test which is to be marked out of 100. Section 17 (b) of the Policy states, inter alia, that because the nature of this test is based around the actual role, rather than technical knowledge or academic ability, any score of less than 60% shall be regarded as an automatic failure and shall preclude a candidate's entry to Stage 4 of the promotions process. Section 17 (c) of the promotions policy provides that the basic competency test carries a total of 100 marks. Candidates are required to obtain a minimum of 60 % to achieve a qualifying score. This is not to be aggregated against the written test.

² Under Statutory Instrument 2012 No.1 - The Police Service (Delegation of Powers) Regulations, 2 [Gazetted 20th April, 2012, the Governor, in exercise of the powers conferred by section 97 (5) of the Virgin Islands Constitution Order, 2007 (2007 No.1678 expressly delegated to the Commissioner of Police the power to appointment (to promote) to offices in the Police Service below the rank of Superintendents

THE PARTIES' SUBMISSIONS

- [19] The Claimant contends that on the basis of the evidence from the Commissioner and the Intranet result table, the Claimant was entitled to be promoted in accordance with the Policy either on 1st September 2018 (in promotion position number 17) or 1st October 2018 (in promotion position number 18).
- [20] In advancing his case, the Claimant relied extensively on the following:
- (a) The evidence of Commissioner Mathews contained in his affidavit sworn to 13th May 2020 and found at pages 91-103 of Trial Bundle 3.
 - (b) The letter of the RVIPF's Human Resource Officer, Ms. Loren Rymer dated 10th May 2018 attached to affidavit of the Claimant dated 1st October 2020.
 - (c) Document titled Promotion Candidate Scores provided by the First Defendant on 29th September 2020 pursuant to a Court Order for Specific Disclosure.
 - (d) Table appearing on pages 108-110 of the Claimant's affidavit filed on 25th May 2020 which he contends was compiled from information appearing on the RVIPF Intranet containing notices of promotions. This Table is set out below for ease of reference.
- [21] The Claimant has also pointed to what he describes as the inconsistency in the evidence filed on behalf of the Defendants and the distinct lack of candour when treating with this Claim. First, the Claimant pointed out that on three occasions in his affidavit of 13th May 2020, the Commissioner stated unequivocally that a total of 23 officers were successful in the promotions examinations. The Commissioner stated that out of the 23 successful candidates the Claimant placed 15. The Claimant noted that the Commissioner's narrative as it relates to the order in which promotions took place is as follows:
- (a) Of the original list of 23 successful candidates, two officers were promoted to specialist positions ("the first specialist promotions"). After the first specialist promotions, the Claimant was left at position 17 of the 21 remaining officers. Following the appointment to the two specialist positions, the officers who placed 1 to 13 on the promotions list were promoted ("the top 13 promotions"). Some of these officers were promoted to specialist positions and others were promoted to non-specialist positions.
 - (b) At paragraph 20 of his affidavit, the Commissioner stated that following the top 13 promotions, two officers at position 16 and 19 were promoted to specialist positions ("the second specialist promotions"). Hence at this point, based on the Commissioner's evidence a total of 17 officers would have been promoted i.e.

- the first specialist promotions (2 officers)
- the top 13 promotions (13 officers)
- the second specialist promotions

[22] Importantly, Counsel for the Claimant noted that the Commissioner does not indicate whether it was position 16 out of the original list of 23 successful candidates or position 16 out of the 21 officers who remained to be promoted after the first specialist promotions. Counsel submitted that this was a material difference because it would change his ranking on the list of successful candidates awaiting promotion. Counsel for the Claimant argued that as a matter of logic, the Claimant could only be displaced from position 15 to 17, if the two officers in the first specialist promotions originally ranked after the Claimant. In this case, the Claimant would be number 17 out of 23 and not out of 21. However, if one considers only the remaining 21 officers the Claimant would continue to rank 15 out of the 21.

[23] Counsel for the Claimant was at pains to point out that the Commissioner has never retracted his evidence that a total of 23 officers were successful in the promotions examinations. Instead, it was the Human Resource Manager, Ms. Ryan-Rymer who, in her affidavits of 8th and 24th June 2020, attempted to correct or clarify the Commissioner's evidence. At paragraph 16 of her affidavit of 8th June 2020, Ms. Ryan-Rymer says that when the Commissioner says that 23 officers were successful in the exam that was correct. However, she then sought to clarify that in fact 30 officers were successful and not 23 as the Commissioner stated. She goes on to state that after seven (7) officers were originally promoted to specialist positions a further two (2) were promoted to specialist positions leaving the Claimant at position 16 out of 21. At paragraph 19 of her affidavit, she concluded that thereafter the door to promotion for the Claimant was closed unless an opening arose in the future.

[24] By way of contrast, Counsel for the Claimant noted that the Commissioner evidence makes no mention of these purported 7 promotions to specialist crime positions and asserted that the Claimant was ranked no. 15 of 23 on the list of successful candidates awaiting promotion.

[25] Ms. Ryan-Rymer's affidavit of June 24th 2020 was clearly intended to clarify the conflicting evidence which permeated the case for the Defence. At paragraph 6 (b) of that affidavit she stated:

"At the time of giving the Commissioner of Police the relevant information and upon further review, I realized that there were some inconsistencies on my initial database that inadvertently affected the information given to him. This has since been rectified."

[26] Ms. Ryan-Rymer then maintained that 30 and not 23 persons passed the written examination and that the Claimant placed 21st of the 30 having attained a score of 73%. However, at paragraph 6 (d) of this affidavit she now says that 6 persons and not 7 (as she said in the 8th June affidavit) were promoted to specialist positions leaving 24 persons to be further promoted and not 23 (as she said in her 8th June affidavit). Ms. Ryan-Rymer further stated that the Claimant was at position no. 17 of the remaining 24. Out of the 24 remaining persons, a further 3 (and not 2 as she said in the 8th June affidavit) were promoted to specialist positions. The persons who were ranked in the first 13 places in the promotions examinations were also promoted. She further stated that in February 2020, two positions opened up and the Claimant filled one of those positions from 1st June 2020.

[27] Counsel for the Claimant took issue with the fact that the Commissioner has never specifically retracted his statements made under oath. He submitted that Ms. Ryan-Rymer's clarification cannot amount to a retraction of the Commissioner's evidence. Moreover, he argued that Ms. Ryan-Rymer's evidence is too riddled with internal inconsistencies and convenient amendments to be reliable. Counsel further submitted that Ms. Ryan-Rymer's narrative does not dovetail with the actual documentary evidence available on the RVIPF's Intranet and presented in tabular form by the Claimant.

