

THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

DOMHCV2019/0154

BETWEEN

ZARINA MATTHEW

Claimant

and

PUBLIC SERVICE COMMISSION

Defendant

Appearances:

Mr Lennox Lawrence and Ms. Jodie Luke of Platinum Law Chambers for the
Claimant

Mrs. Tameka Hyacinth-Burton Solicitor General (Ag) of Attorney General's
Chambers for the Defendant

2020: September 7, 8, 15, 17;
: December 30;
2021: January 25 (Issued)

JUDGMENT

[1] **STEPHENSON J.:** This is a claim brought by the claimant for judicial review against the Public Service Commission (*the defendant*) in respect of the purported decisions, actions, non-actions and failure of the defendant to promote the claimant to the position of Trade Officer III (*the post*) and to challenge the promotion of Mornette George (*Ms. George*) to the said position.

- [2] It is well established principle of law that Judicial Review is a review of the manner in which the decision was made and not whether the decision was right or wrong. **Re: Chief Constable of The North Wales Police v Evans¹ Per Lord Brightman.**
- [3] Certiorari is a remedy in proceedings for judicial review. Judicial review is the exercise of the supervisory jurisdiction of the Supreme Court where the court essentially puts the decision maker to the test as to the methodology or procedure that was employed to arrive at that decision. It seeks to ensure the proper use of the decision making process. The action must be predicated upon facts and circumstances existing and which the decision maker knew or ought to have known at the time that the decision to be impugned was made.
- [4] If a public body seeks to make an appointment it must be carried out in a fair, transparent manner and should be a merit based selection process in line with the principal and standards of Natural Justice. An appointment means a filling of a vacancy through an open external selection process or through internal promotion. A promotion is considered to be an appointment if it involves higher pay and greater responsibility.
- [5] Promotions which are irregular are potentially unlawful. Those appointments are not automatically null and void, simply because the person appointed also has legal rights. It is within the remit of the high court to grant a just and equitable order. Until a court pronounces on the validity of the appointment that appointment exists in fact and has legal effect in terms of which its legal consequences will continue to exist. Therefore the appointment or promotion irrespective of the irregularities remains valid until and unless it is declared unlawful by the court.
- [6] The claimant in the fixed date claim form filed on her behalf is seeking declaratory, injunctive administrative orders against the defendant as follows:

¹[1982] 3 All ER 141 at 154

- i) declaration that the Defendant is under a statutory duty to properly apply the principles and procedures applicable to selection for promotion as set out at regulation 12 of the Public Service Commission Regulations;
- ii) A declaration that in failing to properly apply the principles for selection for promotion in respect of the Claimant, the Defendant acted ultra vires, and unlawful, accordingly, the appointment of Mornette George to the position of Trade officer III was ultra vires, unlawful, null and void and of no effect;
- iii) A declaration that the Defendant is under a statutory duty to properly apply the procedure for appointment as set out at regulation 17 of the Public Service Commission;
- iv) A declaration that in failing to apply and/or to properly apply the procedure for appointment in respect of the Claimant, the Defendant acted ultra vires, and unlawfully, accordingly, the appointment of Mornette George to the position of Trade officer III was ultra vires, unlawful, null and void and of no effect;
- v) A declaration that in failing to appoint the Claimant (being an officer senior to Mornette George and who was recommended by the Permanent Secretary for the position of Trade officer III) and in appointing Mornette George in her stead, the Defendant acted unreasonable, arbitrarily, capriciously and illegal;
- vi) A declaration that in any event the Defendant's failure to state reason why the Claimant was being bypassed was unlawful and irregular;
- vii) A declaration that the Defendant's failure to appoint the Applicant to the position of Trade officer III (a position to which she was highly recommended by the Permanent Secretary, and which she held for 5 years in an acting capacity and as complained of herein) violated the Claimant's legitimate expectation to procedural due process;
- viii) A declaration that the Defendant's failure to appoint the Claimant to the position of Trade officer III (a position to which she was highly

recommended by the Permanent Secretary, and which she held for 5 years in an acting capacity) violated the Claimant's legitimate expectation to the substantive benefit of appointment to the position of Trade officer III;

