

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2016/0219

IN THE MATTER OF CHAPTER 10 OF THE SAINT VINCENT AND THE GRENADINES CONSTITUTION
ORDER OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION (2009)

AND

IN THE MATTER OF PART 2 OF THE PUBLIC SERVICE COMMISSION REGULATIONS TO CAP 10
THE SAINT VINCENT AND THE GRENADINES CONSTITUTION ORDER OF THE LAWS OF SAINT
VINCENT AND THE GRENADINES REVISED EDITION (2009)

BETWEEN

PUBLIC SERVICE UNION

of Mackie's Hill

CLAIMANT

AND

PUBLIC SERVICE COMMISSION

DEFENDANT

Appearances:

Mr. Joseph Delves of counsel for the claimant.

Honourable Attorney General Mr. Jaundy Martin, with him Mr. Duane Daniel and Ms. Shernell Hadaway for
the defendant.

2017: Nov. 14 & 21

2018: Feb. 2

Mar. 8 & 13

Jun. 26

Dec. 19

JUDGMENT

BACKGROUND

- [1] Henry, J.: This case pits the **Public Service Union ('PSU') against the Public Service Commission ('PSC')**. The PSU claims to represent the interests of public officers employed by the Government of Saint Vincent and the Grenadines while the PSC has responsibility for appointing and promoting civil servants to the various positions within the civil service in the State of Saint Vincent and the Grenadines.
- [2] The PSU complains that the PSC has failed to comply with three of the regulations¹ governing promotions within the service. It charged that in the discharge of its functions relative to promotion under regulation 19, the PSC has acted without due regard to the principles of fairness, transparency and objectivity outlined in the Regulations; and that there have been unreasonable delays and inconsistencies in the process. It alleged that the process employed is unlawful.
- [3] The PSU highlighted the experience of five public officers who all testified. They are Agnes Llewellyn, Kejo Peters, Joel Poyer, Elroy Boucher and Conroy Daniel (**'the five named officers'**). The PSU relied on their testimony and that of Kenroy Boucher Celena McDonald in support of its contention that the PSC operates in breach of the established procedures for promotion. The PSU seeks administrative orders including a declaration that the promotion process is unlawful; an order directing the PSC to implement and establish an efficient, transparent and effective performance appraisal and promotion regime in accordance with the regulations; and a declaration that the PSC has failed to comply with regulations 15, 19 and 20.
- [4] **The PSC's chairman and a number of present** and former senior public officers testified about the method used to recommend and make promotions generally and specifically in respect of certain promotions for which the five named officers were eligible to be considered. The PSC contended that it complies with the Regulations in the conduct of its mandate under the referenced Regulations. I have found that it did not do so in several instances which were highlighted,

¹The Public Service Regulations made pursuant to the Constitution, Cap. 10 of the Laws of Saint Vincent and the Grenadines, Revised Edition, 2009.

particularly in relation to promotions to posts within the respective Departments and Ministries where the five named officers were assigned at the relevant times.

ISSUE

[5] The issues are:

1. Whether the PSC has failed to comply with the procedures outlined in the PSC Regulations 15, 19 and 20 governing promotion?
2. Whether the PSC has failed to observe principles of fairness, transparency and objectivity in exercising its functions under regulation 19? and
3. To what relief, if any, is the PSU entitled?

ANALYSIS

Issue 1 - Has the PSC failed to comply with the procedures outlined in the PSC Regulations 15, 19 and 20 governing promotion?

[6] As part of the case management order on 21st February 2017 the parties were ordered to file and serve affidavits on or before 19th May 2017. The PSU was ordered to call no more than 8 witnesses while the PSC was directed to call no more than 8 witnesses. The latter orders were based on representation by the respective parties as to the number of witnesses they respectively intended to present at trial. The parties did not apply to increase the number of witnesses the order provided for this.

[7] In presenting its case, the PSC (through its witnesses) alluded on several occasions to the order directing it to limit its witnesses to 8. The PSC made no submissions regarding any part of the order. It is not clear if the PSC wished to imply that its ability to present its case was hampered by this limit. Suffice it to say that CPR Parts 25 and 26 impose an obligation on the court to actively manage cases and defines its case management powers.

[8] In doing so, the court must seek to give effect to the overriding objective to deal with cases justly. In this regard, legal practitioners and litigants have a corresponding duty to assist the court in furthering the overriding objective. The parties and counsel's duty includes making appropriate applications relating to the presentation of evidence. It seems to me that a **party's failure to make** such applications would in appropriate cases fall short of their duty.

- [9] The public service of Saint Vincent and the Grenadines employs about 5000 public officers. Seven of them testified on behalf of the PSU. Neither the PSU nor the PSC supplied any data to the court regarding the number of public officers who were employed during the periods under consideration.
- [10] At the end of the trial on 26th June 2018, the PSU requested two weeks to complete closing submissions. The court directed that the parties file and serve written submissions on or before July 11th 2018 and transmit electronic copies to the court office on even date. The PSU filed its written submissions. The PSC did not file any written submissions, offered no explanation for its failure and made no application for an extension of time to comply with the order.
- [11] In a decision dated 17th August 2017, the court ordered the PSC to disclose to the PSU on or before 21st August 2017 and 31st August, 2017 respectively, a number of documents or classes of documents in respect of the five officers under consideration. Specifically, the PSC was ordered to make specific disclosure of all reports of vacancies and related advertisements of vacancies which occurred within the respective Ministries and/or Departments; performance evaluations, letters of commendation and special reports in respect of work done by those officers; and special recommendations by the **Chief Personnel Officer** ('CPO'), Permanent Secretary ('PS') and/or head(s) of department ('HoD') in respect of positions filled in the departments and ministries to which the five officers were assigned, as prescribed respectively by regulation 19 (3) (e) and (f) and (i).
- [12] The PSC was granted an opportunity to submit to the court any requests for those documents to be redacted as a protective measure. They made no such application and they did not disclose the specified documents as ordered. **On March 8, 2018 when the PSC's Chairman started giving his testimony, he sought to tender into evidence 116 documents as the PSC's list of documents** and to amplify his testimony based on those documents. The learned Honourable Attorney General submitted then that the documents were not exhibited, but rather became part of the record through standard disclosure, as the case proceeded through case management. The PSU objected to the documents being tendered at that stage. The application to tender the documents was disallowed.
- [13] Based on the manner in which the PSU presented its case, one of its main contentions is that the

PSC is not guided by the criteria which must be considered when making promotions and does not comply with the regulations governing the promotion process. In its closing submissions, it argued that **the PSC 'does not adhere to** the guidance set out in Part 2 of the Regulations generally and in Regulation 19 in particular and that **there is no discernible policy which it follows.**² Regulation 19 deals with the principles of selection for promotion and will be examined at length.

[14] The PSU submitted further **that** 'in exercising its power and authority to promote public officers as mandated by the Constitution, the PSC ought to act with fairness, transparency, impartiality and **objectivity.**' Part 2 of the **regulations addresses 'Appointments, Promotions and Transfers'** and consists of regulations 1 through 27.

[15] The PSU contended that the PSC has functioned in violation of regulations 15, 18, 19, 20 and 27. It is to be noted that the PSU did not expressly plead any violation of regulations 18 and 27. Regulation 18 deals with advertisements of vacancies while regulation 27 provides for preparation of confidential annual reports. Regulation 19 mandates that the PSC considers the relevant annual reports during the promotions process. To the extent that **the PSU's allegation** of breach of the principles of fairness, transparency and objectivity by the PSC (in exercise of its functions under regulation 19) relate to non-compliance with regulations 18 and 27, the Court will examine the evidence and the law accordingly.

[16] The PSU contended that the five named officers were:-

- a) not assessed or evaluated for most and in some cases all of their tenure in the civil service;
- b) repeatedly bypassed for promotions; or not promoted at all; while in some cases, others less qualified than they were promoted; and/or
- c) were not notified of vacancies, invited to interviews or given an opportunity to compete for those positions.

[17] The PSU charged that contrary to the specified regulations, and principles of fairness, transparency and objectivity, the PSC:

²Claimant's submissions filed on 3rd July 2018, at para. 5.

- a) failed to maintain seniority lists;
- b) did not advertise vacancies within or outside the public service; and
- c) implemented no performance appraisal system except for persons on probation.

The kernel of its case is that the promotion policy and procedures applied by the PSC are non-compliant with the regulations and criteria, are unfair and unlawful.

[18] The PSU in its fixed date claim form and affidavits consistently advanced that the PSC as a rule, does not comply with the referenced regulations. It relied on the testimony of its witnesses and the **PSC's witnesses to establish its case. It must be** noted that the PSU did not frame its claim as a charge restricted to the individual experiences of the five named officers. Rather, it has invited the Court to find that based on the evidence, the Court should conclude that the experiences of those public officers is representative of the experience of public officers generally.

[19] By launching this claim, the PSU has invoked the **Court's power to grant an administrative order** in the form of declaratory relief against the PSC. Part 56 of the Civil Procedure **Rules 2000 ('CPR')** codifies the **Court's power to grant such relief. It** empowers the Court to grant such relief as appears to be justified by the facts.

[20] An application for an administrative order arises:

1. by way of judicial review;
2. for relief under the relevant Constitution;
3. for declaratory relief against a State, court, tribunal or other public body; or
4. to quash an order, scheme, certificate, plan³, or a decision or action by a minister or government department, where power is conferred on the court, by any legislation or the common law.⁴

[21] Pursuant to part 56.2 of the CPR a person, group of persons or that has an interest may bring a claim for an administrative order. The PSC contended that the five named officers were required to and

³Or amendment of approval of such plan.

⁴CPR 56.1(1).

have not sought permission from the PSC before this claim was filed. By an interlocutory decision made on 31st May 2017, the court ruled that the claimant in the instant matter is the PSU and not the PSC. It **dismissed the PSC's application for an order that** the court has no jurisdiction to entertain the claim for those reasons.

PSC's Implicit Contention – No Locus Standi

[22] Although the PSC filed no closing submissions, it appears from the affidavit of its Chairman, Mr. Williams that the PSC relies on those arguments again at this stage. In this regard, Mr. Williams deposed⁵:

- '8. **I have been Chairman of the** Public Service Commission since April 2001. I am very familiar with the Public Service Regulations. Persons seeking to bring an action, as the Claimant has proceeded to do, must do so with the requisite permission under the Civil Service Orders Rule 3.19. I cannot recall any situation where the permission of the Public Service Commission was sought by the Defendant or any other person to bring an action against the Commission.
9. The Defendant says that it has never been involved directly in any negotiations for a Collective Agreement with the Claimant. The practice is that over the years it is for the Government to select its negotiating terms to meet with the Trade Union concerned to come up with a Collective Agreement. In some other jurisdictions, the Public Service Commission may be directly involved in the collective bargaining process.' (bold added)

[23] In its earlier application the PSC set out 11 grounds on which it disputed **the court's jurisdiction to** determine this claim. They were:

1. The PSU did not adhere to certain prerequisites set out in the Civil Service **Orders** ('CSO'), which embodies the conditions of service of public officers and was published under the authority of the Cabinet;
2. Paragraph 3.19 of the CSO prohibits a public officer from instituting civil proceedings in connection with matters arising out of the discharge of his/her duties, against a Minister,

⁵Paragraphs 8 and 9 of his fourth affidavit filed on 19th May 2017.

Permanent Secretary or other public officer, without first obtaining permission from the PSC; **and the PSU failed to draw this procedure to the court's attention;**

3. The PSU has not shown that the referenced prerequisite was complied with, or that attempts were taken to comply with it or that it obtained a court order permitting it to represent the 5 named officers in the action;
4. The PSU failed in its duty to provide the court with complete information regarding whether it is in a position to or ought to represent the five named officers in a representative capacity;
5. The 5 named officers represented by the PSU in the instant claim failed to follow a mandatory procedure in the CSO for seeking redress, by writing first to the head of department, the permanent secretary and ultimately to the Chief Personnel Officer;
6. The PSU has brought this action before those compulsory procedures and necessary pre-conditions have been pursued by the five named officers; and they have failed to direct **the court's attention to such matters;**
7. **The PSU's alleged omissions constitute material non-disclosure** which is contrary to good practice and accordingly the claim is not properly before the court.

[24] On that occasion the PSC **challenged the Court's jurisdiction on two main grounds**, namely that the:-

1. Fixed Date Claim form was instituted without adherence to necessary pre-requisites in the CSO; and
2. the PSU failed in its duty to provide the Court with complete information with which to make a considered determination of whether the PSU ought to, or was in a position to act in a representative capacity in light of the CSO.

[25] The PSC argued then that the subject matter of the claim falls squarely under the ambit of the discharge of the duties of a public officer. It was contended by the PSC that while the PSU purports to act in a representative capacity on behalf of 5 named public servants it has failed to:

1. show that CSO paras. 3.19 or 11.1(1) were adhered to; that any attempts were made to adhere to it which were unsuccessful; or

2. serve the PSC with any court order which may have been issued permitting it to act in a representative capacity on behalf of the 5 named public officers.

[26] The PSC reasoned that those purported formalities are precursors to *locus standi* and being able to institute a claim. They argued that failure to adhere to them **is fatal to the PSU's recourse** to the Court for the reliefs claimed. The PSC submitted that it was prejudiced because it was not afforded an opportunity - before the claim was instituted - to address issues raised by the substantive public officers, to assess the legitimacy of any of the complaints mentioned and/or to make amends where justified or applicable. The PSC argued that such behaviour is contrary to good practice and that in the circumstances the matter is not properly before the court.

CSO 3.19

[27] CSO 3.19 provides:

'No steps may be taken by public officers to institute civil proceedings in any Court in connection with matters arising out of the discharge of their public duties, or against a Minister, a Permanent Secretary or other public officer, for anything done in the performance of his duty, unless, and until the sanction of the Service Commission has been obtained.'

[28] CSO 11.1 states:

'(1) An officer who wishes to make representations relating to his conditions of service or any other matter of a public nature must first address his head of Department or Permanent Secretary. If he is not satisfied by the reply he receives he may then write to the Chief Personnel Officer through his Head of Department and Permanent Secretary who must forward the communication without undue delay and advise the officer that this has been done. In every such case the Head of Department and Permanent Secretary should embody in a separate memorandum his own views on the representations made and forwarded (*sic*) this with the communication.'

[29] The PSU has pleaded that it wrote repeatedly to the PSC on behalf of the public servants who constitute its membership, complaining about problems with the promotions process. Its President Mr. Elroy Boucher testified that the letters have remained unanswered. **The PSC's Chairman Mr. Cecil Blazer Williams** conceded that the PSC has not responded to those letters. I find that the PSC has not. In those circumstances, it seems to me that the 5 named officers have invoked the procedures contemplated by CSO 3.19 and 11.1 respectively. Based on the evidence they sought to do so collectively through an agent of their choice.

[30] Contractual legal principles permit a person to authorize an agent to act on his or her behalf. While none of the parties addressed this concept frontally by way of submissions, it arises from the **testimony of the PSU's witnesses. The PSC has made no formal contradictory representations.** An agency relationship may be created where a person appoints an agent to act on his behalf in dealings with a third party.⁶ Such a relationship may arise expressly by deed or oral agreement: or through **ratification of the agent's acts by the principal.**⁷ It can also be implied from the **parties' conduct**⁸.

[31] The PSU and the five named officers have averred that an agency arrangement exists between them. The PSC does not dispute this. In the premises, **I conclude that notwithstanding the PSC's** stance that it has not entered any collective negotiations with the PSC, there is nothing precluding civil servants or the 5 named officers from appointing a collective bargaining agent. In fact, the Constitution contemplates that this be done. I therefore infer from the evidence that the PSU is the collective bargaining agent of choice of the body of civil servants including the five named officers.

[32] Having regard to all of the circumstances and the evidence, I find that the 5 named officers public officers through the PSU (and Mr. Joel Poyer on his own behalf as outlined below) sought unsuccessfully to engage the PSC in an attempt to address their concerns regarding the promotions process. I consider this to be a collective approach by which they sought to exhaust the

⁶ See *Halsbury's Laws of England* 4th Ed. Vol. 1, para. 701.

⁷ *Ibid.* at paras. 715, 756 and 759. See also *Markwick v Hardingham* (1880) 15 ChD. 339 and *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680 CA.

⁸ *Ibid.* at paras. 715.

reliefs available under the CSO, prior to embarking on civil proceedings. **The PSC's failure to** engage them does not erase those efforts.

[33] Rather, the **PSC's failure to respond to the PSU signalled its disinterest in seeking to address** the complaints made on behalf of the public officers. By doing so the PSC effectively closed the door to the body of public officers obtaining relief in an expedient, efficient and effective manner. The 5 named public officers were therefore entitled to conclude that they had invoked the referenced CSO provisions albeit in a collective and not expressly prescribed manner.

[34] Decisions by the courts and tribunals have emphasized the importance of not sacrificing substance and justice on the altar of procedure. Administrative bodies charged with regulatory and public administration functions would be well-advised to adopt this approach in carrying out their **functions. In my opinion, the PSC's apparent insistence on form over substance runs afoul of** the over-arching ideal of attainment of just outcomes.

[35] I remind myself that the CSO is a document which purportedly governs the contractual arrangement between the government as employer and the public officers as employees. I take into account that no evidence has been led which established that the five named public officers undertook to be bound by the CSO provisions. In addition, I considered the potential savings in resources, including time and finances which could be realized by both sides if representations on behalf of the large body of public servants are entertained by government agencies, from a single entity than through individual contact from each such officer.

[36] From a pure practical standpoint, the benefits are apparent. I hasten to add that no evidence was led by either side on such issues. The cost/benefit imperatives seem obvious and compelling. In any event, even if such an approach was not feasible, practical or available, the **PSU's** appointment as their agent by the five named officers is beyond dispute. The usual contractual law principles of agent and principal would be applicable as outlined earlier.

[37] The PSU's **submissions** that it was the claimant, and it was not the individual public officers who

were the claimants, found favour with the court. In this regard, the case of *Ventouris v Mountain*⁹ was considered and applied. So did its argument that public officers have a guaranteed fundamental constitutional right to belong to trade unions pursuant to section 11(1) of the Constitution. Its claim to be the constitutionally recognised entity entitled to represent public officers in accordance with section 77 of the Constitution was not refuted at the earlier hearing, nor was its contention that the public officers have a right to its representation. It is not clear if those assertions are being disputed by the PSC in this round.

[38] Regrettably, the PSC did not articulate any lingering issues it has with the manner in which the PSU initiated this claim in a representative capacity. The absence of such representations leaves the **court without a full appreciation of the PSC's position on this issue. In this regard, it is possible** that they have not all been addressed. It bears repeating that parties and their legal practitioners have a duty to fully state their case not only in pleadings but throughout the entire process including by way of submissions. In the event that Mr. William's **testimony was adduced to re-open the *locus standi*** issue, I find that the PSC has failed to establish any proper legal bases on which the court may legitimately rule that it has no jurisdiction to entertain the claim brought by the PSU. I therefore make no order striking out the claim for want of jurisdiction.

[39] For the foregoing reasons, I find that there is no merit to this veiled attack on the progression of the claim in the absence of approval from the PSC to the PSU or to the five named officers. The **PSC's masked refutation that it has recognized and engaged with the PSU as a bargaining agent** for civil servants does not absolve it from responding to the claim in the present formulation.

[40] In fact, the PSC would as a matter of contract law, be obliged to entertain representation by any other agent, lawfully constituted or appointed to represent a public officer, even if such agent is not a recognized trade union with which the PSC engaged in a Collective Agreement. For example, if a public officer appointed a lawyer or his or her spouse or parent to make representations to the PSC on her/his behalf, the PSC cannot refuse to engage with such person for such a spurious reason. I have concluded that there is no merit to this posture. For the avoidance of doubt, I do not ascribe to the position that a public officer can unilaterally opt out of a binding contract with his or her

⁹ [1990] 1 WLR 1370, QBD.

employer.

Adjudication of claims for administrative relief

[41] When adjudicating claims for administrative relief, the Court does not function in an appellate capacity. Instead, it is concerned among other things with satisfying itself that the conduct complained of, does not violate the legislative regime which confers the requisite authority. The Judicial Committee of the Privy Council and the Court of Appeal have repeatedly expounded on the **Court's role when it is called upon to evaluate the action of a Public Service Commission.**

[42] For example, in the case of *Harinath Ramoutar v Commissioner of Prisons and Public Service Commission* Lord Sumption pointed out:

'The courts do not sit as a court of appeal from the decisions of ... the Public Service Commission, and are in no way concerned with the merits of candidates for promotion or the micro-management of personnel decisions The courts are, however, concerned to ensure that public bodies carry out the functions that the relevant legislation assigns to them.'

[43] While this Court has not been asked to review any particular decision of the PSC in the case at bar, **it has been invited to review the pattern of conduct characterizing the PSC's operations in the exercise of its promotion function within the civil service of Saint Vincent and the Grenadines. Lord Sumption's dictum is therefore apt and will be applied.**

[44] The several allegations of breach levelled against the PSC relate to its reputed non-compliance with regulations. The Court is therefore required to examine the evidence to ascertain whether the PSU has made out a case that the PSC has generally failed to comply with the regulatory framework **governing the promotion's process within the service** or in the specific instances described by the public officers. I propose to examine each allegation of breach seriatim.

Reporting of vacancies

[45] **The PSU's first line of attack is that the PSC has not complied with regulation 15.** Regulation 15

prescribes the procedure for the reporting of vacancies. It states:-

'15. Reporting of vacancies

When a vacancy occurs, or it is known that a vacancy will occur, in any public office in any department or ministry, the Permanent Secretary shall report the fact to the Commission and-

- (a) if the Permanent Secretary recommends that the vacancy should be filled by the appointment or promotion of an officer serving in that department or ministry he will inform the Commission, and if the promotion of that officer would involve the supersession of any more senior officers in the ministry, he will also state the reasons for the supersession of each officer;
- (b) If the Permanent Secretary is unable to recommend the promotion of a serving officer he will inform the Commission of the names of the most senior officer in the particular grade or cadre from which the promotion would normally be made, stating his reasons why he does not consider the officers named to be suitable for promotion to the vacant post;
- (c) If the Permanent Secretary recommends that applications to fill the vacancy should be invited from serving officers or from both serving officers and the general public, he will attach to his report a draft advertisement setting out details of the vacant post and its duties and the qualifications for appointment;
- (d) If the Permanent Secretary is unable to recommend that the vacancy should be filled immediately, he will so inform the Commission and state his reason therefor.'

[46] This regulation prescribes the mechanism by which the PSC is notified of the existence of vacancies in the public service. The Permanent Secretaries play a leading role in this regard. The Government of Saint Vincent and the Grenadines is organized by Ministries. In accordance with sections 51 through 53 of the Constitution, a number of Ministries are constituted with responsibility for the different areas of **the government's business**. Every Ministry comprises two or more departments, each with specific functions. Each Ministry is headed administratively by a different PS in accordance with section 60 of the Constitution. The PS has administrative and supervisory authority for officers in his or her Ministry.

[47] The regulations confer on each PS certain responsibilities and obligations in relation to the public officers serving within his or her Ministry. The PS is required to report and make recommendations

to the PSC regarding the filling of vacancies and promotions within the Ministry. Under regulation 15, the PSC has a corresponding duty to ensure that the PS submits reports of vacancies. The **report must contain the PS's recommendation as to** whether or not the vacancy should be filled and if so, by what process.

- [48] Regulation 15 provides guidance to the relevant functionaries regarding what is to transpire within the public service when a post becomes vacant. The PS (within whose Ministry the vacancy arises) is obligated to report the vacancy to the PSC and recommend whether he considers that the post should be filled or remain vacant. If he recommends the latter he must give reasons.
- [49] If the PS recommends a replacement, he must make recommendations as to how it should be filled. Regulation 15 provides three options. The PS must elect one and provide the PSC with reasons for such election. The PS may recommend that the vacancy be filled:-
1. internally within a department or Ministry, from among the officers serving in that Ministry or department; (**'internal approach'**) (sub-regulation (a));
 2. from another department or Ministry within the government service; (**'within government'**) (sub-regulation (b)); or
 3. from among candidates drawn from within the Ministry or department and from the general public; (**'external option'**) (sub-regulation (c)).
- [50] Where the PS recommends an internal approach, he must notify the PSC. If the proposed promotion will result in a more senior officer within the Ministry being superseded, the PS must give the PSC reasons for such supersession. If the PS recommends promotion from across the government service, he must provide the PSC with the name of the most senior officer in the particular grade or cadre from which the promotion would be in normal circumstances be made. He must also give the PSC his reasons for not recommending such person for promotion.
- [51] A PS who recommends the external option must submit with his report to the PSC, a draft advertisement containing details of the vacant post, the related duties and the requisite qualifications. **Ultimately, the PS's** report is of an advisory nature and is not binding on the PSC. The decision regarding filling a vacancy or leaving the post vacant rests with the PSC¹⁰, unless the

¹⁰In accordance with section 78 of the Constitution.

PSC has delegated that appointing function to an authorised officer pursuant to section 78 (2) of the Constitution .

[52] Regulation 15 engages procedures for advertising vacancies, principles of selection and the creation and use of seniority lists. Those matters are dealt with respectively in regulations 18, 19 and 20 and will be examined later.

[53] Regarding regulation 15, the PSU alleged that the PSC failed to comply with it. It invoked this provision in respect of Kejo Peters and Joel Poyer. In this regard, it pleaded that Mr. Peters was not aware of advertisements of the posts or the vacancies for the post of Administrative Officer within the Ministry of Health when they arose on two occasions¹¹. The PSU claimed that Mr. Peters became aware of the appointments only after they were announced In the case of Joel Poyer, the PSU pleaded **that as far as Mr.Poyer is aware ‘public officers generally have no idea of when a post becomes available’ because they are not brought to their attention, applications are not invited and there are no interviews.**

[54]In its submissions, the PSU skirted the issue of whether the PSC performed its functions as required by regulation 15. It argued that the PSC failed and/or refused to comply with an order for specific disclosure of reports of vacancies, made by the respective Permanent secretaries who headed the departments in which Elroy Boucher, Kejo Peters, Agnes Llewellyn, Conroy Daniel and Joel Poyer **were posted. The PSU contended that the effect of the PSC’s non-compliance** is that it cannot resist the claim. It advanced no legal authority in support.

[55] In deciding whether the PSU has established breach of regulation 15, the Court must assess whether the pleadings were adequate and whether the evidence amounts to proof on a balance of probabilities. Essentially, regulation 15 requires that the PSC obtain reports from the relevant PS about any vacancy in his or her departments and Ministries. Although the PSU pleaded that the PSC failed in its duty to receive such reports in relation to offices which have been filled, none of its witnesses testified about any instance in which the PSC failed to obtain the reports stipulated in regulation 15 (a), (b) or (c). Neither did the PSC’s **witnesses.**

¹¹Paragraph 32 of the Statement of Claim.

- [56] The PSC denied the allegations of non-compliance with regulation 15. Through its Chairman Mr. Cecil Blazer Williams deposed that it complies with regulation 15. He stated that the PSC oversees over 5000 officers. It is conceivable that among those officers are persons who are on probation or otherwise might not have been appointed to the public service. Mr. Williams did not indicate how many of those are 'public officers' within the meaning in the Constitution and the regulations. It is reasonable to deduce that the majority are public officers.
- [57] Mr. Williams testified that he is very familiar with the regulations regarding promotion. He never pointedly or obliquely stated that he received reports of vacancies from any PS either generally or in connection with any of the specific promotions about which testimony was received. I conclude therefore that this regulation was not addressed by any witness. It is a matter of record that no report of any such or any other vacancy was disclosed.
- [58] **The PSU lays the blame for the absence of such evidence squarely at the PSC's feet. In this regard,** it contended that the PSC did not disclose the reports of the vacancies as directed by the court. **This contention does not absolve the PSU of its obligation to lead evidence of the PSC's failure to** ensure that the regulation 15 reports are created and maintained. The PSU could have adduced for example, evidence regarding publication in the Gazette or the lack thereof. It did not.
- [59] **The Court must have before it as a minimum, some basic allegation as to the PSC's failure to keep** those reports. Without such evidence, it is not possible to find that the PSU has made its case on this score. By failing to comply with the specific disclosure of the reports of vacancies, the PSC ran afoul of basic ethical and professional standards to which all court users are held. The court would **have been entitled to draw an adverse inference in the PSU's favour if relevant evidence probative** of the allegation was advanced.
- [60] The PSU referred to regulation 15 only twice in its fixed date claim. On both occasions, the reference is captured in its statement of the reliefs sought. It pleaded that it was seeking a declaration that **the PSC has 'failed to comply with' regulation 15. However, no witness made any assertion that the** PSC failed to ensure that reporting of vacancies was scrupulously conducted by permanent secretaries as required by law. In the absence of such testimony, the allegation has not been proved.
- [61] **The PSC's non-disclosure notwithstanding,** there is no evidentiary basis on which the Court can

conclude that the PSC has defaulted in ensuring that regulation-15 reports of vacancies are prepared and submitted. I find therefore that the PSU has failed to establish that the PSC has not complied with regulation 15. I make no finding that the PSC has violated regulation 15 in the promotions process.

Advertisement of vacancies

[62] The PSU contended that the PSC did not implement regulation 18 when considering officers for promotion. I hasten to add that the PSU did not plead expressly that the PSC failed to comply with regulation 18, and it did not seek a declaration to that effect. Moreover, while its witnesses alleged that certain vacancies were not advertised, the PSU did not charge (as a standalone complaint) that the PSC failed to comply with regulation 18. What it did was to rely on such allegations to found its accusations of non-compliance with regulations 19 and 20.

[63] The PSU alleged and the officers testified that posts were not advertised and public officers were not generally informed of vacancies within the civil service. It is therefore necessary to examine whether the PSU has made out a case of non-compliance with Regulation 18.

[64] Mr. Williams indicated that when a post becomes vacant, the PS may recommend that the position be advertised in the newspapers because the persons employed in the particular Ministry or in the service might not have the relevant experience. He stated that certain positions in the teaching profession are always advertised and within the nursing service, vacancies in senior positions are notified through publication at the MCMH and clinics. He indicated that all applicants are usually interviewed followed by assessment and selection of the successful candidate in accordance with regulation 19.

[65] Mr. Williams asserted that the PSU has produced no evidence to show that the PSC is derelict in its duties. Prison Superintendent Mr. Brenton Charles made the same statement as did Hospital Administrator Mrs. Grace Walters and PS in the Ministry of Agriculture Mr. Raymond Ryan. Mr. Charles admitted that although vacancies within the Prison Department are not advertised, prison officers would become aware of them by **'being a staff member'**. The five named officers disputed that vacancies were advertised.

[66] Regulation 18 states:

'18. Advertisement of vacancies

1. The Chief Personnel Officer shall, when so directed by the Commission, by circular or by publication in the *Gazette*, give notice of vacancies and any officer may make application in the prescribed form for appointment to any such vacancy. Such application shall be forwarded to the Chief Personnel Officer through the head of department and Permanent Secretary under whose authority the applicant is serving.
2. Where the Commission considers either that there is no suitable candidate already in the public service available for the filling of any vacancy or that, having regard to qualifications, experience and merit, it would be advantageous and in the best interest of the public service that the service of a person not already in the service be secured, the Commission shall take such step (including advertisement of the existence of such vacancy) as it may think necessary for the filling of such vacancy.' **(bold added)**

[67] Sub-regulation (1) imposes a duty on the CPO to give notice of vacancies when he is directed to do so by the PSC. It implies that the PSC must advertise vacancies within the public service by circular or publication in the *Gazette*. **The word 'vacancies' is not qualified by the definite article 'the' or the indefinite article 'a'**. This suggests that the requirement for advertisement of vacancies applies to all vacancies within the public service.

[68] In deciding what is being conveyed by that sub-regulation, the Court is guided by canons of statutory interpretation. In this regard, it is noted that the Public Service Commission Regulations were made by the Governor General in 1969. They consist of subsidiary legislation, interpretation of which is governed by established rules of statutory construction.

[69] It is useful to summarize the applicable tenets for present purposes. It is accepted that the Court **seeks to understand and give effect to Parliament's** (or other rule-making body) intention¹² when it is required to interpret laws. The Court is not permitted to legislate¹³, as doing so would violate the

¹²Per Viscount Dilhorne in *Stock v Frank Jones (Tipton) Ltd.* [1978] 1 WLR 231 (HL).

constitutional principle of separation of powers. **The Court's function is to ascertain the law-giver's intention** in an objective manner.¹⁴

[70] When doing this, the Court must stick to the ordinary meaning of **statutory words**,¹⁵ as far as possible. It is also required to adopt a purposive approach.¹⁶ The language used in sub-regulation (1) of regulation 18 is unambiguous and there is no assertion by the PSU or the PSC that it is not. Accordingly, in applying the literal rule of statutory interpretation to that sub-regulation, I conclude that the objective of the law-maker was to ensure that all vacancies within the public service are advertised in advance of the post being filled. This intention conforms with the reasonable objective of ensuring transparency within the appointment and promotions process in the civil service.

[71] The language does not imply that there are circumstances when the advertisement process should be skipped. The PSC does not argue for such an interpretation. In the circumstances, I find that regulation 18 (1) imposes a statutory duty on the PSC to ensure that all vacancies within the civil service are advertised either by circular or in the official *Gazette*. It also provides that any public officer may apply to be appointed to the vacant post. Such applicant is directed by the sub-regulation, to transmit his application in the prescribed form, to the CPO through the relevant HoD and PS.

[72] Sub-regulation (2) obligates the PSC to take such steps that it considers necessary for the purpose of filling vacancies in the public service, in cases where there is no suitable candidate in the public service. It provides that one such step is the advertising of vacancies. The language used in the regulation reveals that the PSC must take steps to fill the vacancy, but only such steps that it considers necessary. It is arguable that sub-regulation (2) does not impose such a duty but makes it directory only. The PSC made no such argument.

¹³Inco Europe Ltd. and Others v First Choice Distribution (a firm) and Others [2001] 1 WLR 586 per Lord Nichols of Birkenstead.

¹⁴ Per Lord Nichols of Birkenstead in the R v Secretary of State ex Parte Spath case.

¹⁵ Sir Rupert Cross: Statutory Interpretation, at page 105; applied in **Attorney General's Reference** SLUHCVAP2012/0018 (Unreported, delivered on 24th May 2013).

¹⁶ Per Lord Nicholls of Birkenhead in R V Secretary of State for the Environment, Transport and the Regions, ex parte SpathHolme Ltd.[2011] 2 AC 349.

[73] In this regard, I am guided by the provisions of section 3(6) of the Interpretation and General Provisions Act¹⁷ which state:

'In every written law, the word "shall" shall be read as imperative and the word "may" as permissive and empowering'.

It is noted that the provision directs that the PSC shall take such step, including advertisement of the existence of such vacancy. The sub-regulation expressly specified the advertisement as a mandatory component of the steps that the PSC must take.

[74] It follows that the PSC is obligated to advertise every vacancy within the civil service, including in respect of which it determines that no suitable candidate exists in the service. To construe regulation 18 (2) otherwise would create an absurdity within the entire scheme of the Regulations. In construing statutes, the Court is enjoined to bear in mind the presumption against absurdity and find against a construction which would result in absurdity.¹⁸

[75] I hold that advertisement of vacancies within the civil service is mandated by sub-regulation (2) of regulation 18, even where the post is being filled externally. Regulation 18 (2) also requires that before filling a vacancy by the external option, the PSC must consider whether there is a suitable candidate within the civil service. In arriving at a determination regarding whether to fill the post from among current public officers, the PSC must take into account of:-

1. the qualifications, experience and merit that the post holder is required to possess; and 2. whether it would be advantageous and in the best interest of the public service that the service of a person not already in the service be secured.

[76] If the PSC decides to recruit an external candidate, it must take all such steps to fill the vacancy that it considers necessary, including advertising the post. Regulation 18 (1) and (2) appear to deal with two different scenarios. Firstly, sub-regulation (1) provides guidance where the PSC has decided to fill a vacancy by the internal route. Secondly, sub-regulation (2) specifies what is required if the post is to be filled externally. In the both cases, advertisement by circular or through the Gazette is mandatory. Having regard to the testimony of the witnesses, it is clear that the PSC did not ensure

¹⁷ Cap. 14 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

¹⁸ Halsbury's Laws of England, (1995) Vol. 44(1), at para.1477, 4th Ed.

that vacancies within the civil service are advertised routinely in every case. This is contrary to the dictates of regulation 18. I so find.

Regulation 20 - Seniority Lists

[77] Although Regulation 19 precedes regulation 20 numerically, it is more expedient to first consider to the latter regulation before the former. This approach commends itself primarily because the issue of seniority lists must also be taken into account in relation to regulation 19.

[78] Regulation 20 provides:

'20. Seniority Lists

1. The Chief Personnel Officer shall keep up to date seniority lists of all officers holding offices in the several grades of the public service and from time to time shall provide the Commission with copies of such lists.
2. The seniority of an officer shall be determined by the date of his appointment to the particular grade within the range in which he is serving. The seniority of the officers promoted to the same grade on the same date shall be determined by their seniority in their former grade.
3. The seniority of an officer who resigns voluntarily from the public service and is subsequently re-appointed shall be determined by the date of his re-**appointment.**'

[79] This provision is self-explanatory. Sub-regulation (1) obligates the CPO at all times, to maintain current seniority lists of all public officers and to provide the PSC with copies. Sub-regulation (2) provides guidance on how the seniority of officers is to be determined. It makes clear that this is done by reference to their respective dates of appointment. Sub-regulation (3) makes provision regarding how to determine the seniority of a public officer who re-joins the service after having resigned. **Such an officer's seniority will be based on the date of re-entry** into the service.

[80] During cross-examination, the Chairman of the PSC acknowledged that public officers may be promoted across departments within the civil service. He accepted that the PSC must therefore know which officers are the most senior within the service, if the promotion process is to work. He accepted that the PSC did not produce the seniority lists in accordance with regulation 19 and did not disclose them as ordered by the Court. Mr. Williams acknowledged that he understood the

duty of disclosure. He accepted that he is a lawyer of 20 years call and understands how disclosure works.

[81] **By his own admission, Mr. Williams has accepted that the PSC failed to comply with the Court's order for disclosure of the seniority lists.** The Court therefore did not have before it material which was relevant to conducting a comprehensive review of all relevant data. In this regard, the PSC offered no explanation to justify its default. It appears there is none.

[82] The Courts have long held the view that in judicial review proceedings, a public authority owes a **duty of candour to disclose materials which are 'reasonably required by the Court to arrive at an accurate decision.'**²⁰ It is an on-going duty which lasts throughout the proceedings.¹⁹

[83] Commenting on this duty in the Court of Appeal judgment of Tyrone Burke (Chief Personnel Officer) v Otto Sam, Justice of Appeal Baptiste opined:

'The existence and rationale of the duty are not to be equated with procedural rules and practices concerning the burden of proving facts or leading evidence. Its purpose is to **engage the authority's assistance in supervising the legality of its decisions: to uphold** those which are lawful, and correct those which are not. The applicant has to satisfy the court that he is entitled to judicial review and it is for the respondent to resist an unjustified application.'¹⁴

[84] Quoting Donaldson MR from the case of R v Lancashire County Council ex p Huddleston, the learned Justice of Appeal added:

"But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."²⁰

[85] The learned Law Lord also remarked that:

'This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.'²¹

¹⁹Graham v Police Service Commission and the Attorney General of Trinidad and Tobago [2011] UKPC 46, paras. 18 and 19, per Sir John Laws; cited with approval by Baptiste JA in Tyrone Burke (Chief Personnel Officer) v Otto Sam.

²⁰[1986] 2 All ER 941.

[86] The courts have echoed those sentiments over the years. In 2004, one Law Lord on the Judicial Committee of the Privy Council expressed the view **that a public authority's duty of disclosure in judicial review cases is more a matter of principle than procedure.** In the case of *Belize Alliance of Conservation Non-Governmental Organisations v Department of Environment*, Lord Walker stated:

'It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to co-operate and to make candid disclosure, by way of affidavit, of all the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings.'²¹

[87] In the *Tyrone Burke* case, the Court of Appeal noted that there was a conflict of evidence between the appellant and the respondent as to who made the impugned decision. It observed that the **learned trial judge assessed the appellant's evidence against all of the materials available to her, including documentation.**

[88] The Court of Appeal opined that in evaluating the evidence the learned trial judge was entitled to test **the appellant's evidence by reference to the available contemporary materials and the absence of documentation** which the appellant would reasonably be expected to present but has failed to do. The Court found that the appellant had not satisfied the duty of candour. The learned Justice of Appeal remarked too that the learned trial judge was entitled to draw an adverse inference from the absence of such materials. Those statements are very instructive and are just as applicable in the instant case. I rely on them.

[89] By order made on 21st February 2017 the parties were directed to make standard disclosure on or before 31st March 2017. It cannot go unremarked that neither the PSC through its legal practitioners nor its witnesses, or its Chairman Mr. Cecil Blazer Williams attempted to present to the Court the mandated seniority lists. By affidavit filed on 13th October 2017, Mr. Kezron Walters

²¹ [2004] UKPC 6 at [86].

deposed that attempts were made to file standard disclosure as ordered. He stated that the CPO went on leave soon after and it was discovered that the seniority list was not as easily obtained as both the Chairman and the Honourable Attorney General thought, because the file was at the Treasury Department. At the trial, Mr. Cecil Blazer Williams testified that he did not know if the file was sent to the Treasury Department as alleged by Mr. Walters.

[90] Mr. Walters explained that locating all of the disclosure materials was extremely time-consuming and this made it impracticable for the PSC to comply within the timeframe stipulated by the Court. He deposed further that some of the materials had been archived and included hundreds of files dating back over thirty years. He stated that the files included faded typing from equipment relevant to those 'olden periods'. He averred: **'Some of the paper and files are deteriorating and producing unhealthy residue and one found it difficult to be around them for a lengthy period of time as they cause ill feelings to occur.'** Mr. Williams confirmed that this was so.

[91] On July 31st 2017 during the hearing of an application by the PSU for specific disclosure of the seniority lists and other records the PSC offered to disclose all seniority lists. The Honourable Attorney General represented that the PSC was in a position to make them available to the PSU within 2 to 3 weeks. The **PSC's failure to comply is rendered even more peculiar** in the absence of an application for an extension of time to comply.

[92] In his affidavit (referenced above) Mr. Walters deposed that the **PSC's failure was not deliberate or contumelious**. He averred that compliance with the timelines became difficult although attempts were made immediately to comply with the same. He indicated that the Honourable Attorney General informed him that the Chairman of the PSC had notified him that the lists were available and that he should check with the CPOMs. Gonsalves to obtain them.

[93] He explained that Ms. Gonsalves went on leave and was deputized and it was subsequently discovered the seniority list was not as easily obtained as the Chairman and the Honourable Attorney General thought. He stated that the file was at the Treasury Department and was not readily available. **Mr. Walters' testimony does not explain the non-disclosure and non-production of the seniority lists by departments, Ministries and across the public service.**

[94] In its Defence, the PSC pleaded that the CPO keeps seniority lists in accordance with regulation 20. Under cross-examination Mr. Williams confirmed that he instructed that the seniority lists were available and could be obtained from the CPO. He explained that there are two types of seniority lists. He said **that the first kind 'goes up to persons who have done the development course which covers from junior to senior clerks.'** He explained that the second type of seniority list exists by departments.

[95] **The PSC presented several sheets of paper headed 'Employee by position'. They contained lists of names of employees by post and date of assignment. Those lists arrange the names of officers within those departments in order of seniority. They appear to fall within the second category of seniority lists described by Mr. Williams, i.e. of seniority within department. They do not reflect seniority across the entire service. No such seniority lists were produced or disclosed.**

[96] Mr. Williams testified that the expression 'seniority' may be interpreted depending on the particular Department. He stated that **'both things come into play: (1) seniority within a department where the promotion is taking place; and (2) seniority across the entire government/public service.'** He explained further:

'A person can be promoted into the Immigration Department who was not there before and a person can be promoted out of Immigration into a department which is not immigration. In order for that to be able to work the PSC must know who is senior across departments.'

[97] **Mr. Williams' testimony** at the trial demonstrated that he understood what was required to effect compliance with maintenance of seniority lists under regulation 20. He maintained that as stipulated by regulations 20 and 19, seniority was a factor that the PSC took into account in respect of promotions within the civil service. He averred that this was also done in respect of promotions to offices for which Messieurs Peters, Poyer, Boucher and Daniel and Ms. Llewellyn were eligible and about which the PSU has complained in the instant claim.

[98] The trial bundle contained a number of seniority lists which comprised 45 pages. All had the date Wednesday October 11, 2017 inscribed across the bottom. It was not clear for what period or periods those lists were current. In the face of the foregoing testimony from Mr. Williams and Mr. Walters, **it is reasonable to infer that the PSC's failure to disclose the seniority lists** (specified by

regulations 18 and 19 was deliberate and intentional and was also activated by an improper motive.

[99] The failure invites the making of adverse inferences. Essentially, the non-disclosure and non-production of the statutorily mandated seniority lists belies **Mr. Williams' testimony that seniority lists** are maintained by the PSC. Within the context of this case, it is also noted that the PSC disclosed²² four documents that it described respectively as seniority lists in respect of the Customs and Excise Services, Policy Development and Admin/National Mobilisation, Forestry Services and Prison. They contained the names of officers by grade. The documents indicated the post of each officer and the respective dates of appointment.

[100] None of the witnesses identified or described any alternative mechanism or records which were maintained by the PSC or its satellites which were consulted during promotions hearings and determinations, over the referenced periods. It follows that when the PSC considered promotions to posts for which the named officers were eligible it could not have been and was not adequately **apprised of the names of all 'eligible officers' across** all departments and Ministries within the civil service. This failure runs afoul of the stipulation in regulation 20 and regulation 19 (1) (2)(a) and (3)(b). **In this regard, the PSC would have been unable to 'take into account the position of an officer's name on the seniority list'**²³ and his seniority relative to other eligible officers.

[101] In the absence of a seniority list containing all names of public officers across the civil service, there is inadequate evidence from which the court can find that the PSC complied with its statutory duty to maintain seniority lists pursuant to regulation 20 of the regulations at all and particularly during the periods under consideration by this court. Taking everything into account I can only conclude that the PSC did not maintain the seniority lists mandated by regulation 20, and has not done so during the currency of the employment of Elroy Boucher, Agnes Llewellyn, Joel Poyer, Conroy Daniel and Kejo Peters in the civil service, or at all. I find that it did not. I find also that therefore the PSC did not have the necessary facility to ensure compliance with Regulations 20

²²By Supplemental List of Documents filed on 17th October 2017.

²³Pursuant to regulation 19(3)(b).

and regulation 19 (1) (2)(a) and (3)(b) and that it could not and did not comply with them during the referenced periods.

Principles of Selection for promotion

[102] I turn next to consider regulation 19. Regulation 19 of the PSC regulations provides:

'19. Principles of selection for promotion

1. In considering the eligibility of officers for promotion, the Commission shall take into account the seniority, experience, educational qualifications, merit and ability together with relative efficiency of such officers and, in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy.
2. The Commission in considering the eligibility of officers under sub-regulation (1), for appointment on promotion shall attach weight to-
 - (a) seniority, where promotion is to an office that involves work of a routine nature;
 - (b) merit and ability, where promotion is to an office that involves work of progressively greater and high responsibility and initiative than is required for an officer specified in paragraph (a).
3. In the performance of its functions under subregulations (1) and (2), the Commission shall take into account as respects each officer-
 - (a) his general fitness;
 - (b) the position of his name on the seniority list;
 - (c) any special qualifications;
 - (d) any special course of training that he may have undergone (whether at the expense of the government or otherwise);
 - (e) the evaluation of his overall performance as reflected in annual confidential reports by a Permanent Secretary, head of department or other senior officer under whom the officer worked during his service;
 - (f) any letter of commendation or special reports in respect of any special work done by the officer;
 - (g) the duties of which he has had knowledge;

- (h) the duties of the office for which he is a candidate;
 - (i) Any specific recommendation of the Chief Personnel Officer, Permanent Secretary or head of department for filling the particular post;
 - (j) Any previous employment of his in the public service or otherwise;
- (k) Any special reports for which the Commission may call;
 - (l) His devotion to duty.

4. In addition to the requirements prescribed in subregulations (1), (2) and (3), the Commission shall consider specifications that may be required from time to time for appointment to the particular post. (bold added)

[103] Regulation 19 lays out anon-exhaustive list of matters which the PSC is required to take into account when deciding which candidate should be promoted to a particular post in the public service. Sub-**regulation (1) stipulates that the PSC must have regard to the candidates'** seniority, experience, educational qualifications, merit, ability and the relative efficiency of such officers. If as between two or more competing officers they are equally efficient, the PSC must resolve the deadlock by reference to their relative seniority.

[104] Sub-regulation (2) (a) provides that where the promotion under consideration is to a post where routine work is conducted, the PSC must attach weight to seniority. This suggests that the most important factor in such cases is seniority. Paragraph (b) of sub-regulation (2) deals with promotion to a post where the successful candidate will be expected to engage not in routine work but in work of a progressively greater and higher responsibility and initiative. The PSC is enjoined by that provision to attach more weight to factors of merit and ability.

[105] When making their selection in each case, the PSC must (in accordance with sub-regulation (3)) **take into account the candidates' general fitness, seniority, special qualifications or training; overall** performance captured in annual confidential reports from line managers and supervisors; letters of commendation or special reports addressing any special work done by the officer; knowledge of duties; duties in his or her present post; devotion to duty and previous employment history. This sub-regulation engages Regulation 27 which mandates Permanent Secretaries and HoDs to furnish the CPO with confidential annual reports regarding each officer serving in their departments

and ministries. The reports are due on or before the last day of February and required to cover the **officers' performance for the previous 12 month period ending December 31st.**

[106] Regulation 27 provides:

'In order to assist the Commission in performing its functions, Permanent Secretaries and heads of departments shall, in each year on or before the last day of February, furnish to the Chief Personnel Officer confidential reports in respect of officers serving in their ministries or departments. Such reports shall relate to the twelve months ended on the preceding 31st December.'

[107] Other factors stipulated in sub-regulation (3) to which the PSC must also have regard, are any specific recommendation(s) made by the CPO, PS or HoD for filling the post. It may also request special reports of its own. Likewise, pursuant to sub-regulation (4) the PSC must take into account the specifications for appointment to that post.

[108] In light of my finding on the non-existent seniority lists, it follows that the PSC has failed to take into account the seniority of candidates for promotions within the civil service during the period of employment of the five named officers – Ms. Llewellyn, Mr. Elroy Boucher, Mr. Kejo Peters, Mr. Conroy Daniel and Mr. Joel Poyer. The PSC has therefore not taken into account a critical element of the promotions regulations. This failure is material and is contrary to the law.

[109] The PSU highlighted several instances in which they claim that the PSC did not give effect to the principles contained in regulation 19. The PSC insisted that it did. Regarding those cases, **neither party produced the reasons for the PSC's decision in** its choice of appointee on promotion. The PSC provided no memoranda or note outlining what was considered. The PSC failed in its duty of candour in this regard. What was presented in court was on the one hand, a litany of complaints by the PSU of alleged deviation by the PSC from the referenced principles; and on the other hand, denial of those accusations by the Chairman of the PSC and senior officers within the civil service.

[110] The PSU contended:-

‘For years public servants individually and by their union, have been complaining to their employer about certain conditions of service, namely that the written criteria established in the Constitution governing their promotion was not being applied, implemented, or followed in any consistent manner and that many deserving public officers were not being promoted accordingly. For years the employer ignored these complaints. The employees therefore **sought the assistance of the Court.**’

[111] It also submitted:

‘... it has received a number of complaints for many years from its members including the 5 persons, that they have not been promoted, considered for promotion, made aware of promotion vacancies, or that they have been superseded by persons who are less qualified than they were. The PSU stated that it attempted to address those concerns by raising the respective matters with relevant authorities, including the Chief Personnel Officer (CPO) **but their complaints have gone unanswered.**’

[112] The PSU pleaded and submitted further that:

‘... in exercising its power and authority to promote public officers as mandated by the Constitution, the PSC ought to act with fairness, transparency, impartiality and objectivity. Unfortunately however the PSC contended that the PSC does not adhere to the guidance set out in Part 2 of the Regulations generally and in Regulation 19 in particular and there is no discernible policy which it follows. The PSU contended that its public officers have a legitimate expectation that they be considered for promotion in accordance with Regulation 19.’²⁴ (bold and underlining added)

[113] Framed as outlined above, the submissions appear to be two-pronged in scope. The PSU seems to be making a case on behalf of public officers generally and also on behalf of the five named officers specifically, in relation to its assertions that when considering and making promotions the PSC does not comply with Regulation 19 and regulations in general.

[114] In its pleaded case, the PSU alleged specifically:

²⁴ Paragraphs 5 and 7 of the Statement of Claim filed on 11th January 2017

'The five persons who it represents in this suit, namely Public Officers AL, KP, JP, EB and CD, are all public officers who have been appointed in the public service for many years and have **worked without promotion as hereinafter detailed.'** and

'For many years now the Claimant has received a number of complaints from its members including the five persons it represents in this Claim, that in relation to promotions, they have not been promoted, considered for promotion, made aware of promotion vacancies, or that they have been superseded by persons who are less qualified than they were. The Claimant has attempted to address these concerns by raising the respective matters with relevant authorities, including the Chair of the Defendant and the Chief Personnel Officer, but to no avail.²⁵

[115] The PSU pleaded further:

'It is in the general interest of all Public Officers, whether they are represented y (sic) the Claimant or not, that there is a known and implemented procedure by which officers may be promoted and by which their work performance can be objectively monitored, **assessed, evaluated, reviewed and improved.'**²⁶

[116] In its prayer, the PSU reverted to generalizations and prayed expressly for:

1. A declaration that the Defendant [PSC] has failed to comply with Regulations 15, 19, and 20 of the Public Service Regulations to Cap 10 of the Saint Vincent and the Grenadines Constitution Order of the Laws of Saint Vincent and the Grenadines Revised Edition (2009) (**"the Regulations"**).
2. A declaration that the Defendant is required but has failed to observe principles of fairness, transparency and objectivity in exercising its functions under Regulation 19 of the Regulations.
3. A declaration that there have been unreasonable delays and inconsistencies in the promotion process and that these delays and inconsistencies are unlawful.

²⁵Paragraphs 1 and 4 of the Statement of Claim.

²⁶Paragraph 6 of the Statement of Claim.

4. An order that the Defendant establish and implement an efficient, transparent and effective performance appraisal and promotion regime in accordance with Part 2 of the Regulations.
5. Costs
6. **Such further relief as the Court deems fit.**' (bold added)

[117] The approach taken by the PSU seems to be one of inviting the court to extrapolate from the experiences of the five named officers and Ms. Celena MacDonald and Mr. Kenroy Boucher and arrive at a conclusion that this is the manner in which the PSC has acted normally, usually and characteristically in exercising its promotion mandate over an indefinite period. The Court is therefore required to examine the incidents described by those officers and assess whether the PSU has proven on a balance of probabilities that:

1. the PSC has so conducted itself in relation to those five named officers and/or other officers; and
2. if so, whether the PSU has established that such behaviour is characteristic of how the PSC has given effect to the referenced regulations.

[118] The PSC has not disclosed the decisions regarding the impugned promotions and appointments of public officers. In the absence of those written decisions and reasons underlying them, this Court is not in a position to decide whether the PSC took into account all relevant factors and **disregarded irrelevant considerations. The PSC's Chairman gave oral evidence based on his** recollection which he admitted had gaps. His testimony was bolstered by present and former senior public officers.

[119] Essentially, the Court is placed in a position where it must attempt to ascertain facts without critical underlying documentation. The seniority question has already been extensively addressed. Without the impugned decisions, it is impossible for the court to find that any decision made by the PSC in relation to impugned promotions were invalid, unlawful or arrived at in a procedurally improper manner. I will not attempt to evaluate any of those decisions because the decisions are not before me. I propose to deal with the indicia in the regulation individually or collectively as is convenient to the particular factual circumstances. This would avoid unnecessary repetition.

[120] It is useful to list the promotions in respect of which the five named officers allege that they were **bypassed**. The time of such promotion is also relevant. Likewise, the PSC's position as to whether the respective officer was considered is material. This information can be captured effectively in tabular format and is outlined in the table immediately below.

Name of Officer	Qualifications/Education	Impugned promotions or appointments and dates	PSC's position as to whether officer was considered
<p>Agnes Llewellyn (joined service on Jan. 2 1987) 1996 - promoted to senior customs officer</p>	<p>8 O'levels</p>		
<p>1999-2008 Min. of Education</p>	<p>2004/2005 -Certificate in Social services</p>	<p>a) 2004/2005 –Vita Franklynwas allegedly promoted from grade 2 or 3 community health aide directly to grade 7</p>	
<p>2008-present Ministry of National Mobilisation</p>	<p>2014 - BSc. Social Work Applied for post of Director, Family Affairs Division but her application never reached PSC as far as she is aware</p>	<p>Officers including – Antoinette Duncan, Corren Duncan, YolandeLondin, Isilma Samuel, and Nzinga Quashie who allegedly had less academic qualifications and experience were promoted. Annastacia HarryandKelly Da Silva were promoted although allegedly they respectively had less</p>	<p>Mr. Cecil Blazer Williams admitted that he presented no documentation regarding the candidates who were considered for promotion during Ms. Llewellyn's tenure or whether recommendations were made as to such promotions</p>

		academic qualifications and fewer years than her.	
Conroy Daniel(joined service on Nov. 15 1991) as junior prison officer, most junior post in Prison Service.	Attended Greiggs Primary School, no secondary school education.	Several persons have been promoted past him including: a) ASP Andrews b) Chief Officer Rodriguez c) Chief Officer Clarke d) Corporal Matthias e) Corporal G. Clarke f) Corporal Harry g) Corporal Babb h) Corporal Letten i) Corporal Matthews	Mr. Cecil Blazer Williams testified that he supplied no documentation regarding the candidates who were considered for promotion during Mr. Daniel's employment within the public service and no recommendations in respect of such promotions.
	Trained as Prison Officer		
Joel Poyer(joined service on 1984 and appointed formally in 1991) Forestry Department as Forestry Officer (Equivalent to FO3)	Saint Vincent Technical College – agricultural science		
2007 - Seconded to Nat'l Sports Council for 9 months	Assoc. Degree – Forestry Technician		
1991 - Forestry Officer 3 (FO3)	Diploma Labour Relations and Labour Negotiations	1995 – Amos Glasgow from FO3 to Forest	

		Supervisor (FS) (he joined service 2 months after Poyer and was allegedly trained at the same time)	
	Certificates in forestry, trade union activities, credit union activities, leadership, personnel relations and other organisational skills	2005/2006 – Cosmos McLeod (Associate Degree in Watershed Management) was promoted from FO3 to FS having allegedly joined service in 1990 after Poyer.	
		2014–Glenroy Gaymes (has a number of Certificate Diplomas) was promoted from FO3 to FS (he joined service in 1991 after Poyer and was allegedly trained by Poyer).	
		2015 – Mr. Harry (Forest Diploma) was appointed as acting FS (he joined service in 1990, after Poyer.	
Elroy Boucher (joined service in 1988 as a teacher (then called 'Probationary Assistant Teacher' is now referred to as Teacher or Teacher 1 - on a permanent appointment	Associate Degree – Engineering Technology with specialization in biomedical and electronics		
1998 – transferred to	Diploma in Management	Post of maintenance officer	

Maintenance Department, MCMH Biomedical Technologist, engineering assistant		was allegedly awarded to the least experienced officer on one occasion, no satisfactory explanation was provided by the hospital Administrator or PS Luis DeShong	
		May 2015 – Roland Shallow(Degree in Clinical Engineering)was promoted to post of Senior Engineering Assistant. Allegedly there were more qualified officers: Joanne Best with Master's Degree in Biomedical Engineering.	
Kejo Peters (joined service on Sept. 5, 2005) – junior clerk grade 3 or grade K	8 CXC subjects		
Audit Department – two years	BSc. (Hons) Management Studies		
Ministry of Health (unspecified period)	MBA Human Resource Management	a)Sue-Mona Moses and Denise Robinsonpromotedas Administrative officers. Although allegedly he had his Bachelor's degrees before them; Sue-Mona Moses allegedly has more experience than him. Kari	Mr. Cecil Blazer Williams accepted that he produced no documentation regarding the candidates who were considered for promotion during Mr. Peter's employment

		Da Silva was overlooked for a promotion at that time also although she graduated with Ms. Robinson, who is the niece of a member of the PSC. He became aware of 2 promotions only after they were announced.	within the public service or any recommendations as to such promotions
Sept. 5 2016 – present Customs Department - – junior customs officer (grade 3 or grade K)	Customs Management and leadership course (Hons.)	Other officers promoted Mr.O'Riley Prince, Asquith Ballah, Zinga Nelson	
Kenroy Boucher – June 16, 1990 appointed as police officer			
Oct. 1 2006 – transferred to Immigration Department as Senior Immigration Officer			
2010 – transferred to NEMO		2010 - vacancy for Assistant Chief Immigration officer arose, filled by (the wife of then CPO) one Mrs. Burke, who had no immigration experience	Mr. Cecil Williams stated that he knew that Mrs. Burke was appointed to that post but he did not remember if Mr.Kenroy Boucher was considered for that vacancy or if his name

			was submitted.
2013 - Re-assigned to Ministry of National Mobilisation		2017 - Chief Immigration Officer filled by a junior officer.	
Celena Macdonald			
Dec. 9 1994 – joined public service			
2001-2011 – worked at House of Assembly			
May 2013 – transferred to Forestry Department	Sept. 2011 – Obtained degree		

Annual reports, letters of commendation, special reports, specific recommendations – Regulation 19 (3)(a), (b), (e), (f), (i), (k) and (j)

Annual reports

[121] Almost without exception the public officers who testified on behalf of the PSU insisted that no annual reports were prepared in connection with their performance during the years they have been employed in the public service. The PSC was ordered to disclose the annual reports in respect of the five named officers. It did not.

[122] Mr. Elroy Boucher testified that he has had no assessment or evaluation of his work performance since joining the service. He recalled that a performance management and development system was tried between 2002 and 2005 across public service on a trial basis. However, he said that since then no assessment has been conducted in the service and that the PSC abandoned all efforts at making it work and failed to implement it. He observed that there is no performance appraisal system in the civil service except for probationers, whose performance appraisal is submitted by the HoD.

- [123] Hospital Administrator Mrs. Grace Walters testified that she is not aware that there are no **assessments of Mr. Boucher in the case at bar. She averred 'We have some assessments of staff in the Engineering Department.'** She maintained that staff in the Biomedical Department has been assessed. In this regard, she stated that she has a few assessments of certain persons in the Department in her office. She claimed she has one copy of those while the others were sent to the Ministry. She testified that no one in this case asked her for a written assessment of any of those persons. I draw the irresistible inference that the Ministry of Health has neither prepared nor maintained annual reports in respect of the work undertaken by Mr. Elroy Boucher during the currency of his employment there; and that the failure was deliberate and intentional.
- [124] Mr. Poyer testified that he has received no evaluation or assessment since 1998. He said that no such assessments or evaluations have taken place in the Forestry Department since that time. Mr. Raymond Ryan has been the PS in the Ministry of Agriculture since 2012. Forestry falls under his administrative domain. Mr. Ryan admitted that the Ministry has not disclosed to Mr. Poyer any documents created in relation to him within the last 12 years and has not shown him any written evaluations. Mr. Ryan insisted that Mr. Poyer has had performance appraisals of his work.
- [125] He explained that each officer is required to prepare and submit monthly reports covering the **matters outlined in the Ministry's results**-based work plans, and indicating what work the officer has done. He stated that these reports are then discussed with the officer by the supervisor regarding their performance. He explained further that the supervisor provides information to the PS if there are adverse comments and reports; the reports are then collated for accuracy and forwarded as a Department Report to him (Ryan). He said that there are 200 civil servants in the Ministry of Agriculture and **therefore he could not say if there are many, many reports on Mr. Poyer's file.**
- [126] Mr. Ryan could not say how many times those assessments have been done since Mr. Poyer joined the service. He said that ideally those assessments should be done monthly but he did not know how often they were done and he would have to check the records of the Forestry Department. He indicated that he would have to check the system to see if Mr. Poyer has ever been evaluated. He said **'I am aware that the PSC has not supplied** a single evaluation of any of the officers in this

case.' He stated that while there is an internal evaluation process where we utilize the monthly, annual, quarterly reports to evaluate the work of officers, they have not been provided in this case.

[127] Mr. Ryan was brusque in his delivery. His nonchalance was remarkable given the sensitivity of the issues under consideration. He has accepted that materials which were ordered to be disclosed were not supplied to the PSU. This is a blatant breach of a court order and of **the PSC's duty of candour** to the court. In essence, Mr. Ryan has admitted that the annual confidential reports stipulated by regulations 19 and 27 are not prepared and maintained by the relevant officers in his Ministry. This is in direct breach of the law. Mr. Ryan claimed that there is a system in the Ministry **where Mr. Poyer's supervisor assesses him and his work in writing**. He maintained that this is presented as a report.

[128] **Although Mr. Ryan's admission** removes the need to draw adverse inferences, I make the **observation that the 'monthly reports' described by Mr. Ryan do not satisfy the requirements of regulations 27 and 19** in respect of the annual reports. I conclude that the Ministry of Agriculture's breach of the regulations was deliberate and intentional.

[129] Mr. Daniel indicated that he has never been assessed or evaluated. The Prison Superintendent Mr. Brenton Charles countered that the prison officers are assessed and evaluated. He supplied no documentary evidence of this. I draw the inference that no such assessments have been conducted in the Prison in respect of Mr. Conroy Daniel. I find that such failure was deliberate and intentional.

[130] Mr. Peters indicated that he was never assessed or evaluated while posted to the Ministry of Health. He averred that he was not assessed or evaluated since being transferred to the Customs Department, until April 2017 when on his own initiative, he requested 4 senior civil servants to write written assessment for him as physical evidence of his work ethics and behaviour in the service.

[131] Mr. Peters indicated that he obtained those assessments from the Director Audit, the Chief Nutritionist, a Supervisor in the Customs Department, and a retired Chief Lab technician who was

formerly employed in the Ministry of Health. He stated that he submitted them to the PSC. These do **not qualify as 'confidential annual reports within the meaning of regulation 19 (3)(e) and 27.**

[132] Mr. Luis DeShong is the former PS in the Ministry of Health. He stated that Mr. Peters was assessed and evaluated by others who worked with him in the Department to which he was assigned in the Ministry of Health. He indicated that those assessments and evaluations were not in writing but were communicated to him (DeShong) orally by the Senior Assistant Secretary Ms. Cheryl Jack and one Odette Barrow.

[133] Mr. DeShong testified that Mr. Peters received negative assessments and evaluations all which were communicated to him (DeShong) orally. He indicated that based on assessments and evaluations of others he repeated those adverse reports as being factual. The originators of those alleged negative reports did not testify. Any such reports constitute hearsay and I reject them. It seems that they were used against Mr. Peters to block any upward mobility within the service. No evidence was produced of disciplinary proceedings or outcome in relation to them.

[134] Mr. DeShong indicated that persons in the Ministry of Health were evaluated based on the oral assessments of their immediate supervisors in two scenarios: a) where that person is recommended for promotion or b) where a post is advertised and there was a need for a written assessment. He said that in those cases, the written assessments would be forwarded to the CPO. No supervisor or other senior officer who had supervisory responsibility for Mr. Peters in the other departments to which he was assigned provided testimony. I infer that no such assessments were **conducted in relation to Mr. Peters' work and that it was a deliberate and intentional failure.**

[135] Ms. Llewellyn testified that since she entered the civil service on Jan. 2 1987, she has never been assessed or evaluated. Ms. Celena MacDonald attested that she has never had her work performance assessed or evaluated. Mr. Kenroy Boucher stated that he was aware that an appraisal system was tried for one year at the Immigration Department on a trial basis. He said that he does not know if he was ever appraised. **No senior person from these officers' respective departments or ministries provided contradictory testimony.** I therefore infer that no performance appraisals were conducted in relation to their work and that such failure was deliberate and intentional.

[136] In view of the foregoing, it is pellucid that the PSC could not have had and did not have the benefit of annual reports of the five named officers when they were considering promotions to posts for which the officers were eligible. I draw the further inference that the PSC also did not have any annual performance appraisals for any of the appointees who were promoted. More than one supervisory head admitted that the assessments and related recommendations were made orally to the Permanent Secretaries and by extension the PSC.

[137] Regulations 19(3)(e) and 27 are unambiguous and written in simple language. The PSC must take annual performance reports into account when considering the eligibility of officers for promotion. Failure to do so results in non-compliance with the legal stipulations and constitutes to an illegality.

It has been established and is now widely accepted that illegality in judicial review cases arises in circumstances where adjudicators fail to apply the law when considering and making determinations.²⁷ By failing to ensure that the annual confidential reports were maintained in respect of the named officers and considered respectively in relation to the referenced promotions, the PSC acted unlawfully.

Letters of commendation, special reports, specific recommendations

[138] The PSC has largely acknowledged that it tendered no documentation regarding the candidates who were considered for promotion and were promoted in the respective departments to which the five named officers were assigned, during their respective periods of employment within the public service. Mr. Cecil Blazer Williams accepted that he produced no such documentation or any recommendations regarding such promotions.

[139] Mr. Cecil Blazer Williams testified that he had not set out any document to the court regarding the **promotions which took place during Mr. Boucher's employment**; or recommendations made as to such promotions. He said that Mr. Boucher was recommended for the post of Senior Engineering Assistant and that the recommendation was in writing. He acknowledged that he had not disclosed that recommendation. He indicated that he was sure that Mr. Boucher was one of three persons

²⁷Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9.

recommended for that post. He added that he could not recall if the recommendation was for Mr. Boucher to act or whether it was for a permanent appointment to the post.

[140] He stated that while this would have been in writing, no such documentation was presented to the court. He claimed that he looked at those documents and saw them when the PSC made a decision on it. He could not recall exactly when this happened but offered that it might have been in 2017. He averred that unfortunately the documents he referred to were not taken out of their relevant files to be presented and he therefore did not have them to present to the court.

[141] **This testimony is nothing short of incredible in view of Mr. Kezron Walters' testimony that the PSC** and its legal practitioners encountered difficulty retrieving records largely due to the age and state of many documents. It does not go unremarked that no such averments were made in respect of the more recent documentation. This cavalier attitude by the Chairman of the PSC speaks volumes. It lends credibility to the adverse inferences made in respect of the annual confidential reports and seniority lists. **It also supports the findings that the PSC's related 'failures' to disclose** are deliberate and intentional.

[142] Mr. Luis DeShong, Mrs. Grace Walters, Mr. Raymond Ryan and Mr. Brenton Charles did not testify of the existence of any such letters of commendation, special reports or specific recommendations described in regulation 19(3)(f)(i) and (k). Most of those were not reports which had to be routinely maintained. Apart from specific recommendations of Hods, the CPO and PS for filling a post, such reports and documentation would not be created with any degree of regularity. Absence of such documentation (other than the specific recommendations) would not have been remarkable **but for the Chairman's testimony.**

[143] The PSC's failure to disclose and produce the specific recommendations supports a finding that they either do not exist or have been intentionally and deliberately suppressed. In face of the PSC **Chairman's testimony I find that they have been deliberately and intentionally withheld** and more probable than not that this has been done out of an improper motive. I infer therefore that the PSC has failed to ensure that regulation 19(3)(i) has been given effect to in the course of its deliberations and determinations in respect of promotions for which the five named officers were eligible.

[144] The PSU questioned whether the PSC could possibly comply with the statutory requirements set out in the Regulations in the absence of scientific tools like seniority lists or evaluations. It submitted that it could not. The OSU argued that on this point alone its claim is bound to succeed. It submitted that in *Rajkumar v Lalla* the court was considering a regulation which is similar to regulation 19. Commenting on the absence of an evaluation of the officers' overall performance as reflected in the annual staff reports, Lord MacKay, said:

'Their lordships have reached the conclusion that in restricting consideration of the appellant's promotion to the order of merit list of 1995 already three years old and disregarding the other matters referred to in Regulation 172, in particular regulation (e) an evaluation of the officers overall performance as reflected in the annual staff reports, the approach taken to the decision on the appellant's promotion was fundamentally flawed.'²⁸

[145] **The PSU's submission is** appealing and I agree with it. The PSC would be hard-pressed to give effect to the letter and spirit of the promotion related regulations if it did not maintain the seniority lists, annual performance appraisals and the other requirements mandated in regulations 18, 19, 20 and 27. I turn now to consider the other indicia set out in regulation 19.

Experience, Efficiency, Merit and Ability

[146] Experience, fitness, devotion to duty, efficiency, merit and ability are matters which would be expected to be addressed in an annual performance appraisal. They could also be covered in letters of commendation, special reports and special recommendations. While annual reports are directed by law to be prepared on a cyclical basis, this is not the case with the other prescribed documented measures of performance. This observation brings into greater focus the absolute imperative of preparation and maintenance of annual reports. Furthermore, the measurement of merit and ability is expressed²⁹ to be indispensable to the promotions process where promotion is to an office that involves work of progressively greater and high responsibility and initiative, than normal.

[147] The performance appraisal system mandated by regulations 19(3)(e) and 27 serves multiple purposes. It ensures transparency and accountability. It provides a mechanism for employer and

²⁸[2001] UKPC 53 at para. 21.

²⁹In regulation 19(2)(b).

employee alike to monitor an employee's performance in an objective and open manner. It creates opportunities to incentivize and reward employees and is a reliable gauge against which to plot a **unit's development. More fundamentally, it is a reliable tool which can be used by the PSC, CPO, PS, HoD and the employee to make recommendations not only for training and development of a particular officer but for promotions.**

[148] Without that annual reporting system or a similar performance appraisal system, there is no certainty. Irregularities and even excesses and illegality can creep in. A reporting system which is based on oral transmission of information, wholly reliant on human recall and memory is equally untrustworthy, flawed and inconsistent with the letter and spirit of the regulation. The absence of the written annual report **necessarily impinges on the PSC's ability to competently and effectively assess the candidates' merit and ability.** No other approach is contemplated and mandated by the regulation 19(1) (2)(a) (b) and (j).

Impugned promotions

Elroy Boucher

[149] Mr. Elroy Boucher testified that the promotion of Mr. Raymond Shallow to the post of Senior Engineering Assistant was fraught with procedural irregularities and illegalities in that the PSC failed to take into account that:

1. The post was not advertised;
2. There were more qualified and experienced officers within the department who were not considered or given a chance to compete for the post;
3. Mr. Shallow had very little experience in the area of his study and no significant managerial experience in that department;
4. Ms. Joanna Best was more qualified, since she had a Masters whereas Mr. Shallow had a **Bachelor's degree**; and
5. He had acted in that post repeatedly and had more managerial experience and was senior to Mr. Shallow.

[150] Mr. Boucher indicated that he sent an application for the post but got no response. He attested that he met with the CPO who told him he was out of time, that the PSC had met and made a decision and she was not aware he was eligible/ He recounted that the Chairman of the PSC told him that

he was not aware of his application and that he should come to see him beforehand in the future if there was any position for which he is eligible. Mr. Boucher maintained that he was not considered based on his conversation with the PSC chairman and CPO. He testified that the PS Luis DeShong told him he was not recommended. Mr. Boucher recalled that the post of maintenance officer was awarded to the least experienced officer on a separate and no satisfactory explanation was provided by the Hospital Administrator or PS DeShong.

- [151] Mrs. Walters testified that she is the administrative head of the MCMH and that the Engineering Department falls directly under her purview. She explained that it services the 5 local hospitals and 39 health centres in the urban and rural areas. She acknowledged that the staff in the Engineering Department has to deal with the equipment at those 44 locations.
- [152] Mrs. Walters admitted that she is part of the apparatus of the promotion system in the Ministry. She acknowledged that she did not write a recommendation when the post of Senior Engineering Assistant became vacant. She said that she was contacted by telephone. She stated that she spoke to her superior and assumed that the recommendations would have been made in accordance with the usual process. It is apparent that the usual process involves relating the recommendations by telephone, at least within the Biomedical Department within the Ministry of Health. Mrs. Walters did say that she has never spoken to the PSC or anyone from within those ranks.
- [153] Mrs. Walters acknowledged that the present holder of the Senior Engineering Assistant post is Mr. Shallow who joined the service after Mr. Boucher. She indicated that while Ms. Joanna Best Gordon joined the staff temporarily at some point she was not on the permanent staff before Mr. Shallow. She **accepted that Mrs. Best Gordon holds a Master's Degree in Medical Engineering.** She testified that Mr. Shallow trained in Cuba and that he advised her that his degree is on par with **Mrs. Best Gordon's. Mrs. Walters attested that Mr. Shallow's degree matriculates him directly into a Ph.D. degree for engineering.** She admitted that this information was not independently verified by the Hospital or Ministry, but was **accepted on Mr. Shallow's** say so and on his presentation of his degree.

- [154] Mrs. Walters accepted that Mr. Elroy Boucher acted in the absence of the Senior Engineering Assistant. She stress that it was not her understanding that this was a prelude, guarantee or entitlement to that post if/when it became available. She stated that the attendance register indicates that Mr. Boucher usually arrives to work early. She remarked that nonetheless it is sometimes difficult to locate him on the compound where he is scheduled to be. She did not indicate if this was recorded in any written annual report or other written communication or documentation addressed to Mr. Boucher. This would have been ideal.
- [155] Mrs. Walters recalled a conversation she had with Mr. Boucher when he approached her to ask that he be recommended for the post of Senior Engineer Assistant. She indicated that the post was not yet vacant. She stated that she told Mr. Boucher at that time that one of the reasons she would not recommend **him was the fact that he was 'never here' and 'away' from the compound quite frequently.**
- [156] Under cross-examination, she stated that sometimes she was looking for him and could not locate him. She accepted that at such times he could have been at any one of 45 other places because of his job. Mrs. Walters testified **'To say that Mr. Boucher does not work will not be accurate as he performs the duties according to his job description, although he is not a worker that can be described as one that 'goes above and beyond that call of duty'. She stressed that there are times when it is not possible to reach him by phone outside normal working hours.**
- [157] As an aside, I make the observation it is a rare employee who will be accessible to his or her employer at any hour of the day on each of the 356 days in the year. I therefore do not find Mr. **Boucher's** occasional unavailability peculiar unless of course he is required to be or pledged to be always accessible outside of working hours. Mrs. Walters admitted that she has never put in writing that she would not recommend Mr. Boucher for the post of Senior Engineering Assistant – the top job in the biomedical unit, which is held by a Biomedical Engineer.
- [158] Mr. Williams indicated that an acting appointment is not a guarantee that the person appointed to act will be given the substantive post. He said that appointment is normally based on seniority. He stated that when a post becomes vacant, the relevant Ministry through the PS provides the CPO

with **'the names of eligible candidates'** and all relevant information including years of service, familiarity and experience with the nature of the work, qualifications, training, last date of **appointment, assessment of competence and efficiency.'**

[159] He explained that the CPO **'then submits the application to the PSC who may** call candidates for an interview to decide on the matter in accordance with Regulation 19. He said that seniority is not the only factor considered, but weight is attached to seniority if the post is one of a routine nature; and if there is an equality of efficiency of two or more officers who are eligible for the promotion, the PSC gives consideration to the **candidates'** relative seniority.

[160]Mr. Williams testified that alternatively a Ministry through the PS may submit the names of persons recommended for consideration for promotion, in order of priority. Mr. Williams averred that if there are 3 or 5 persons in a particular department, the names are presented for promotion in order of priority and reasons given as to why they are ordered in that manner. He asserted that persons will be considered even if they are not **recommended because it is not the individual PS'** authority to dictate who is to be appointed. He **described it as a matter of 'inclusiveness'**. **He pointed out that** depending on the size of a unit, everyone in that unit may be included.

[161] Mr. Williams averred that even though Mr. Boucher and Ms. Best were working in the Department before Mr. Shallow, he was promoted to the post based on the regulations and the notes accompanying regarding each individual. He explained that those notes about each individual play a very important role in the decision making process. He testified that unfortunately he failed to produce those notes. In fact, no such notes exist and that the regulations were not fully complied with **in relation to Mr. Shallow's appointment.**

[162] The PSU contended that it is not a coincidence that Mr. Boucher was not promoted. It submitted that while Mr. Deshong claimed he recommended Mr. Boucher orally, Ms. Walters said she did not nor did she make an assessment. It argued that when the post was filled in May 2015 the process used by the PSC appeared to be one where Ms. Walters received a call and chatted with someone. The PSU submitted that Mrs. Walters was not asked for an assessment; did not recommend Mr. Boucher.

[163] Quoting Lalla: The Public Service and the Public Service Commissions, p 161. The PSU submitted further:

'Promotion provides a positive incentive and stimulus to an employee to aspire to greater heights in his chosen field. When it fails to materialise, it leads to apathy, frustration, demotivation, dissatisfaction, low morale and dysfunctionality. This is particularly so when juniors are pitch-forked over their seniors without being given any reason for such action. Officers who are repeatedly overlooked for promotion develop a sense of rejection and become demotivated. Moreover, it would be unreasonable, in the absence of reasons, for those bypassed for promotion to conclude that promotion is based not on merit but on some other factor.'

[164] The PSU contended that for years public servants individually and by their union, have been complaining to their employer about certain conditions of service, namely that the written criteria established in the Constitution governing their promotion was not being applied, implemented, or followed in any consistent manner and that many deserving public officers were not being promoted accordingly. It argued that for years the employer ignored these complaints as a result of which the employees have sought the assistance of the Court.

[165] **It is not open to the court to review the PSC's choice of the favoured candidate** for the post of Senior Engineering Assistant or indeed any of the those queried by the PSU and the five named officers. This issue was not raised on the pleadings and in the absence of a decision, no adequate foundation has been established for doing so. Suffice it to say that the evidence before the court highlights problems with the manner in which the PSC chose the Senior Engineering Assistant. **I accept Mr. Boucher's testimony that he was not considered.** I find that he was not, based on the absence of the specific recommendations and his credible testimony.

Kejo Peters

[166] The PSU complained that Mr. Peters was superseded several times by persons in his department. Mr. Peters testified that while posted at the Ministry of Health, he became aware of 2 promotions only after they were announced, in respect of persons one of whom obtained her **Bachelor's degrees** after he did. He identified one as Simona Moses, the other as Denise Robinson. He remarked that Ms. Robinson is the niece of a member of the PSC who was promoted ahead of another individual with similar qualifications. Mr. Peters averred that there was no consistency in the promotions. He

observed that other officers promoted past him including **Mr.O'Riley Prince**, Asquith Ballah, Zinga Nelson. **He complained that although he obtained a Master's Degree he has not been promoted.**

- [167] Mr. Peters testified that the CPO Mrs.Gonsalves and acting CPO Mikhail Burke both told him that it depends on which name is selected from among those submitted to the PSC by the PS.He recounted that when he approached the Chairman of thePSC in 2016, he was toldthat he will look into it. He stated that he also spoke with Acting CPO Mrs. Arlene Sam in 2017 after submitting his evaluations and she told him that she saw them or received them.
- [168] Mr. Luis De Shong testified that he is acquainted with Mr.Kejo Peters who worked under him in the Ministry of Health. He said that he did not directly supervise Mr. Peters who was 6 or 7 levels below him.Headmitted that no written assessments were done for Simona Moses, Denise Robinson-Craigg and Zhinga Nelson. He said that he gave **'everybody who got a Bachelor's degree ... the opportunity and recommended them for an appointment as Administrative Officer'**.
- [169] Mr. De Shong stated that normally when a promotion is being considered to the post of **Administrative Officer in the Health sector, the candidate must have completed a Bachelor's Degree, performed creditably and have the requisite number of years' service.** He indicated that he recommended everyone for promotion who satisfied those requirements, including Kejo Peters.
- [170] Mr. De Shong subsequently stated that he would not say the promotions were conducted without written assessments or performance evaluations or in the absence of written evaluations. He explained that statements made in the recommendations which could amount to an appraisal of their performance. With respect, this does not satisfy the strictures of regulations 27 and 19 as to preparation of annual reports.
- [171] Mr.DeShong said that he made those recommendations based on oral evaluations. He indicated that this practice was not widespread. However, he acknowledged that it was not limited to Mr. **Peters' case. He stated that of the recommendations** he made for promotion, only a small number were based on oral evaluations but he could not give an exact percentage.. His candour in this regard is commendable. This is quite troubling though because it reflects that the standards are not maintained as a matter of course and that there is no monitoring of deviations.

[172] It follows that there is no accountability and no attempts within the Ministry of Health, to correct such departures. Mr. De Shongacknowledged that the claimants have not had one written evaluation. These are damning admissions. It is evident that under his watch that the requirement for annual reporting requirement was not routinely complied with.

Ms. Llewellyn

[173] Ms. Llewellyn testified that she has never been invited to a promotion interview since entering service on January 2 1987. She said that she was not sure if she was considered for vacancy. She stated that in 2005 a Vita Franklyn was promoted from grade 2 or 3 to 7 directly, although she Llewellyn had completed 18 years' service by that time and was senior to her.

[174] Ms. Llewellyn testified that she has been superceded by many officers junior to her in Ministry of National Mobilisation, who all had less academic qualifications and experience. Those persons according to her included Antoinette Duncan, Corren Duncan, Yolande Londin, Isilma Samuel, and Nzinga Quashie. She claimed that she has been told by the CPO she needs to inform the CPO of her qualifications and experience; while the PSC chairman said he will look into it. She said she appealed to the Honourable Prime Minister who promised to investigate. Mr. Williams accepted that no documentation regarding Ms. Llewellyn has been tendered into evidence by the PSC.

Mr. Daniel

[175] Mr. Daniel testified that he has never been promoted since he joined the service within the prison Department. He acknowledged that he has only a primary school education. He stated that 9 other prison officers have been promoted past him even though he has been charged with manning the Prison on his own on many occasions. He indicated that he is required to give written report to supervisors when he runs shifts. He claims that he is the most experienced prison officer. He opined that **promotion is a 'friend ting' in the prison**. He decried that everyone except him has been promoted in the prison service. He declared that this is not fair since even prison officers who have been working for only 5 years earn more than he does although he is the most experienced and performs similar duties.

[176] Mr. Brenton Charles indicated that a number of factors are considered during the promotion process. He stressed that it is important that a candidate possesses the capacity to command the respect of

fellow officers. He stated that Mr. Daniel has never been able to command that respect because he is viewed as working against the belief and mandate of the prison service. He referred to some accusations that have been made against Mr. Daniel. I omit them from this judgment as they have no probative value.

[177] He noted that Mr. Daniel entered the prison service with only a primary school education. He stated he was informed and believes that over 30 years ago the prison service accepted candidates based primarily on their robust physique, with little to no emphasis on academic qualifications. He claimed that during that time seniority was the main factor used to determine eligibility for promotion. Mr. Cecil Blazer Williams did not speak to this.

[178]Mr. Charles did not indicate who told him this. He has provided no reasons why the originator of that statement did not testify in this case. That material is therefore hearsay. The PSC filed no notice of its intention to adduce such evidence as stipulated by the Evidence Act³⁰ (**'the Act'**) and rules of court deemed to be made pursuant to its provisions.

[179] Section 47 (1) of the Act provides:

'In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person whether called as witness in those proceedings or not, shall, subject to this section and to rules court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.'

[180] Although no rules of court have been made by the rule making authority in this jurisdiction, the rules which were made under the UK Civil Evidence Act 1968 are deemed to apply.³¹Those rules³² provide that a person wishing to adduce hearsay statements must serve notice on all other parties of such desire within twenty-one (21) days after the date that the matter is set down for trial. In the case of non-documentary hearsay, the adducer must give particulars of the maker of the statement and the substance of the statement or words used and the time when it was made.

³⁰Cap. 220 of the Laws of Saint Vincent and the Grenadines, Revised Edition, 2009, sections 47 and 55.

³¹Pursuant to section 55(12) of the Act.

³²Rules of the Supreme Court Order 38, rules 20 to 32 made under the UK Civil Evidence of 1968.

[181] If the adducer claims that the maker cannot or should not be called because of his unavailability, he must give reasons. Such reasons might include that the person's question:

1. is dead;
2. beyond the seas;
3. physically or mentally unfit to attend as a witness;
4. cannot with reasonable diligence be identified or found; or
5. cannot reasonably be expected to have any recollection of matters relevant to the accuracy of the statement.

[182] If the requisite notice is served and the opposing party requires the maker of the hearsay statement to be called, he must serve a counter-notice within seven (7) days after receipt of the notice that the adducer proposes to adduce such hearsay evidence. The court retains a residual discretion to allow such hearsay testimony to be given in evidence notwithstanding non-compliance with the rules; or if it considers that refusal might otherwise compel one side to call an opposing party.

[183] The PSU did not object to the referenced hearsay testimony. It was admitted into evidence. In considering what weight to **ascribe to it, I note the PSC's non-compliance** with the referenced rules, particularly the absence of the name(s) of the originator of the hearsay and lack of details as to why they are not witnesses in this case. I therefore give little weight to such testimony. Its probative value is worthless.

[184] Mr. Charles testified that there has since been reform within the prison service which required academic qualifications as one of the criterion for being eligible for admittance. He produced no documentary proof of that. He listed nine officers who have joined the prison service subsequent to Mr. Daniel who have all been promoted. He also outlined their academic credentials ranging from CXC passes to Diplomas.

[185] One officer was said to possess a certificate in welding. I am not clear how that is relevant to the services provided at the prison. Yet another³³, who has reportedly since resigned was not identified

³³ K. Letteen.

as having any academic qualifications. Another officer³⁴ **was noted to have 22 years' experience**, training in basic prison duties, a course in adolescent growth and development from the ministry of Health and Human Resource Development and a training course from the Ministry of Agriculture Program.

[186] It was not disputed that Mr. Daniel has **had over 26 years' experience in the prison services, has had basic training in prison duties or that he 'runs shifts' without direct supervision. Mr.** Charles complained that he has made no efforts to improve his academic qualifications. He indicated that promotions within the prison service are triggered by a recommendation from the Superintendent to the PSC, directed through the PS and CPO.

[187] He testified that he would call officers who are eligible for promotion and explain to them the criteria for promotion which includes qualification, experience, merit and general fitness in accordance with regulation 19. He did not say whether this included Mr. Daniel. This gives the impression that other officers are not notified of vacancies or considered for promotion. This is a concession that regulation 19 is not fully complied with. It also suggests that the buck stops with the Superintendent, that if he does not invite a prison officer to the discussion about eligibility requirements, they are automatically excluded from consideration by the PSC. If this is the case, it is not lawful.

[188] Mr. Charles stated that on 8th December 2016 and 15th March 2017 eligible prison staff names were **recommended to the PS for consideration for promotion. Mr. Charles testified that Mr. Daniel's** name was among the 10 other candidates recommended for the post of First Class Prison Officer. He indicated that he was not sure if the names had been forwarded to the PSC. Mr. Charles did not indicate that this was a departure from the prison reform protocols referenced earlier and if so why such a shift in policy; and what if any circumstances justified a **recommendation on Mr. Daniel's** behalf at this specific time.

[189] **Mr. Charles' testimony was riddled with inconsistencies on this stated policy. In this regard, he**

³⁴T. Bobb.

maintained that academic qualifications were now a virtual precondition to promotion, yet at least two prison officers (excluding Mr. Daniel were considered eligible for promotion) and were accordingly recommended, without explanation. I do not accept his assertion that any such policy exists. I would imagine that documentary evidence of it would have been provided if it did.

[190] The procedure described by the Superintendent does not conform with regulations 18, 19, 20 and 27. He has contradicted Mr. Cecil Blazer Williams in this regard. This is concerning.

Kenroy Boucher

[191] Mr. Kenroy Boucher was appointed as a police officer on June 16 1990. He was transferred to the Immigration Department on October 1 2006. He has been a Senior Immigration Officer since then. In 2010 he was assigned to NEMO. That year a vacancy for Assistant Chief Immigration officer arose. Mr. Boucher inquired of the PS if he could apply for the post and was told they needed someone with more civil service experience.

[192] He testified that it was filled by someone who had no immigration experience and who was the wife of then CPO – a Mrs Burke. Mr. Kenroy Boucher was re-assigned to the Ministry of National Mobilisation in 2013 where he is now posted. He stated that after Mrs Burke resigned from the post of Chief Immigration Officer it was filled by a junior officer. He said he was not invited to apply for either vacancy and he has never seen an advertisement for the post in the *Gazette* or elsewhere.

[193] Mr. Williams stated that he knew that Mrs. Burke was appointed to that post but he did not remember if Mr. Kenroy Boucher was considered for that vacancy or if his name was submitted. Mr. Williams would have been expected to come to court armed with documentation and information to rebut the allegations made by the PSU. In this instance he did not.

[194] Mr. Williams averred that while the PSC has cogent evidence to show that it acted properly in all the circumstances, all of that evidence was not presented in court. I draw the adverse inference that **such cogent evidence was not presented in relation to Mr. Boucher's claims because it did not exist. Mr. Kenroy Boucher's experience is yet one other example of the failures of the promotion processes within the civil service.**

Mr.Poyer

- [195] Mr.Poyer was very outspoken. He has been in the service since 1984 and has been assigned to the Ministry of Agriculture throughout that time at the Department of Forestry. He testified that he has never been promoted although a recommendation was made for his promotion in 1991 or 1992 by System Caribbean, a personnel assessment company who made other recommendations for promotions of other officers, which were effected. He averred that the PSC follows and applies the promotion policy not at all or chaotically or inconsistently.
- [196] Mr.Poyer identified a number of persons who were promoted although they joined the service after him. He spoke of an Amos Glasgow who was trained with him; Cosmos McLeod, Mr. Harry and Glenroy Gaymes who joined after him. He claimed that he trained Mr. Gaymes. Mr.Poyer stated that he was not considered for those posts and should have been. He also identified Mr. Simon as another officer who superseded him. He pointed out that the department does not maintain any formal seniority list which means that it cannot consider or properly consider all factors mandated by regulation 19.
- [197] Mr.Poyer testified that he applied for the Forestry Supervisor position and received no response. He spoke to Chairman of the PSC about it in 2016 and was told that he had not received any documents. Mr.Poyer said that he gave the Chairman a copy of the document and never got a response. He arranged for the PSU to write to the CPO on his behalf and no answer was forthcoming.
- [198] Mr. Raymond Ryan said that Mr.Poyer was not considered for the post of Forestry Officer 3 in 2014 when Samuel Harry was promoted to that position, because he did not at all times have a degree in Forestry. He stated **that Mr.Poyer had an Associate's degree then. He could not recall the names of the persons considered for that position.** It strikes me that there would have been no need to for him to rely on memory if the information was provided in his affidavit. He would also have been able to provide those documents as the custodian of the records in the Ministry of Agriculture.

[199] Mr. Ryan **admitted that Mr.Poyer's supervisor is Mr. Simon.** He was unable to recall whether Mr. Simon had a Diploma and not a degree. He said he would have to check the records. Mr.Poyer averred that Mr. Simon has a Diploma. I accept his averment in the face of no credible denial from the officer who is charged with maintaining those records and in face of his failure to produce them, and in view of the fact that the **statement appears in Mr.Poyer's affidavit.**

[200] Mr. Ryan said that Mr.Poyer was not considered for promotion when Mr. Simon or Mr.Gaymes were promoted. He explained that he would not have been privy to the considerations which informed **Mr. Simon's promotion because he was Chief Forestry Officer and not PS then. He admitted that** he has full access to the Forestry Employment file which would have details about those promotions. He admitted that he thought it was important for him to know what was on the file seeing that he is a witness in this case.

[201] He acknowledged that Mr. McLeod was promoted from FO3. He said he would prefer to check the **file to ascertain if McLeod has an Associate's degree. On reviewing his affidavit he accepted that Mr. Cosmos McLeod has an Associate's degree in Watershed Management,** the same level as **Mr.Poyer's degree. He** stated that Mr.Poyer was not considered for promotion when Mr. McLeod was promoted. He could not say who was considered for promotion at that time.

[202] Mr. Ryan admitted that Osa Samuel is a Forestry Supervisor which is at a level superior to **Mr.Poyer's post. He acknowledged that Mr. Samuel possesses a Diploma and is less experienced** than Mr.Poyer. He stated that Mr.Poyer was not considered for promotion at that time in 2016, based on the recommendation from his Hod and Director of Forestry Mr. Providence. He said that he could not recall changing the list submitted by the Director.

[203] Interestingly, he stated that he was not saying that it may have or did not happen. This is a curious response. With a smirk on his face, Mr. Ryan retorted that if he did not supervise the work, depending on the circumstances, it would have been appropriate for him to change the list, though if there were extenuating circumstances, albeit very rarely. Having regard to Mr. **Ryan's response** accept that he did change the list. This is an inference which is reasonable from the circumstances of the answer, the body language and the facial expression.

- [204] Mr. Ryan claimed that Mr.Poyer was not considered for promotion because there were cases of non-compliance, insubordination, disruptive behaviour, a medical report from his doctor and a report from the Director Mr. Providence that he be given less strenuous duties. Those documents were not produced.
- [205] **Mr. Ryan's answers** reveal that the sanction imposed on Mr.Poyer for the allegations of misconduct was a denial of consideration for and a promotion. No evidence was led of any disciplinary proceedings, findings and punishment. This is truly amazing. the observations made in respect of **Mr. Peter's, Mr.Poyer's and Mr. Daniel's similar treatment are just as applicable to Mr.Poyer.**
- [206] In a truly democratic society, the resources of the State are administered in accordance with the law and in accordance with principles of fairness and probity and not subject to the whims and fancies of a select group of people whatever their beliefs, affiliations or persuasions. The allegations made **by the PSU have been largely borne out principally by the testimony of the PSU's** and the PSC's witnesses and also due to the lack of candour on the part of the PSC and its witnesses from which the court has drawn adverse inferences as it is entitled to do.
- [207] Mr. Cecil Blazer Williams testified that he has presented no documentation regarding the candidates **who were considered for promotion during Mr. Peter's, Mr.Poyer's, Ms. Llewellyn's, Mr. Boucher's and Mr. Daniel's employment within the public service or recommendations** made as to such promotions, the record bears this out.
- [208] Only 7 public officers have highlighted such instances of procedural impropriety and unlawfulness. The entire public service is served by approximately 5000 public officers. While there is insufficient evidence before me from which to deduce that there are systemic procedural failures and lack of compliance with the requirements of Regulation 19 across the civil service, there is enough material in this case to find that within the Ministry of Health, Ministry of Agriculture, Department of Customs, Prison Department and Ministry of National Mobilisation that the regulations have been repeatedly breached in more than one respect in the case of the officers who have complained through the PSU and in the cases of the officers whose promotions have been called into question.

[209] The PSC has defended the conduct of the Departmental Heads, Permanent Secretaries and other supervisors against whom these complaints have been made even though the evidence is crystal clear. This is perhaps not surprising since the PSC would be the body with ultimate culpability. This leads me inexorably to the conclusion that either the members of the PSC are not sufficiently familiar with the Regulations to give effect to them; are not concerned about ensuring that they are substantially complied with or are complicit in the failures. Whatever the reasons, the consequences of inaction could potentially lead to a total breakdown of the system and in the case at bar has resulted in denial of due process to the affected public officers.

[210] For all of the foregoing reasons, I am satisfied that this is an appropriate case in which to make the declarations requested in respect of aspects of the operational machinery of the promotions system in the public service. I am satisfied that the PSC has failed to comply with Regulations 15, 19 and 20 of the Public Service Regulations in relation to promotions for which public officers Agnes Llewellyn, Elroy Boucher, Joel Poyer, Kejo Peters and Conroy Daniel have been eligible during their service in the public service.

[211] Mr. Williams testified that Mr. Daniel and Mr. Peters were promoted since the commencement of the proceedings and that Ms. Llewellyn was also promoted. This has been confirmed by the PSU. Mr. Williams denied that the promotions were made because of these proceedings. It is hoped that the PSC will take the necessary steps to investigate and eradicate the irregularities in the promotion system within the civil service that have been identified in this case. The public, the civil servants, the government and people of Saint Vincent and the Grenadines deserve no less. The law demands it.

[212] In the absence of the determinations made by the PSC in respect of the impugned promotions, this court does not have before it evidence from which it can conclude on a balance of probabilities, that there have been unreasonable delays and unlawful inconsistencies in the promotion process in respect of promotions for which Agnes Llewellyn, Elroy Boucher, Joel Poyer, Kejo Peters and Conroy Daniel were eligible during their service in the public service. I make no such declaration.

Issue 2 - Has the PSC has failed to observe principles of fairness, transparency and objectivity in exercising its functions under regulation 19?

[213] The PSU alleged that the PSC failed to observe principles of fairness, transparency and objectivity in exercising its functions under Regulation 19 in respect of promotions for which Agnes Llewellyn, Elroy Boucher, Joel Poyer, Kejo Peters and Conroy Daniel were eligible during their respective periods of service in the public service of Saint Vincent and the Grenadines.

[214] On this score the PSU submitted that although Mr. Ryan accused Mr.Poyer of discreditable conduct, no evidence was led that any disciplinary actions had ever been taken against him. I agree. The PSU argued that the PSC did not produce any adverse report on Mr.Poyer in the last 11 years. It reasoned that fairness would require that he be given an opportunity to meet such criticism. It cited the case of Permanent Secretary Ministry of Foreign Affairs, and Prime Minister Patrick Manning v Feroza Ramjohn³⁵.

[215] The PSU submitted further that the PSC acted improperly when they ignored **its and Mr.Poyer's** several letters on promotion policy. I agree with those submissions and accept that they constitute a departure from principles of fairness. The observations made with respect to Mr. Peters are just as applicable to the treatment accorded to Mr. Daniel, Mr. Peters and Mr. Boucher where adverse reports were made against them. In none of those cases was evidence led that the officers were given an opportunity to participate in any disciplinary hearing to clear themselves. Notwithstanding **the adverse reports were acted on by the supervisors and the PSC, to the officers' detriment.**

[216] It is now well-accepted and established that administrative bodies are required to know the law that they are charged with applying. If this is not done and rigorously enforced injustice is likely to result **and ultimately a breakdown in the system would follow. As 'the guardian of legality' the court must** 'first construe the authorizing power; determine its terms, scope and purpose, and measure the decision or action against this.'³⁶Where procedures implemented by an administrative body reveal

³⁵[2011] UKPC, para. 39.

³⁶Quorum Island (BVI) Ltd. v Virgin Islands Environmental Council BVIHC VAP 2009/021 para.30, (per Rawlins, C.J.)

that it does not understand the applicable law, it is left to the court to identify such defects.³⁷

[217] The preceding paragraphs have highlighted areas where the PSC has departed from the letter and spirit of the regulations which govern the promotion process within the civil service in Saint Vincent and the Grenadines. They include a failure by the PSC to ensure that vacant positions are advertised; that confidential annual reports are prepared in respect of each public officer and that specific recommendations are prepared and submitted formally to the PSC in respect of each such opening in the service. The absence of seniority lists in the required format is another glaring deficiency in the process.

[218] Unless the PSC complies with those requirements the body of public officers will not be properly served by that body. Importantly, such defaults will have a deleterious knock-on effect on the administration of the government service. The regulations create statutory duties which attract sanctions for breach. The Chairman and each member of the PSC as well as the appointing body should as a matter of priority take urgent steps to regularize the operational machinery within the promotions process in the civil service. This is an appropriate case in which to grant relief to **PSU to signal the court's** disapproval of the current processes and to hasten ameliorative reform.

[219] The PSC is duty bound to familiarize itself with the governing regulations and procedures and to ensure that each actor in the system appropriately trained and monitored to ensure that there is no departure from the legislative mandate. I find that it has not done so in some of the instances described by the five named officers. They are identified above. I do not repeat them. In the premises, I find that the PSC has failed to observe principles of fairness, transparency and objectivity in exercising its functions under regulation 19.

Issue 3 - To what relief, if any, is the PSU entitled?

Declaration

[220] The PSU seeks declaratory relief. The grant of declarations is discretionary. In the exercise of its discretion the court takes into account all the relevant circumstances such as **the claimant's** conduct and its effect. The PSU has established that the PSC has failed to comply with several

³⁷Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.

aspects of the Public Service Regulations governing the promotions process within certain departments and Ministries in the civil service. No evidence was led of how many promotions were handled during the periods under consideration. No statistical data was presented from throughout the civil service from which to extrapolate that there is a service-wide habit of flouting the provisions of the Regulations. It would be a stretch for the court to make such a leap on the available evidence. In the circumstances, it is fair and just to grant declaratory relief to the PSU limited to the matters proven. Corrective action is also desirable.

[221] Accordingly, it is declared that the PSC has failed to comply with Regulations 15, 19 and 20 of the Public Service Regulations in relation to promotions for which public officers Agnes Llewellyn, Elroy Boucher, Joel Poyer, Kejo Peters and Conroy Daniel have been eligible during their service in the public service. It is further declared that the Public Service Commission has failed to observe principles of fairness, transparency and objectivity in exercising its functions under Regulation 19 of Public Service Regulations in respect of promotions for which Agnes Llewellyn, Elroy Boucher, Joel Poyer, Kejo Peters and Conroy Daniel have been eligible during their service in the public service.

[222] The PSC is ordered to establish and implement forthwith and maintain an efficient, transparent and effective performance appraisal and promotion regime within the public service in accordance with Part 2 of the Public Service Regulations. The PSC must ensure that such system incorporates functional monitoring and corrective mechanisms.

Costs

[223] The Court may award assessed costs in judicial review proceedings³⁸. The general rule provides for the successful party to be awarded costs.³⁹ I am of the opinion that this is a fitting case in which to award costs. It is therefore ordered that the PSC pays costs to the PSU to be assessed on application to be filed and served on or before 31st January 2019.

³⁸CPR 56.13.

³⁹ CPR 64.6.

ORDER

[224] It is declared and ordered:

1. The Public Service Commission has failed to comply with Regulations 18, 19, 20 and 27 the Public Service Regulations in respect of promotions for which public officers Agnes Llewellyn, Elroy Boucher, Joel Poyer, Kejo Peters and Conroy Daniel have been eligible during their respective periods of service in the public service of Saint Vincent and the Grenadines.
2. The Public Service Commission has failed to observe principles of fairness, transparency and objectivity in exercising its functions under Regulation 19 of Public Service Regulations in respect of promotions for which Agnes Llewellyn, Elroy Boucher, Joel Poyer, Kejo Peters and Conroy Daniel have been eligible during their respective periods of service in the public service of Saint Vincent and the Grenadines.
3. The Public Service Commission is ordered to establish and implement forthwith and maintain an efficient, transparent and effective performance appraisal and promotion regime within the public service, (including robust and functional monitoring and corrective mechanisms) in accordance with the stipulations in Regulations 18, 19, 20 and 27 of the Public Service Regulations.
4. The Public Service Commission shall pay to the Public Service Union pursuant to CPR 56.13 (5), costs to be assessed, on application to be filed and served on or before 31st January, 2019.

[225] I am grateful to learned counsel Mr. Joseph Delves, for his written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar