Neutral Citation Number: [2023] CA (Bda) 8 Civ

Case No: Civ/2022/01

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL COMMERCIAL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2018: No. 381

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12
Date: 24/03/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

DAVE ANDERSON GREENIDGE

Appellant

-and-

THE COMMISSIONER OF POLICE

Respondent

Ms. Victoria Greening of Resolution Chambers Ltd for the Appellant
Mr. Allan Doughty and Ms. Safia Gardener of MJM Ltd for the Respondent

Hearing date(s): 7 March 2023

- -

APPROVED JUDGMENT

SMELLIE JA:

1. The Appellant is a Detective Inspector of the Bermuda Police Service ("**BPS**"). By way of Judicial Review proceedings in the Supreme Court, he sought to challenge the decision by which he was deemed ineligible to participate in the 2018 Inspector to Chief Inspector Promotion Process ("**the Promotion Process**").

2. On 26 April 2018, the Appellant submitted an application for promotion to the rank of Chief Inspector during the Promotion Process when applications for promotion to the rank were ongoing. However, on 4 May 2018, in response to his application, the Appellant received an email from Assistant Commissioner Martin Weekes ("**ACOP Weekes**") advising him that he was ineligible to participate in the process "*since (he) did not meet the PDRs [Personal Development Review] requirements*".

3. The Judicial Review application was heard by the Chief Justice on 8-9 March 2021and, on 26 April 2021, the Chief Justice delivered judgment dismissing the application. The Appellant appealed and, on 7 March 2023, the arguments on his appeal were heard and judgment reserved.

The grounds of appeal.

4. Five main grounds of appeal were filed. Three grounds alleged in various ways that the Appellant's trial counsel: (1) failed to put forward the Appellant's case, (2) failed to follow his instructions or (3) failed to cross-examine ACOP Weekes who was an important witness as he was responsible for the administration of the Promotion Process - all such that the Appellant's case was so inadequately presented before the Chief Justice as to have resulted in a miscarriage of justice.

5. On the hearing of the appeal, Ms Greening, in her arguments on behalf of the Appellant, relied upon those three grounds (discussed below). However, significantly, she did not persist in reliance on, but instead conceded, the two other grounds which were filed. These, in particular in Ground 4, had complained that the Chief Justice had failed properly to consider "*all the various examples of officers who failed to submit their PDRs within the deadline*" for the Promotion Process but were nonetheless granted a waiver which the Appellant was unfairly denied. And, in Ground 5, that the Chief Justice erred when he concluded that there was no unfairness by inter alia, accepting that "*on occasion the [Promotion] 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 the PDRs (paragraph 26)".* Here too, the complaint was that the Appellant had been unfairly and discriminatorily denied an extension of the strict time limits which, as the Chief Justice accepted, had been granted to other candidates. This latter argument was, however, not pursued. The Appellant had not applied for, and in the circumstances to be examined below, could not reasonably have expected to have been granted, an extension and this was no doubt the reason why this ground was also abandoned.

6. The concessions of Grounds 4 and 5, on the hearing of the appeal, are of particular significance because of the nature of the allegations which were central to the challenge by way of Judicial Review. It was alleged by the Appellant, and forcefully argued on his behalf before the Chief Justice, that waivers of the PDR requirements (as distinct from extensions of time for compliance) had been routinely granted to several other officers during the Promotion Process, while unfairly

and discriminatorily denied the Appellant; and, moreover, that this denial was despite his long and exemplary service, including while acting as Chief Inspector, by virtue of which the Appellant asserted he had acquired a legitimate expectation that a similar waiver would have been granted to him.

7. The merits of this argument, which will be described as the "*waiver argument*", were thoroughly examined and addressed by the Chief Justice, leading to the following conclusions in his judgment:

> "*[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 the 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 [such as the Appellant] 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 [Promotion] (P)rocess and the organization. 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*."

8. And, finally from the Chief Justice's judgment for present purposes at [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 [such as the Appellant as an Inspector], from eligibility*

> *for promotion, if they fail to complete their PDRs* ***without reasonable excuse****. It is impossible, in the Court's view, to characterize such a decision as irrational."*

9. The focus of the arguments on appeal having shifted away from the waiver argument to the alleged failings of trial counsel, those conclusions of the Chief Justice were no longer challenged directly. Instead, Miss Greening contended, on behalf of the Appellant, that trial counsel had failed to cross-examine ACOP Weekes about evidence in the form of internal communications within the BPS (by way of email and WhatsApp messages); this, she alleged, revealed: that there was "*confusion and inconsistency*" relating to the PDR requirements; that they had changed such that the Appellant should have been treated as having complied; and that the WhatsApp messages revealed that there was bias and partiality on the part of ACOP Weekes in his denial of the Appellant's eligibility for promotion. The fact that there was no cross-examination of ACOP Weekes about those internal communications before the Chief Justice, was put forward by Miss Greening as a permissible basis for the criticism of trial counsel's conduct resulting in a miscarriage of justice and for allowing the appeal.

10. We will come to examine these arguments further below, but before so doing, the relevance of the PDR requirements must be explained.

The PDRs in context

11. PDRs are mandated by the Commissioner of Police, the person charged by section 3 of the Police Act 1974 with responsibility for the command and administration of the BPS. To these ends, PDRs are promulgated by way of Standing Special Instructions (SSI- A-3/022), first issued in April 2011. SSI A-3/022 (as later amended in April 2012) explains at [1.2] that: "*The BPS is committed to the ongoing development of its personnel to ensure that officers fully meet the requirements of their post and to prepare them to fill other posts within the Service. The Performance and Development process(es) described within this document are expected to significantly contribute toward the development of BPS personnel.*"

12. The SSI-A-3/022 then proceeds in detail to describe the PDR processes.

13. As their title implies, the PDRs are ongoing annual personal development reviews of officers of all ranks of the BPS, ranging from constable to superintendent. As SSI A-3/22 states at [2.1], it is the policy of the BPS that all officers will undergo annual performance and development reviews.

14. The reviews are based upon reports inputted electronically into the Development Performance Management System database, in accordance with procedures in respect of which training is provided. Officers are required to report by way of entering evidence-based narratives, on a contemporaneous basis, of significant events occurring during the course of duty.

15. As required by [6.1] of SSI A-3/022, PDRs for all officers commence on 1st April and end on 31st March of the following year. The PDR entries are required to be verified by an officer's immediate supervising officer or Line Manager (respectively the "Appraisee" and "Line Manager"). Line Managers are required to review PDRs of Appraisees once per quarter to ensure relevance and accuracy of content, as well as that contents are entered appropriately in respect of the various

competencies or "Behaviours" assigned to the rank; e.g: Effective Communication, Team Work, etc. Line Managers are also required to conduct and record meetings with Appraisees at least annually by way of appraisal meetings (except for probationary constables who must be appraised bi-annually): [6.2].

16. As a general and established appraisal tool, PDRs had come to be assessed and graded as part of the examination for promotions. However, this was reconsidered after expression of service-wide discontent. After consultations, including with the Bermuda Police Association, in October 2017, the relevant SSI A-3/014 - that which prescribes the Promotion Policy - was amended in [5.9], to require that candidates for promotion must at least have completed PDRs during the 2 years preceding the relevant Promotion Process. Thus, in this case, on a proper reading of SSI A-3/014 [5.9], candidates such as the Appellant, in order to be eligible for entry into the Promotion Process which commenced in May 2018, were required to have completed PDRs for the years 2016-2017 and 2017-2018.

17. There was also, in any event, the need to complete all PDRs in the required time-frames, ie. between 1 April of any given year and 31 March of the next year, in order to comply with the assessment and appraisal processes, not only for promotion purposes but also for professional personal development and training.

18. The Appellant attempted to make his PDR entries for both 2016-2017 and 2017-2018 on 6 April 2018. In the case of the 2016-2017 entries, these were indisputably out of time, their completion having been required pursuant to SSI A-3/022 [6.1], to have been no later than 31 March 2017. While a general extension of time for completion of the 2017-2018 PDRs to 6 April 2018 was granted for the purposes of applications to enter the Promotion Process, no such extension could properly have been contemplated for the 2016-2017 PDRs, given by then what would have been the passage of more than a year and the requirements for accuracy and contemporaneity of entries.

19. It was for this reason, it must be emphatically noted, that the Appellant, in his application for the Promotion Process submitted on 26 April 2018, sought a <u>waiver</u> of the 2016-2017 PDR requirement, Any notion of an extension of time to 6 April 2018 for completion of those PDRs, (ie. the date when he had attempted to complete both sets of PDRs) being by then hopelessly untenable. Hence, the development before the Chief Justice of the waiver argument, which has been conceded before this Court.

20. Nonetheless, as mentioned above, Miss Greening, on behalf of the Appellant, was critical of what she described as trial counsel's failure to cross-examine ACOP Weekes about certain internal emails and a particular WhatsApp message. As regards the emails, she argued that these had misleadingly advised, for the purposes of the Promotion Process, on the applicability of the PDR requirements. The point of her argument was that, had the matter been cross-examined upon, the evidence would have established before the Chief Justice: that the requirement for PDRs for 2016-2017 had been effectively abandoned by ACOP Weekes, speaking on behalf of the Commissioner; that, in reality, the requirement was only for the 2017-2018 PDRs; and that those, in light of the general extension granted to 6 April 2018 for completion, had been completed in time by the Appellant. Miss Greening also criticized trial counsel's failure to cross-examine in relation to the WhatsApp messages which Miss Greening described as demonstrating bias against the Appellant.

