

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2021/1033

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW UNDER PART 56 OF THE CIVIL PROCEDURE RULES 2000 (As Amended) PURSUANT TO LEAVE GRANTED BY THE HONOURABLE JUSTICE ESCO HENRY BY ORDER DATED 10th MARCH 2022

AND

IN THE MATTER OF REGULATIONS 8(1) and 8(2) OF THE PUBLIC HEALTH (PUBLIC BODIES SPECIAL MEASURES) RULES 2021

AND

IN THE MATTER OF THE DECISION OF THE PUBLIC SERVICE COMMISSION TO TERMINATE THE EMPLOYMENT OF THE 1st, 2nd, 3rd and 4th CLAIMANTS WITHOUT AN OPPORTUNITY TO BE HEARD HAVING DEEMED THE SAID CLAIMANTS TO HAVE ABANDONED THEIR POST AND THEREBY RESIGNED FROM THEIR RESPECTIVE POSTS

AND

IN THE MATTER OF THE DECISION OF THE POLICE SERVICE COMMISSION TO TERMINATE THE EMPLOYMENT OF THE 5th CLAIMANT WITHOUT AN OPPORTUNITY TO BE HEARD HAVING DEEMED THE SAID CLAIMANT TO HAVE ABANDONED HIS POST AND THEREBY RESIGNED

IN THE MATTER OF THE DECISION OF THE COMMISSIONER OF POLICE TO TERMINATE THE EMPLOYMENT OF THE 6th CLAIMANT WITHOUT AN OPPORTUNITY TO BE HEARD HAVING DEEMED THE SAID CLAIMANT TO HAVE ABANDONED HER POST AND THEREBY RESIGNED

AND

IN THE MATTER OF SECTIONS 1, 5, 6, 8, 16, 17, 37, 38, 77,78, 84, 96 and section 101 OF THE CONSTITUTION OF SAINT VINCENT AND THE GRENADINES

AND

IN THE MATTER OF COVID-19 (MISCELLANEOUS AMENDMENTS) ACT NO. 5 OF 2020 and SRO NO.
32 OF 2021 ENTITLED THE COVID-19 (MISCELLANEOUS AMENDMENTS) ORDER 2021

BETWEEN

SHANILE HOWE

1st CLAIMANT

NOVITA ROBERTS

2nd CLAIMANT

CAVET THOMAS

3rd CLAIMANT

ALFONZO LYTTLE

4th CLAIMANT

BRENTON SMITH

5th CLAIMANT

SYLVORNE OLLIVER

6th CLAIMANT

AND

THE MINISTER OF HEALTH AND THE ENVIRONMENT

1st DEFENDANT

THE PUBLIC SERVICE COMMISSION

2nd DEFENDANT

THE COMMISSIONER OF POLICE

3rd DEFENDANT

ATTORNEY GENERAL

4th DEFENDANT

POLICE SERVICE COMMISSION

5th DEFENDANT

CONSOLIDATED WITH

SVGHCV2022/0053

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW UNDER PART 56 OF THE CIVIL PROCEDURE

**RULES 2000 (As Amended) PURSUANT TO LEAVE GRANTED BY THE HONOURABLE JUSTICE
ESCO**

HENRY BY ORDER DATED 8th JUNE 2022

AND

**IN THE MATTER OF REGULATIONS 8(1) and 8(2) OF THE PUBLIC HEALTH (PUBLIC BODIES
SPECIAL MEASURES) RULES 2021**

AND

**IN THE MATTER OF THE DECISION OF THE PUBLIC SERVICE COMMISSION TO TERMINATE THE
EMPLOYMENT OF THE 1st – 265th CLAIMANTS WITHOUT AN OPPORTUNITY TO BE HEARD HAVING
DEEMED THE SAID CLAIMANTS TO HAVE ABANDONED THEIR POST AND THEREBY RESIGNED
FROM THEIR RESPECTIVE POSTS**

AND

**IN THE MATTER OF THE DECISION OF THE COMMISSIONER OF POLICE TO TERMINATE THE
EMPLOYMENT OF THE 257th – 265th CLAIMANTS WITHOUT AN OPPORTUNITY TO BE HEARD
HAVING DEEMED THE SAID CLAIMANTS TO HAVE ABANDONED THEIR POST AND THEREBY
RESIGNED**

AND

**IN THE MATTER OF SECTIONS 1, 5, 6, 8, 16, 17, 37, 38, 77,78, 84, 88, 96 and section 101 OF THE
CONSTITUTION OF SAINT VINCENT AND THE GRENADINES**

