

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No.1062 of 2013

BETWEEN:

SEYMOUR DACOSTA CUMBERBATCH APPLICANT/CLAIMANT

AND

**COMMISSIONER OF POLICE FIRST RESPONDENT/DEFENDANT
POLICE SERVICE COMMISSION SECOND RESPONDENT/ DEFENDANT
ATTORNEY-GENERAL THIRD RESPONDENT/DEFENDANT**

IN THE MATTER of the Administrative Justice Act, Cap.109B of the Laws of Barbados.

AND IN THE MATTER of the Police Act, Cap.167 of the Laws of Barbados.

AND IN THE MATTER of the CONSTITUTION of Barbados.

AND IN THE MATTER of the Public Service Act, 2007.

AND IN THE MATTER of an Application for an order of Certiorari.

AND IN THE MATTER of an Application for an order of Mandamus.

AND IN THE MATTER of an Application for an order of Prohibition.

AND IN THE MATTER of an Application for an order of Injunction.

AND IN THE MATTER of an Application for a Declaration.

Before Dr.The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2014: July 24

September 15

2016: May 27

Mr. Ralph Thorne Q.C. Attorney-at-Law for the Applicant/Claimant.

Mr. Patterson Cheltenham Q.C. in association with Mr. Hal Gollop Q.C. and Ms. Natasha Green, Attorneys-at-Law for the Second Respondent/Defendant.

Ms. Donna Brathwaite Q.C., Attorney-at-Law for the First and Third Respondents/Defendants.

DECISION

Introduction

[1] This is an application by the Second Respondent/Defendant, the Police Service Commission (“the PSC”), filed on 07 March 2014. The Court is asked to strike out the Amended Fixed Date Claim Form and the Amended Statement in Support, both filed by the Applicant/Claimant, Mr. Seymour Cumberbatch (“Mr. Cumberbatch”), on 28 June 2013.

Brief Overview

- [2] On 19 June 2013, Mr. Cumberbatch filed a Fixed Date Claim Form seeking judicial review of the decision of the First Respondent/Defendant, the Commissioner of Police (“the COP”), and the PSC, “in conducting the process for the selection and appointment of a candidate to fill the post of Deputy Commissioner of Police in the Royal Barbados Police Force”.
- [3] An Amended Fixed Date Claim Form and an Amended Statement in Support of Claim were filed on 28 June 2013. And on 02 October 2013, a Further Amended Fixed Date Claim Form and a Further Amended Statement in Support of Claim were filed.
- [4] When the claim was filed, Mr. Cumberbatch was appointed to the post of Assistant Commissioner of Police in the Royal Barbados Police Force (“the Force”). He was also acting in the vacant post of Deputy Commissioner of Police (“DCP”). This latter post had been advertised, and Mr. Cumberbatch was one of nine applicants. He was selected for an interview, and informed of the date and time of his interview.
- [5] By letter dated 18 June 2013, his counsel notified the Chief Personnel Officer that his participation in the interview process was under protest, “Having regard to the sending on leave of Mr. Darwin Dottin, the Commissioner of Police, and the attending circumstances”. Mr. Cumber-

batch was not interviewed due to illness, and the interview process has been suspended pending the determination of his claim.

Oral Amendments to Claim

- [6] Initially, Mr. Cumberbatch requested numerous remedial orders. However, on 15 September 2014, the second day of the hearing of the PSC's application by this Court, counsel for Mr. Cumberbatch informed the Court that certain parts of the claim did not require any consideration by the Court because they were spent. Several portions of the Further Amended Fixed Date Claim Form were said to be no longer relevant.
- [7] These discarded aspects of the claim significantly reduced the range of remedies sought by Mr. Cumberbatch. In particular, orders relating to Mr. Dottin and his removal from office were no longer required (paras.(a) to (e)). And some orders, that proposed to anoint Mr. Cumberbatch as the only possible appointee to the post of DCP, were also ditched (paras.(h) to (l)).
- [8] After counsel for Mr. Cumberbatch jettisoned the majority of the remedies originally sought, all that remained were paragraphs (f), (g), (m), (n), (o) and (p) of the Further Amended Fixed Date Claim Form. The Court is now asked to grant the following:
1. a Declaration that Mr. Cumberbatch is qualified and so entitled to be appointed to the post of DCP in the Force (para.(f));

2. a Declaration that Mr. Cumberbatch has a legitimate expectation that he would be selected, recommended and appointed to the post of DCP based on the practice where he has acted in that same post consistently and repeatedly since on or about 2004 (para. (g));
3. a Declaration that the procedure for selection, recommendation and appointment to the post of DCP is invalidated by the acts and omissions of the COP and the PSC on the following grounds:
 - (i) carrying out an administrative act or omission in a way unauthorised or contrary to law;
 - (ii) exceeding jurisdiction;
 - (iii) failing to satisfy or observe conditions or procedures required by law;
 - (iv) breaching the principles of natural justice;
 - (v) unreasonably, irregularly or improperly exercising discretion;
 - (vi) abusing power;
 - (vii) acting upon bad faith, improper purposes and irrelevant considerations;
 - (viii) acting on instructions from an unauthorised person;
 - (ix) acting in conflict with the policy of an Act of Parliament;
 - (x) acting in error of law, whether or not apparent on the face of the record;
 - (xi) acting in the absence of evidence on which a finding or assumption of fact could reasonably be based; and
 - (xii) breaching of and omitting to perform a duty (para.(m));
4. an order of Certiorari in quashing the procedure for selection, recommendation and appointment to the post of DCP (para.(n));

5. Damages (para.(o)); and
6. Costs (para.(p)).

The Application

[9] The application by the PSC is grounded on Rule 26.3 (3) (b) of the Civil Procedure Rules, 2008 (“the CPR”). The claim is challenged on the basis that Mr. Cumberbatch had no reasonable ground for bringing the claim, because:

1. there was no breach of the Administrative Justice Act (“Cap.109B”); and
2. the claim against the PSC was premature and without merit.