She argued that together these two issues would have changed the outcome before the Chief Justice as a result of which that there was a miscarriage of justice. Accordingly, it is to the consideration of these criticisms that we now turn.

The PDR requirements and the "misleading and confusing" emails.

21. The contextual starting point is [5.9] of the Promotion Policy of SSI A-3/014 itself, which sets the eligibility requirements for admission to the Promotion Process as follows:

> "*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*". [emphasis added].

22. As mentioned above, following consultations in 2017, the first limb of [5.9] was discontinued as a requirement for admission to the Promotion Process but the second limb was retained. And while, as a requirement for admission, the PDRs were no longer to be graded, they were assessed, once admission was gained, as part of the examination along with the Application Form in which candidates were required to answer two questions relating to "Ongoing Professional Development" and "Career Summary".

23. Notwithstanding the terms of [5.9] as set out above speaking of the "*preceding 2 years*", we see from the Record of Appeal, [at Volume 1 Tab 10 pages 168 -178], that SSI A-3/014 (as amended and streamlined in 2017), was circulated, with an "Annex One", within the BPS on an unspecified date. This was with a Distribution to "*All Members*" in which in [2] of Annex One, it was stated that "*All of the eligible candidates will be requested to submit a promotion process application form and a printout of a completed PDR for the past year and the current year to the divisional commander. There will be a 21-day period in which to submit applications*".

24. When this directive from Annex One is compared to [5.9] of SSI A-3/014 itself, one sees immediately that there is a potential inconsistency between them as to what time-frame the PDRs must cover: i.e: "*the preceding 2 years*" as opposed to "*the past year and the current year*". There is also the 21-day period for submission notified in Annex One, which being in an undated directive, might have been seen as negating effectively for the purposes of the Promotion Process, the requirement of the PDR Directives themselves in SSI A-3/022 [6.1], viz: that "*PDRs for all officers will commence on 1 April and will end on 31 March the following year*."

25. Against that already seemingly confused background, the first controversial email was that sent by PC Julia Swan, Policy Analyst, on 29 January 2018, addressed to "*All Group Police Officers*", with Subject designated: "*PDR Evidence/Promotion Process"* and headed "*SENT ON BEHALF OF ACOP WEEKES*". It stated as follows:

> *"Good day all,*
>
> *This email serves to update you that the Performance and Development SSI has recently been amended. The amendment relates to the requirement for officers to provide four (4) pieces of evidence per PDR Behaviour when intending to*

> *participate in the Promotion Process. Due to the fact that the Promotion Process SSI has been amended and streamlined, there is no longer a requirement for PDRs to be marked as part of the process and therefore there is no requirement to provide additional evidence.*
> *To be clear, officers who are intending to participate in the Promotion Process need only have a satisfactory PDR for the preceding year and are only required to provide two pieces of evidence [ie: relevant evidence-based entries] per behaviour."*

26. As the year of the Promotion Process was to commence as at 1 April 2018 (with the process itself declared to start by way of applications being submitted by I May 2018), this email could reasonably have been understood as saying that only the PDR for the "preceding year"; i.e: 1 April 2017- 31 March 2018, was required, even though, as we have seen, the Promotion Policy as promulgated by [5.9] of SSI A-3/014, called for PDRs for the preceding two years.

27. The subject-matter became even more muddled when a series of emails from Inspector Emmerson Carrington was issued generally on behalf of the BPS variously stating as follows:

> *"On 6 April 2018 at 2:07 pm, Subject: REMINDER RE PDR ENTRIES*
>
> *All,*
>
> *Please note that as per General Orders #12/2018, the deadline for entering evidence into the PDRs for 2016-2017 and 2017-2018 for this promotion process is Friday 6th April 2018 (today). This is to provide time for line managers to verify the evidence entries and to assign grades by the deadline of Friday 13th April 2018.*
>
> *As per the SSI, CANDIDATES ARE ONLY REQUIRED TO HAVE A MINIMUM OF TWO PIECES OF EVIDENCE, PER BEHAVIOUR. Only verified evidence can be considered when assigning grades.*"

28. Again, on 6 April 2018, but an hour and six minutes later at *3:13:46 pm*, with the same subject heading, Inspector Emmerson Carrington wrote:

> "*All*
> *As a follow up to my previous email, any candidate for the extended promotion process who wishes to appeal the PDR deadline, may do so in writing to ACOP Weekes. All such applications will be considered on a case by case basis*."