AND

**IN THE MATTER OF COVID-19 (MISCELLANEOUS AMENDMENTS) ACT NO. 5 OF 2020 and SRO NO.
32 OF 2021 ENTITLED THE COVID-19 (MISCELLANEOUS AMENDMENTS) ORDER 2021**

BETWEEN:

SHEFFLORN BALLANTYNE

(in his representative capacity pursuant to Court order dated 8th June 2022)

1st CLAIMANT

TRAVIS CUMBERBATCH

(in his representative capacity pursuant to Court order dated 8th June 2022)

2nd CLAIMANT

ROHAN GILES

(in his representative capacity pursuant to Court order dated 8th June 2022)

3rd CLAIMANT

AND

THE MINISTER OF HEALTH AND THE ENVIRONMENT

1st DEFENDANT

THE PUBLIC SERVICE COMMISSION

2nd DEFENDANT

THE COMMISSIONER OF POLICE

3rd DEFENDANT

ATTORNEY GENERAL

4th DEFENDANT

Before: The Hon. Mde. Justice Esco L. Henry High Court Judge

Appearances:

Ms. Cara Shillingford-Marsh with her Mr. Jomo Thomas and Ms. Shirlan Barnwell for the claimants/applicants

Mr. Anthony Astaphan SC, Solicitor General with him Ms. Karen Duncan, Mrs. Cerepha Harper-Joseph for the 1st, 3rd and 4th defendants/respondents.

Mr. Grahame Bollers for the 2nd and 5th defendants/respondents.

2022: Oct. 5
Nov. 16

DECISION

BACKGROUND

[1] **Henry, J.:** This is a consolidated claim by a number of individuals ('the claimants') in which they are seeking among other things, judicial review of legislative measures introduced by the Minister of

Health and the Environment; and of decisions by the Public Service Commission ('PSC'), the Commissioner of Police ('COP') and the Police Service Commission ('Police SC') deeming them to have resigned their respective offices within the public service of Saint Vincent and the Grenadines or the Royal Saint Vincent and the Grenadines Police Force. The claimants also seek constitutional relief for what they allege to be breaches of their pension rights and right to protection from inhuman and degrading treatment arising from the alleged wrongful termination of their employment. The claimants have been employed as either public officers or police officers. A central plank of this case surrounds what they have described as unlawful, procedurally irregular, unconstitutional and disproportionate conduct towards them by the defendants in relation to their employment.

[2] At the first hearing on June 8th 2022, case management directions were issued. The parties were directed to file and serve all interlocutory applications on or before October 14th 2022. By Notice of Application filed on 9th September 2022, the claimants applied for an order permitting them to call Dr. Nikolai Petrovsky and Dr. Herman J. Edeling as expert witnesses on the ground that the evidence they intend to give is reasonably required to resolve these proceedings justly. For purposes of the application, the claimants are properly applicants and the defendants are constituted as respondents. However, for convenience, I will refer to the former as 'claimants' throughout and the latter as 'defendants'.

[3] In the application, Dr. Petrosky is said to have a number of qualifications and extensive expertise as a Director of Diabetes and Endocrinology and for having assisted with the development of a COVID-19 vaccine. Dr. Edeling was stated to have given evidence in the New Zealand High Court, where the court accepted that he was qualified to give evidence on the likely effects of vaccination on the workforces.

[4] The claimants' application is opposed by the Minister of Health and the Environment ('the Minister'), the PSC, the COP, the Police SC and the Honourable Attorney General. They contended that the application is insufficient and improper and that the purported expert evidence is inadmissible. They submitted that the issues in dispute in the consolidated claims involve

matters of law and fact, the resolution of which cannot reasonably be advanced by admission of expert evidence as to the effectiveness of the COVID-19 vaccines. They submitted further that the claimants have pleaded no constitutional challenge regarding the effectiveness and safety of COVID-19 vaccines and have adduced no facts or evidence on which the Court can justifiably grant the application. The claimants maintained that the proposed expert testimony is reasonably required for a just resolution of the claims. The application is refused for the reasons set out in this decision.

ISSUE

- [5] The singular issue is whether the claimants should be granted leave to adduce the proposed expert testimony from Drs. Petrovsky and Edeling.

BACKGROUND

- [6] It is useful to provide a summary of the circumstances surrounding this claim, to frame the context out of which the instant application arises. The genesis of the consolidated claims are rules 8(1) and (2) of **SR&O No. 28 of 2021** made by the Minister on 19th October 2021. By rule 5(1) of the SR&O, the Minister stipulated that certain classes of public officers must be vaccinated against the COVID-19 disease. Similar provision was made by the Prime Minister in respect of police officers.¹
- [7] Those legislative provisions also provided that an employee within the specified classes who failed to take the vaccine, without reasonable excuse, must not access his workplace and would be treated as being absent from duty without leave [rule 8(1) and section 73A]. Sub-rule (2) of the SR&O purported to invoke and embody Regulation 31 of the Public Service Regulations ('PS Regulations') to the effect that an officer would be deemed to be absent from duty without leave if he failed without reasonable justification to take the vaccine. Section 73A of the Police Act was to similar effect in relation to police officers. It is common ground that the claimants, being public officers and police officers within the specified classes, failed to take the COVID-19 vaccine. They all received letters from the relevant officer within the public service or police force informing them that they were deemed to have resigned their respective offices.

¹ Pursuant to section 73A of the Police Act, Cap. 391 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

- [8] The claimants were granted leave to apply for judicial review of the decisions by the Minister and Honourable Prime Minister to respectively make the impugned rules and law, limited to illegality, procedural impropriety and proportionality. They did so by Fixed Date Claims filed respectively on 24th March 2022 and 23rd June 2022. They challenge those provisions as being respectively unconstitutional and having been made in breach of natural justice, ultra vires, disproportionate and procedurally irregular; and in breach of section 8(8) of the Constitution. Among other orders, they seek from the court a declaration that the section 43B of the Public Health (Amendment) Act 2020 which grants power to the Minister to declare a public health emergency, and rule 8 of 8(1) and (2) of SR&O 28 of 2021 are inconsistent with sections 17, 77 and 78 respectively of the Constitution and are null and void.
- [9] The claimants also seek an order that the COVID-19 (Miscellaneous Amendments) Act No. 5 of 2020 violates section 37 of the Constitution and the constitutional doctrine of separation of powers and is therefore unconstitutional and void; and further that the failure to define 'the Minister' in it and to confer sweeping powers on the Minister to amend and existing law is vague and ambiguous, contravenes the constitutional rule of law doctrine and is accordingly void, or alternatively a declaration that 'the Minister' means the Minister of Health. They seek a declaration that section 73A of the Police Act made by the Prime Minister purportedly pursuant to section 2(2) of the COVID-19 (Miscellaneous Amendments) Act 2020 is void.
- [10] In their pleadings, the claimants contended that there is no rational connection between the temporary public health measure under the impugned SR&O and treating an employee who refuses to take the vaccine as having abandoned his or her job and permanently terminated at the employer's instance. They submitted that the referenced SR&O is disproportionate in so far as less intrusive measures could have been taken to achieve the purpose for which the Minister was given power to make the rules. They pleaded further that the Minister had no power to regulate the employment status of public officers and therefore the impugned rules were ultra vires and unconstitutional, by reason that they effectively deprive them of their pension rights under sections 1, 6 and 88 of the Constitution.

[11] As against the PSC, the COP and the Police SC, the claimants pleaded that the letters deeming them to have resigned their offices and that they are no longer public officers or police officers, amounted to a termination of their employment without a hearing, in breach of natural justice principles and their right to a fair hearing under section 8(8) of the Constitution. They contended further that this constituted a violation of sections 77(12) and (13), 78, 84(6) and 84(7) of the Constitution respectively, rendering the letters null and void.

[12] In the Notice of Application for leave to adduce expert testimony, the claimants outline 2 grounds for the application, namely that:

- '1. Pursuant to Civil Procedure Rule 32.6(1), "A party may not call an expert witness or put in the report of an expert witness without the court's permission.
2. The evidence, which the expert witnesses intend to give, is reasonably required to resolve these proceedings justly."

[13] Under the rubric 'Expertise', they pleaded:

'3. The proposed expert witness Dr. Nikolai Petrovsky BMedSci, MBBS PhD, FRACP is the Director of Diabetes and Endocrinology Department at Flinders Medical Centre. He is a Full Academic Professor (Level E) and Flinders University and is the Research Director of Vaxine Pty Ltd. In his later role, he developed a vaccine which is currently used in Iran. His educational qualifications include

- a. 1976-79 Bachelor of Medical Science (University of Tasmania)
- b. 1979-82 Bachelor of Medicine, Bachelor of Surgery (MBBS), University of Tasmania
- c. ...

5. The evidence which this expert witness will give will assist the Court in determining whether the Claimant's constitutional rights have been breached. ... The expert evidence will assist the Court in determining whether there is a rational connection between the Defendant's actions and the permitted aim. It was (sic) also assist the Court in determining the issue of proportionality which arises both in the Constitutional and judicial review aspect of this claim.'