[28] Based on Ms. Ryan-Rymer's narrative, 13 officers who were the top officers in the exams were promoted as a block, in close proximity. After considering the evidence gleaned from RVIPF's intranet, the Claimant submitted that if officers were being promoted on the basis of merit and in accordance with the Policy, then at the very least the Claimant ought to have been the 17th or 18th officer to be promoted and that such promotion should have taken place on 1st September 2018 or 1st October 2018.

- [29] Finally, Counsel for the Claimant asked the Court to infer – from the contrast between paragraph 19 of Ms. Ryan-Rymer’s affidavit of 8th June 2020, in which she stated that all positions for promotion to the rank of sergeant had been filled and that the Claimant had no prospect of being promoted unless a position opened up in the future, and her bald statement at paragraph 6 (k) of her affidavit on 24th June 2020 (less than 2 weeks later), announcing the promotion of the Claimant - that the First Defendant never intended to promote the Claimant and that he only did so in the context of the present court action and the disclosures which had emerged up to that point.
- [30] However, in affidavits filed by the First Defendant on 13th May, 2020, Mr. Alwin James, the Deputy Commissioner of Police on 8th June, 2020 and Ms. Ryan-Rymer, filed on 8th June, 2020 and on 24th June, 2020 and 5th October 2020, the Defendants have trenchantly disputed the Claimant’s contentions. In their evidence, the Defendants explain that the Promotion Policy was created and reviewed in conjunction with the Police Welfare Association in a bid to promote trust and confidence in the process of promotion within the RVIPT. The Policy sought to inject a measure of transparency and fairness into the process by ensuring that the Commissioner of Police was not the sole arbiter of the applications for promotion and instead assigning this responsibility in part to the Police Promotion Selection Board.³ The Defendants further explained that the promotion process involves a written exam, a competency related assessment and then a competency related panel interview.⁴
- [31] The Defendants’ conceded that the Claimant clearly attained a score of a seventy-three percent (73%) on the police promotion assessment which made him eligible to be promoted to the rank of Sergeant. However, they say that actual promotion would depend on there being the requisite vacancies which were to be filled. According to Counsel for the Defendants, there is no guarantee that an officer who is successful at the police promotion assessment would in fact be promoted.
- [32] Counsel for the Defendants conceded, there were clear internal inconsistencies in the defence witnesses’ evidence. However, Ms. Ryan-Rymer attempted to resolve these conflicts in her affidavits filed on 24th June 2020 and 5th October 2020. In the former affidavit, Ms. Ryan-Rymer frankly admitted that she may have misled the First Defendant such that his evidence did not accurately

³ See paragraph 7 of the Affidavit of the First Defendant filed on 13th May, 2020

⁴ See paragraph 9 of the Affidavit of the First Defendant filed on 13th May, 2020

reflect the position. She attributed this misinformation to the inconsistencies on the initial database which would have since been rectified.

- [33] While it is correct that the First Defendant did not file supplemental evidence confirming this position, the Court must assume that as he is not only a witness in the case but also a litigant that he would have instructed the filing of Ms. Ryan-Rymer's evidence and is prepared to be bound thereby. It is however, clear that in attempting to bring some clarity to the evidence, Ms. Ryan-Rymer misrepresented the First Defendant's evidence⁵ which led to some significant confusion.
- [34] Ms. Ryan-Rymer clarified that the Claimant's score of 73% ranked him at 21 of the 30 officers who were successful in the promotion examination process. At paragraph 5 of her second affidavit, Ms. Ryan-Rymer references section 4 (c) of the Policy which she says makes it clear that that an individual wishing to be appointed to a specialist positions would first need to apply for the position and then additional provisions would apply. It is apparent that it was possible that officers who ranked below the Claimant or who would have attained a lower score could have legitimately been promoted before him where they have applied for the specialist positions and had successfully completed the process for promotion to such specialist posts. It is common ground that the Claimant never applied for a specialist post and so he would not have qualified for such a promotion.
- [35] In accordance with the Policy, the officers who were promoted prior to the Claimant either attained a higher score in their promotion assessment or they applied for a specialist position and were promoted to fill these specialist vacancies. Ms. Ryan-Rymer then proceeded to describe the course of events which followed. She indicated that of the 30 successful officers; 6 were promoted to the post of specialist crime unit by the end of July 2018, leaving 24 officers who remained eligible for promotions to both specialist and non-specialist positions (assuming that they became available). The Claimant would then have ranked 17 out of the remaining 24 successful officers awaiting promotion. Thereafter, a further 3 officers were promoted to the specialist posts.

⁵ Paragraph 6 (e) of Ms. Ryan Rymer evidence incorrectly asserts that the Commissioner referred to a list of 24 successful officers, he actually referred to a list of 23

[36] At this point, the Claimant would have ranked 16 out of the remaining 21 officers. Ms. Ryan-Rymer stated that 13 vacancies for the rank of sergeant arose and the 13 officers who ranked higher than the Claimant were promoted. These posts also included specialist posts. There was a subsequent additional promotion to a specialist post which eventually left a total of 7 officers awaiting promotion. In April 2020, when two further vacancies arose, one officer was promoted to a specialist post and the Claimant was promoted to the post of Sergeant in June 2020. Counsel for the Defendants therefore submitted that the entire process was a transparent one and was based on the Policy.

COURT'S ANALYSIS AND CONCLUSION

[37] The Court has carefully considered the totality of the evidence presented on behalf of the Parties. There can be no doubt that the evidence filed by the defence witnesses was rife with discrepancies and contradictions which would no doubt have peaked the Claimant's suspicions that the evidence was fabricated to fit the particular narrative. Certainly, the incipient way in which the evidence unfolded and the obvious inconsistencies presented a difficulty not only for the Claimant, who frankly expressed his consternation in his affidavit of 15th June 2020, but also for the Court. Counsel for the Claimant submitted that the Court should view the defence's evidence with suspicion and the Court is satisfied that indeed anxious scrutiny is warranted.

[38] However, it is settled law that administrative actions are presumed to be legal and valid. This presumption is rebuttable. The classic statement of this legal principle is set out in the judgment of **R v Inland Revenue Commissioners ex p Rossminster**⁶;

“Where Parliament has designated a public officer as decision-maker for a particular class of decisions the High Court ...must proceed on the presumption *omnia praesumuntur rite esse acta* until that presumption can be displaced by the [claimant] for review- upon whom the onus lies of doing so.”

[39] Accordingly, the burden is on the party who seeks to set aside any determination, order or decision to bring sufficiently cogent evidence to show that the decision is invalid, unreasonable or unlawful.

⁶ [1980] AC 952 at 1013 F – H

- [40] Although, the evidence which supports the defence's case is not without difficulties, what is also clear is that despite his admitted access to and knowledge of the Policy,⁷ the Claimant either completely overlooked or failed to appreciate critical aspects of the Policy which would have impacted the promotions process. This misapprehension became evident during the course of the trial and explained the evolving positions adopted by the Claimant throughout this claim.
- [41] In his original affidavit filed on 29th January, 2020, the Claimant alleges that it was unreasonable and irrational for the First Defendant not to promote him to the rank of sergeant given that he had acted in the rank of sergeant on 11 occasions for a cumulative period of over five years since 2012 prior to and after his successful completion of the police promotions examinations in 2017.⁸ This submission ignored the plain and unambiguous provisions set out section 5 (b) of the Policy which provides:
- “Officers who are required to “act” in a higher rank shall revert to their substantive rank at the conclusion of the period of acting. There is no automatic entitlement to promotion outside of this policy...”
- [42] When considered together with the full remit of the Policy, it is pellucidly clear that acting appointments even repeated acting appointment in the rank of sergeant would not *without more* form the basis for promotion to this rank. During the course of these proceedings, the Claimant quite rightly did not pursue this part of his claim and so the Court will not address it save to say that promotion on such a basis would have been contrary to the letter and intent of the stated Policy and thus irrational and unreasonable.
- [43] The weakness of the Claimant's submissions, is further disclosed in the fact that he failed to appreciate that it is possible that officers who ranked below him may achieve promotion prior to him where they would have applied for a vacant specialist positions and successfully completed the process prescribed at section 4 (c) of the Policy. Indeed, it is clear to the Court that the Claimant would not have been aware of the possibility of securing a promotion following this procedure and moreover would have been unaware of the relevant vacancies when they would have become available. In his evidence in reply, the Claimant makes that plain where he asserted that “*an additional process for promotion to specialist post which was not part of the policy was non-*

⁷ See paragraphs 9 (d) and (e) of the Claimant's affidavit filed on 29th January, 2020

⁸ See paragraph 8(a) of the claimant's affidavit filed on 29th January, 2020

transparently introduced following the completion of the promotions process. This separate or additional process has been used to subvert the published process by introducing arbitrariness unfairness and inconsistency which the promotions policy was said to have been passed to cure.”

[44] Apart from the bare assertion, the Claimant provided no cogent evidence which could prove his contention on a balance of probabilities. He has therefore not demonstrated that this provision was inserted into the Policy surreptitiously, after the Claimant had already engaged the promotions process, with the intention of frustrating his efforts to secure a promotion. Conversely, in untraversed evidence, both Ms. Ryan-Rymer and the Deputy Commissioner of Police, Mr. Alwin James who reiterated that the additional track for promotion to specialist post was set out at 4 (c) of the Policy which came into force in 2012, and was widely circulated and published on the RVIPF intranet where a copy could be easily accessed by all employees. He further stated that the Policy was certainly available during and post the promotion process involving the Claimant as it existed on the intranet in 2017 prior to its republished update in advance of the May 2018 assessment process.⁹

[45] Curiously, the Claimant appears to agree with this. At paragraph 7 (b) of his affidavit filed on 25th May 2020, where he stated that: *“It is true as stated at paragraph 21 of the COP affidavit that the Promotions Policy was widely circulated and published for several years.”* The Policy would therefore have been available during and subsequent to the promotion process involving the Claimant.

[46] The Claimant further contends that fairness would have dictated that he be informed that this promotion track and that he should have been notified and advised of the availability of the specialist positions when they became vacant. It is clear to the Court that the Claimant would have been aware of the existence of the Policy and would have had access to its provisions. The untraversed evidence submitted in defence of this Claim discloses that the Policy had been in effect for some time prior to the commencement of this promotion process. Moreover there is untraversed evidence¹⁰ that the relevant (specialist sergeant) vacancies were advertised internally in accordance with the Policy. In the Court’s judgment, by any measure, this would have satisfied the requirement of fairness.

⁹ See also the corroborating evidence at paragraphs 8 and 14 of the affidavit of DCP Alwin James

¹⁰ Paragraph 14 of the affidavit of DCP Alwin James and paragraphs 13 – 14 of the Affidavit of Ms. Ryan-Rymer

- [47] Again, during the course of the proceedings, the Claimant did not robustly pursue these complaints. Indeed during the trial, Counsel for the Claimant repeatedly emphasized that the Claimant took no issue with the fact that officers who undertook the specialist promotion track could properly leapfrog him in the list for promotion.
- [48] At paragraph 6 of his affidavit of 25th May 2020, the Claimant also contended that “*constables who have not taken part in the promotions process or who had taken part and failed have been promoted to act as sergeant bypassing persons who were on the list of 30 successful candidates.*” This is a serious allegation which demanded that the Claimant provide cogent evidence in support. Unfortunately, the Claimant failed to do so. Indeed, there was no evidence before the Court which could reasonably lead to a conclusion that the Policy had been ignored with such impunity. No doubt in recognition of this, these allegations were also not pursued in submissions before this Court.
- [49] In his affidavit filed on 1st October 2020, the Claimant submitted that based on the documentation disclosed by the Defendant on 29th September 2018, at least two officers who were not eligible for promotion based on having failed the competency stage of the process found their way on the list of successful candidates for promotions ahead of the Claimant and were in fact promoted ahead of the Claimant. He based this submission on the document dated 10th May 2018 which reflected two officers listed at position number 12 and position number 14 on the list of successful candidates, namely the candidates bearing Nos. 4222 and 3391 who were unsuccessful on the basic competency exam and ought not to have been on the list of successful candidates. The Claimant submitted that they were nevertheless promoted prior to 1st June 2020, while he remained a constable. Additionally, he submitted that the officer with candidate No. 4362 who appears on the list at position number 24 had a failed score of 57 on the written exam based on the promotions policy ought not to have been among the successful candidates. He argued that this raises an issue of the credibility of the list.
- [50] This evidence followed an order for specific disclosure made at the instance of the Claimant who sought permission to inspect and copy the RVIPT database containing the list of 30 officers who were successful in the promotion process. Having received a copy of the list of the candidate scores collated from the database on 29th September 2020, the Claimant carefully compared the same to a document dated 10th May 2018 which contained the results of the competency test which had been

completed on 9th May 2018. He submitted that that document contained information which conflicted with disclosure received on 29th September 2020.

- [51] This compelled Ms. Ryan-Rymer to again produce supplemental evidence aimed at clarifying the apparent inconsistencies. In her affidavit of 5th October 2020, she pointed out that the document dated 10th May 2018, was erroneous and had in fact been replaced with a subsequent list of results which had been reissued on 11th May 2018 when the errors were identified. At paragraph 4 of that affidavit she stated:

“I recall that I was reviewing the results and it was discovered that due to several candidates having the same surnames, it resulted in an inadvertent error in the publishing of the certain candidates’ scores. Once this error came to our attention the list was reviewed and it was subsequently corrected. On May 11th 2018 a corrected list of results of the constables to sergeants competency test was published to the Force’s intranet, which is accessible to all police officers in the RVIPF.”

- [52] At paragraph 5, Ms. Ryan-Rymer addressed the Claimant’s allegations regarding candidate no. 4362. She clarified that this candidate had successfully appealed for a review of his grade and thereafter was permitted to progress through to the other stages of the assessment process.

- [53] Clearly, the Defendants piecemeal disclosures are wholly unsatisfactory and no doubt contributed to a certain degree of unnecessary angst on the part of the Claimant. However, the Claimant still has to contend with this evidence which is entirely plausible and, moreover, was untraversed.

- [54] Finally, the Court has carefully considered the Claimant’s evidence which supports his claim that the First Defendant’s actions were arbitrary and irrational. At paragraph 7 (k) of his affidavit of 25th May 2020 he contends that his original position in the list of successful candidates was 15 and that *“it follows that two persons with lower scores were promoted ahead of me. This is confirmation of my assertion that persons who obtained places than me were promoted to the rank of sergeant. However, I say that in fact twenty-four (24) persons have already been promoted which means that nine (9) persons have been promoted in the overall examination process have been promoted ahead of me.”* The Defendants concede that officers with lower scores than the Claimant would have indeed been promoted ahead of him; however, they say that this was entirely consistent with the provisions of the Policy as these officers would have successfully engaged the process whereby they would be

promoted to specialist sergeant posts. It is not disputed that the Claimant never applied for a specialist sergeant post and so would not have undertaken that promotion track and could not have been promoted on that basis.

[55] The Claimant has quite properly critiqued the Defendants' evidence; however, he still bears the burden of proving his case. The conflicting evidence as to his ranking in the list of successful candidates calls for anxious scrutiny. In order to prove his case, the Claimant would have to demonstrate that at any point in that promotion cycle, he was leapfrogged to promotion by an officer who attained a lower qualifying score and who had been promoted to a non-specialist position ahead of him. There simply is no evidence that this occurred. Ultimately, the evidence shows that 8 officers were promoted to non-specialist sergeant positions and in a response to the Claimant's request for further information; the Defendants have unequivocally stated that none of these person scored less than the Claimant.

[56] Unfortunately, the Claimant was unable to persuade the Court of these allegations on a balance of probabilities. Given the high threshold which a Claimant alleging irrationality/unreasonableness has to traverse and given the way in which he pleaded his case, this was fatal to his Claim. The Court therefore finds that the Claimant has not demonstrated that the decision of the First Defendant not to promote the Claimant prior to 1st June 2020 following his successful completion of the 2017 promotions exams was not in keeping with the RVIPF promotions policy or was irrational or unreasonable.

LACK OF CANDOUR

[57] A critical component of the Claimant's case is his contention that he was leapfrogged in the list of persons eligible for promotion to the rank of sergeant. Given the doubts raised in the Defence's evidence, it is not surprising that on 25th May 2020, the Claimant made a request for further information in which he represented that information obtained from the RVIPF intranet showed that a number of officers were promoted and confirmed as sergeants in non-specialists posts prior to him. The Claimant provided a Table listing 8 officers and their promotion dates. He requested that the Defendants confirm or deny that the named officers were in fact promoted to such posts. He also sought confirmation that any of these officers obtained a score of less than 73%.

- [58] The Claimant received a response from Ms. Ryan-Rymer on 8th June 2020. In this response Ms. Ryan-Rymer confirmed that up to that date of the request i.e. 25th May 2020, the 8 officers had been promoted to non-specialist positions and she said that all 8 non-specialists who were promoted received a higher mark than 73% on the final examination.
- [59] Subsequently the Claimant made a further request to inspect and copy the database connected to the list of successful candidates but the Defendant failed to voluntarily comply with this request and instead insisted on a court order. By Notice of Application filed in August 2020 the Claimant applied for order of specific disclosure which would compel the Defendants to provide the Claimant with an opportunity to inspect and copy the database containing the list of 30 officers who were successful in the promotion exam process. Further to a court order, on 29th September 2020, the Claimant was provided with list of the Promotion Candidate Scores which was assembled from the database and which reflected the list of candidate numbers and their respective scores.
- [60] The Claimant has however, submitted that the First Defendant has not fully complied with the order for specific disclosure and that along with the disclosure of the list of successful candidates, the Defendants ought to have disclosed, at a minimum, the candidate numbers of the eight officers who up until 25th May 2020 were promoted to non-specialist positions ahead of the Claimant, since that is information which the Defendants alone possess. This would effectively tie the particular officers and their respective grades.
- [61] Counsel further submitted that given the non-disclosure by the Defendants, the Court should not rely on the bare statement of Ms. Ryan-Rymer that the eight non-specialists who were promoted before the Claimant were promoted on merit. Applying the judgment in **Tyrone Burke v. The Otto Sam**¹¹, he submitted that the Court is entitled to draw adverse inference from the failure of the Defendants to disclose documents which were so obviously materially relevant to the issue before the Court. Counsel commended to the Court the following excerpt of the decision of the Eastern Caribbean Court of Appeal in **Tyrone Burke v. Otto Sam** where the Court said:

“It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision. The existence and rationale of the duty are

¹¹ Tyrone Burke v. Otto Sam, St. Vincent & The Grenadines Civil Appeal No. 2 of 2014

not to be equated with procedural rules and practices concerning the burden of proving facts or leading evidence. Its purpose is to engage the authority's assistance in supervising the legality of its decisions: to uphold those which are lawful, and correct those which are not. 8The duty of candour in judicial review proceedings applies throughout the proceedings. The applicant has to satisfy the court that he is entitled to judicial review and it is for the respondent to resist an unjustified application. "But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands." Donaldson MR also said that the new development of judicial review had created:

"a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration".

[62] The Court fully accepts and endorses the legal principles adumbrated in the judgment in **Tyrone Burke v. Otto Sam**. However, in the case at bar, the Court is satisfied that the information provided by Ms. Ryan-Rymer was responsive to the specific and careful wording of the request for further information. No doubt sensitive to the fact that such disclosure would impact the confidentiality and privacy of the officers who are not parties to this litigation, the Claimants request for information made it clear that the First Defendant was *"not required at this time to disclose the name or names of the officers if any who you have confirmed were promoted to non-specialist posts, who scored less than 73% per cent. Only the number of such officers are being requested at this time."*

[63] The Claimant now takes issue with the fact that candidate numbers of the 8 named officers were not provided to him but this was never specifically requested.