[10] On 07 March 2014, the Chairman of the PSC, Mr. Guyson Mayers, filed an affidavit in support of the application. He averred that he was advised by counsel that the documents filed by Mr. Cumberbatch on 28 June 2013 disclosed no reasonable ground for bringing the claim (para.5). He was also advised that there was no breach of Cap. 109B, and that the claim was meritless and premature because the PSC had made no decision concerning the selection and appointment of anyone to the post of DCP (para.6).

[11] Parts 25 to 27 of the CPR apply to a directions hearing of a judicial review application (Part 56.9 (1) CPR). Therefore, the application to strike out the

claim is within the scope of the Court's power to case management judicial review proceedings.

The Legal Principles

[12] Part 26.3(3) of the CPR provides that:

“The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court

(a).....

(b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim....”.

[13] The Court observes at the outset that this is not an application for summary judgment under Part 15 of the CPR. In this regard the Court takes guidance from Edwards J.A., who opined that:

“Consequently the learned judge would be obliged to assume that the facts alleged in the amended statement of claim were true, and she would not be entitled to make use of the powers contained in CPR 15.2 in the absence of any application for summary judgment before her. The summary judgment test - whether the [Claimant] had any real prospect of succeeding on the claim – [is] not an option in considering the respondent's application to strike out the amended statement of claim.”. (See **Citco Global Custody NV v. Y2K Finance Inc., C.A. Virgin Is., Suit HCVAP 2008/**

022, decision dated 19 October 2009, at para.[19]).

[14] In **Blackstone’s Civil Practice 2011**, the learned editors of that treatise discussed the legal guidelines to be followed when a court is considering an application under Rule 26.3 (3)(b) of the CPR. Such applications:

“...may be made on the basis that the statement of case under attack fails on its face to disclose a sustainable claim or defence. Traditionally this has been regarded as restricted to cases which are bad in law, or which fail to plead a complete claim or defence....On hearing such an application it will be assumed that the facts alleged are true (see **Morgan Crucible Co. Plc v. Hill Samuel and Co. Ltd [1991] Ch. 295** per Slade LJ)...The rules do not, however, contain any express ban on adducing evidence in support.....

A claim may be struck out if it sets out no facts indicating what the claim is about..., or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant....

Where the argument involves a substantial point of law which does not admit of a plain and obvious answer, it may be best not to have it determined on a striking-out application... Where the law is in a state of development, it will usually be inappropriate to decide questions...on hypothetical facts.”. (Paras.33.7 to 33.9).

[15] Sykes J. struck out a claim against a defendant in **Sebol Limited v. Selective Homes & Properties Limited et al, Sup. Ct. Ja., Suit No.HCV 2526 of 2004, decision dated 09 October 2007**. In that case, although the claim for

rectification of a mortgage was known to the law, the grounds were not reasonable because the defendant had assigned its rights under the mortgage to a third party. Sykes J. also observed that the Jamaica equivalent of Rule 26.3(3)(b):

“...does not speak of a reasonable claim. It speaks of reasonable grounds for bringing the claim. It would seem to me that simply as a matter of syntax the instances in which a claim can be struck out against a defendant are wider than under the old rules. The rule contemplates that the claim itself may be reasonable, that is to say, it is not frivolous, unknown to law or vexatious, but the grounds for bringing it may not be reasonable. Clearly the greater includes the lesser. Thus if the claim pleaded is unknown to law then obviously there can be no reasonable grounds for bringing the claim. It does not necessarily follow, however, that merely because the claim is known to the law the grounds for bringing it are reasonable. The rule focuses on the grounds for bringing the claim and not on just whether the pleadings disclose a reasonable cause of action.”. (Para.24).

[16] The decision of Sykes J. was upheld by the Jamaica Court of Appeal. (**Sup. Ct. Civ.Ap. No.115/2007, decision dated 12 December 2008**). It is noteworthy that the learned Court of Appeal referred to authorities which demonstrated that, before a claim is struck out, “it must clearly be obvious that no reasonable cause of action is disclosed”. (Para.27). The Jamaica Court of Appeal also endorsed Harris J.A. who in another case from Jamaica opined that:

“The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principle as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases.”. (See **S&T Distributors Limited et al, v. CIBC Jamaica Limited et al, SCCA 112/04, decision dated 31 July 2007**; and **Sebol**, supra, C.A. judgment at para.26).

[17] Another guideline which this Court should bear in mind is the overriding objective as expressed in Rule 1.1 of the CPR. Conteh C.J. explained it in this way:

“It is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding objective of the rules and its powers of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides; why put the defendant through the travail of a full blown trial when at the end, because of some inherent defect in the claim it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?”. (**Belize Telemedia Ltd. et al v. Magistrate Usher et al, (2008) 75 WIR 138** at para. [20]).

The Factual Matrix

[18] What then are the facts relied on by Mr. Cumberbatch? To date he has filed five affidavits in this matter. A group of three was filed on 19 June 2013,

and the other two filed on 21 June 2013 and 11 March 2014. The first of the triad, (“the Affidavit”), consists of forty-three paragraphs and six exhibits. The Affidavit provides the factual matrix and the allegations central to Mr. Cumberbatch’s claim for judicial review.

[19] The Affidavit informs that Mr. Cumberbatch joined the Force around March 1970. At the time of filing his claim, his substantive post was that of Assistant Commissioner of Police. However, he was also acting in the post of DCP, consequent upon the retirement of Mr. Bertie Hinds from that post. The post of DCP is immediately senior to that of Assistant Commissioner, and Mr. Cumberbatch was one of three appointed Assistant Commissioners. He was also the most senior of the Assistant Commissioners.

[20] The vacant post of DCP was advertised in December 2012. Mr. Cumberbatch and eight other persons applied for this post. Exhibits SC 3A to SC3E refer to a number of his acting stints in the post of DCP from 01 November 2004 to 03 January 2005; 15 August 2005 – 16 September 2005; 26 October 2005 to 06 December 2005; 21 July 2008 to 19 August 2008; 15 November 2010 to 15 December 2010; and 26 September 2012 to 31 December 2012.

[21] The abovementioned acting appointments occurred when Mr. Bertie Hinds was either on vacation leave, or was appointed to act as Commissioner. The

last tranche of Mr. Cumberbatch's acting appointments arose when Mr. Hinds proceeded on pre-retirement leave with effect from 26 September 2012. In fact, Mr. Cumberbatch alleges that he acted in the post of DCP "consistently over a long period of time". (Para.29 of the Affidavit).

[22] Mr. Cumberbatch was notified that his interview was scheduled for 10:00 a.m. on 21 June 2013. Thereafter, a series of events occurred that caused him to doubt that he would receive a fair hearing at his interview, or that a fair process would be observed in the selection and appointment of an individual to fill the vacant post of DCP.

[23] On 17 June 2013, four days before his interview, Mr. Cumberbatch was informed that Mr. Dottin was sent on administrative leave, and would be retired in the public interest. As a result Mr. Dottin was unlikely to be a member of the interview panel. The Court will refer later to an affidavit filed by the PSC's Chairman, which details the background to the advertising of the post of DCP; the selection of candidates to be interviewed; and the composition of the interview panel prior to Mr. Dottin's departure. (See paras. [31] to [35] *infra*).

[24] Mr. Tyrone Gittens, the most junior of the Assistant Commissioners, replaced Mr. Dottin as the acting Commissioner. Mr. Cumberbatch considered this to be a reversal of "earlier stated practices of respect for

seniority and experience” (para.31 of the Affidavit). Also of interest to Mr. Cumberbatch was the fact that as an Assistant Commissioner, Mr. Gittens had not applied for the post of DCP.

[25] In his affidavit of 21 June 2013, Mr. Cumberbatch confirmed that some of the interviews for the post of DCP were conducted on that day, and that Mr. Griffith was a member of the interview panel. Mr. Cumberbatch was concerned about Mr. Griffith’s presence on the interview panel. He referred to an incident in March 2013, when the PSC declined Mr. Dottin’s recommendation for Mr. Cumberbatch to act as Commissioner, while Mr. Dottin was on approved leave.

[26] Exhibit SC3F of the Affidavit reveals the reason why the acting appointment was not approved. This Exhibit is a memorandum written by the Chief Personnel Officer. The memorandum states that:

“I am directed by the [PSC] to advise that the recommendation for [Mr. Cumberbatch] Assistant Commissioner, acting [DCP] to act in the post of Commissioner.... with effect from 2013-03-18 to 2013-04-19 consequent upon the grant of vacation leave to Mr. Darwin Dottin, has not been approved.

2. The Commission was of the opinion that an Officer who was not an appointed [DCP] should not be in charge of the [Force] for an extended period at this time”.

- [27] Mr. Gittens, the person eventually appointed by the PSC to act as Commissioner, was never appointed as a DCP. Therefore, a reasonable inference to be drawn is that the PSC reversed its position to enable the appointment of Mr. Griffith as the acting Commissioner.
- [28] On 21 June 2013, the interview panel also included members of the PSC and Mr. Charles Blades, a retired DCP. Mr. Cumberbatch was further disquieted by the presence of the PSC Chairman on the interview panel. The Chairman was previously employed as a police officer, but held a rank “considerably inferior” to Mr. Cumberbatch when they served in the Force at the same time. It was anticipated that the Chairman was “in a position to exercise considerable influence in the process of the interview, selection and appointment of a candidate to the post of [DCP]” (para.34).
- [29] This confluence of circumstances confirmed to Mr. Cumberbatch that a process that should be governed by objectivity, impartiality and transparency, would be undermined. He feared either discrimination or the introduction of irrelevant considerations into the selection process. In his opinion, Mr. Dottin’s departure constituted a fundamental break in that process. (Paras.35-37 of the Affidavit).
- [30] Mr. Cumberbatch also concluded that the principles of natural justice had been breached; and that the entire process for the selection of a candidate for

the post of DCP was tainted by illegality and unfairness. (Para.38).

The Mayers Affidavit

- [31] The Chairman of the PSC filed an affidavit on 27 September 2013. This affidavit confirms the background to the process towards the interviewing of candidates for the post of DCP. Part of the process was a recommendation by Mr. Dottin, prior to his forced departure, that only four of the nine applicants be interviewed. Mr. Cumberbatch was included in this number, but not Mr. Griffith who had not applied. The Permanent Secretary in the Office of the Attorney-General did not agree with this recommendation. By a memorandum to the Chief Personnel Officer, dated 04 April 2013, the Permanent Secretary, recommended that all applicants be interviewed, “in view of the fact that there are no statutory qualifications attaching to the post”. The PSC met on 20 March 2013, and agreed to interview applicants on 10 May 2013.
- [32] The Court notes that the May interviews were scheduled to take place just over a month before Mr. Dottin was sent on administrative leave. The interviews did not take place as originally scheduled. At a PSC meeting, held on 29 May 2013, the interviews of seven of the original nine applicants were rescheduled to 21 June 2013.
- [33] Again the Court notes that interviews would now occur after Mr. Dottin was

placed on administrative leave. In fact, Mr. Cumberbatch believed that Mr. Dottin's absence would "seriously affect the fair process that would be due in the interview selection and appointment of a candidate into the post of [DCP]". (See para.30 of the Affidavit).

[34] The Chairman's affidavit also revealed that, prior to his exit, Mr. Dottin was invited by the Chief Personnel Officer to recommend the composition of the selection panel. Mr. Dottin recommended three persons, the Permanent Secretary, the Commissioner, and a private sector representative. Therefore, when the interviews began, the interview panel comprised a larger panel than recommended by Mr. Dottin. In fact, Mr. Dottin's recommendation did not contemplate the inclusion of members of the PSC. The Permanent Secretary supported Mr. Dottin's recommendation for the composition of the interview panel.

[35] The Chairman contended, however, that the PSC acted in accordance with relevant legislative guidelines. He asserted that Mr. Cumberbatch was never treated unfairly or prejudiced by the PSC. The Chairman rejected any inference that he personally would have acted unfairly, or in a discriminatory manner, towards Mr. Cumberbatch, as a result of serving previously in the Force as Mr. Cumberbatch's junior.

Application of Legal Principles

1. The Assumed Facts

[36] The foregoing is the factual background against which the claim for judicial review is formulated. And, according to the legal principles enunciated earlier, the Court must assume the facts, as alleged by Mr. Cumberbatch, to be true. (See **Morgan v. Hill**, supra at para.[14].

[37] The Virgin Islands Court of Appeal in **Gitco Global** (supra at para. [13]), took guidance from Slade L.J. in **Morgan v. Hill** where that learned Lord Justice opined that:

“On an application to strike out a pleading.....no evidence is admissible and since it is only the pleading itself which is being examined, the court is required to assume that each and every one of the facts pleaded (unless manifestly incapable of proof) is true and will be capable of proof at the trial. In some instances the court may regard the assumption as somewhat unrealistic, but it nevertheless has to be made”. ([1991] Ch 295, at 314A-B).

[38] The Court was further guided by the caution expressed in **Gitco Global** that:

“Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny”. (Para.[13] of judgment, quoting from **Bank of Credit and Commerce International (Overseas) Ltd (in liq.) & Ors. v. Price Waterhouse and another [1988] B.C.C. 617 at 620**).

- [39] All the personal facts provided by Mr. Cumberbatch about his rank, seniority, length of service and experience are assumed to be true. So too the facts about Mr. Dottin's involvement in the selection process; his recommendations for the interview panel; his removal from performing the duties of his substantive post of Commissioner; and, consequentially, the discontinuance of his involvement in the selection process.
- [40] Other assumed facts are the PSC's refusal to permit Mr. Cumberbatch to act as Commissioner, and the reasons advanced therefore. The Court also accepts, as a reasonable inference, that the PSC changed its position in order to allow Mr. Griffith to act as Commissioner. Having benefitted from the PSC's change in policy, Mr. Griffith became a member of the panel to interview Mr. Cumberbatch. It is also an assumed fact that Mr. Griffith is junior in rank to Mr. Cumberbatch, and that Mr. Griffith never applied for the post of DCP.
- [41] Additional assumptions are that the panel selected to interview Mr. Cumberbatch differed from that suggested by Mr. Dottin. Members of the PSC were included in the interview panel. Amongst the PSC interviewers was its Chairman, Mr. Mayers, who at one time was a member of the Force, but junior to Mr. Cumberbatch.
- [42] Any assumptions or reasonable inferences, in relation to Mr. Cumberbatch's

assertion of a legitimate expectation, will be addressed later in this judgment. [Infra at paras.[84] to [94]).

[43] A pertinent observation is that neither of the two affidavits, sworn by Mr. Mayers, refute the facts and conclusions mentioned at paragraphs [39] to [41] above. These affidavits are silent on facts relating either to Mr. Dottin's unilateral separation from the Force; or to the allegations of a particular policy position in relation to Mr. Cumberbatch, with a change in that policy to facilitate the acting appointment of Mr. Griffith.

[44] The Mayers affidavit of 27 September 2013, simply proffers that the interview panel was lawfully constituted; that the PSC followed the mandated legal principles; that Mr. Mayers' service in the Force would not affect his deliberations on the interview panel negatively; and that Mr. Cumberbatch had no reason to believe that the process of selecting and appointing a DCP would not be fair, impartial and according to law in relation to him.

2. Finding a Legally Recognisable Claim

[45] The next step for the Court is a determination of whether the particulars filed on behalf of Mr. Cumberbatch disclose a legally recognisable claim. Jones J. described this exercise as requiring a court to perform:

“10.....a delicate balancing act so as to determine whether the facts presented establish a complete

cause of action but are merely lacking sufficient particulars to allow a Defendant to properly defend the case or whether the lack of particularity has resulted in the Claimant failing to establish a complete cause of action.

11....what is required is a consideration of whether the facts pleaded by the Claimant establish a cause of action with respect to the various claims. If a cause of action is established but the claim lacks particularity, then an order for further and better particulars is usually appropriate. If, however, no cause of action is established or the claim is groundless, in the sense of having no merit or being doomed to fail in any event, then particulars of the pleading will not assist and an order for further and better particulars is inappropriate”. (See **Export – Import Bank of Trinidad & Tobago v. Water Works Limited and others, CV No. 2010-03594, decision dated 01 May 2012**).

[46] Cap.109B is the statutory framework for judicial review applications.

Section 3(1) of that legislation provides that:

“An application to the Court for relief against an administrative act or omission may be made by way of an application for judicial review in accordance with this Act and with rules of court.”.

Judicial review is a legally recognisable basis for an action in Barbados. But is this particular claim sustainable, given the statutory requirements, and the facts and inferences relied on by Mr. Cumberbatch?

[47] An administrative act or omission is defined in section 2 of Cap.109B as:

“...an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment;”.

[48] An “act” is further defined as including:

“any decision, determination, advice or recommendation made under a power or duty conferred or imposed by the Constitution or by any enactment.”.

[49] Mr. Cumberbatch is challenging the actions of the COP and the PSC in conducting the process for selecting and appointing an individual to fill the vacant post of DCP. The COP is a public official with administrative responsibility for the Force. And the PSC is an authority of the Government of Barbados. Therefore, both the COP and the PSC constitute authorities subject to the judicial review of their administrative acts or omissions, arising out of the performance of statutory duties or functions.

[50] Mr. Cumberbatch provided various grounds supporting his claim. The Further Amended Statement offers twelve grounds in support of the claim.

These grounds are that:

- (a) the acts of the PSC and the Third Respondent/Defendant (“the A-G”), either jointly or severally, were unauthorised or contrary to law;
- (b) the PSC and the A-G exceeded jurisdiction;
- (c) the PSC and the A-G failed to satisfy or observe conditions or pro-

- cedures required by law;
- (d) the PSC and the A-G breached the principles of natural justice;
 - (e) the PSC and the A-G acted unreasonably, irregularly or improperly in exercising discretions;
 - (f) the PSC and the A-G abused power;
 - (g) the PSC and the A-G acted in bad faith, for improper purposes or upon irrelevant considerations;
 - (h) the PSC acted on instructions from an unauthorised person;
 - (i) the PSC and the A-G acted in conflict with the policy of a statute;
 - (j) the PSC and the A-G acted in error of law, whether or not on the face of the record;
 - (k) the PSC and the A-G acted in the absence of evidence on which a finding or assumption of fact could reasonably be based; and
 - (l) the PSC acted in breach of or omitted to perform a duty.

[51] What is immediately apparent is that there are no allegations of unlawful acts or omissions on the part of the COP, in relation to the exercise of any of his statutory powers or duties. Rather, the complaint is against the actions of the PSC and the A-G. Additionally, these grounds give no specifics in relation to the acts or omissions alleged against either the PSC or the A-G. Specific facts were found in the affidavits filed by Mr. Cumberbatch, but only about alleged unlawful decisions made by the PSC in relation to the composition of the interview panel.

[52] Coincidentally, there is another application before the Court to strike out the A-G as a defendant to the claim. But, assuming for the moment that the A-G, as a Minister of Government, is a proper party, the Court did not identify any specific facts alleging unlawful acts or omissions by the A-G, that would explain the inclusion of the A-G in the grounds supporting the claim.

[53] The consistent thread in Mr. Cumberbatch's claim is his deep concern about the fairness of the decisions of the PSC taken in the exercise of powers conferred on it by the First Schedule to the Public Service Act, Cap.29. The First Schedule is the Recruitment and Employment Code ("the Code"). Indeed, portions of the Affidavit echo principles enunciated in the Code. For example, the Affidavit refers to objectivity, impartiality and transparency. These are concepts appearing in Clause 3 of the Code.

[54] Clause 3 of the Code provides that:

“(1) Every individual to be appointed to an office in the Public Service shall be selected on merit, but where the nature of the work so requires, consideration shall be given to seniority and experience.

(2) The method of selection shall be governed by objectivity, impartiality and transparency”.

[55] Clause 7 of the Code further provides that:

“Selection panels established by recruiting authorities shall comprise persons

- (a)...
- (b)...
- (c) who are impartial”.

[56] The Code then is relevant to this claim. The Chairman of the PSC acknowledged that the Code governs the procedure for selection to posts in the public service. (See para. 14 of the affidavit filed on 27 September 2013). The Code is, therefore, the enactment under which the PSC exercised its powers and duties in relation to the recruitment process. The Code is an enactment within the section 2 definition of an act or omission.

[57] The Code expressly incorporates principles of natural justice. Clause 7(c) refers to the second limb of natural justice, that is, the requirement of impartiality and the rule against bias. The rules of natural justice seek to ensure fairness in the procedures and decision making of inferior tribunals. Indeed, Clause 3(2) of the Code calls for fairness in the selection process.

[58] In their book “**Judicial Review Principles and Procedures**”, Jonathan Auburn et al comment that:

“Many of the requirements of fairness significantly predate the development of the modern law of judicial review. They were developed by the courts across a range of cases, often by reference to the nature of the decision being made and the interest at stake. The new extensive range of procedural steps that fairness potentially requires in a particular case is supplemented by two main sources: in some cases legislation provides for the decision maker to follow specific procedures.....In addition,

in some cases an individual might have a legitimate expectation arising out of a representation or an interest that he or she may have in a benefit, that a public body will adopt a particular procedure”. (Oxford University Press, 2013, para.5.03).

[59] The Court is not persuaded that Mr. Mayers’ previous employment in the Force, as an officer junior to Mr. Cumberbatch, is sufficient, without more, to raise the spectre of bias against Mr. Mayers and the interview panel. Absent from the pleadings is any allegation that while Mr. Mayers was a member of the Force, there was any negative interaction between himself and Mr. Cumberbatch, or any interaction at all.

[60] Neither is Mr. Dottin’s removal from the process germane to the allegations of bias. Of limited relevance is Mr. Dottin’s absence, prior to his removal, which led the PSC to consider his recommendation for Mr. Cumberbatch to act as Commissioner. This is the recommendation that the PSC declined to accept, because Mr. Cumberbatch was not appointed as DCP.

[61] Mr. Mayers and other members of the interview panel, are also members of a PSC that refused to appoint Mr. Cumberbatch to act as Commissioner. And in light of a reasonable inference that Mr. Griffith’s appointment to act as Commissioner was accommodated by a reversal of the policy applied by the PSC to Mr. Cumberbatch, there is before the Court a *primâ facie* evidential basis to support the allegation of biased individuals on the inter-

view panel.

[62] The existence of actual bias or a real likelihood of bias, on the part of members of the interview panel, would be in breach of Clauses 3(2) and 7 of the Code. Auburn et al also noted that one of the factors likely to affect what fairness requires, in a particular case, would include “...the history and nature of any previous course of dealing between the decision maker and the individual”. (Para.5.27). Thus, previous dealings between the PSC and Mr. Cumberbatch may be relevant to the judicial review application before the Court.

[63] The Court finds that Mr. Cumberbatch has made out a reasonably recognizable claim for judicial review, pursuant to a breach of natural justice in relation to the composition of the interview panel. And the Court is reminded by Auburn et al that “What fairness requires in a particular case is a question of law on which the court is the final arbiter”. (Para.5.29).

[64] There is no stratum of assumed facts to support a direct pecuniary interest in the outcome of the interview process by any of the members of the interview panel. Although actual bias is difficult to prove, a court hearing the substantive matter may enquire whether the PSC, having reversed itself so as to allow Mr. Griffith to act as Commissioner, has a direct interest that would be prejudicial to Mr. Cumberbatch, if its members participated in the inter-

view process.

[65] That court may also enquire whether Mr. Griffith, as the beneficiary of the PSC's reversal of policy, has a direct material and personal interest in the outcome of the interview process, that would automatically disqualify him from membership of the interview panel. (See **O'Reilly v. Mackman [1983] 2 AC 237, 276E; R v. Gough [1993] AC 646, 661G; Laker Airways Inc. v. FLS, Aerospace Ltd [2000] 1 WLR 113, 117 H**).

[66] Should the evidence fall short of establishing actual bias on the part of either the PSC members on the interview panel, or on the part of Mr. Griffith, the matter would not end there. A court must also consider whether the circumstances as alleged (and if proved), would lead a fair minded and informed observer to conclude that there was a real possibility that members of the interview panel were biased. Would the surrounding circumstances give rise to a real possibility of a lack of impartiality? This assessment has to be made in relation to both Mr. Griffith and any member of the PSC on the interview panel. (See **Porter v. Magill [2002] AC 357** at [103], per Lord Hope).

Prematurity

[67] Counsel for the PSC urged the Court to dismiss the claim because there was no decision by the PSC in relation to the selection or appointment of a DCP.

In other words, Mr. Cumberbatch should not be heard by this Court if his claim is found to be premature.

[68] Counsel for the PSC tendered the first set of written submissions in support of the application on 07 March 2014. In those submissions reliance was placed on paragraphs [2] to [26] of submissions filed on 27 February 2014, in anticipation of a trial on the pleadings as filed. In those paragraphs counsel argued that:

“[15] ...the [PSC] asserts that no decision, determination, advice or recommendation has been made in relation to [Mr.] Cumberbatch. It follows that the [PSC] further asserts that no interests of [Mr. Cumberbatch] are or have been adversely affected.

[16] It is submitted that at its heart, this matter essentially constitutes a premature application for judicial review. A careful perusal of [Mr. Cumberbatch’s] pleadings reveal that they do not deal with anything which had occurred, but rather, anticipate in a negative way, what may occur”.

[69] The Court agrees that no decision was taken by the PSC in relation to the selection or appointment of an individual to the post of DCP. However, certain decisions were taken by the PSC during the process. And one of those decisions settled the composition of the interview panel. There is before the Court *primâ facie* evidence that the composition of the panel is in breach of a statutory imperative of the Code and a rule of natural justice.

The real issue then is whether Mr. Cumberbatch should have awaited the completion of the entire process before filing a judicial review application.

[70] In “**Judicial Review Handbook**”, (5th ed., 2008), Michel Fordham Q.C. explains that:

“Judicial review may be characterised as “too soon”. The Court may regard it inappropriate to rule on a grievance which is not yet “ripe” for review, and which may turn out not to have practical significance”. (Para.4.7).

[71] Auburn et al also opined that:

“A court is unlikely to grant permission to apply for judicial review if a claim is brought prematurely. The case law on prematurity is not particularly well developed and it is difficult to discern any general principles as to the approach that the courts will adopt in this context. However, issues as to prematurity generally arise in the context of challenges to two types of decisions: first where a claimant seeks to challenge a procedural or interlocutory decision by a tribunal or an analogous public body and, secondly, where a claimant seeks to challenge a decision by a public body to embark upon a particular process or course of conduct”. (Para. 26.21).

[72] Counsel for the PSC referred to **Maraj v. Board of Inland Revenue (Suit No.4 of 1989, T&T C.A., decision dated 20 June 1996)**. In that case, the appellants sought judicial review in circumstances where the Board of Inland Revenue wrote to them indicating an intention to further assess the appellants for the years 1980-84. De la Bastide CJ held that the letter was

not an assessment, but an indication of a proposed assessment. The appellants were invited to dialogue with the Board in order to persuade the Board not to pursue the assessment. Therefore, they should have waited until an assessment was made and then challenged that assessment. Having not done so, the application for judicial review was premature.

[73] There was an interesting aspect to the **Maraj** decision that counsel for the PSC did not take mention. There was evidence that one of the individuals working on behalf of the Board had been involved in a bitter property dispute with the appellants. That individual was initially involved in the process leading up to the proposed assessment. As a result of complaints by the appellants to the Board, the individual was removed from any involvement in the investigation of the tax liability of the appellants.

[74] De la Bastide CJ agreed that the employee should have refrained from participating in the investigation. However, the learned CJ found that “his failure to do so does not in the circumstances of this case provide any basis for granting relief by way of judicial review”. What is of interest to this Court is that the learned CJ, albeit obiter, conceded that there may be situations where the decisions of Board employees are vitiated because of bias on their part. He opined that:

“...one can envisage, for instance, a situation where a decision to impose penalty interest, which

involves the exercise of a discretion, might be struck down on the ground of bias.”

- [75] Admittedly, in **Maraj** there was no evidence that any of the critical decisions were made by the impugned employee. But the judgment conceded that the decisions of an inferior tribunal may be vitiated on the basis of bias. And further, there is the suggestion that if the evidence had indicated that the employee was actively involved when critical decisions were made about the appellants’ tax liability, the appellants would have succeeded in their application for judicial review. If such circumstances had existed, it is questionable whether the appellants’ application would have been stymied by the defendant’s plea of prematurity.
- [76] Another case referred to on behalf of the PSC is **Macintosh v. The Service Commission (Suit No. CV03410 of 2006, T&T H.Ct., decision dated 27 February, 2007)**. In that case the claimant sought judicial review of a Commission’s failure to promote him to the rank of Inspector. Prior to filing his action, the claimant had made representations to the Commission, and the Commission was awaiting information before making a decision on the representations.
- [77] Pemberton J. dismissed the application for judicial review as being premature. The learned Judge found that the claimant:

“...chose not to invoke the Court’s aid but to follow the procedures in the Regulations. That process is still in train and to my mind it is clear that no decision has been made yet concerning [the claimant’s] representations. Since there is no decision and there is no evidence of exceptional circumstances warranting my intervention, I do not see how this application for leave can be favourably considered”. (Para. [13])

[78] Unlike **Macintosh**, the assumed facts in the case at bar indicate a decision to constitute an interview panel, and a decision about the composition of that panel. These decisions were made under the statutory authority of the Code. This Court is of the view that an alleged breach of a mandatory provision of the Code, which invokes a rule of natural justice, must be an exceptional circumstance.

[79] Fordham Q.C (supra at para.[70]), refers to a 1995 unreported case in which it was held that if “the course [the defendants] are suggesting is fundamentally unlawful, the sooner that is decided the better”. (Para.4.7.1 citing **R v. British Advertising Clearance Centre, ex p Swiftcall Ltd., 16 November 1995**).

[80] There are facts before this Court alleging that the PSC is acting in breach of the statutory directives of the Code. This is in essence an allegation that the course the PSC has chosen is fundamentally flawed. Therefore the issues of actual or apparent bias should be determined before the interview process is

permitted to continue.

[81] Auburn et al also opine that:

“There are good reasons why the Court should generally not grant permission to apply for judicial review in cases concerning interlocutory or procedural decisions: challenges to such decisions are likely to lead to delay and increased costs, may strain relationships between the parties and the decision-making body, and may eventually turn out to be unnecessary. Conversely, unlawful interlocutory and procedural decisions might fundamentally undermine the fairness of a procedure or the lawfulness of the eventual substantive decision and a failure to correct them at an early stage might mean that the time taken by and costs incurred in relation to the subsequent process are wasted”. (Para.26.22).

[82] The Court is of the view that Mr. Cumberbatch should not be forced to await the outcome of an interview process that may be tainted by a biased interview panel. To await that outcome may well expose him to submissions that he waived any objections to the panel, and/or that the Court should grant him no remedies because of his delay. As Toulson J. observed:

“It cannot, however, be in accordance with the spirit of the [European] Convention or the common law that the court should be powerless to prevent a violation of a right to a fair procedure, merely because of the existence of a later way of remedying the consequences. A stitch in time may save nine”. (See **R (Dr S) v. Knowsley NHS Primary Care Trust [2006] EWHC 26 (Admin)** at para.68).

[83] Surely, the hands of this Court cannot be tied in the face of constitutional and other statutory provisions that legislate Mr. Cumberbatch's right to procedural fairness. The Court is unable to say that Mr. Cumberbatch's claim is doomed to fail because it is premature. And a proven breach of the relevant statutory provision would invalidate any resulting future transaction, such as the selection and appointment of a DCP. (See **Noble v. Inner London Education Authority (1983) 82LGR 291, CA**).

Legitimate Expectation

[84] Mr. Cumberbatch raised the issue of a legitimate expectation in his pleadings. Paragraph 29 of the Affidavit states that:

“The foregoing events nevertheless established my second highest seniority within the [Force] and I **legitimately expected** that base (sic) on my qualifications, seniority and experience that I would receive fair consideration for appointment to the post of [DCP], altogether having acted in the post consistently over a long period of time”.

[85] And, of the remaining remedies sought, Mr. Cumberbatch has asked the Court to grant a Declaration that he has:

“...a **legitimate expectation** that he would be selected, recommended and appointed to the post of [DCP] based on the practice where he has acted in that same post consistently and repeatedly since on or about 2004”. (Para.[8], supra).

[86] According to Auburn et al:

“A legitimate expectation may arise where a public body has a discretionary power and it represents that it will exercise that power in a particular way. Such representations may be express, in the form of an explicit promise or statement, or they may be implicit, in the form of, for example, a consistent past practice.....it is now recognised that where a legitimate expectation arises, the public body will be required to give effect to it unless circumstances entitle the public body to resile from it”. (Para.19.02).

[87] Auburn et al go on to define the two broad categories of legitimate expectation in this way:

“Legitimate expectations are broadly categorised as either procedural legitimate expectations, where the expectation is that the public body will follow a particular procedure before it takes a decision (eg giving notice, allowing representations to be made, affording a hearing, or engaging in consultation), or substantive legitimate expectation, where the expectation is that the public body will reach a particular decision as a matter of substance (e.g to grant a licence or to keep open a residential care home)”. (Para.19.03).

[88] It is unlikely that the pleadings are restricted to a legitimate expectation of procedural fairness. There is no need for Mr. Cumberbatch to resort to this aspect of legitimate expectation, because the Code assures him a statutory right to procedural fairness. Therefore, his pleadings are understood in the context of a substantive legitimate expectation.

[89] The pleadings highlight a consistent practice of repeatedly acting in the post

of DCP over a period of approximately nine years. This allegation is assumed to be an accurate factual account. And the reasonable inference is that the PSC instituted and condoned this practice. There is no response, in the affidavits of Mr. Mayers, to the allegation of an existing practice.

[90] However, the Court is being asked not only to declare that there was a legitimate expectation based on the practice, but also to declare that as a result of the practice, Mr. Cumberbatch was the “heir apparent” to the post of DCP. In this regard, another of the remedies craved by Mr. Cumberbatch is relevant to this discussion. He also seeks a Declaration that “he is qualified and so entitled to be appointed to the post of [DCP] in the [Force]” (See para.[8], supra).

[91] Even if the Court found that Mr. Cumberbatch’s pleadings contain the bare bones of a legally recognisable claim, his counsel disavowed any thought or submission that Mr. Cumberbatch was the only individual who could be appointed as the DCP. On 15 September 2014, counsel informed the Court that as the Code guaranteed an interview process, he was unable to argue that Mr. Cumberbatch was the only one who should be appointed as DCP.

[92] Counsel contended, however, that it was open to Mr. Cumberbatch to argue that he is qualified to be considered for the post, and that he has a legitimate expectation to be most favourably considered. The fact that Mr. Cumber-

batch was selected by the PSC to be interviewed, implies that PSC already considers him to be qualified. Therefore, a Declaration to that effect appears to be unnecessary.

[93] The Court concurs with the submission of counsel for the PSC that:

“...the nuanced construction counsel for [Mr. Cumberbatch] sought to apply to the term “*entitled*” by suggesting that in the context of this case it means entitled to “*most favourable consideration*” is specious at best”. (Para. [16] of the Written Submissions filed 30 September 2014).

[94] It is the view of this Court, that the submissions made by Mr. Cumberbatch’s counsel effectively removed two of the remaining remedies sought from the ambit of his pleadings. This view is consistent with counsel’s abandonment of other similarly worded remedies. (See paragraphs (h) to (l) of the Further Amended Fixed Date Claim Form).

[95] The request for Declarations, along the lines of paragraphs (f) and (g) of the Further Amended Fixed Date Claim Form, are no longer before the Court. It follows that there is no base on which to construct the claim of a legitimate expectation, as drafted in paragraph 29 of the Affidavit.

[96] Section 5(3) of Cap. 109B permits a Court to grant orders additional to any orders requested by a claimant. Therefore, the Court does not propose to strike out the claim of a legitimate expectation although it is not supported by a request for an appropriate remedy. This matter should be heard on its

merits. The Court will not, however, speculate about the evidence that may be adduced to give flesh to a legitimate expectation, carved out of the bare bones of a consistent past practice of permitting Mr. Cumberbatch to act as DCP.

Disposal

[97] The application of the PSC, filed on 07 March 2014, is hereby dismissed. Mr. Cumberbatch will have his costs to be agreed or assessed.

Sonia L. Richards
Judge of the High Court