29. And the next day, 7 April 2018 at 10:54:28 am, again with same subject heading, he wrote:

> "*Good morning*
> *In the email below I inadvertently stated that entries into the PRD (sic) for 2016-2017 period would also be considered and I apologize for the confusion that created. The email should have referenced entries in your PDR for the period 2017-2018 ONLY*".

30. In her arguments before this Court, Miss Greening submitted that the net effect of these emails, beginning with that from PC Swan on 29 January 2018 (and apparently confusing and contrary to [5.9] of SSI A-3/022 as they were), was that the Appellant (along with others who are said to have been affected similarly) was, as at the expiry of the deadline for submissions (extended to 6 April 2018), entitled to have his application accepted by having regard to the PDRs for 2017-2018 only, the deadline for which he had indisputably met.

31. Further she submitted: that the PDR requirement for 2016-2017 had thus been abandoned on behalf of the Commissioner; and that it was the failure of trial counsel, Mr Froomkin KC, to have raised this issue before the Chief Justice by way of cross-examination of ACOP Weekes - despite Mr Froomkin having been instructed by the Appellant to do so – which was said to have led the Chief Justice to conclude erroneously and unfairly, that the Appellant had been properly deemed ineligible for the Promotion Process.

32. While we accept that the emails are confusing and potentially misleading (and was so acknowledged before the Chief Justice by ACOP Weekes at [29] to [32] and [41] of his 3rd Affidavit), there is, however, when all the relevant circumstances of the case are considered, no basis for concern that the Appellant relied upon the emails so as to have affected, unfairly, the outcome of his application for admission to the Promotion Process.

33. This conclusion is amply supported by a number of factors as follows:

(a) It is clear from his application letter of 26 April 2018, addressed to ACOP Weekes, that the Appellant understood the requirements as they were, in reality, mandated by [5.9] of SSI A-3/022. He had undeniably accepted the need for, and so sought the waiver of, the 2016-2017 PDR requirement:

> "*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 PDRs however; the 2016-2017 PDR was completed outside of the deadline.* [In fact, as mentioned above, completion was attempted on 6 April 2018].
>
> *Although clearly the PDR is a recognized tool for gauge (sic) 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 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.*
>
> *Please confirm that my enclosed application will be considered favourably together with all other applicants."*

(b) On 4 May 2018, as already mentioned, the Appellant had received a response from ACOP Weekes by email, qua Promotion Panel Chairman. This response, [as summarized at [11] of the Chief Justice's judgment and exhibited in full to the Appellant's Affidavit in support of his application for leave to appeal at Vol 1 of the Record, Tabs 2 and 3 page 8] confirmed that the Appellant had not met the PDR requirements as the audit of the PDR system indicated that: (1) all of the entries in the Appellant's PDR for 2016-2017 were entered on 6 April 2018 (the deadline having been 31 March 2017); and (2) it appeared that none of the entries were verified within the prescribed time. (3) ACOP Weekes sought further and better particulars in relation to the Appellant's allegation that in the past "waivers" had been granted relating to the PDR requirements. (4) The email ended by ACOP Weekes stating that on the face of it, the Appellant's 2016/17 PDR appeared not to qualify as a duly completed PDR and enquired whether the Appellant agreed with this position.

At [17] of his 3rd Affidavit, ACOP Weekes affirmed that there had been no written response from the Appellant, although he did respond in a phone call with ACOP Weekes, admitting that he knew that he had not completed the PDR in time.

(c) As regards the allegation of Mr Froomkin's failure to cross-examine ACOP Weekes, Mr Froomkin does not accept that his not having done so was in any way prejudicial to the Appellant's case before the Chief Justice. Specifically, as regards the requirement for the 2016-2017 PDRs, Mr Froomkin exhibited instructions in writing (in the form of a draft affidavit) from the Appellant which were revealing. Relying upon an implicit waiver of privilege, Mr Froomkin presented these instructions as Exhibit A to his affidavit filed in response to the Appellant's allegations. At [34] of this draft affidavit the Appellant had written:

> "*As I declared in my application.. I did not complete my 2016-2017 PDR by the required deadline. This is a moot point and unchallenged by me. I have demonstrated in DAG4 [an email attaching a spreadsheet from Sgt Michael Butcher to ACOP Weekes setting out the results of an audit of the applications made for the Promotion Process] that several persons either breached the same PDR requirement or different sections of the Promotion Policy and the PDR Policy and were granted waivers by ACOP Weekes and ACOP Daniels, co-chairs of the 2018 Promotion Process*" (the Appellant then goes on to give purported examples).

It is clear from this statement of the Appellant's instructions to Mr Froomkin, that the burden of his challenge to the determination of his ineligibility was not that he had in any way been confused or misled by the emails as to the need for the 2016-2017 PDRs; rather it was that, in having been refused a waiver of the requirement by ACOP Weekes while, in his view, others had been granted waivers, he had been treated unfairly and discriminatorily.

Indeed, this became the very waiver argument relied upon and expanded upon in his Affidavits but was unsuccessful before the Chief Justice and abandoned before this Court - and properly as we conclude.

(d) In light, not only of [5.9] of SSI A-3/022, but also of the General Orders which were then currently in force, it is not surprising that the Appellant's application letter conveyed no sense of doubt in relation to, but instead acknowledged, the 2016-2017 PDR requirement. Moreover, General Orders 14/2018, published by typical weekly circulation within the BPS on Friday 6 April 2018 by the Commissioner, were definitive in this regard. Part 2 dealt specifically with the Inspector to Chief Inspector Promotion Process and under the heading "Performance Development Review (PDR)" stated as follows:

> "*Candidates are required to submit a full printed version of their current completed PDR (2017-18) and previous PDR (2016-17), along with the application form, by deadline 2.00pm on Friday 27 April 2018."*

(e) It is not apparent how the Appellant can claim to have been prejudiced by the confusing emails, in relation to the need for compliance with the 2016-2017 PDR requirement when, in any event, he was already hopelessly out of time and simply could not have complied. The policy of the PDRs, if it is to have any real meaning and value, must depend upon the entries made being contemporaneously in order not only to be accurate but also amenable to verification by the Line Managers. The Appellant's unacceptable attempt at the *ex post facto* entries a year out of time on 6 April 2018, was not evidence based but properly regarded by ACOP Weekes as merely "*manufactured so as to be included in the promotion application*" [See his 3rd Affidavit at [19]]. Nothing conveyed by the emails, however confusing, could have affected the outcome of the Appellant's long-standing and disqualifying non-compliance in this regard. Indeed, this too explains why he never sought an extension of time for compliance but sought a waiver instead.

(f) And so, where at [39] of his 2nd Affidavit (which was itself before the Chief Justice), the Appellant states that "I relied on and acted on (the confusing) emails as I understood them and upon my knowledge of the longstanding flexibility applied to (the PDR requirements) and fulfilled the requirements in order to participate in the promotion process", this simply cannot be true in light especially of his waiver argument (adumbrated as early as in his letter of application), his admission to ACOP Weekes over the phone and his instructions given to Mr Froomkin in his draft affidavit, all as discussed above.

34. Having regard to all the foregoing circumstances, we conclude that Miss Greening's argument must be rejected as being factually misconceived. There is no basis for a concern either that the Appellant was confused by the misleading emails or that, as the result of Mr Froomkin's alleged failure to cross-examine ACOP Weekes about the emails, there was a miscarriage of justice in the proceedings before the Chief Justice. There had been no confusion on the part of the Appellant. He undeniably had recognized and accepted the PDR requirement for 2016-2017 and, having failed to comply, the need for a waiver. And hence the waiver argument on which he squarely but unsuccessfully relied before the Chief Justice.

35. We take this view although it does appear from the Record of Appeal that Mr Froomkin may have misunderstood the rules on cross-examination and as the Appellant complains, the possible value of it. At [9] of his affidavit, Mr Froomkin admits that on 23 September 2021, in anticipation of the hearing before the Chief Justice, "*I sent an email to the Appellant, once again reminding him that "there will be no oral evidence at trial. The hearing is based upon the Affidavits and exhibits filed*." [**emphasis in the original]**.

36. This is not correct. In judicial review proceedings, it is trite law that cross-examination is allowed upon the affidavits by leave of the Court, where the circumstances justify the grant of such leave. But while we would accept that leave may well have been granted if sought to cross-examine ACOP Weekes about the confusing emails (and for reasons to come below, the impugned WhatsApp messages as well), we remain of the view that cross-examination on those issues would not have affected the outcome before the Chief Justice.

37. Here, we note again, that the issue was squarely whether or not the Appellant had been denied unfairly, a waiver of the PDR requirements- the issue which was given to resolution, as it was, by reference not only to the opposing affidavit evidence of the Appellant and ACOP Weekes but primarily by reference to the documentary evidence; and was so resolved without the pursuit of challenge on this appeal.

38. While cross-examination on the confusing emails (and as discussed below, the impugned WhatsApp messages) might have brought into question the motives of ACOP Weekes as the person administering the Promotion Process, it was, at the end of the day, upon the indisputable documentary evidence that resolution of the waiver argument depended.

The impugned WhatsApp messages.

39. Among the affidavit evidence filed on behalf of the Appellant in the proceedings, is the affidavit of a colleague, Inspector Barry Valentine Richards. Inspector Richards is himself the proponent of a complaint similar to that of the Appellant's and four other Inspectors, who were deemed ineligible for the Promotion Process, for having failed to complete a PDR for the 2016-2017 year within the deadline; see the Report of the Inspector to Chief Inspector Promotion Board Results 2018 notified under cover of a letter dated 10 July 2018 to the Chairman, Public Service Commission from Acting Commissioner of Police Paul M Wright (at Record of Appeal Tab 23 pp 575 to 585. ("**the Results**")

40. While the primary allegation in Inspector Richard's affidavit is that he too is aware of other officers having been given waivers of the PDR requirements which he, the Appellant and the others were denied discriminatorily, the focus of his affidavit is upon certain WhatsApp exchanges he had with ACOP Weekes. The narrative of the messages exchanged with ACOP Weekes he asserts at [9] of his Affidavit "*demonstrates that the decisions about who to promote were not based on the competence or performance, but rather corrupt practices"*. And at [10] "*That I believe that the BPS have acted unfairly against the Applicant*."

41. The messages speak for themselves and so we set them out here as they are set out in Inspector Richards' affidavit from [6] to [8]:

"[6] *That on 8 May 2018 the ACOP and I communicated with one another on our cellular telephones via "Whats App" about my application to be promoted. Between 1.43 p.p. and 1.46 p.pm the ACOP and I exchanged the following messages:*

(1.43 p.m.) ***ACOP*** *"Sent you an email you won't like"*
(1.44 p.m.) ***ACOP*** *" It wouldn't have been a problem if Dave wasn't being as difficult as he is"*
(1.46 p.m.) ***ACOP*** *"Some of your entries were dated 2nd May 2017 and the cut off was 1st May"*
(1.46 p.m.) ***BVR*** *"I responded. I haven't touched my PDR since last year. I was completed in time"*
(1.47 p.m.) ***ACOP*** *"Fuck"*

I attach marked as page 1 of Exhibit "BVR-1" a copy of the WhatsApp messages.

[7] That when the ACOP refers to "Dave" I believe he was referring to the Applicant in these proceedings.

That after the results of the promotion process had been announced, there was a further email (sic) exchange between myself and the ACOP as follows:

(11.36 a.m.) ***BVR*** *"Passing Cardswell. Can't believe you guys done that. Not because of my case, but certainly the disrespect he's shown all the bosses. You and Daniels included. Smh. B"*
(11.37 a.m.) ***BVR*** *"It's obviously (sic) you have to protect your position with the organization. I respect that. Don't always agree but certainly understood that."*
(11.38 a.m.) ***ACOP*** *"yep I know. Unfortunately he learned from being disqualified once and failing the next time. He had that thing wrapped up tight and left us no way to go with an independent in the room he had it down"*
(11.39) ***ACOP*** *"I went to the boss and asked him what we could do. He said we had no choice but to pass him. And he hates Cardwell"*

I attach herewith as pages 2-3 of Exhibit "BVR-1 a copy of the WhatsApp messages."

42. On any view, these exchanges from ACOP Weekes are embarrassing. They are potentially revealing, on the part of the senior officer responsible for administration of the Promotion Process, of a prejudiced mind-set. Indeed, Inspector Richards justifiably so describes them. If the reference at 1.44 p.m. on 8 May 2018 to "*It wouldn't be a problem if Dave wasn't being so difficult as he is*", is to the protestations of the Appellant, as Inspector Richards assumes to be the case, it is little wonder why, despite there being in reality no evidence of discrimination in the Promotion Process, there were concerns that there might have been.

43. One unfavourable, but entirely reasonable, view of that utterance, is that it reveals that ACOP Weekes would have preferentially allowed Inspector Richards at least an extension of time for completion of his PDRs "*if Dave wasn't being so difficult as he is*", even while refusing the Appellant himself the waiver which he sought, had there been a policy of granting waivers. It is, as we note above, only on the proven basis that no such policy existed, that such misgivings, even if genuinely held by the Appellant, could not operate in this case to change the outcome.

44. Similar misgivings arise from the exchanges in relation to Inspector Cardwell as they suggest that had ACOP Weekes and the "boss" - presumably a superior to ACOP Weekes - felt they had an option in the matter the outcome for that officer might have been different. In other words that they might have chosen to deny Inspector Cardwell his success in the Promotion Process, because of dislike for him as an habitually disrespectful sub-ordinate.

45. This is not the kind of loose banter one would expect to be going on between senior officers of a disciplined force like the BPS in relation to a matter as sensitive as the Promotion Process, involving as it does the career prospects of dedicated officers, and especially not during the very currency of the Promotion Process, while the Results were still pending.

46. In the prevalence of such an atmosphere, it is hardly surprising that misgivings might have abounded among those who were not successful in the promotion process, even while there may be no other objective basis for them.

47. Although we are nonetheless satisfied that the complaints of the Appellant in this case are unjustified, we feel compelled to record our concerns that this sort of conduct is not in keeping with the high standards to be expected of the BPS.

The legal premise of the grounds argued on appeal

48. The Appellant's grounds of appeal based upon alleged prejudice resulting from the failings or "ineffectiveness" of Mr Froomkin KC as trial counsel, were not argued by Miss Greening as based upon any particular legal principle. When asked by the Court on more than one occasion to explain the basis upon which the Chief Justice's judgment could have been over-ruled in this respect, she responded merely that "my client suffered prejudiced as the result". Given that we have concluded firmly to the contrary, that could be the end of the matter.

49. Because, due to the industry of Mr Doughty, we received submissions on the justiciability of an argument based upon trial counsel's failing, and given the novelty of the issue in Bermuda, we will express, albeit inconclusively, our views on the issue.

50. Mr Doughty's research revealed that a ground of appeal based entirely upon the failings of trial counsel, has been entertained by the courts of the United Kingdom only in the context of criminal appeals. There it has been held that errors on the part of advocates may lead to a conviction being found to be unsafe. According to ***Blackstone's Criminal Practice***, 2021 Edition at [26.24], a number of formulations of the test for determining when an advocate's errors are sufficient to lead to the quashing of a conviction have found favour at different times. That the advocate's conduct

must be flagrantly incompetent was said to be necessary in *Ensor* [1989] 2 All ER 586, while in *Richards* [2000] All ER (D) 900, the Court held that the test to be applied in relation to the conduct of the lawyer was that contained in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, i.e. the *Wednesbury* unreasonableness test. Of more direct relevance to what might be an appropriate test in a criminal case in Bermuda, in *Boodrum v State of Trinidad and Tobago* [2001] UKPC 20, [2002] 1 Cr App R 12 (103), the Privy Council observed that, if conduct of an appellant's lawyers was such that the appellant had been denied due process, the conclusion would be that the appellant had not had a fair trial and the conviction should be quashed without the need for an investigation of the impact of the lawyers' failings on the outcome of the trial.

51. There are immediately apparent reasons why a similar approach might not be suitable for response to a ground of appeal based upon the failings of trial counsel in a civil case such as the present where the interests are classically partisan and where the ordinarily available recourse would be for the disgruntled client to seek recourse against his lawyer. In the context of an ordinary civil action, there is no reason why the successful litigant should be denied the fruits of its success on account of the failings of the lawyer for the other side.

52. However, as Mr Doughty's researches have revealed, in Canada the Courts have established rules which will allow the setting aside of a civil judgment as the result of incompetence of counsel in certain confined circumstances where it can be established that "*the ineffectiveness of counsel led to a miscarriage of justice*"; see *Gligorevich v McMaster* 2012 ONCA 115 (Can LII) and *Mediatube Corp. v Bell Canada* 2018 FCA 127 (Can LII). In both these cases it was also held that there is a "*strong presumption*" that the conduct of trial counsel falls "*within the range of reasonable professional assistance" which makes the ground of ineffective assistance of counsel most difficult to establish*."

53. There is no need, in the context of the present matter, to decide upon the applicability of such principles. In the case at Bar, we hold that such oversights as there may have been in relation to cross-examination, did not lead to a miscarriage of justice .

54. Given the nature of his instructions for the Appellant's case based principally upon the waiver argument, Mr Froomkin cannot be criticized for not having interrogated ACOP Weekes about the confusing emails which were addressed in his third affidavit and about which the transcripts show there was, nonetheless, discussion before the Chief Justice. Nor, for the reasons we explained above could cross-examination of ACOP Weekes about his indiscretions revealed by the WhatsApp messages have changed the outcome. We repeat that, such interrogation could not, in our view, have changed the outcome before the Chief Justice, based, as his judgment was, upon a thorough examination of the documentary evidence leading to the dismissal of the waiver argument.

The jurisdiction argument

55. Before the Chief Justice, Mr Doughty on behalf of the Respondent, argued that the Appellant's case was not amenable to judicial review because it challenged the operational polices of the BPS, in the form of the PDRs as mandated by SSI A-3/O22 and the Promotion Policy as mandated by

SSI A-3/014. The argument was accepted by the Chief Justice, who nonetheless prudently went on to consider and decide the waiver argument upon its merits.

56. The argument which the Chief Justice accepted is explained in his conclusions on this issue at [16] to [18] of his judgment, following a review of a trilogy of earlier decisions which flowed from the pen of distinguished Justice of Appeal Scott Baker. These included that in *Commissioner of Police v Romeo Allen and Others* [2011] Bda LR 13 delivered in that learned judge's capacity as the then President of this Court. The Chief Justice continued with citation of his own judgment at first instance in the earlier case of *Bhagwan v Corbishley (Commissioner of Police) [2021] Bda LR 37* in which he had reviewed and applied the learning from the trilogy of cases to the effect that there was a distinction to be drawn between cases which were disciplinary in nature and operational in nature and that *"only in the most exceptional circumstances"* should the Court ever interfere in operational decisions, the difference between them and disciplinary decisions being *"often a matter of feel"*.

57. The Chief Justice then continued in his judgment in this case as follows:

> "[16] *In **Bhagwan** the Court noted that the action 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 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 PDRs should have been waived by the promotion panel. The present action does not seek to challenge the Promotion Policy [here foot-noting that several other officers also made similar complaints and a number of them had also filed Judicial Review applications challenging the decision excluding them from the Promotion Process]. 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 well 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 extend to a pure employment situation (per Woolf J (as he then was) in R v BBC , ex p Lavelle [1983] I1 WLR 23 30C) and in the case 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 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*."

58. Before this Court, Mr Doughty, being mindful of the later decision of this Court on Appeal in *David Bhagwan v Commissioner of Police et al* [2022] CA (Bda) 11 Civ, sought to support those conclusions of the Chief Justice but on the rather more narrow basis that the Appellant's challenge was one, not only to the fairness of the decision which deemed him ineligible to apply for the Promotion Process but also, as expressed by him in his Letter of Application to ACOP Weekes (set out above at [32]) in the second paragraph:

> "*Although clearly the PDR is a recognized tool for gauge (sic) the performance of staff, it ought not to be the one factor in Performance Management, and not a condition precedent."*

59. Expressed in those terms, the Appellant's challenge, says Mr Doughty, was not to the *fairness* of the application of the PDR requirement to himself but to its *appropriateness* as a policy and operational measure, and for that reason he submits, the challenge falls on the impermissible side of the disciplinary/operational divide as applied in ***Bhagwan*** at first instance, following the trilogy of cases including ***Commissioner v Romeo Allen and Others*** (above).

60. On the facts of this case, we regard that as too narrow a view of the nature of the challenge which, though ultimately unsuccessful on its merits, undoubtedly raised issues ranging beyond the merely operational, in the form of the waiver argument which gave rise to allegations of unfairness and discriminatory treatment.

61. We have no hesitation in holding that such allegations, if raised genuinely in relation to decisions which affect the welfare of members of the BPS, will be amenable to judicial review. Views as to whether or not such decisions carry "sufficient public law" content , or are disciplinary or operational in nature - that distinction itself to be often discernible only as a "matter of feel" - or whether they may be categorized as having arisen purely in an "employment relationship", will not be the defining considerations when examining allegations of unfairness of treatment in the context of a public institution such as the BPS. The potential inconsistency of approach which can arise from the application of such criteria, we think is demonstrable from the conclusion in ***Bhagwan*** (both at first instance and on appeal) that Officer Bhagwan's complaints about unfair treatment in a promotion process were amenable to judicial review but, at least provisionally at first instance in this case - that the Appellant's complaints about unfair treatment in a similar process were not so amenable.

62. It is for the sake of avoiding such apparent inconsistency that this Court declared at [68] of the appellate judgment in ***Bhagwan***, and repeat now as suitable for application in this case, as follows:

> "*We conclude that the proper approach is to consider not only whether there is a "public law" element but also whether the consequence of the Process and the*

> *decisions taken affect the interests of the applicant in a way which gives rise to considerations of fairness; whether the Process and the decisions may be regarded as operational or disciplinary in nature being but a guide to an understanding of the consequences*".

63. The nature of the allegations of unfairness raised by the Appellant, although ultimately unsuccessful, were neither merely spurious nor vexatious. And so, while we agree with the Chief Justice's assessment of the waiver argument and uphold his dismissal of it, we regard the allegations in the case as having been amenable to judicial review.

64. For the foregoing reasons we dismiss the appeal.

GLOSTER JA:

65. I agree.

CLARKE P:

66. I, also, agree. We will consider submissions on the costs of the appeal to be submitted in writing within 14 days of the date hereof.