[14] They continued:

‘6. The proposed expert witness Dr. Herman J. Edeling is a neurosurgeon and medico-legal practitioner. He has done extensive research and published several publications on the effects (sic) Covid 19 vaccines. In assessing the lawfulness of the impugned legislation which impose mandatory vaccination, it is important for the Court to consider whether the vaccines may have harmful side effects on the human body. This will assist in determine (sic) the issue of proportionality and constitutionality.’ (Emphasis added)

[15] Mr. Shefflorn Ballantyne supplied affidavit evidence in support of the application. He exhibited the curriculum vitae for both Drs. Petrovsky and Edeling and Dr. Petrovsky’s Bachelor of Medical Science certificate issued by the University of Tasmania, his Bachelor of Medicine and Bachelor of Surgery certificate from the same institution and his University of Melbourne PhD certificate. He also exhibited Dr. Edeling’s registration profile supplied by the Health Professions Council of South Africa and his Certificate of Fellow of College of Medicine of South Africa. He produced a copy of the decision of the New Zealand High Court in **Ryan Yardley et al v Minister for Workplace Relations and Safety et al [2022] NZHC 291** during which Dr. Petrovsky was declared an expert witness. Neither the application nor the supporting affidavit testimony indicated the nature of the evidence or expertise which it was being proposed that the doctors be permitted to supply at trial.

THE LAW

[16] A party who wishes to adduce expert evidence must obtain permission from the court in accordance with rule 32.6 of the **Civil Procedure Rules 2000** (‘CPR’). The decision of whether to grant leave is predicated on whether the proposed expert evidence is ‘reasonably required to resolve the proceedings justly’². In making its determination, the Court must have regard to the overriding objective of the CPR to act justly.

² See CPR rule 32.3.

[17] In **John Oliver Dyrud v. Palmavon Jasamin & First Anguilla Trust Company**³ the Court of Appeal held that in determining what is admissible as expert evidence, the Court must take four considerations into account. Firstly, would the proposed evidence reasonably assist the court in deciding the proceedings justly? Secondly, does the witness possess the necessary or appropriate knowledge and experience to provide the requisite expert evidence? Thirdly, is the proposed witness sufficiently impartial and independent of the parties so as to render his impartial opinion and independent product? Fourthly, is there is a reliable body of knowledge or experience to underpin the expert's evidence? I can do no more than adopt and apply them.

Claimants' submissions

[18] The claimants submitted that the Courts have recognized that expert evidence can be opinion evidence (where the expert is required to give an opinion on facts presented to the Court by others) or 'skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent'. They contended that the instant case is a mixed claim for judicial review and constitutional relief which requires medical evidence. They argued that among the reliefs claimed is a declaration and a quashing order with regard to Regulations 8(1) and 8(2) of **SRO 28 of 2021** which imposes a vaccine requirement on them on pain of dismissal from their jobs and consequential loss of salaries, pension and other benefits. They contended that they also seek such relief on the ground that the requirement to take the vaccine is disproportionate, *inter alia* to the objective of remedying and mitigating the public health emergency posed by Covid-19 Pandemic.

[19] They acknowledge that the objective of remedying and mitigating the public health emergency posed by Covid-19 was a legitimate one. They submitted however that the dispute is whether the means employed are proportionate to the objective. They argued that to resolve the proportionality issue the Court would be required to determine (a) whether there was a rationale connection between the means employed and the objective pursued; and (b) whether there were less invasive ways of achieving the objective.

³ AXAHCVP2021/0010, (Unreported)

- [20] The claimants submitted that only an expert in the field of medicine can provide the court with independent expert evidence as to the medical effects of taking the vaccine. Such evidence they contend, will be helpful in resolving the issue of proportionality; whether the Covid-19 vaccines have harmful effects on the human body; whether the impugned infringements of the constitutional rights are reasonably justifiable in a democratic society; and ultimately whether constitutional rights have been breached as pleaded.
- [21] The claimants contended that the proposed expert evidence would collate the knowledge and experience of people in the medical profession as regards the effectiveness of the vaccine in terms of the objective of remedying and mitigating the adverse effects of the pandemic, the level of invasiveness involved in taking the vaccine, inclusive of the risk of side effects and also whether there were other less invasive means of achieving the objective apart from the requirement to take the vaccine. They argued that the Court would not be able to properly resolve the issue of proportionality without the assistance of the evidence which Drs. Petrovsky and Edeling would provide.
- [22] The claimants submitted that Dr. Petrovsky was accepted as an expert witness by the New Zealand High Court in **Ryan Yardley et al v Minister for Workplace Relations and Safety et al**⁴ where similar issues relating to the COVID 19 vaccine mandate were considered. They submitted further that Dr. Herman J. Edeling is a neurosurgeon and medico-legal practitioner who has done extensive research and published several publications on the effects of Covid 19 vaccines. They argued that based on his qualifications and experience, he may be accepted as an expert witness.
- [23] Learned counsel for the claimants, Mrs. Shillingford-Marsh stated that they do not know the contents of Dr. Petrovsky's and Dr. Edeling's proposed expert reports. She explained that the proposed experts are independent from the claimants, have not prepared their reports and therefore the claimants do not know the nature of the proposed expert evidence. She said that their expertise is in the fields of vaccine and immunization specific to the actual effects of vaccine on the human body.

⁴ [2022] NZHC 291.

[24] Learned counsel submitted that the affidavits filed in support of the claims constitute pleadings. In this regard, she said that the claimants were not given options to save their jobs. She contended that this claim raises issues of bodily autonomy and integrity and cruel and inhumane treatment. She added that the experimental nature of the vaccines and linkages to myocarditis and pericarditis are common knowledge and should factor into the Court's determination at the substantive hearing.

[25] She said a number of declarations are sought, and further there are several challenges to the mandatory vaccination on constitutional bases. She stated that based on the pleadings, the issue of proportionality and constitutional matters arise and on these issues the proposed experts can provide evidence that would reasonably assist the court in resolution of these claims. She reasoned that the criteria for admission of expert testimony are satisfied and leave should be granted to adduce expert evidence from Dr. Petrovsky and Dr. Edeling.

Defendants' submissions

[26] On behalf of the 1st, 3rd and 4th defendants, learned Senior Counsel Mr. Anthony Astaphan argued that an expert cannot give evidence on an issue which is not pleaded. He submitted further that if the claimants do not know what the proposed experts intend to say, they are not in a position to claim that such evidence will assist the court in resolving the issues. He submitted that such a posture is inconsistent with the principle articulated in the **John Dyrud v Palmavon Jasamin and Kennedy v Cordia**⁵ cases that expert evidence must be relevant to the issues in dispute. He reasoned that the Court cannot make that decision without knowing what the proposed experts intend to say.

[27] Learned Senior Counsel submitted that the headings in both claims are instructive in that they make no mention of Reg. 5(1) or the word 'vaccine'. He argued that the decision in **Beach Properties Barbuda Limited and Others v Laurus Master Fund Ltd and Another**⁶ makes clear that the

⁵ [2016] 1 WLR 597.

⁶ ANUHCVP2007/0002.

heading is of considerable importance as it sets out the basis on which the relevant reliefs are sought. That case dealt with an application for an injunction. Barrow JA noted:

‘The requirement of stating grounds also serves to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought.’⁷

Learned senior counsel contended that the claimants have not in the grounds to their claims, asserted that they are seeking a declaration by reason of the side effects of the COVID-19 vaccine, for safety reasons, or that taking the vaccine was a disproportionate response to the covid crisis because it put their lives at risk. He contended further that this is not expressly pleaded as a ground

on the judicial review claim or the constitutional claim in respect of rule 5 of **SRO 28 of 2021**.

[28] Learned Senior counsel submitted further that in none of grounds or pleadings underpinning the claims and in none of the declarations sought, be they on constitutional or judicial review grounds have the claimants alleged safety concerns in relation to the vaccine. He contended that absent any such pleadings that disclose a basis to challenge the mandate under rule 5 of the impugned SRO, it is not necessary for any related expert evidence to be adduced because it is not relevant.

[29] On behalf of the 2nd and 5th defendants, learned counsel Mr. Graham Bollers argued that the court must be guided by the four referenced considerations in **John Dyrud v Palmavon Jasamin**. He said that under CPR 11.9, the evidence in support of an application must be contained in an affidavit unless otherwise provided in a court order, rule or Practice Direction. He stated Mr. Shefflorn Ballantyne’s supporting affidavits contain no such evidence, do not state why the experts are required, or provides any information to enable the court to find that the proposed experts are sufficiently impartial. He said that there is no evidence that would allow the court to grant permission to the claimants to call expert witnesses.

[30] Learned counsel Mrs. Shillingford-Marsh rejoined that the application satisfies the dictates of Part 32 of the CPR. She said that ground 8 of the Fixed Date Claim Forms relates to the entire impugned SRO and addresses all of the relevant issues. As to the nature of the proposed experts’

⁷ Ibid. at para. 19.

expertise, she submitted that this is set out in summary fashion in paragraphs 5 and 6 of the application and in Mr. Ballantyne's affidavit.

DISCUSSION

- [31] CPR rule 32.6(3) provides that a party who applies for permission to adduce expert testimony must not only name the expert witness but identify the nature of his or her expertise. Implicit in the requirement to declare the nature of expertise is the logical justification only expertise that is relevant to the proceedings and to the proposed expert testimony should be included in the application. The claimants have provided for the court, very impressive curricula vitae for both Drs. Petrovsky and Edeling, both of whom are medical practitioners. It can be gleaned that Dr. Petrovsky is not only qualified and has relevant training in the specialty of diabetes and endocrinology but in vaccine development and surgery. In Dr. Edeling's case, he is trained and qualified in neurosurgery and in research work relative to the effects of COVID-19 vaccines.
- [32] Unfortunately for the claimants, they have not indicated in their application or supporting affidavits, what specific expertise of Dr. Petrovsky or Dr. Edeling they intend to present in these proceedings to assist in the resolution of the dispute. They have not restricted it to relevant matters. Further, they have not indicated the nature of the evidence that the experts are likely to supply. On this, they were content to state vaguely that Dr. Petrovsky's evidence will assist the court in determining whether their constitutional rights have been breached and the issue of proportionality which arises from the claims for administrative and constitutional reliefs. In respect of Dr. Edeling, they make no claims about his proposed evidence by state simply that the court has to determine whether the vaccines have harmful effects when it considers the lawfulness of the impugned legislation.
- [33] These were mis-steps by the claimants which undermine their application. In this regard, they have failed to satisfactorily answer the second requirement outlined in **John Oliver Dyrud v Palmavon Jasamin** in that they have provided no basis on which the court can interrogate the nature of the proposed expert testimony and whether the proposed experts possess relevant qualifications and training for such purpose.
- [34] With respect to the third identified criterion in **John Dyrud v Palmavon Jasamin**, the claimants have provided no background to their relationship with the proposed witnesses to enable the Court to conclude either way about their impartiality and independence. The court is not permitted to

speculate and I refrain from so doing. I am unable to conclude that either Dr, Petrovsky or Edeling is independent of the claimants or whether any concerns of partiality may justifiably be levelled against them.

[35] As to the fourth requirement, (whether a reliable body of knowledge or experience underpins the expert's evidence) this has not been addressed in the application. This factor cannot therefore be evaluated by the court. The highlighted gaps in the application in my estimation fall short of satisfying the standard for granting permission to adduce expert testimony. It is therefore not necessary to assess the proposed expert testimony against the pleadings especially since the claimants have not outlined the nature of the expertise.

[36] Nevertheless, for what it is worth and for completeness, I will briefly examine the pleadings against

the assertion that the proposed expert testimony is relevant, probative and reasonably required to resolve the proceedings justly. I shall assume for this purpose that aspects of the proposed testimony relate to medical evidence about the COVID-19 vaccine(s).

[37] In relation to Dr. Petrovsky, the claimants contention that his testimony would be relevant to a determination of whether their constitutional rights have been breached must be viewed through the lenses of the constitutional aspects of the claims. Likewise, this is the approach to be taken in relation to their assertion that his evidence will assist the court in determining whether there is a rational connection between the 1st defendant's actions and the permitted aim of the impugned legislation as well as on the issue of proportionality.

[38] An examination of the pleadings reveals that the claimants have invoked sections 1, 5, 6, 8(8), 16 (1) & (2), 17, 37, 77, 78, 84(6) & (7), 88, 101⁸. They sought declarations that:

⁸ See paras. (c), (g), (j), (l), (m), (o), (p), (q), (r), (s), (6), (7), (8), (9) (10), (12), (13), (16), (17), (19), (20), (21), (22), (23) and (24) of the Fixed Date Claim in Claim no. 2021/1033; and paras. (c), (g), (j), (l), (m), (o), (p), (6), (7), (8), (9) (10), (12), (13), (15), (16), (17), (18), (19) and (20) of the Fixed Date Claim in Claim No. 2022/0053.

1. The PSC's, COP's and the Police SC's decisions deeming the respective public officers and police officers to have resigned their offices pursuant to Regulation 31 of the Public Service Commission Regulations and section 73A of the Police Act respectively, for failure to take the Covid-19 vaccine, without affording them an opportunity to be heard contravene section 8(8) of the Constitution;
2. The purported power granted to the Minister to declare a public health emergency under section 43B of the Public Health (Amendment) Act is inconsistent with section 17 of the Constitution.
3. SRO No. 38 of 2020, cited as the Public Health Emergency (Declaration) Notice 2020 is inconsistent with section 17 of the Constitution having been made pursuant to 43B of the Public Health Act.
4. SRO 28 of 2021 constitutes inhuman and degrading treatment and contravenes section 5 of the Constitution, in that it purports to make the taking of a COVID-19 vaccine mandatory on pain of suffering the loss of livelihood, loss of pension rights and being exposed to criminal sanctions.
5. SRO 28 of 2021 infringes their rights to protection from deprivation of property without compensation and protection of their pension rights contravenes sections 1, 6 and 88 of the Constitution, in that it has the effect of depriving them of their accrued benefits associated with their employment.
6. Regulation 8 of SRO 28 of 2021 contravenes sections 77 and 78 of the Constitution to the extent that it purports to declare circumstances in which Public Service Regulation 31 shall apply; an officer must be treated as absent from duty without leave; and commits an act of misconduct and is liable to discipline.
7. The COVID-19 (Miscellaneous Amendments) Act 2020 contravenes the constitutional rule of law doctrine by failing to define 'the Minister' while conferring sweeping powers on that person to amend any existing law.