- ix) A declaration that in all of the circumstances of the case the passing over of the Claimant for appointment to the position of Trade officer III and the appointment of Mornette George was Wednesbury unreasonable, and the appointment of Mornette George was irrational, unreasonable, null and void and of no effect;
- x) An order of certiorari to move into the High Court and quash the decision of the Defendant to appoint Mornette George to the position of Trade officer III;
- xi) An order of prohibition prohibiting the said Mornette George in exercising any function as Trade officer III or continue to hold the office of Trade officer III until the final hearing and determination of the substantive Judicial Review proceedings or until further order;
- xii) An order of Mandamus directing and/or ordering the Defendant to properly consider the recommendation of the Permanent Secretary and the seniority of the Claimant, and further to properly apply the statutory scheme as set out in Regulations 12 and 17 of the Public Services Commission Regulations in relation to the Claimant prior to the appointment of any Third Party to that position of Trade officer III;
- xiii) An order for a stay of all proceedings with respect to the appointment of Mornette George to the position of Trade officer III, and that the said Mornette George is prohibited from exercising all functions as Trade officer III pending the final outcome of the substantive matter;
- xiv) Damages; and
- xv) Costs.

Underlying Facts

- [7] The claimant is a public officer employed in the public service from 1997 to date. She holds the substantive position of senior clerk in the Permanent establishment.
- [8] The salient facts as alleged in her claim are stated in her affidavit filed in support of her claim on the 9th August 2019.
- [9] The claimant averred that between the period August 11th 2014 and September 30th 2015 she was appointed on numerous occasions to act in the position of Trade Officer III.²
- [10] The claimant further averred that between October 1st 2015 and December 2018 she received 12 acting appointment in the position of Trade Officer II vice Ms. Margaret Roudette save on one occasion for the period August 1st 2017 to 15th September 2017 when she acted as Trade Officer II in a vacant position. It is noted by the court that there was a total of seventeen acting appointments given to the claimant which were for the most part consecutive. The claimant exhibited all her letters of appointment regarding her acting stints.³
- [11] The claimant stated that she was recommended by the Permanent Secretary Ministry of Trade, Energy and Employment ("the PS") for a permanent appointment to the vacant position of Trade Officer III effective January 2019 when Ms Roudette the previous holder of the post was recommended for appointment as Trade Officer II. An extract of this recommendation was produced to the court.⁴
- [12] The claimant contended that on the 24th June 2019 she was the most senior officer within the Ministry of Trade, Energy and Employment ("The Ministry") to hold the position of Trade Officer III (acting). The claimant further contended that she was the

²Paragraph 5 of her affidavit filed on the 31st July 2019

³ Ibid Exhibit ZM1

⁴ Ibid Exhibit ZM2

sole eligible officer for appointment to the post as confirmed by the PS and as a requirement of regulation 12(1) of the Public Service Commission Regulations. (*"The Regulations"*). That her eligibility was based on her performance and experience and on the recommendation made by the PS which satisfied the principles and procedures for promotion as set out in Regulations 12 and 17(a) of the Regulations.

[13] The claimant also averred that at all material times her general fitness, educational qualifications, recommendations, duties of which she had knowledge were all clearly set out in the recommendation presented by the PS. Further that she was the sole person recommended by the PS for permanent appointment in the vacant position.

[14] The claimant complained that instead of appointing her, the defendant appointed Ms. George who was at all material times a junior officer to her. Further that there was no such recommendation as is required in favour of Ms George and that the appointment made was procedurally improper in that it was without consideration of the recommendation made by the PS and without any due and proper consideration of any Employee Assessment and Development Review (*"the EADR"*) for her. That the appointment was not in compliance with the Regulations and therefore ultra vires null and void. Ms Matthew further contends that she had a legitimate expectation to be appointed to the position which was not met.

[15] It was contended by the claimant that the defendant was under a duty to proceed with the recommendation of the PS unless a legal basis was established for denying her that substantive benefit and in the circumstances of the case the appointment of the very junior officer was unreasonable, improper and illegal.