[64] The Court accepts that a respondent public authority, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision. This so called duty of candour applies from the outset of judicial review proceedings and applies to all information relevant to the issues in the case, not just documents. It requires that when responding to an application for judicial review, public authorities must be open and honest in disclosing the facts and information needed for the fair determination of the issue. Most especially, the duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge.

[65] However, this is by no means a typical case as there are third parties rights at play here. The duty of candour would not, in the Court's judgment, extend to voluntarily affording access to electronic

databases containing the personal information of third parties in the absence of an order of court. It seems to the Court that an application for specific disclosure would have been warranted. The Claimant did not advance such an application and cannot now seek to profit from this.

Did the Claimant have a legitimate expectation to be promoted in accordance with the promotions policy upon sitting and successfully completing the 2017 police promotion examination?

[66] The Claimant submitted that the principle of legitimate expectation is based on the proposition that when a public body states that it will do something, a person who has reasonably relied on that statement should, in the absence of good reason, be entitled to rely on the statement and to have it enforced through the courts. He represented that for a legitimate expectation to arise there has to be a clear, unambiguous and unqualified representation.¹²

[67] The Claimant contends that he had a legitimate expectation that he would be promoted to the rank of Sergeant upon sitting and successfully completing the 2017 police promotions examinations. He asserted that based on the combination of utterances by the then Commissioner of Police in 2014 and 2015, there was a clear, unequivocal, unambiguous and unqualified representation to him that should he sit and pass the examination he would be promoted based on his performance in the examination. He submitted that in the circumstances, the introduction of post-examination measures resulting in the promotion of persons who placed after him in the examination while he remained a constable frustrated his legitimate expectation and he is entitled to a declaration to that effect.

[68] At paragraph 10 of first affidavit, the Claimant sets out the representations contained in written correspondence upon which he relies.

- i. By letter dated 14th October 2013, the then Commissioner of Police stated: *"It is very unfortunate that you could not undertake the promotional process in 2012 due to financial and work constraints, this is a decision you decided to make. ...Unfortunately, I cannot and will not promote you without successfully passing the Force Promotional Process to the rank of sergeant."*

¹² Elvis Daniel & Others v. Public Service Commission & The Attorney General, St. Vincent & The Grenadines Civil Appeal, No. 7 of 2016

- ii. By letter dated 3rd December 2014, the then Commissioner of Police represented inter alia that he would be better off sitting the written examination since the written examination carried a larger portion of the marks and “*promotions within the RVIPF is based on a points system [and he would] therefore stand to gain a competitive edge in the promotions process by actually sitting the written examinations.*”

[69] The Claimant contends that in reliance of these representations, he completed the written examinations and was not promoted.

[70] A legitimate expectation is an expectation that a person would have received a benefit or experienced another result, either because in the past, a policy or procedure was operated in a particular way (so the person expects that it will continue to be operated in that way); or because the decision maker promised a benefit and then later refuses to grant the benefit. The relevant legal principle is analogous to the private law principle of estoppel and originated in Lord Denning’s judgment in **Schmidt v Secretary of State for Home Affairs**.¹³

[71] Courts have held that any unofficial practice or statement of intention, if expressed in loose terms, may give rise to unintended legitimate expectations or unintentionally breach legitimate expectations. However, before a court can determine that a legitimate expectation arises, it must first consider whether the expectation can be qualified as legitimate. A court must then consider whether the expectation possesses established qualities. First, the representation must be clear, unambiguous and devoid of relevant qualification. By way of example, in **R v Shropshire County Council ex parte Jones**¹⁴ an applicant for a student grant given to understand he has a very good chance of securing an award does not acquire a legitimate expectation.

[72] Whether or not a representation fulfills these qualities is a matter of construction. It is clear that the context of the representation will obviously be relevant and important. In **R (Ishtiaq Ahmed) v The Parole Board for England and Wales**¹⁵ the English court held that a representation did not arise in the context of a prisoner seeking parole as the parole board must always address the question as to whether or not release would be too dangerous on a particular day in question. It is also clear that

¹³ (1969) 2 Ch. 149 at p 171

¹⁴ 1997) 9 Admin L R 625 applying R v Jockey Club, ex parte Ram Race Courses Ltd [1993] 2 ALL ER 225

¹⁵ [2008] EWHC 311

the expected benefit or advantage must be more than a “mere hope”. Where from the context it is clear that the representation could not have been intended or understood as inducing binding expectations then it could not be held to give rise to legitimate expectations.

- [73] Whether a legitimate expectation has arisen will also depend on a number of factors including: whether the person or authority promising the benefit had the legal power to grant it, or whether it was ultra vires; who made the promise and how many people stood to benefit by it; and whether the person to whom the promise was made took action in reliance on it, which placed him in a worse position than he otherwise would have been.
- [74] What is also clear is that the burden is on the Claimant to show that this representation amounted to a *clear, unambiguous and promise devoid of relevant qualification*. Further, the claimant must establish that in all the circumstances the expectation was reasonably entertained at the material time and justifies the protection of the courts. see: **R v Secretary of State for Education & Employment ex parte Begbie**.¹⁶
- [75] The Court has considered the relevant context in which both statements and representations would have been made. The Court has also considered the plain text of these statements. Having done so, the Court is not satisfied that these representations would have given rise to a binding assurance that the Claimant would have been promoted to the post of sergeant. The context reveals an ongoing legal dispute between the Claimant and the then Commissioner in which the Claimant sought to challenge his decision to refuse to allow the Claimant the opportunity to sit the promotional examinations while on secondment out of state and later to refuse to exercise his discretion to waive the examination requirement in circumstances where he had acted in the position for a period of 6 months in the requisite period.
- [76] In the Court’s judgment, the language used certainly does not invoke a sense that the Commissioner intended to express a commitment to promote the Claimant to the rank of sergeant and to do so at a particular time. Rather, the Commissioner’s letter on 14th October 2013 purports to explain his

¹⁶ [2000] 1 WLR 1115

refusal to invoke FSO M:7 (4) to waive the examination requirement. The full text of that correspondence is critical. At paragraphs 2 – 3 of the letter the Commissioner makes this statement:

“The Force Promotion Policy supersedes FSO M:7 (4) and therefore any officer seeking promotion up to and including the rank of Chief Inspector will need to undertake and successfully pass the promotion process in accordance with the Force Policy. It is very unfortunate that you could not undertake the promotion process in 2012 due to financial and work constraints, this was a decision you decided to make.

....I am sure that you will be in a very good position to take and pass the next Force Promotion Process to the rank of Sergeant. However, in the meantime unfortunately I cannot and will not promote you without successfully passing the Force Promotion Process to the rank of Sergeant.”

[77] While the Commissioner was attempting to provide reasons for his refusal to exercise his discretion to waive the exam, he could not have intended to fetter himself in the future. The Court has no doubt that had the full extent of the assurance sought to be relied upon by the Claimant been made plain to the Commissioner he would have certainly have declined to provide such assurance. This is especially so in the context where the Policy which had been promulgated prescribed a complex system involving *inter alia*, an assessment procedure conducted by an independent selection Board.

[78] When the Court has regard to the second letter of 2014, the Court’s view is reinforced. That letter, when examined for its full terms and effect makes it plain that the Commissioner was well aware of the full remit of the Policy and intended to adhere to the same. In the penultimate paragraph of this letter the Commissioner made the following self-explanatory statement:

“Separate and apart from the above, it may also be wise for you to consider whether it may not be in your best interests to sit the relevant written examination. This is based on the fact that should Force Standing Order M: 7 (4) be applied, the candidate is only awarded a pass mark in the written examination which translates into the minimum points that can be earned in relation to the examination stage of the promotion process. However, should you take the written examinations, there is a possibility that you would attain a percentage which is higher than the pass mark and this increase the points awarded to you for this stage of the process. Since promotion within the RVIPF is based on a point system, you therefore stand to gain a competitive edge in the promotions process by actually sitting the written examination. “

[79] In the Court’s judgment, this later correspondence, even when read with the earlier exchanges, could not give rise to a legitimate expectation that the Claimant would be promoted once he had successfully completed the examination. As in **R v Shropshire County Council ex parte Jones**,

at its highest, the Claimant can only say that he was given to understand he would have improved his chances of being promoted and that is in fact consistent with the terms of the Policy.

- [80] It is clear that the Claimant understood that the RVIPF did in fact have an established promotion policy. It is also apparent that the Claimant understood the process and the considerations which would apply as he clearly deposed that he understood that the Policy involved a three stage promotional process. Despite demonstrating an intimate knowledge of the Policy, and having decided to fully engage this process, it is therefore surprising that the Claimant would have failed to appreciate the impact which section 4 (c) of the Policy would have on the process.
- [81] The Claimant has further argued that his legitimate expectation was frustrated when he was kept in the position of constable while persons who were not entitled to be on the promotions list, having failed the competency test, were promoted before him. While it is entirely right to say that the Policy would have created such an expectation, what is also clear is that he failed to prove that this actually occurred.
- [82] The Claimant has represented that his legitimate expectation was also frustrated because although he was entitled to be promoted either on 1st September 2018 or 1st October 2018, he was not. The attempt to frame this expectation in reference to particular time frames is, in the Court's judgment reveals an unfortunate misapprehension of the promotion process set out in the Policy. In order to succeed in his claim, the Claimant would have had to demonstrate either that he was leapfrogged to promotion to a non-specialist rank of sergeant by persons who either were not entitled to be on the promotions list because they failed to achieve the relevant scores or who because of their scores ranked below him on the promotions list.
- [83] Finally, for the avoidance of doubt and for the reasons already indicated, the Court is not satisfied that the Claimant has advanced a plausible case that he was entitled to be promoted having accrued the requisite acting experience in the rank of sergeant and having successfully completed the promotion process.

[84] Ultimately, what the Claimant suggests would result in his promotion ahead of persons who achieved higher scores in the promotion process and who preceded in the list for promotion. This would obviously be contrary to the stated the aims of the Policy. The process by which officers are promoted within the RVIPF is regulated by an established Policy and it is well settled that failure of public authorities to stand by their published policies will lead to unpredictability which is inimical to the rule of law.

[85] In light of these findings, the Court finds that the failure of the First Defendant to promote the Claimant either on 1st September 2018 or 1st October 2018 was not unreasonable or irrational.

Did the Governor have the power pursuant to section 66 (2) of the Police Act to grant the Claimant early retirement after he attained the age of 50?

[86] In written legal submissions advanced by the Claimant he contended that the Defendants have conceded this issue and that no further legal submissions are required. Counsel for the Defendant submitted that this was a misrepresentation of the defence's position.

[87] What is apparent is that the Claimant has advanced that the Governor is empowered under the statutory provisions to grant or approve the early retirement of an officer where that officer has applied to leave the service before attaining the mandatory retirement age of 55 years. The Claimant relied on section 66 (2) of the Police Act which provides as follows:

“Every subordinate police officer and constable may be required by the Governor to retire from the Force on or after attaining the age of 50 years.”

[88] Counsel for the Defendants submitted that on the plain reading of section 66 (2) it is apparent that it purports to grant the Governor the power to require a subordinate police officer and constable to retire from the force on or after attaining the age of 50 years. However, the Defendant's submitted that this section is not intended to facilitate approvals of requests for retirement. Rather, they contend that this section is intended to provide an avenue by which, if the need arises and the requisite conditions are present, the Governor on his own initiative, may require the requisite officer to retire from the Force.

[89] At its core, the relationship between an employer and employee is a contractual one. The terms of an employment contract will include those which are mutually agreed by the parties but they will also consist of non-negotiable terms that derive from extrinsic sources such as – statute, collective agreements, custom and practice. It follows that where a court is asked to consider the rights and entitlement of an employee, the court will have to construe the express terms of the contract but it will also have to construe any legislative provisions which may be incorporated by operation of law.

[90] Nowhere is this more self-evident than in a public service employment contract where a court is required to consider not only the statutory provisions set out in the Virgin Islands Constitution but also in the Police Act. It is in the latter statute that the Court finds the provisions regulating retirement of officer from the RVIPF. These terms to the extent that they impact the employment relationship between officers employed in the RVIPF and their employer are to be read as forming part of the contract.

[91] The provisions regulating retirement from service are set out in Part VI of the Police Act. Section 66 of the Act regulates the ways in which an officer may retire from the Force. It provides:

- (1) “Every Inspector, subordinate police officer and constable may be required by the Governor to retire from the Force after he or she has served 25 years or more in the Force.
- (2) Every subordinate police officer and constable may be required by the Governor to retire from the Force on or after attaining the age of 50 years.
- (3) The Governor may, on recommendation by the Commissioner, permit an Inspector to retire on or after attaining the age of 50 years.
- (4) Every Inspector, subordinate police officer and constable shall be required to retire from the Force on his or her attaining the age of 55 years.”

[92] In construing these provisions the Court has borne in mind the guidance set out in **R v Secretary of State for the Environment, Transportation and Regions ex parte Spath Holme** where Lord Nicholls explained the scope of that exercise in the following terms:

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful so long as it is remembered that the ‘intention of Parliament’ is

an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used.”

- [93] In carrying out this exercise, this Court has had regard to the most recent dictum delivered in the 2018 by the Eastern Caribbean Court of Appeal in **Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited**. At paragraphs 22 – 25 of the judgment, Carrington JA (Ag) considered the appropriate approach to be adopted by a court:

“Parliament is expected to say what it means and mean what it says. The first recourse in determining the meaning of a statutory provision should be to the grammatical meaning of the words used and their context. If the grammatical meaning of the words used is clear and the context does not lead to the conclusion that the words used may have more than one meaning or a different meaning from the natural grammatical meaning, then effect should be given to the clear grammatical meaning as disclosing the intention of Parliament in using them. When considering the context of words in an enactment, one has to consider the enactment as a whole, and not only the section in which the words under consideration appear, as well as all facts relevant to the subject matter of the Act that are before the court, including any commentary supplied by the drafters of the Act. The ultimate aim of the court is to arrive at what **Bennion on Statutory Interpretation** refers to as an informed interpretation of the legislation under consideration. **Bennion on Statutory Interpretation** suggests that this is arrived at in two stages:

“What may be called first stage of interpretation arises when the enactment is first looked at. Here a provisional view may be formed, perhaps that the meaning is clear. Or it may appear at the first stage that the enactment is grammatically ambiguous or vitiated by semantic obscurity. In all three cases it is necessary to go on and apply the informed interpretation rule. Thereafter, at second stage interpretation, a final view on legal meaning is formed.”

Bennion’s “informed interpretation rule” is that the court should infer that the legislator, when settling the wording of legislation intended it to be given a fully informed, rather than a purely literal interpretation (though the two usually produce the same result).”

- [94] The ultimate aim of the court is to arrive at what **Bennion on Statutory Interpretation**¹⁷ refers to as “an informed interpretation” of the legislation under consideration. It is also clear that when considering the context of words in an enactment, one has to consider the enactment as a whole, and not only the section in which the words under consideration appear. The words of any statutory provision must therefore be read in the context provided by the statute as a whole. The Court is obliged to examine the relevant provision in its context.

¹⁷ Fifth Edition pages 591 et seq – Section 204

- [95] Turning to the case at bar and applying the approach to statutory interpretation applied in **Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited**, the Court is satisfied that the BVI Legislature said exactly what it means and means exactly what it said in this legislation. The grammatical meaning of the words at section 66 (2) of the Police Act are clear and the particular context does not lead to the conclusion that the words used have more than one meaning, or a different meaning from the natural grammatical meaning. In the context of the clear and unambiguous criteria, the Court should be reluctant to import words or phrases which contradict the ordinary and clear meaning of the statutory provisions.¹⁸ The relevant legislative provisions do not present any grammatical ambiguity or semantic obscurity and as the meaning of the words are clear and no ambiguity arises then under the rule of statutory construction, the statutory intention must be found in these words.
- [96] The Claimant relied on the provisions of section 66 (2) and Counsel for the Claimant forcefully insisted that the Defendants' evidence revealed a concession that the Commissioner is empowered to permit the Claimant's early retirement. This Court does not agree.
- [97] Counsel for the Claimant insisted that there are four routes to retirement prescribed by section 66. However he reiterated that Claimant had applied to the Governor pursuant to the correct section 66 (2) and not section 66 (1) as erroneously referenced in the correspondence. Counsel for the Claimant submitted that under this section, any officer who attains the age of 50 may apply (for permission to retire early) to the Governor who has a wide discretion to permit such request. The Governor was therefore obliged to exercise this power judicially. This wholesale reliance on section 66 (2) of the Police Act no doubt explains the Claimant election to withdraw the claim for relief at (IV) of the Amended Fixed Fate Claim Form because according to Counsel, section 66 (2) is flexible in that apart from the requirement that the applicant be 50 years old, the section does not impose any other precondition. There is no mandate dictating how the Governor may exercise that discretion, neither does it explain how he may come to act on it (whether on application or on his own motion). According

¹⁸ Gwynne v Burnell (1840) 6 Bing NC 453; in The Corporation of The County of Vercheres v The Corporation of The Village of Varennes (1891) 19 Scr 365

to Counsel there is no requirement to consult with or seek the recommendation of the Commissioner of Police.

- [98] The Court was not persuaded by these submissions. Counsel for the Claimant failed to provide any plausible basis upon which the natural, plain and ordinary meaning of the term “***may be required by the Governor to retire***” should not be applied when they clearly do not disclose any grammatical or semantic obscurity.
- [99] Section 66 Act plainly recognises that retirement from the Service may be effected through a voluntary or involuntary process. It is also clear that the Legislature intended to draw a distinction between officers of subordinate rank (below that of inspector) and those who are above the rank of inspector. A plain reading of that section reveals that the compulsory age of retirement for inspectors and those falling below the rank of inspection is 55 years. This imputes an automatic determination of the employment relationship once the relevant age is reached.
- [100] However, officers may also be involuntarily retired before reaching the compulsory age of retirement. The legislation indicates that this is at the behest of the Governor who presumably has a wide discretion. There are conditions which must be achieved before the Governor may purport to initiate such involuntary retirement. The conditions for the exercise of such discretion differ depending on the rank of the officer. All officers below the rank of inspector may be involuntarily retired from the Force after they have served 25 years or more. However, only officers below the rank of inspector may be involuntarily retired on or after attaining the age of 50 years (despite having not completed 25 years of service or more).
- [101] The section does however contemplate that persons may wish to voluntarily leave the Force before reaching the compulsory age of retirement. The language used here (66 (3)) is very different. It is permissive, implying that the officer is being allowed to retire when he clearly wishes to or has applied to do so.

[102] However, the Legislature has made it clear that this privilege attaches only to officers carrying the rank of inspector and then only where the Commissioner has recommended such retirement. The Act simply does not contemplate that persons below the rank of inspector may seek the permission of the Governor to voluntarily retire from the Force before reaching the compulsory retirement age.

[103] It follows from this that the Claimant who held a rank below that of Inspector could be involuntarily retired from the Force where he served 25 years or more or where he attained the age of 50. However, there is no provision regulating what would effectively be an application to retire early. Of course, such an interpretation reveals a clear discrimination between officers of the rank of inspector and those who, like the Claimant, are of a subordinate rank. However, this issue was not addressed by either side in this litigation.

[104] The relevant statutory provisions cannot be read in isolation: their colour and content are derived from their context. This Court is therefore obliged to read the provisions of sections 66 in the context provided by the Act as a whole and in doing so the Court has noted the provisions of section 54 of the Police Act which contains a similar wording and which has reinforced its conclusions. Under the marginal note – “**Compulsory Retirement**”, that section provides as follows:

“Where the Governor considers on the recommendations of the Commissioner that it is desirable in the public interest that any Inspector, subordinate police officer or constable, should be required to retire from the Force, he shall call for a full report from the Commissioner concerning that Inspector, subordinate police officer or constable and if after

(a) considering the report; and

(b) giving the officer an opportunity of submitting a reply to the grounds upon which his or her retirement is contemplated,

he is satisfied, having regard to the conditions of the Force, the usefulness of the officer thereto and all the other circumstances of the case, that it is desirable in the public interest that the Inspector, subordinate police officer or constable retire from the Force, he **may require the Inspector, subordinate police officer or constable to retire on such date as the Governor may specify.**” Emphasis mine

[105] When the Court has regard to the legislative context afforded by section 54 and 66 (3) of the Act, in the Court’s judgment the context clearly implies unilateral action on the part of the Governor which

may result in the involuntary determination of an officer's employment once the age condition or years of service have been met.

[106] In light of these findings, the Court is not satisfied that the Claimant has demonstrated that applying the ordinary and clear meaning of the legislative provisions would stultify or defeat the purpose or intention of the Legislature or produce an absurdity, anomaly or contradiction which would mandate a secondary interpretation. Moreover, it has not been demonstrated to this Court that consequences are objectionable, undesirable, unreasonable, unworkable, impracticable, anomalous or illogical. In the Court's judgment, there is no real doubt about the legal meaning of section 66 (2) of the Police Act and so there is no need to move on to the second stage of the informed interpretive rule.

[107] On the way that the Claimant has framed his case, he clearly sought to rely on a statutory provision set out in the Police Act which, for the reasons indicated, do not support the contentions advanced. He therefore has not persuasively advanced an expressly regulated basis for entitlement to early retirement.

[108] The Court will therefore decline to make the declaration sought.

Did the First Defendant fail to support the application of the Claimant for early retirement?

If the answer is yes, was the decision of the First Defendant not to support the Claimant's application for early retirement irrational, wholly unreasonable and made in bad faith?

[109] During the course of the trial, it became clear that the Claimant no longer wished to pursue the declaratory relief sought at (iv) of the Fixed Date Claim Form. Rather, he invited the Court to find as a fact that the First Defendant did not support the Claimant's application for early retirement. It is clear to the Court that the First Defendant would not have supported the Claimant's request. However, such a discrete finding would not, in the Court's judgment, assist the Claimant who sought to argue that in all the circumstances it was irrational and wholly unreasonable and in bad faith for the First Defendant not to support his application and to seek to force him into a corner where he would have to choose between losing his right to a pension and pursuing his course of study.

- [110] It is now settled law that a decision made subject to a discretionary power must be “reasonable”. “Reasonableness” in this context includes an implicit recognition that there will be many ways in which a decision maker might exercise a particular discretion: and there is more than one lawful conclusion that might be reached (reasonableness does not mean, therefore, that a court reviewing it would have reached the same decision). Provided that the decision was rationally open to a reasonable decision maker in possession of all the facts in the case, if challenged, a court would generally uphold it as lawful. This is because courts have recognised that when two reasonable persons are faced by the same set of facts, it is possible for them to come to different conclusions any one of which may fall within the range of lawful decisions.
- [111] However, courts have also recognized that there is a category of decisions which would lie outside that range of discretion or which could be described as “*so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it*”; or which are “beyond the range of responses open to a reasonable decision maker”.¹⁹
- [112] In the seminal case of **Council of Civil Service Unions v Minister of the Civil Service**²⁰, the House of Lords defined an irrational decision as one “*which is so outrageous in its defiance of accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at it*”. However, there can be no doubt that “unreasonableness” now covers a multitude of sins including absurdity, irrelevant considerations, misdirection, fettering discretion, and improper or illegitimate motives. In the exercise of their supervisory jurisdiction, courts have increasingly found legally unreasonable decisions and actions at all levels.
- [113] However, given the range of lawful decisions which may be available, it is not surprising that the Privy Council has described a claimant’s burden of establishing a decision as irrational or unreasonable as one which is “*notoriously heavy*”: **Gookool and Others v Permanent Secretary of the Ministry of Health and Quality of Life and Anor**²¹. It follows that the Claimant has the burden of proving to the Court that the Commissioner’s refusal to endorse his application for early

¹⁹ Associated Provincial Picture Houses Limited v Wednesbury Corporation [1947] 2 ALL ER 680, 683

²⁰ [1985] AC 374, 410

²¹ [2008] UKPC 54, paragraph 18

retirement was absurd, impacted by irrelevant considerations, misdirection, fettering of discretion, or improper or illegitimate motives and *“defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it”*.

- [114] Having considered the totality of the evidence before the Court as well as the paucity of legal submissions advanced in support of this ground of challenge, the Court has no hesitation in finding that the Claimant has failed to produce any evidence which would meet this threshold or which could support this claim.
- [115] Moreover, the Court had some difficulty in comprehending the logic or rationale of this limb of the Claimant’s claim. The fact that the Claimant has chosen to advance this challenge where he has not ultimately sought to impugn the substantive merits of the Governor’s decision to refuse his request is puzzling. Moreover, in circumstances where, the Claimant contends that section 66 (2) of the Act imposes no condition precedent requiring a recommendation from the Commissioner, it is again puzzling that the Claimant would persist in advancing this claim for relief. This is especially so when the Claimant now accepts that under section 97 (1) of the Virgin Islands Constitution, the power to make appointments, to exercise disciplinary control over, to remove and presumably to retire persons holding or acting in such offices is vested in the Governor who must, and did in fact act in accordance with the advice of the Police Service Commission (which was consensually removed as a party) and not the Commissioner.
- [116] It is trite law that a court must never act in vain. Given these factors and given that as at the date of trial, the Claimant had reached the compulsory retirement age under the Police Act and had effectively proceeded on pre-retirement leave; the Court can see no utility in the Claimant’s pursuit of this ground for review. It is clear to the Court that even the Claimant was able to prove his case that a grant of the declaratory relief sought would be an exercise in futility.
- [117] In light of the findings herein, it is not necessary for the Court to make any finding regarding the claim for damages and so for the reasons set out, the Court is satisfied that the Claimant’s claim should be dismissed.

COSTS

[118] Finally, CPR 56.13 (6) provides that no order for costs may be made against a claimant for an administrative order unless the Court considers that the claimant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. Notwithstanding the Court's findings, this case does not fall within that matrix.

[119] **It is therefore ordered as follows:**

- i. **The Claimant's claim is dismissed.**
- ii. **No order as to costs.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar