



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 381

BETWEEN:

DAVE ANDERSON GREENIDGE

Applicant

- and -

THE COMMISSIONER OF POLICE

Respondent

Before: Hon. Chief Justice Hargun

Representation: Mr. Saul Froomkin QC for the Applicant

**Mr. Allan Doughty and Ms. Safia Gardner of MJM Limited for the
Respondent**

Date of Hearing:

19 October 2021

Date of Judgment:

25 November 2021

JUDGMENT

Whether a decision of the Assistant Commissioner of Police that the Applicant did not qualify to participate in the promotion process for police officers is open to judicial review; whether there was the legitimate expectation that the applicant will be allowed to participate in the circumstances; whether the decision is otherwise Wednesbury irrational

Hargun CJ

Introduction

1. This is another case arising out of the promotion process for promoting Police Officers in the Bermuda Police Service (“**the BPS**”). In this case Detective Inspector Dave Anderson Greenidge (“**the Applicant**”) complains that he was not allowed to participate in the 2018 promotion process (“**the Promotion Process**”). The Applicant asserts that on 26 April 2018, he submitted an application for promotion for the rank of Chief Inspector during the process when applications for promotion for the rank were ongoing. However, on 4 May 2018, in response to his application, the Applicant received an email from Acting Commissioner Martin Weekes “**ACOP Weekes**”) advising him that he was ineligible to participate in the process “*since (he) did not meet the PDR requirements.*”
2. The Applicant seeks an order of certiorari quashing the decision of ACOP Weekes and a declaration that the Applicant was eligible to participate in the promotion process and is entitled to damages. The grounds upon which this relief is sought are as follows:
 - (1) That the Applicant had a legitimate expectation that his application for promotion to Chief Inspector would be properly considered by the Promotion Board.
 - (2) That bearing in mind the Applicant’s years of service, record of service and the fact that for 20 consecutive months he acted as head of the Criminal Investigation Unit

as Acting Chief Inspector, he had reason to believe that he would be promoted to the rank of Chief Inspector.

- (3) That the Applicant was treated unfairly in that the alleged reason given for his ineligibility for promotion was inconsistently applied to other Applicants and had in the past been waived.
 - (4) That the said decision was unreasonable and irrational.
 - (5) That in refusing to consider the Applicant's promotion application, he was treated unfairly.
 - (6) That in refusing to properly consider and process his application, the established regular practice regarding promotion was disregarded.
3. The Application is supported by three affidavits filed by the Applicant and an affidavit by Police Sergeant Michael Butcher ("**PS Butcher**") and Inspector Barry Richards. In response, the Respondent has filed three affidavits of ACOP Weekes, an affidavit by and an affidavit by the BPS, Human Resources Manager, Mr. Michael Trott ("**Mr. Trott**").

Background

4. In his third affidavit ACOP Weekes explains that the BPS Promotion Policy¹, is an ever-changing document and has been revised multiple times in his career. In recent years the Promotion Policy has been revised following consultation at all levels of the BPS, including the Bermuda Police Association ("**the BPA**"). Following the completion of the last promotion process, feedback was sought and has formed the starting point for consultation of the revisions for the next promotion process.
5. ACOP Weekes states that a Promotion Process was run in 2012 and again in 2013. The 2013 Policy was radically different from the previous policies in that it provided for a very

¹ Set out in a document amended 15 August 2012 to implement a new promotion process; amended again on 18 December 2012; and amended again in October 2017 to streamline the process in existence at the time of the present Application.

strict drawn-out process designed to “*filter out*” as many candidates as possible in order to limit the number of formal interviews that took place. The process for each rank promotion had an application form which had multiple questions to answer as well as a career summary document to prepare. All candidates’ applications were marked, and many were “*failed*” on the answers that they gave to the questions. The applicant also had to submit completed Personal Development Review (“**PDR**”) documents that were screened by the panel and where entries were not deemed strong enough the candidate was rejected. The idea was to only have 10 candidates at each rank progressed through to the interview stage. Following the conclusion of the 2012 and 2013 promotion processes, all applicants, along with the BPA, were invited to submit written feedback that would be considered in advance of the next promotion process.

6. When it was suggested in 2017 that a revised process needed to be established, ACOP Weekes volunteered to take the lead. ACOP Weekes then took the written feedback from the 2012 and 2013 promotion processes and invited volunteers from across the Service to form a working group (“**Working Group**”) to refine the policy and present a revised policy to the Commissioner of Police (“**the Commissioner**”).
7. The membership of the Working Group was varied between police officers who held the rank of Constable to the rank of Chief Inspector. Representatives from the BPA were also invited to join the Working Group. The feedback that was ultimately provided by the Working Group was that the 2012 and 2013 Promotion Processes were unduly time-consuming and that many of candidates felt it unfair that their PDRs which have been signed off by the supervisors were found not to be strong enough for them to continue in the process. To that end the Working Group proposed that the Commissioner implement a new policy. The Commissioner directed that the new policy should be as “*inclusive*” as possible and not designed to “*exclude*” candidates as had been the case with the previous policy. To that end the Commissioner allowed the following changes:

- (1) Removal of the lengthy questions from the application form leaving only the requirement to complete all sections (and details of professional development undertaken by the candidate at their own volition).

(2) Removal of the requirement for PDRs to be graded by the panel. The Commissioner declined to remove the PDR requirement completely but did agree to only require the applicant to attach the 2 completed PDRs for the last 2 years. The Commissioner agreed that the applicants would not be marked down on the contents, and they must just prove the compliance with the PDR Policy by completing one each year. This requirement is reflected in paragraph 5.9 of the current Promotion Policy:

“5. ELIGIBILITY REQUIREMENTS

5.9 Officers will not be eligible to participate in any extended promotion process if they received a failing grade in their PDR or have failed to complete a PDR during the preceding 2 years.”

8. The BPS policy in relation to the requirement for PDR is set out in a document headed Performance and Development, effective 1 April 2011 and as amended on 16 April 2012. The document states that it is the policy of the BPS that all officers will undergo annual performance and development reviews. It provides that the performance and development reviews for all officers will be conducted using the Development Performance Management System software in accordance with the procedures outlined in the document.
9. In his affidavit dated 10 September 2020 PS Butcher explains that it is the policy of the BPS that all officers will undergo annual performance and development reviews. A failure to complete a PDR is a disciplinary offence as it would be a breach of the Standards of Professional Behaviours, specifically Order and Instruction which states that police officers abide by police regulations, police codes of practice, service policies and lawful orders. A breach of the Standards of Professional Behaviour (not completing a PDR) is actionable under the Police Conduct Order 2016, and therefore the Commissioner has the authority to take action against officers failing to complete a PDR.

10. As noted earlier the Applicant applied on 26 April 2018 for promotion to the rank of Chief Inspector. In the covering memorandum to ACOP Weekes, the Applicant acknowledged that he had not complied with the requirements relating to completing PDRs within the relevant time and sought a “waiver” regarding this requirement. The memorandum stated:

“Sir,

I enclose a copy of my application for promotion, I am aware that one of the criteria for promotion is the requirement of two years of PDR, that is for the period 2016-2017 and 2017-2018. I have completed both PDR’s however; the 2016-2017 was completed outside of the deadline.

Although clearly the PDR is a recognized tool for gauge the performance of staff, it ought not to be the one factor in Performance Measurement, and not a condition precedent. I am aware that in the past, the 2 year PDR requirement has been waived and the applicants have been permitted to participate in the promotion process.

Accordingly I request such a waiver. Bearing in mind that I have been Acting Detective Chief Inspector, OIC of the Criminal Investigation Unit for the past 17 consecutive months and acted in that capacity for a combined total of 18 ½ months out of the past 2 years, it would be unfair to exclude me from consideration for promotion merely on the basis of a single factor.”

11. In response ACOP Weekes confirmed that the Applicant had not met the PDR requirements as the audit of the PDR system indicated that (1) all of the entries in the Applicant’s PDR for 2016/17 were entered on 6 April 2018 (the deadline being 30 March 2017); and (2) it appeared that none of the entries were verified within the prescribed time. ACOP Weekes sought further and better particulars in relation to the Applicant’s allegation relating to past “waivers” relating to the PDR requirement. The email ended by ACOP Weekes stating that on the face of it, the Applicant’s 2016/17 PDR appeared not to qualify as a duly completed PDR and enquired whether the Applicant agreed with this position. There was no written

response to this enquiry by the Applicant. However, the Applicant responded on the telephone that he knew he had not completed the PDR in time.

12. The Court accepts, as appears to be accepted by the Applicant, that the PDRs submitted by the Applicant, in order to comply with paragraph 5.9 of the Promotion Policy, do not comply with the requirements relating to the completion of PDRs. As set out in paragraph 19 of ACOP Weekes Third Affidavit, the first PDR is for the period 1 April 2016 to 31 March 2017. The entries into the Applicant's 2016-2017 PDR, however, were all made in April 2018, well after their due date. The document was clearly generated after the fact and not contemporaneously. The second PDR is for the period 1 April 2017 to 31 March 2018. It also does not comply with the relevant requirements in that the very first entry made by the Applicant on March 15, 2018, deals with a matter dating back to 25 January 2017, a date that falls outside the relevant review period. The same is true of the second entry which refers to an incident that took place on 21 July 2016. As all entries made by the Applicant are recorded as having been made on 15 March 2018, the PDR is clearly not a contemporaneous record.

13. The Applicant was not given the "waiver" which he sought in the memorandum dated 26 April 2018. However, the Applicant was given an opportunity to file a grievance with the Grievance Advisory Board of the BPS. The applicant, however, elected not to pursue the grievance and instead commenced these judicial review proceedings.

Is the decision reviewable?

14. As a preliminary issue Mr. Doughty contends that the decision whether or not the Applicant is qualified to participate in the promotion process is not a proper subject matter of judicial review as the decision is essentially an operational matter for the Commissioner that lacks the appropriate public element to attract judicial review. Mr. Doughty relies upon this Court's decision in *Bhagwan v Corbishley (Commissioner of Police)* [2021] Bda LR 37.

15. In *Bhagwan* the Court referred to three decisions of Baker LJ (and JA) in relation to the operation of a Police Service in which Baker LJ draws a distinction between decisions which are disciplinary in nature and decisions which are operational in nature. The Court noted that these cases support the proposition that disciplinary decisions are the proper subject of judicial review by the courts. However, operational decisions within a police force are in general not susceptible to judicial review and decisions in relation to promotion processes are of a kind which the Court should “*only in the most exceptional circumstances, if ever, interfere.*” The three decisions referred to in *Bhagwan* are *R (ex p Morgan) v Chief Constable of South Wales* [2011] EWHC Admin 262, *R v (ex p Tucker) v Director of the National Crime Squad* [2003] EWCA Civ 57, and *Commissioner of Police v Romeo Allen and Others* [2011] Bda LR 13. The Court referred to these three cases at paragraphs 29-34:

“29. In *R (ex p Morgan) v Chief Constable of South Wales* [2011] EWHC Admin 262, the Claimant was a police inspector in the South Wales Constabulary and was seeking judicial review of the decision to withdraw his qualification for promotion (“his white ticket”). The Chief Constable decided to withdraw the Claimant’s promotable grade because he concluded that his lack of objection, evidenced by his handling of an incident involving violence between youths of different races, outweighed the positive reports by his line manager. He decided he did not have the confidence in the Claimant’s judgment, sufficient to promote him to Chief Inspector. The Claimant argued that the withdrawal of his white ticket was either a disciplinary sanction or something akin to it. Baker LJ, delivering the only reasoned judgment of the Court of Appeal, disagreed and held at paragraph 19:

“...Furthermore, the decision under challenge in the present case is one of a kind with which the courts should in my judgment only in the most exceptional circumstances, if ever, interfere. It is quite erroneous to look at the decision as one relating to discipline; it was a question of suitability for promotion. I am quite unpersuaded by the first limb of Mr. Eicke’s argument. The removal of the Claimant’s white ticket was neither a disciplinary sanction nor anything akin to it. The Chief Constable did not

act in a procedurally unfair way and he was not required to follow the procedure laid down within the Police (Discipline) Regulations.”

30. Baker LJ revisited his earlier ruling in *ex p Morgan* in the later decision of *R (ex p Tucker) v Director of the National Crime Squad* [2003] EWCA Civ 57. In this case the Appellant, a Detective Inspector in the Derbyshire Constabulary, was seconded for 5 years to the National Crime Squad (“NCS”). The secondment was extended until May 2002, but in April 2001 it was terminated, and he was summarily returned to his local force. His claim for judicial review of that decision failed before Harrison J who held that the decision was amenable to judicial review but that the Director General of the NCS had acted fairly notwithstanding the absence of reason for the decision and lack of opportunity for the Appellant to make representations. In the Court of Appeal, Baker LJ disagreed that the decision was susceptible to judicial review and relying upon his earlier decision in *ex p Morgan* drew a distinction between operational and disciplinary decisions. At paragraph 27 and 32 Baker LJ held:

“27. A police officer is in a different position from other employees. On becoming an officer he forfeits certain advantages, for example the right to strike or bring proceedings for unfair dismissal. He is subject to the discipline of his force and has by and large to go where and do what he is told. On the other hand he gains certain advantages for example the right to remain in service, health permitting, and to ill health and injury pensions. Dismissal or other disciplinary punishment is governed by statutory procedures that are amenable to judicial review in the event of any breach of public law principles, such as fairness.

In contradistinction to the decision with regard to the other officers, there was no disciplinary element to decision in the Appellant's case. He was returned to his force because the Respondent had lost confidence in his ability to carry out his responsibilities. It seems to me that this was an entirely operational decision similar to the kinds of decision that are made

with officers up and down the country every day of the week. Examples are transferring officers from uniform to CID or from traffic to other duties. These, to my mind, are run of the mill management decisions involving deployment of staff or running the force. They are decisions that relate to the individual officer personally and have no public element. They are, if you like, the nuts and bolts of operating a police force, be it the NCS or any other. It is, in my judgment, quite inappropriate for the courts to exercise any supervisory jurisdiction over police operational decisions of this kind. There is, quite simply, no public law element to them. The position is different where, however, disciplinary proceedings have been taken against an officer and the ordinary principles of fairness have been breached.”

32. In relation to *ex p Tucker* it should be noted that the Privy Council in *Prime Minister Manning v Feroza Ramjohn* [2011] UKPC 20, after citing paragraph 32 in the judgment of Baker LJ, held at paragraph 34 that: “On the issue of reviewability, the Board has some doubt as to the correctness of the Court of Appeal’s conclusion in *Tucker* that the DDG’s decision was altogether beyond the Court’s supervisory jurisdiction.”

33. Baker JA returned to this topic in the Bermuda Court of Appeal’s decision in *Commissioner of Police v Romeo Allen and Others* [2011] Bda LR 13. Baker LJ referred to paragraphs 27 and 32 of his earlier judgment in *ex p Tucker* as representing the line of demarcation between reviewable and unreviewable decisions within the Police Service and in particular the distinction between operational and disciplinary decisions. He also referred to as the decision of the Pitchford J in *R (Hopley) v Political Health Authority and another* (unreported) 3 July 2002, where the learned judge identified 3 matters to be considered when considering whether a public party with statutory powers was exercising a public function amenable to judicial review or a private function that was not namely:

- (i) Whether the defendant was a public party exercising statutory powers.

(ii) Whether the function being performed in the exercise of those powers was a private or public one.

(iii) Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration.”

16. In *Bhagwan* the Court noted that the action in that case as framed, did not merely affect DS Bhagwan but affected all officers who participated in the promotion process. In that case the action challenged the 2018 Promotion Policy, promulgated for the purposes of discharging the Commissioner’s statutory duties under section 3 (1) of the Police Act 1974. Given that the decisions made by the promotion panel, which were the subject matter of the challenge in *Bhagwan*, affected the validity of the 2018 Promotion Policy and affected the Police Service as a whole, the Court concluded that the decisions raised sufficient public law issues which were amenable to judicial review.

17. In the present action the decision challenged by the Applicant is confined to whether in the circumstances the requirement relating to PDR’s should have been waived by the promotion panel. The present action does not seek to challenge the Promotion Policy.² In the circumstances the present challenge relating to whether the Applicant should have been allowed to participate in the Promotion Process, in the Court’s judgment, falls within the category of decisions which are operational in nature. In essence, it is an employment dispute which does not engage any public law considerations. In the ordinary case an application for judicial review should not be extended to a pure employment situation (per Woolf J (as he then was) in *R v BBC, ex p Lavelle* [1983] 1 WLR 23, 30C) and in the case

² It is noted that several other officers also made similar complaints. In addition to the Applicant, Chief Inspectors Tracy Adams and Hashim Estwick, Inspectors Tracy Burgess, Barry Richards and Sherwin Joseph, and many others failed to meet the PDR requirements. In most cases they all failed to provide two completed PDRs duly completed within the time required by the PDR Policy. They submitted a formal Grievance to the Commissioner but were not allowed to go through to the interview stage. A number of the officers have also challenged the decision by way of judicial review proceedings which are currently pending.

of employment by a public body, the legal status of the employer does not per se inject any element of public law (*McClaren v Home Office* [1990] ICR 824, 836-838B).

18. In the circumstances the Court concludes that where the challenge is confined to whether an applicant should have been allowed to participate in the Promotion Process within the BPS (for example, because the applicant has not complied with the PDR requirements in accordance with paragraph 5.9 of the Promotion Policy) such a challenge is not properly the subject matter of judicial review. Accordingly, the Court would dismiss the present application on this basis alone. However, as the merits of the application have been argued and as this matter may go further, the Court will address those issues briefly.

Whether the Applicant was treated unfairly and that the Policy requirements were inconsistently applied

19. The Court can conveniently deal with grounds 1, 3, 5 and 6 together (whether the Applicant had a legitimate expectation that his application for promotion to Chief Inspector would be *properly considered* by the Promotion Board; whether the Applicant was treated unfairly and that the alleged reasons given for his ineligibility was inconsistently applied to other Applicants and had in the past been waived; whether in refusing to consider the Applicants application, he was treated unfairly; and whether in refusing to properly consider and process the application, the established regular practice regarding promotions was disregarded).
20. The real complaint by the Applicant in this regard is based upon his assertion that ACOP Weekes during the 2018 Promotion Process personally waived and/or extended the PDR requirements of numerous officers of the various ranks and that such a waiver should have been extended to the Applicant. It is the Applicant's contention, as set out in the covering memorandum to his application, that "*in the past, the 2-year PDR requirement has been*

waived and applicants have been permitted to participate in the promotion process” and “accordingly I request such a waiver.”

21. In this regard the Court accepts the evidence of ACOP Weekes, as set out in his third affidavit, that the requirement to complete a PDR is in the Performance and Development Policy and is designed to ensure people succeed in their annual assessments. Strict timelines are included in the Policy. However, every effort is made to accommodate officers of all ranks to get them to submit a PDR including on occasions offering a service wide extension in order to accommodate computer issues and other service wide problems.
22. These extensions to completion dates are not given on an ad hoc basis to individual officers but are extended to the whole service. The Court accepts ACOP Weekes evidence that “*waivers*” are not given without any justification to individual officers for the promotion process. In certain cases, “*waivers*” have been given to individual officers if they are able to reasonably justify why they have been unable to complete the PDRs in accordance with the policy. It is incumbent upon an officer to provide evidence and/or justification as to why the officer has not been able to comply with the requirement relating to the PDRs. There have been no cases where “*waivers*” relating to the PDR requirement have been given to the officers where the officers have provided *no justification* for failure to comply with the PDR requirement.
23. In his affidavits that the Applicant refers to a number of instances where he maintains that “*waivers*” were given in relation to the PDR requirement. In relation to those incidents the Court finds as follows:
 - (1) In paragraph 22 of his second affidavit the Applicant asserts that in the 2013 Inspector to Chief Inspector promotion process, Inspector Simon Groves did not complete the PDR requirements in order to qualify him to participate in the promotion process, but he was allowed to participate and subsequently promoted. However, it is to be noted that in relation to this promotion process the requirement for this class was waived for all officers. Furthermore, Inspector Groves did complete the PDR requirements as is confirmed by the response to the PATI request in an email from Inspector Geraghty dated 18 December 2018.

- (2) The Applicant also asserts that in the 2013 Chief Inspector to Superintendent promotion process, Chief Inspectors Simons and Sean Field-Lament did not complete their 2011-2012 PDRs and were allowed to participate in the promotion process. Again, as noted above, in relation to this promotion process the requirement for this class was waived for all officers by Deputy Police Commissioner Jackman. In any event, the response to the PATI request dated 18 December 2018 does confirm that Chief Inspector Simons did comply with the PDR requirements. It appears that there was no record for Chief Inspector Field-Lamont.
- (3) In paragraph 24 of his second affidavit the Applicant states that in the case of Sergeant Denis Astwood, who participated in the 2018 Sergeant to Inspector Promotion Process, he did not complete a *primary* PDR and only completed two *acting* PDRs. The Applicant maintains that Sergeant Astwood was given a *waiver* to participate in the process. As ACOP Weekes explains Sergeant Astwood made representations to the Promotion Board that he had been *acting* the whole time and so all evidence was in an *acting* capacity, which was accepted by the Board. This was an explanation which was acceptable to the Board. In contrast the Applicant has elected to give no explanation as to why the PDRs were not completed within the requisite time frame required under the Policy.
- (4) The Applicant asserts that in the 2018 Deputy Commissioners Promotion process, the PDR requirement was waived and Chief Inspector Tracy Adams, who was denied participation in the 2018 Chief Inspector to Superintendent Promotion Process, was allowed to participate in the 2018 Deputy Commissioners' promotion process ("**DCOP Process**"). However, the DCOP Process was not conducted by the Promotion Board acting under the terms of the Promotion Process. The DCOP Process was conducted under the authority and supervision of the Governor.

- (5) The Applicant refers to the PDR audit conducted by Sergeant Butcher which in turn refers to the case of PS Exell who completed both PDRs within the prescribed deadlines. All entries were appropriately verified and signed off. The audit notes that all of his 2017-18 PDR entries were entered on 16 April 2018 and that this extension was authorised by ACOP Weekes. The Court accepts that the extension was authorised on the basis that the officer in question was unable to enter the data on the computer system at the relevant time.
- (6) Sergeant Butcher's audit also notes that PS Kellman completed his 2017- 18 PDR within the prescribed deadlines and the entries were appropriately verified and signed off. However, he did not complete his 2016-17 entries for 5 behaviours until 2 May 2017. PS Kellman explained to ACOP Weekes that “... *this was a period of significant PDR software problems that presented to technical challenges for some end users. I too had difficulties with the PDR and had to request that my PDRs be deleted due to, evidence, for some reason being allocated under the wrong behaviours. I then had to re-enter all my evidence*”. This explanation, related to why the PDR was not entered on time, was acceptable to ACOP Weekes on the basis that the supporting emails indicate that “*you would have had your entries in by the May 1st cut off if it had been possible.*”
- (7) The Applicant also contends that the PC Barker was given a “*waiver*” in relation to the PDR requirement. PC Barker made representations in relation to his inability to comply with the deadlines which were acceptable to ACOP Weekes on the basis that having “*reviewed the evidence supplied and spoken to your supervisors during the period in question, it would appear that you have supplied sufficient evidence that you did in fact enter the entries into your PDR prior to the computer problems and so at this time following consultation with the Co-Chairs we are offering you an opportunity to appear before the Promotion Board.*”
- (8) The Applicant also relies upon the “*waiver*” granted to PC Celestine, who, on 1 October 2015 took the first of a long series of convalescent leave arising from

several injuries that she had sustained as well as an illness. Whilst PC Celestine did try to return to work on several occasions during that period, those efforts were unsuccessful. In those circumstances ACOP Weekes and Mr. Trott, the BPS Human Resources Manager, reviewed PC Celestine's PDR record and were satisfied that PC Celestine had legitimately taken the sick leave in question and therefore there was no information that she could submit into her 2016-17 PDR as a result. For that reason, they agreed to recommend to the Commissioner that PC Celestine should be accommodated by allowing her 2015-16 PDR to be credited in favour for entering the 2018 Promotion Process; as her inability to complete her 2016-17 PDR, for lack of data, was no fault of her own.

24. ACOP Weekes points out that in the case of the Applicant, Supt. Field-Lament was his supervisor. Supt. Field-Lament sent many emails to the Applicant reminding him of his responsibilities in regard to the PDRs. When it was announced that a Promotion Process was commencing and applications required to have two completed PDRs attached, only then did the Applicant enter PDRs for the preceding two years into the PDR data entry system.
25. The Applicant was invited to make a submission which could provide justification as to why the PDRs were not completed within the time set out in the policy. However, the Applicant responded on the telephone to ACOP Weekes stating that he knew he had not completed the PDR in time. The Applicant has submitted no explanation and/or evidence which the Promotion Board could reasonably consider justifying the departure from the time limits for the completion of the PDRs.
26. In the circumstances the Court is satisfied that the Promotion Board has not adopted the policy under which "*waivers*" for non-compliance with the PDR requirements are granted routinely and for no reason at all. The Court accepts that on occasion the Board has

accepted explanations which justified why in a particular case an officer could not comply with the strict time limits relating to the completion of PDRs.

27. In the circumstances the doctrine of “*legitimate expectation*” can have no room to operate. In order for “*legitimate expectation*” to arise there must be a promise or practice which is clear, unambiguous and devoid of relevant qualification (see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; *R v North and East Devon Health Authority, ex p Coughlin* [2001] QB 213, cited in *Paponette v The Attorney General of Trinidad and Tobago* [2010] UKPC 32). In short there was no relevant practice of “*waivers*” entirely divorced from any justification for noncompliance with the PDR requirements.

28. In the circumstances there can be no unfairness in requiring a senior officer of the BPS to comply with the PDR requirement. As noted above, the PDR requirement is expressly set out in paragraph 5.9 of the Promotion Policy as a condition of participating in the Promotion Process. The Court accepts the proposition, set out in ACOP Weekes’ Third Affidavit, that to have allowed the Applicant to proceed in the process when he contravened policy and the PDR behaviour of Personal Responsibility by failing to complete his own PDRs on time despite multiple reminders from his supervisor, would have created harm to the process and the organisation. The Court accepts that to have allowed the Applicant to proceed without any evidence to suggest that he had successfully completed the application process would also have opened up the Service to justifiable criticism that the Promotion Board was unfairly allowing one person to proceed where many others had been advised they could not for lesser disregard for the policy.

The relevance of *acting* as Chief Inspector

29. In his grounds of seeking relief the Applicant states that bearing in mind his years of service, record of service and the fact that for 20 consecutive months he acted as head of the Criminal Investigation Unit as Acting Chief Inspector, he had reason to believe that *he would be promoted to the rank of Chief Inspector*. In the written submissions prepared by Mr.Froomkin QC it is said that the fact that for 20 consecutive months he was the Acting Chief Inspector he had reason to believe that *he was eligible to participate in the promotion process for consideration for promotion to the rank of Chief Inspector*.

30. I accept Mr. Doughty's submission that there is nothing in the 2018 Promotion Policy or any previous promotion policy which suggests that the time spent at an acting rank would be credited in favour of an applicant seeking promotion.

31. I also accept that the evidence before the Court clearly establishes that the expectation of each member of the service was that they would finish their PDRs on time for each year. Furthermore paragraph 5.9 of the Promotion Policy expressly stated that it was a condition of participating in the Promotion Process that the applicant complete a PDR during the preceding 2 years. There is no evidence before the Court which suggests that serving at an acting rank obviates the requirement set out in paragraph 5.9 of the Promotion Policy. Accordingly, the Court is bound to conclude that for the purposes of compliance with paragraph 5.9 of the Promotion Policy the fact of serving in an acting rank by itself is not a relevant factor.

Decision was unreasonable and irrational

32. The Applicant contends that the decision of the Promotion Board not to allow the Applicant to participate in the Promotion Process on the ground of failure to comply with paragraph 5.9 of the Promotion Policy (completion of PDRs) was unreasonable and irrational.

33. In order to establish that the decision meets the test of “*irrationality*” the applicant has to establish that the decision is one which *no* reasonable person or body could have arrived at. In *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223, Lord Greene MR formulated the test at page 230 as follows:

“It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether.”

34. In considering this submission the Court takes into account that the BPS is a disciplined force, whose members are required to follow all lawful orders of the Commissioner who, by statute, is the commander of that force. The PDR is a tool that the Commissioner has mandated be completed by every member of the BPS from the rank of a probationary Constable to Superintendent of Police to ensure that professional growth of all members of the service are recorded.

35. All members of the BPS above the rank of Sergeant are expected to “*sign off*” on their subordinates’ PDRs as a matter of their managerial duties. As noted earlier, the completion of the PDRs in accordance with the time limits set out in the policy is expressly made a condition of participation in the Promotion Process by paragraph 5.9 of the Promotion Policy.

36. Having regard to the terms of paragraph 5.9 of the Promotion Policy it is, in the Court’s view, not unreasonable to exclude officers tasked with middle level managerial responsibilities, from eligibility for promotion, if they fail to complete their PDRs *without*

a reasonable excuse. It is impossible, in the Court's view, to characterise such a decision as irrational.

37. In the circumstances the Court is bound to dismiss Inspector Greenidge's application for judicial review seeking to set aside the decision of ACOP Weekes refusing Inspector Greenidge's application to participate in the Promotion Process.

38. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 25th day of November 2021.

NARINDER K HARGUN
CHIEF JUSTICE