[16] Prior to the appointment of Ms. George, the claimant stated that based on her instructions her attorney wrote to the defendant complaining that the recommendation to appoint Ms George circumvented the established protocol followed by the Ministry and that an irregular procedure was being adopted to recommend a junior officer for promotion which recommendation was not proposed by the Ministry.

[17] That in spite of the correspondence from her attorney and in the face of the recommendation from the PS it was contended by the claimant, that the defendant proceeded to appoint Ms George to the position and that this appointment was also in total disregard to the regulations 12 and 17.

[18] Further, the claimant contended that apart from sidestepping the aforementioned regulations the vacant post was not advertised as required by regulation 11 of the Regulations enabling her to make an application for the post.

[19] The claimant contended that the defendant is a statutory authority whose powers are constrained by the regulations and that in acting outside of the said regulations the defendant's actions were unlawful, irregular and capricious and therefore their decision by its very nature is null and void and of no effect.

[20] The claimant further contended that the defendant is under a duty to act reasonably and that there is a duty on their part to give reasons for their decision and failing to reply to the correspondence addressed to and received by them from her attorney the defendant has in effect acted unreasonably in that they failed to consider relevant considerations and gave consideration to irrelevant considerations.

[21] In sum it was canvassed on behalf of the claimant that the actions of the defendant were unlawful, irregular and capricious. That the defendant has failed to give her any reason why she was denied her legitimate expectation to be appointed to the position of Trade Officer III in a vacant position and or why the recommendation of the PS was sidestepped or ignored and also why a junior officer was promoted without a recommendation from the PS and in or with blatant disregard of the procedure set out in the regulations aforesaid.

[22] A whole raft of points were taken by counsel for the claimant some more important than others and some of little importance all together. So far as is relevant the issues

of law for determination by this court is whether the decision by the PSC was arbitrary, unlawful, null and void because:

- a. the PSC failed to act upon or apply its statutory duty and obligation, to follow, implement and give effect to the applicable principles and procedures provided for in the regulations 12 and 17 for the selection and promotion of public servants and that the PSC has no common law discretion;
- b. it is alleged that Ms George was appointed ignoring the recommendation by the PS and without having due regard to the applicant's fitness, seniority, qualifications, numerous acting appointments in the position of trade officer III, and in doing so the PSC improperly and unlawfully exercised the powers given to it by regulation 17(a);
- c. that the defendant failed to give the claimant any or any proper reason for their decision to bypass her in making the appointment to the post which they did;
- d. the decision of the PSC could be set aside and declared null and void because the PSC stepped outside of the Regulations or on the grounds that its decision was irrational in that it failed to consider and properly apply the relevant considerations as set forth in the regulations; and
- e. the PSC departed from the normal process of promotion as set out in regulation 12 to advertise the vacant position in time or at all to enable the claimant to make an application for the job in accordance with the requirement as set out in the said regulation.

[23] The defendant relied on the evidence of Eleanor V Ferrol, the Secretary to the defendant (*Mrs Ferrol*) who swore two affidavits. Mrs Ferrol also gave viva voce evidence and was cross examined extensively by Counsel Mr Lawrence.

[24] Mrs Ferrol averred that as Secretary to the defendant her duties include attending the meetings of the defendant, recording the decisions made and ensuring that all documents relating to any matter under the defendant's consideration are made

available. This witness was familiar with the exhibits relied on by the claimant to establish her case.

[25] The defendant contended that Ms George contrary to what the claimant says was an officer eligible for consideration of appointment to the vacant post of Trade Officer III. It was submitted by the defendant that Ms George was given 23 temporary appointments to the said post between the period August 2011 and June 2019 and during the same period Ms George also acted and performed in the post of Trade Officer II five times.

[26] The defendant also contended that up until the claimant was given her acting appointment in 2014 Ms George was for four years functioning in a position of a scale and higher salary grade than the claimant.

[27] Mrs Ferrol did not deny that the claimant acted in the post as stated and that she was recommended to the office of Trade Office III by the Permanent Secretary and that upon the occurrence of the vacancy of the post that Ms. George was appointed to the position.

[28] Mrs Ferrol averred that Ms George was performing the duties of Trade Officer III in the Economic Partnership Agreement (EPA) Unit since August 16th 2011 and had on two occasions acted in the position of Trade Officer II. Mrs Ferrol set out in her affidavit⁵ the 27 temporary appointments of Ms George made by the defendant for her to act in the position of Trade Officer III (Temporary) and as an intern performing the functions of Trade Officer III. Further that during those periods of Ms George acting in the post she was paid a salary corresponding with the office.

[29] Mrs Ferrol also averred that Ms George applied for permanent appointment to the officer of Trade Officer III in December 2018 and the defendant was subsequently informed that she would be considered along with other eligible officers when a

⁵ First Affidavit of Eleanor V Ferrol filed on the 13th September 2019

vacancy occurs. I pause to note that the claimant did not take into consideration the fact that Ms George had previously applied for the post if the vacancy occurs.

[30] Mrs Ferrol also stated that Ms George was recommended by the Permanent Secretary for further appointment to the post from June 2, 2019 to June 30 2019 and was also recommended by the said Permanent Secretary for a previous acting stint by Ms George for the period April 1st to 30th and stated as follows: *“Ms George is knowledgeable and experienced in trade issues and has demonstrated the capacity to execute the duties integral to the position of Trade Officer III”*. The defendant exhibited a recommendation by the Permanent Secretary of Ms George received by the PS in 2019.

[31] Mrs Ferrol then listed the qualifications acquired by Ms George and averred that the defendant considered Ms George's experience also and her job experience and exposure in making the appointment.

[32] This witness averred that the defendant considered the claimant who acted in the post for five years and the recommendation made by the Permanent Secretary but decided that these factors were not definitive and that all officers who were eligible had to be considered.

[33] Mrs Ferrol also stated that the defendant considered that Ms George was regarded as having more experience in the position having served in the post for a total of eight years and had more trade specific qualifications.

[34] It was averred by this witness that the claimant was in fact appointed as a senior clerk in the Public Service permanently with effect from 2010 and Ms George was appointed twenty three times in the post for fixed term periods described as temporary appointments since 2011 and until the claimant was granted her acting appointment in 2014 Ms George was in fact at a higher grade and salary scale than the claimant.

[35] Mrs Ferrol did inform the court that the defendant was in receipt of an EADR for the claimant not for Ms George but the defendant in making their appointment relied on the recommendation received from the permanent secretary in June 2019.

[36] Mrs Ferrol stated that there was no statutory duty to advertise the position of Trade Officer III and that the matters set out in Regulation 12 of the Regulations were considered by the defendant when the decision which is being challenged was arrived at.

[37] Under cross examination by Counsel Mr Lennox Lawrence Mrs. Ferrol said that the minutes of the Defendant's meeting do not record the discussions and she opined that the regulations required her to record the decisions of the commissions not the discussions. Mrs Ferrol said that she made a record of the business transacted at the meeting which was convened on the 29th June 2019, she said that the extract of the minutes as exhibited did not give the reasons as to why the claimant was not appointed and that there would have been discussions and deliberations which would not have been recorded in the minutes.

[38] In response to a question put to her by Counsel Mr Lawrence as to what determines that you have an appointment Mrs Ferrol said that you must have a letter from the PSC appointing you to the position.

[39] It was pointed out to this witness that based on the examination of the documents in the trial bundle that Ms George did not have an appointment from the Defendant from the 1 April 2012 to the 30th April 2012. This seemed to infer that Ms George did not have a continuous appointment in the post from 2011 to 2019 as contended by the defendant. Ms Ferrol agreed to this fact.

[40] Regarding the EADR for the claimant under cross examination Mrs Ferrol said that this and the job description even though they were available were not presented to the

meeting of the defendant. Mrs Ferrol also told this court that she received an EADR for the claimant but not for Ms George even though she requested same.

[41] Mrs Ferrol was quite adamant under cross examination that even though it was not recorded in the minutes that the defendant considered everything it was required to by the regulation. Mrs Ferrol never denied that the claimant was recommended by the Permanent Secretary to be appointed to the post.

[42] Essentially the claimant asserts that this is not a situation of promotion within the public service under regulation 12 but a permanent appointment under regulation 17 and it was contended that the defendant erred when it acted under regulation 12 as asserted by Mrs Ferrol.

[43] The defendant contended that the claimant's substantive post within the public service is as a senior clerk and any possible appointment to the post would be on promotion and therefore regulation 12 falls to be considered, and in the circumstances of the case the recommendations of the PS is only one of the factors to be taken into consideration by the defendant.

[44] The Defendants contend that prior to the claimant receiving her first acting appointment in the position of Trade Officer III in 2014 Ms George had already been acting in that position for four years. The clear and obvious take away from that fact would be that Ms George was in reality for four years senior to the claimant in the scheme of things.

[45] It was submitted by the defendant that whenever there is a vacancy arising in the Public Service Regulation 12 is triggered. Of relevance would be the provisions of Regulation 12(1) which states:

"From time to time as vacancies occur the Commission shall consider the eligibility of all officers for promotion, and in considering the claims of persons for promotion merit and ability shall be taken into account as well as seniority, experience and official or special qualifications." ...

[46] Mrs Hyacinth Burton on behalf of the defendant drew to the court's attention the definition of the word promotion in section 2 of Regulations is stated as "*Promotion is the conferment upon a person in the public service of a public office to which is attached a higher salary or higher salary scale than that attached to the public office to which he was last substantively appointed*".

[47] At this juncture, it is useful to make this observation that the claimant's contention is that Regulation 12 is not the regulation to be considered but that it is Regulation 17 that falls to be considered. Based on the very wording of Regulation 12 this court is unable to agree with counsel Mr Lawrence in this regard as clearly the claimant's situation falls squarely within the considerations of this regulation as she was seeking to be considered for appointment to position that was a higher salary and salary scale to which she was last substantively appointed.

[48] In the circumstances of this case it is clear that the claimant's substantive appointment was junior to that of the post that she is seeking appointment to. However, it is to be noted that Regulation 17 speaks to "*The appointment, promotion, transfer and secondment of public officers. ...*"

[49] The defendant also submits that both the claimant and Ms George possessed the relevant and necessary qualifications however based on the recommendation of the PS Ms George's qualification and experience were more specific were more specific to the post.

[50] On the issue of the need and failure to advertise it was the defendant's position is that there is no obligation on their part to advertise the vacancy and in the circumstances of the case at bar failure to advertise the position cannot be construed as being an ultra vires act on their part. It is noted that the issue of advertisement was discussed in **Smart –v- DPP**⁶ where the Privy Council interpreted that regulation 15 which is the same as the Dominica Regulations and it is noted that it was held that the

⁶ [2019] UKPC 35

“advertisement regulation” is a standalone regulation which confers on the commission discretion to advertise. (emphasis mine)

[51] A permanent appointment or a promotion in the public service is not based solely on a performance assessment, recommendation from the PS or successive acting appointments. Regulation 12 clearly spells out the principles and procedures applicable for the selection of promotion.

[52] There is no doubt in this court’s mind that as it regards both the claimant and Ms George, it was a question of promotion when one considers the definition of promotion. Subregulation (1) of Regulation 14 clearly states that *“From time to time as vacancies occur the Commission shall consider the eligibility of all officers for promotion and in considering the claims of persons for promotion merit and ability shall be taken into account as well as seniority, experience and official or special qualifications.”*(emphasis mine)”

[53] Subregulation (2) lists and or suggests twelve factors to be taken into account for each officer. This court is satisfied that the action of the defendant was not Wednesbury unreasonable as contended by the claimant. The evidence of Mrs Ferrol is accepted in its entirety and the reasons set forth by the witness as to why Ms George was appointed to the vacant post.

[54] It is to be noted that the claimant acted in the position of trade officer III on 18 occasions continuously from 2014 to July 2019 and Ms George also acted in the position of Trade Officer III on 23 temporary appointments between the period August 2011 and June 2019.

[55] In this court’s opinion the only difference between the candidates to be appointed to the post is in reality was that the claimant was appointed a senior clerk and Ms George was a temporary officer. If Ms George was acting in the position of Trade Officer III from 2011 it is also clear that Ms George was acting in a senior position to the

Claimant for some three years prior to and then equally as the Claimant from the period 2014 when the claimant first received her acting position to June 2019.

[56] It is to be noted that Ms George also during the period of her employment with the Government acted in an even higher position than that of Trade Officer II according to the evidence adduced by the defendant having received five acting appointments when she acted as an intern performing the functions and duties of the said office and receiving the emoluments commensurate with that office.

[57] “Where there is a lack of evidence as to the commission’s thinking there is to be a presumption of regularity so that it is presumed that the proper criteria was taken into account. **Re: Smart –v D of PA (TTT)** ⁷ where it was found that there was no evidence that the commission abdicated its independent function. It was held that Regulation 15 of the TT regulation was self-standing and clearly gives the commission a choice between two alternatives neither dependant on the other.

[58] Regulations 18 (TTT) addresses specifically the qualities of internal candidates and it was held that matters under regulation 18 are no more than matters to be taken into account. They give rise to no presumption as to the weight to be given to any particular factors.

[59] Seniority does not automatically or necessarily a weighty factor this is only so where the work is of a routine nature.⁸

The Minutes:

[60] In the case at bar counsel Lawrence sought to press Mrs Ferrol as to the contents of the minutes of the meeting suggesting that she failed in her duty as secretary to commission not to record the discussions of the meeting on the day that the decision was taken to appoint Ms George to the post and not the claimant.

⁷ Op cit

⁸ Re: Smart op cit at Paragraph 28

[61] Mrs Ferrol stated over and over again that as Secretary to the Board she does not record the discussions but only the decisions. Counsel Mr Lawrence sought to pounce on this and asked the court to find that the witness was being less than truthful and suggested to the court that the witness was being less than candid with the court and asked this court to draw a negative inference.

[62] It is for the trial judge to draw such inferences as that judge thinks appropriate on the evidence presented. This court is not persuaded by counsel's submission in this regard. There was no evidence presented to this court that the discussions of the meeting were recorded to contradict or challenge the witness.

[63] That even if there was a contemporaneous note taken of the meeting it is clear that the discussions do not form part of the minutes. This court finds no reason to disbelieve Mrs Ferrol when she says that for the purpose of the minutes of the meeting only the decisions are recorded. Counsel Mr Lawrence sought to put otherwise to Mrs Ferrol but failed adduce any evidence whatsoever to counter this witness's evidence in this regard.

[64] Additionally this court is of the view that the defendant ought to be afforded a degree of confidentiality in its deliberation process. A verbatim report of the discussions of meetings of bodies such as the defendant could be inimical and can inhibit frankness and candid discussions.

[65] **Roberts Rules of Order**⁹ states that *"the Official record of the proceedings of a deliberative assembly is usually called the minutes, or sometimes— particularly in legislative bodies—the journal. The minutes should be kept in a substantial book or*

• ⁹Robert's Rules of Order are comprehensive set of rules which govern meetings of political, social, and other organizations.

binder ... the minutes should contain mainly a record of what was done at the meeting, not what was said by the members. ...¹⁰ (emphasis mine)

[66] However, even though it is clear to this court that there is no obligation on the part of the defendant to disclose the contents of detailed discussions it could only be fair that the claimant be provided with a reason for the defendant's decision not to appoint her to the post.

[67] Clearly this would have properly informed Ms Matthew whether or not she should challenge the decision by way of judicial review. Counsel Mr Lawrence relied on the Court of Appeal's finding in the **Tyrone Burke (Chief Personnel Officer –v- Otto Sam**¹¹ in support of his criticism of the defendant's failure to produce a full official transcript or record of the discussions at the meeting related to the decision made in the case at bar.

[68] This court notes however that whilst the decision of the Court of Appeal decision as quoted and relied on by Mr Lawrence addressed *"the unexplained absence of evidence from a witness"* that the circumstance of that case is to be distinguished from the case at bar as in the said Otto Sam Case no minutes were presented to the court to support the contention that the letter containing the impugned decision in fact came from the PSC.

[69] In fact in that case the trial judge's adverse findings in the Otto Sam Case were grounded on the fact that there were no minutes at all produced of the PSC's meeting. Further it is noted that in that case the CPO the claimant, sought to say to the court that he was acting based on the decision of the PSC. However, nowhere in his affidavit evidence did he make reference to the PSC and further no minutes of the PSC was produced in support of the claim.

¹⁰Roberts Rules of Order (12th ed.) RONR 48.1 & 48.2

¹¹ Op cit

[70] This court does not agree with Counsel Mr Lawrence that the defendant failed in its duty of candour.

[71] This court is satisfied that the defendant's witness in her evidence both her averments in her affidavit and her viva voce evidence under cross examination provided this court with a full and fair explanation of the relevant matters taken into consideration by the defendant in making its decision to appoint Ms. George over the claimant.

[72] The explanation presented by Mrs Ferrol recording the acting appointments of Ms George which predated that of the claimant, Ms George's qualifications, and the recommendation of the same PS to recommend the claimant coupled with the fact that Ms George applied for the job previously is in this court's mind is an acceptable explanation for the preference made in the appointment. Mrs Ferrol also made reference to the Ms George's qualification and opined that in fact Ms George was not junior to the claimant as stated by the claimant.

Legitimate Expectation:

[73] The claimant sought to rely on the doctrine of legitimate expectation as a ground for setting aside the impugned decision. Counsel quoted and relied on the judicial dicta in **Philbert Bertrand –v- The Attorney General and the Public Service Commission**¹² where it was stated:

“A person may have a legitimate expectation of being treated a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority including an implied representation, or from consistent past practice and policy. In all instances the expectation arises by reason of the conduct of the decision –maker and is protected by the courts on the basis of that principles of fairness, predictability and certainty in administration should not be disregarded and that a legitimate expectation should not be disappointed.”¹³

¹²DOMHCV2017/0018

¹³ Ibid at paragraph 23

[74] The claimant also quoted and cited the dicta of Lord Fraser of Tulleybetton in the case of **Attorney General of Hong Kong –b- Ng Yuen Shiu**¹⁴ when he said:

“The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.”

[75] It is to be noted that in the **Ng Yuen Shiu case** that the Claimant is here seeking to rely on it was held *inter alia* that:

“ ... That where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise provided the implementation did not conflict with the authority's statutory duty;” (emphasis mine).

[76] There is no evidence which has been led in the case at bar that there was such a promise made to the claimant upon which she relied. The claimant sought to rely on the recommendation made by the PS and the fact that she had acted in the position for an extended period vice Ms. Roudette. This is to be weighed against the evidence adduced by the defendant that Ms George also acted in the post for a longer period than the claimant and even before the claimant and that Ms George even though she was considered by the claimant to be an intern was in fact in view of the defendant adequately qualified and experienced in the position.

[77] Insofar as is material, the doctrine of legitimate expectation was developed by the courts as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectation as it prohibits the arbitrary use of power by

¹⁴ [1983] 2 AC 629

public authorities: **Rainbow Insurance Company Limited v The Financial Services Commission and Others**.¹⁵

[78] The principle of legitimate expectation is broadly 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 reasons, be entitled to rely on the statement and enforce it through the courts: per Lord Neuberger in **The United Policyholders Group v The Attorney General Of Trinidad and Tobago**.¹⁶

[79] The court will enforce an expectation only if it is legitimate. For an expectation to be legitimate, the party seeking to invoke it must show, inter alia, that it lay within the powers of the authority both to make the representation and to fulfill it. A legitimate expectation can only arise on the basis of a lawful practice or promise. The principle of legitimate expectation cannot be invoked if or to the extent that it would interfere with the workings and exercise of the discretion of a public body's statutory duty.

[80] In England it has been held that there can be no legitimate expectation that a public body will confer a substantive benefit when it has no power to do so. In **Attorney General of Hong Kong v Ng Yuen Shiu**¹⁷ The Court said that the concept of legitimate expectation is capable of including expectations created by something that falls short of enforceable legal rights, provided they have some reasonable basis¹⁸.

[81] In **CCSU v Minister for Civil Service** Lord Fraser stated that "*But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the court will protect his expectation by judicial review as a matter of public law.*"¹⁹

¹⁵ [2015] UKPC 15

¹⁶ [2016] UKPC 17

¹⁷ [1983] 2 AC 629

¹⁸ Ibid at p.636

¹⁹ [1985] 1 AC 374 at p.401

[82] It is therefore well established law that for a legitimate expectation to arise there has to be a clear, unambiguous and unqualified representation.

[83] Is there any evidence in the case at bar that there was a clear and unambiguous representation was made to the Claimant? The answer to that question is no. The fact that the claimant has acted in the post for a considerable amount of time amount to a representation that she would be appointed to the post? The answer to that question again is no.

[84] Did the series of acting appointments induce a legitimate expectation of a promotion and substantial benefit on the part of the claimant? Was it reasonable for the claimant to rely on the facts of her successive appointment to act in the post over a period of years sufficient to rely on it so as to create a legitimate expectation on her part? The answer to both of those questions in this court's view is no.

[85] The claimant has sought to rely on the creation of a legitimate expectation based on her many acting appointment in the post. It is her contention that the defendant was unfair to resile from giving effect to the expectation that was created, thus frustrating her expectation. It was contended that fairness and good administration required that it be justified. This to this court's mind has not been demonstrated.

[86] Even if the court finds a legitimate expectation as a result of the series of acting appointment the Court will not order the public authority to honour the creation of the expectation, where to do so would be to assume the powers of the Commission. The issue engaged here is appointment of the claimant to the post. This court's lack the competence to determine the needs and requirements of the public service and it would be in this court's view inappropriate to permit the claimant to invoke the principle of legitimate expectation to compel her promotion and appointment to the post in the circumstances of this case.

[87] In any event in this court's judgment, the claimant has not established any promise or inducement on the part of the defendant that would have given the claimant cause to rely on to her detriment. Having regard to the law on legitimate expectation, the evidence that the claimant seeks to rely on to ground legitimate expectation does not rise to the level or standard on which such an allegation can be founded.

[88] This court finds that it was within the defendant's prerogative to select and appoint who it considered to be the more suitable candidate for appointment to the post and such a decision was only subject to review and to be quashed where it has been established and demonstrated that the defendant acted unfairly, capriciously or with mala fides.

[89] One must never lose sight of the overriding principle of Judicial Review, that the court is concerned not with the decision but with the process.

[90] Upon consideration of the statements of case filed, the evidence and submissions made in this case, this court finds that the claimant has failed to establish that the defendant failed to understand correctly the law that regulated its decision making power and failed to give effect to it.

[91] The court is satisfied that based on the evidence adduced before it that the defendant took into account the relevant matters and came to a conclusion that was a reasonable one that as a commission, it could make. Further, the claimant has failed to establish on a balance of probabilities that the defendant acted with procedural impropriety.

[92] In concluding this case, this court finds that the claimant has all in all failed to establish and make a case of illegality, irrationality and breach of natural justice against the defendant.

[93] The appointment of Ms George was clearly based on and justified by her qualification, experience and performance in the post which interestingly enough predated any

acting appointment in the post enjoyed by the claimant not to overlook the fact also hat she previously applied to be appointed in the said post.

[94] The claimant's claim is therefore dismissed in its entirety with no order as to costs.

[95] The court wishes to record its gratitude to counsel for the assistance rendered in their submissions.

M E Birnie Stephenson
High Court Judge

[SEAL]

BY THE COURT

REGISTRAR