[39] The claimants pleaded further that:

1. Regulation 31 in its application, has the effect contrary to sections 1, 6, and 88 of the Constitution of depriving them of their accrued pension rights under the Pension Act, arising from decades of service.
2. Section 43B of the Public Health Act did not grant power to the Minister to regulate employment status of public officers as this power is conferred on the PSC under sections 77(12) & (13) and 78 of the Constitution, and therefore regulations 8(1) and (2) are ultra vires.
3. There is no rationale connection between the temporary public health measure under the impugned SRO and treating an employee who refuses to take the vaccine as having abandoned his or her job and permanently terminated by the employer.
4. The issuance of letters to the claimants by the PSC, COP and Police SC that they were deemed to have resigned their offices and were no longer public or police officers amounted to termination of employment without a hearing in breach of section 8(8) of the Constitution which guarantees a right to a fair hearing in such circumstances; and contravened sections 8(8), 77(12) (13), 78, 84(6) and (7) respectively, by reason that the PSC and COP were thereby acting under the Minister's direction.
5. Application of SRO 28 of 2021 and section 73A of the Police Act constitute inhuman and degrading treatment and contravene section 5 of the Constitution, in that they purport to make the taking of a COVID-19 vaccine mandatory on pain of suffering the loss of livelihood, loss of pension rights and being exposed to criminal sanctions.
6. The purported public health emergency declared by the Minister y SRO No. 38 of 2020 is consistent with section 17(1) of the Constitution which vests power in the Governor General to declare a State of Emergency.
7. Regulation 8 of SRO 28 of 2021 contravenes sections 77 and 78 of the Constitution to the extent that it purports to declare circumstances in which Public Service Regulation 31 shall apply; an officer must be treated as absent from duty without leave; and commits an act of misconduct and is liable to discipline.
8. The COVID-19 (Miscellaneous Amendments) Act 2020 contravenes section 37 of the

Constitution and the constitutional doctrine of separation of powers as it purports to empower the Minister to amend any existing law.

9. The alleged unconstitutional provisions further contravene section 101 of the Constitution for which relief may be obtained pursuant to sections 16(1) and (2) of the Constitution.

[40] The constitutional freedoms, rights and other protections canvassed in the foregoing pleadings are several, and relate to: (a) protection of the right to a fair hearing [section 8(8)]; (b) protection against inhuman and degrading treatment [section 5]; (c) protection against deprivation of property (pension rights) without compensation [sections 1, 6 and 88]; (d) protection against usurpation of PSC disciplinary and termination of employment functions by the Minister, COP and Police SC [sections 77(12) & (13) and 78, 84(6) and (7)]; protection against usurpation by the Minister of the Governor General's power to declare a state of emergency [section 17(1)]; protection against violation by the Minister of the separation of powers doctrine [section 37]; the right to seek redress for violation of a breach of a constitutional protection [sections 1, 16(1) and 101].

[41] Of the foregoing, the singular item which conceivably might allow for expert medical evidence in relation to the pleaded constitutional breaches is the provision against inhuman and degrading treatment. I am satisfied that in relation to the other constitutional provisions relied on, medical evidence would not reasonably assist the court in resolving the related issues which arise from these allegations.

[42] As articulated in the pleadings, the alleged breach relative to the allegations of inhuman and degrading treatment arise by virtue of the impugned mandatory legislative requirement to take a COVID-19 vaccine on pain of suffering loss of livelihood and pension rights and being exposed to criminal sanction. It appears from the language used that the claimants consider the alleged loss of livelihood and pension rights and criminal sanctions to be the inhuman and degrading treatment. This is supported by the averments made in the claimants' affidavits. For example, the claimant Cavet Thomas asserts⁹ among other things that she was 'discarded by her employer because [she

⁹ In her affidavit filed on 25th March 2022 at para. 12.

exercised her] right and freedom to protect [her] right to bodily integrity.’ While she also claimed that she was afraid to take an experimental COVID-19 vaccine given her medical conditions because she understood that the vaccines carried a risk for injury,¹⁰ it is not discernible from the pleadings (as outlined in the Fixed Date Claims) that the claimants are claiming that (a) the act of taking the vaccines by itself; or (b) that act coupled with the alleged risk of physical injury amounts to inhuman and degrading treatment.

[43] The claimants have in respect of the constitutional challenge of inhuman and degrading treatment expressly linked the alleged mandatory taking of the vaccine to the pleaded consequences of loss of livelihood and pension rights, and being exposed to criminal sanctions. The law is that pleadings must demarcate the nature and extent of a party’s case sufficiently to identify the issues. In **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea and Another**¹¹ the Court of Appeal underscored the importance and purpose of pleadings. Barrow JA who wrote the judgment with which the other learned Justices of Appeal concurred recited the learning as follows:

‘Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still **critical to identify the issues and the extent of the dispute between parties**. What is important is that the pleadings should **make clear the general nature of the case of the pleader**.’¹² (Emphasis added)

[44] It follows that in presenting its case, a litigant will be permitted to rely only on those matters which are expressly pleaded. In articulating their constitutional claim in respect of the inhuman and degrading assertions, the claimants have not included any pleading to the effect that by itself, the legislated requirement to take a vaccine constitutes inhuman and degrading treatment. Accordingly, this aspect of their case does not necessitate expert medical opinion.

Connection between health measure and abandonment of job

¹⁰ At para. 5 of her affidavit.

¹¹ Civil Appeal No. 12 of 2006, at para. 41.

¹² Per Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1993] 3 ALL ER 775 at 793A.

[45] The claimants' pleaded broadly that there is no rational connection between the Minister's public health measure and treating an employee as having abandoned his job. They submitted that both Drs. Petrovsky's and Edeling's expert testimony would be reasonably required on this score. It is not clear to me how medical evidence would reasonably assist the court in determining this issue. I do not consider it to be reasonably necessary for resolution of the claims.

Proportionality

[46] The claimants contend that SRO 28 of 2021, rules 8(1) and (2) are disproportionate in that the Minister could have taken less intrusive measures to achieve the objectives for which he was given power to make rules. They also charge that the PSC's, the COP's and the Police SC's decisions that the respective police officers and public officers had resigned their jobs were also disproportionate. They argued that the proposed experts' evidence would assist the court in making those determinations. While it is evident that medical evidence would be useful to assess the proportionality issues, I am satisfied that such expert evidence is not reasonably required to assist with resolution of those issues. The application to permit Dr. Petrovsky to adduce expert testimony is therefore refused.

Illegality

[47] With respect to Dr. Edeling, it is to be inferred from the grounds in the instant application that his proposed testimony was intended to be directed at the issues of proportionality, constitutionality and illegality. Suffice it to say that the preceding conclusions relative to Dr. Petrovsky with respect to proportionality and constitutionality apply with equal force to Dr. Edeling. This leaves only the issue of illegality for consideration. A number of legislative provisions and impugned decisions are attacked by the claimants on this basis.

[48] I make the observation that the claimants do not suggest that Dr. Edeling's proposed evidence will shed any light on the lawfulness of the impugned legislation. It is implied that his proposed evidence will do so by highlighting the harmful side effects of such vaccines on the human body. Returning again to the criteria outlined in **John Dyrud v Palmavon Jasamin** and in answering the question whether the proposed expert testimony will assist reasonably in resolving issues of alleged illegality, it strikes me that those are purely legal concerns. Dr. Edeling's expertise is not in

the field of law. It is not clear to the court how evidence about the harmful effects of the vaccines would assist in resolving those issues.

[49] The court takes judicial notice that most pharmaceutical drugs are inherently harmful to some degree. While the extent of harm occasioned by a COVID-19 vaccine may be relevant to considerations of proportionality, they do not in my opinion, have a bearing on the legality or otherwise of the impugned legislation or the impugned decisions and therefore would not reasonably assist the court in resolving that issue. In any event, the several allegations of illegality can be disposed of without recourse to expert medical evidence. The application for leave to permit Dr. Herman Edeling to adduce expert evidence is therefore refused.

COSTS

[50] The defendants have prevailed in this round of the proceedings. They seek costs. The parties made no legal submissions on the issue of costs. CPR rule 56.13(6) states that the general rule is that no order may be made against an applicant for an administrative order unless the court considers that he or she has acted unreasonably in making the application or in the conduct of the application. I am satisfied that the claimants have not acted unreasonably. In the premises, I make no order as to costs.

ORDER

[51] It is accordingly ordered:

1. The claimants'/applicants' application for the appointment of Dr. Nickolai Petrovsky and Dr. Herman Edeling as experts is refused.
2. No order as to costs.

[52] I am grateful to counsel for their submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar