REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2011 – 04578

IN THE MATTER OF THE JUDICIAL REVIEW ACT, CHAP. 7:08

AND

IN THE MATTER OF AN APPLICATION MADE PURSUANT TO SECTION 15 OF THE JUDICIAL REVIEW ACT CHAP. 7:08

AND

IN THE MATTER OF AN APPLICATION BY RUBY THOMPSON-BRODIE AND LENORE HARRIS FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE FAILURE OF THE CABINET, OR BY THE ATTORNEY GENERAL AS CABINET'S DESIGNATE, TO MAKE A DECISION WHETHER TO ADVISE HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO TO RE-APPOINT THE APPLICANTS AS MEMBERS OF THE INDUSTRIAL COURT

BETWEEN

RUBY THOMPSON-BRODIE

LENORE HARRIS

Claimants

AND

THE CABINET OF TRINIDAD AND TOBAGO

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendants

Before the Honourable Madam Justice Charmaine A. J. Pemberton

Appearances:

For the Claimants	: Mr Douglas Mendes S.C. leading Mr. M. Quamina instructed by Mr. A. Bullock
For the First Defendant	: Mrs. D. Peake S.C. leading Ms. C. Moore instructed by Ms. Z. Haynes
For the Second Defendant	: Mr. S. R. Martineau S.C. leading Mr. G. Ramdin and Ms. T. Maharaj instructed by Ms. D. Dilraj Batoosingh and Mr. R. Chaitoo

JUDGMENT

[1] **INTRODUCTION**

Trinidad and Tobago has had an eventful and oftentimes turbulent but nevertheless interesting industrial relations climate over the years. In 1965, Parliament saw it fit to streamline industrial relations practice and procedures by passing the **INDUSTRIAL STABALISATION ACT**, ("**ISA**") which *inter alia* provided for the constitution of a Court.

[2] The expected halcyon days post 1965 were short lived**.** In fact, Professor Chuks Okpaluba in his seminal piece in 1975 in commenting on the effectiveness of the ISA had this to say:

> *… the operation of the law has experienced a dramatic turn toward ineffectiveness over the past years. Strikes with impunity, though illegal, have become almost as frequent in Trinidad and Tobago as they were in the pre ISA period. In fact repeal of the ISA is now only a matter of time…*

Professor Okpaluba credits the ineffective functioning of the then Industrial Court, that is, its inability to sit in two divisions, as one of the main reasons for the failure of the ISA[1].

[3] The **INDUSTRIAL RELATIONS ACT**, ("the Act")[2], the successor legislation was passed in 1972 which provided for the establishment of the Court in two divisions. Section 4 of the Act provides for the establishment of the Court, to be headed by a President and a Vice-President together with such Members of the Court as may be determined by His Excellency, the President and the with stated qualifications[3].

[4] I say these things to create the setting for determining this matter which relates at its core to the importance of the proper functioning of the Industrial Court to industrial relations in Trinidad and Tobago. I wish however to state categorically that my principal function in these judicial review proceedings is clear and unequivocal. This court's function is to examine **the process** by which the decisions to be impugned was arrived and allegations of delay and **not** the decisions themselves.

[5] **STYLE OF JUDGMENT**

I recognize and thank all Counsel for their work and diligence in the preparation and presentation of this case. I intend no disrespect if I do not present in detail their

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[1] *"Statutory Regulation of Collective Bargaining: With Special Reference to the Industrial Relations Act of Trinidad and Tobago"*, Mona, Jamaica, ISER, U.W.I., 1975

[2] Chap. 88:01 of the Laws of the Republic of Trinidad and Tobago

[3] Section 4(3) of the Act provides:

> The Court shall consist of the following members:
>
> (a) a President of the Court …;
>
> (b) a Vice-President of the Court …;
>
> ***(c) such number of other members as may be determined by the President of Trinidad and Tobago from time to time who shall be appointed by the President of Trinidad and Tobago from among persons experienced in industrial relations or qualified as economists or accountants, or who are Attorneys-at-law of not less than five years standing.***

arguments and authorities. Please be assured that all of the material provided was studied and taken into account at arriving at this decision.

[6] **FACTS**

Mrs Ruby Thompson-Brodie and Mrs Lenore Harris were appointed Members of the Court over the periods 1991-9 and 2002-10. They signaled their desire to be re-appointed six months before the expiration of their latest terms. Their appointments came to an end in September 2010. They received from the then President (Ag.) an extension of their terms until 9th June 2011. Since that time, there has been copious correspondence passing among them, the President of the Industrial Court, both incumbent and predecessor and the Attorney General concerning their reappointments. To date no decision has been made on their reappointments. It must be noted that between the expiration of the instruments of appointments and the extensions granted by His Excellency the President of the Republic of Trinidad and Tobago, and today, there has been a change at the helm of the Court. The President of the Court who recommended the Claimants' reappointments is different from the President of the Court at present.

[7] **CLAIM FOR JUDICIAL REVIEW**

Having not heard about the reappointments, Mrs Thompson-Brodie and Ms Harris ("the Claimants") instituted these proceedings seeking Mandamus against the Cabinet and Attorney General. On 9th December 2011, I granted leave to the Claimants to seek judicial review in respect of the alleged failure and delay of the Cabinet to make a decision whether to advise His Excellency to re-appoint them as Members of the Court. The Attorney General was named as a Defendant in the application "***in the event that he is the Minister who exercises the general power of the Cabinet in relation to***

decisions to re-appoint Members to the Court".[4] The principal relief sought is as follows:

> *An order of mandamus directing the Cabinet to make a decision forthwith whether to advise His Excellency, The President of the Republic of Trinidad and Tobago to re-appoint them as Members of the Industrial Court;*

The grounds are many but the most salient is that there has been unreasonable delay in deciding whether the Attorney General and by extension the Cabinet will act in accordance with the recommendation of the President of the Court supporting their reappointments.

[8] **EVIDENCE**

THE CLAIMANTS – MRS RUBY THOMPSON – BRODIE AND MS LENORE HARRIS

The Claimants in separate affidavits set out their qualifications and tenure, acknowledging that there was a hiatus in both of their terms as Members of the Court. The evidence further revealed much correspondence from the then President of the Court supporting their reappointments, requests for information from the Attorney General from October 2010, the supply of some of the evidence requested, a letter on their behalf from Senior Counsel in response to requests for information and a further request for information from the incumbent President of the Court. There was even a letter from existing Members of the Court supporting the Claimants in their quests for reappointments. There was no recommendation for their reappointments from the incumbent President of the Court.

[4] See para. 3 of the Affidavit of Lenore Harris sworn on 21st December 2011.

[9] **THE DEFENDANTS**

1. **THE CABINET - MRS MOHANDAI SINGH-MARAJ - SECRETARY TO THE CABINET (Ag.)**

Mrs Singh-Maraj, the Secretary to the Cabinet (Ag.) outlined the practice and procedure when dealing with reappointments of Members to the Industrial Court. A synopsis of this procedure is that when the Attorney General, the Line Minister submits a Note containing a recommendation of whether to reappoint or not to reappoint for Cabinet's consideration, that Note and recommendation are considered by the Cabinet. Cabinet either approves or disapproves the recommendation. If there is an approval, a Minute is prepared and sent to His Excellency, the President who then issues the instruments of appointment. If Cabinet disapproves, the Attorney General informs the Member concerned. I note that Mrs Singh-Maraj did not say if the disapproval is contained in a Cabinet Minute. Mrs Singh-Maraj further deposed that to date, no Note concerning the Claimants' reappointments has been received by the Cabinet or submitted by any member of Cabinet for its consideration.

[10] 2. **THE ATTORNEY GENERAL - SENATOR ANAND RAMLOGAN**

Senator Ramlogan supplied the court with a comprehensive account of the current procedure for reappointment to wit, that before the expiration of the Member's term, the sitting President of the Court would write to the Attorney General recommending the Member for reappointment. Upon receipt of that letter and before making the recommendation to Cabinet, the Honourable Attorney General conducts his own enquiries to determine whether or not he would recommend the Member's reappointment to the Court for another term; the fact that Members of the Court, unlike High Court Judges do not enjoy security of tenure and that the appointments are for fixed terms which automatically expire by effluxion of time on the last day of the fixed term as provided in the instruments of appointment. Senator Ramlogan set out in

detail the correspondence among himself, the former President of the Court and the Claimants' Senior Counsel speaking to the nature and scope of his enquiries.

[11] Senator Ramlogan informed the court that he continues to be in discussion with the incumbent President about whether or not the Claimants will be re-appointed in the following words:

> ***I am at present in discussion with the President of the Industrial Court regarding the reappointments of the Claimants and the appointments of other persons to the Industrial Court. I must ensure that any person appointed to the Industrial Court would fit into the new strategic style of management of the Industrial Court by the new President. The persons appointed to the Industrial Court must be able to contribute to the new goals and focus of the new President of the Industrial Court.***

[12] He continued as follows:

> ***At the date of the commencement of these proceedings, I did not make a decision whether I should recommend to the Cabinet the reappointments of the Claimants because I had not been supplied with all the information I considered relevant and necessary to make such a decision, a fortiori the Cabinet has not made a decision with respect to the reappointments of the Claimants. By letter dated 2nd March 2012, I was provided by the President of the Industrial Court with the information I considered relevant and necessary and which I have been requesting for some time since the expiration of the Claimants' instruments.***

[13] Senator Ramlogan continued his evidence on whether an express promise had been made to the Claimants concerning their reappointments and whether there was a settled and binding practice concerning reappointments of Members of the Court. He

stated categorically as seen above that no decision has been made by him on the issue to date.

[14] On the issue of delay, Senator Ramlogan has denied that any delay in the process for the Claimants' reappointments lay at his door. In fact he stated that the Claimants were made aware of that the issue of their reappointments was under consideration and could not be completed because there was insufficient relevant and necessary information to consider as it had not been provided. Having now been supplied with the information, Senator Ramlogan deposed that he is now in a position to treat with the requests to determine whether he would recommend the Claimants' reappointments.

[15] **SUBMISSIONS**

All Counsel's made interesting submissions on the issue at bar.

THE CLAIMANTS

Counsel was at pains to point out that the proceedings did not require this court to make an order of mandamus directing that the Members be re-appointed or whether the Members should or should not be re-appointed. The Claimants framed their issues as follows:

- **Does Cabinet have a duty to decide whether or not to re-appoint the Claimants as Members of the Court?**
    - **Issue of Legitimate Expectation discussed.**
- **Has there been unreasonable delay by Cabinet in the Performance of its duties.**

The short answers are that given the nature of the power to be exercised, the Cabinet has a duty to make a decision as to whether or not to re-appoint the Claimants. This is

well settled and reliance is placed on **JULIUS v LORD BISHOP OF OXFORD[5]; STOVIN v WISE[6]**; **R v BARNETT LONDON BOROUGH COUNCIL *ex parte* NILISH SHAH[7].**

[16] **LEGITIMATE EXPECTATION**

The duty placed on the Cabinet to decide flowed from the effect of **ELCOCK v AG[8]** which solidifies the Claimants' position. In that case, Cabinet took the decision not to re-appoint the affected Member. The learned Judge found as a matter of fact that there had been a long standing practice that Members who were recommended for reappointments by the President of the Court would be re-appointed. On the facts of that case, there was therefore a breach of the legitimate expectation harboured by the Claimant Mr Elcock that he would have been appointed. This expectation was that Mr Elcock would have been "***treated in accordance with prevailing policy and that if Government wished to depart therefrom it would first observe the dictates of natural justice by notifying him of their intention to replace the existing policy sufficiently in advance of implementing the change, so as to enable him to prepare representations which he wished to make in order to persuade them against implementing the change and hearing his representations before implementing them…***".

[17] Based on the evidence in this case, the Claimants had been recommended by the then President of the Court to be reappointed. Counsel opined that there was no evidence that they had been informed of any change of policy by the Cabinet and were asked to make representations in opposition to the change if they so desired. *Prima facie* therefore the Claimants in this case had a *prima facie* legitimate expectation to be re-appointed. In those circumstances, it was the duty of Cabinet to make a decision.

[18] In the case at bar therefore, the Claimants have a legitimate expectation based on the settled practice to expect reappointments. That settled practice is that if the President

[5] (1879-80) L.R. 5 App. Cas. 214
[6] [1996] A.C. 923;
[7] [1983] 2 A.C. 309
[8] HCA 3308 of 2004 High Court Trinidad and Tobago per Dean – Armorer J

recommends, the Attorney General would advise Cabinet to reappoint by way of a Note to Cabinet. Then the Cabinet would advise His Excellency accordingly and the Members would be appointed.

[19] **DELAY**

The decision whether or not to reappoint must be made within a reasonable time, if not the court can issue mandamus compelling the relevant authority to act. Has there been unreasonable delay by the Cabinet? Counsel admonishes the court to be mindful that there are several policy considerations which impel an expeditious decision. Those considerations are:

- The nature of the decision has the potential to impact upon the proper and due administration of justice by the Court. An expeditious decision fosters proper court administration. The Act must have intended that this decision be taken expeditiously.

- The Claimants have asserted that their lives have been in abeyance;

- The chronology of events on the evidence – letters and meetings, makes it clear that there was unreasonable delay on the part of the Attorney General in making the recommendation to Cabinet as to the Claimants' reappointments resulting in Cabinet's delay in advising His Excellency that the Claimants be reappointed.

[20] Counsel concluded that the chronology of events showed that there had already been substantial delay and since the Claimants' terms had already come to an end and the issue of their reappointments was live since March 2010. Counsel opined that even though the Attorney General assumed office in May, he is deemed to be seized of the matter and in the face of several letters to him by the then President, there was no effort made by him to act until December 2010. The reasons advanced for non-action

are not good reasons and the Court ought to find that there was unreasonable delay. Counsel reiterated his position on the interpretation to be put on the **ELCOCK** case.

[21] **THE DEFENDANTS**

The Defendants disagree.

1. THE CABINET

The Cabinet's position may be summarized as follows:

a. Members of the Court do not enjoy security of tenure such as judges of the Supreme Court of Judicature under the Constitution.

b. The appointments are for fixed terms and automatically expire by effluxion of time on the last day of the fixed term as per the instruments of appointments or reappointments.

c. There is no legal right and/or entitlement to reappointments nor is there a legitimate expectation to such reappointments. The Act is silent on the procedure to be adopted in order to fill vacancies to the Court whether by way of appointments or reappointments or the factors to be considered to determine appointments or reappointments.

d. There is no statutory provision establishing a time frame within which the decision of whether or not to reappoint Members to the Court is to be made.

e. There is no statutory provision that appointments or reappointments are made solely upon the recommendation of the President of the Court or that they are to be made on his recommendation or if he makes a recommendation that it must be accepted.

f. There is no settled or consistent practice with regard to appointments or reappointments being made on the recommendation of the President of the Court.

g. The Claimants have not proved that they had a legitimate expectation to be reappointed as Members.

h. The trigger for Cabinet's action is a Note for its consideration by a Member. There is no Note submitted for Cabinet's consideration.

i. The expression of disquiet by sitting Members with respect to the Claimants' non reappointments, does not equate with non-functioning of the Court. The then President did not contend that the Court was in danger of not functioning or was not functioning.

j. There is no evidence that the Court is unable to function without there being a decision as to whether or not the Claimants should be reappointed[9].

k. The purpose of mandamus is to compel the performance of a public duty. There is no duty imposed on the Attorney General or on Cabinet to a Member after that Member's term has expired.

l. No delay can be attributed to the Cabinet in respect of which any order sought especially mandamus can issue in the Claimants' favour[10].

m. There may be a danger that this application for judicial review was not timely.

[22] **THE ATTORNEY GENERAL**

Mr Martineau gave a detailed analysis of the evidence presented by all the parties. Counsel posited that there is no duty in the Act or any law for the Attorney General or the Cabinet to make any decision to reappoint judges to the court. He reiterated that

[9] See **SHARMA v THE REGISTRAR TO THE INTEGRITY COMMISSION AND ANOR**. [2007] UKPC 42
[10] *Op. cit*.f.n.6

the Act is silent as to what factors ought to be considered for reappointments. In the absence of statutory provisions, it is for the person charged with making the decision to take whatever factors he considers relevant in order to arrive at the decision. In addition, the issue clearly stated in the **EX PARTE VENABLES CASE**[11] is directly applicable in this matter. That case stated the general rule on the adoption of policies as to the exercise of a decision maker's discretion. As applied to this case, Mr Martineau submitted that it was for the Attorney General to determine what factors ought to be considered when recommending the reappointments of Members of the Court and these considerations may be reviewed only on the **WEDNESBURY** principles.

[23] In any event, the factors taken into consideration were reasonable and rationally connected to the Members' reappointments. Further, there was an obligation on the Attorney General to take reasonable steps to acquaint himself with the relevant material in order to make an informed determination on whether or not to reappoint the Claimants as Members of the Court[12].

[24] As far as appointment and by extension reappointments are concerned, it is important to note that the Attorney General **DOES NOT** make appointments; he/she recommends and it is up to the Cabinet to decide and to advise His Excellency the President who then appoints a Member, in conformity with the Act and the provisions of the Constitution.

[25] **DELAY**

It was stated that it was arguable that the lapse of time in arriving at the decision to be made was longer than it ought to have been[13]. Counsel explained that on the evidence

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[11] **R v SECRETARY OF STATE FOR THE HOME DEPARTMENTS *ex parte* VENABLES** [1998] A.C. 407; see especially 496G – 497C.

[12] See **THE QUEEN ON THE APPLICATION OF DF v CHIEF CONSTABLE OF NORFOLK POLICE** [2002] EWHC 1738 at para. 45

[13] This submission arose out of the application the two stage approach adopted by Dean-Armorer J. in **RICHARD RAMNARACE v THE POLICE SERVICE COMMISSION CV 2007 – 000218 para. 16** which reads: *"In order to determine whether such lapses amounted to 'unreasonable delays' for the purpose of s. 15 of the **Judicial Review Act**, the court employed a two stage process:*

before the court that detailed the circumstances of this case, to wit, the changes in the political directorate, the piecemeal fashion in which the information was received and processed and the fact of the appointment of a new President of the Court, the lapse of time cannot constitute a delay capable of being reviewed. Further, there was no evidence that any perceived delay in coming to a decision has defeated the policy or objects of the Industrial Relations Act and the establishment of the Court and had a debilitating effect on the functioning of the Court.[14]

[26] **LEGITIMATE EXPECTATION**

Counsel addressed this issue on his legs and he was quite clear that a court would not give effect to an expectation if it would mean that a public authority had to perform acts contrary to the terms of a statute or acts which had no statutory basis at all. In any event, he maintained that the Claimants provided no evidence to show that they had a legitimate expectation to be reappointed.

[27] **NATURE OF THE STATUTORY POWER – DOES IT IMPLY A DUTY TO ACT AND ONE THAT IS ENFORCEABLE BY MANDAMUS?**

Counsel posited that it is the "construction of statutes that we are about" in this case. One must therefore examine the language used and the setting in which that language is used in order to determine whether there is a duty imposed on the actor and moreover a duty which is enforceable by mandamus. When one looks at the language used in the Act, there is no duty to appoint or reappoint a Member to the Court. Section 4 (3) speaks to "*such number of other members as **MAY** be determined by the President"*. To see if "*may"* imports a duty, one has to look at the legislation. There is no authority to suggest that in this case, a duty to consider arises and far less a duty to

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- Each lapse of time was tested against the definition formulated by Lord Diplock in **Thornhill v the Attorney General** that is to say by considering whether in the circumstances the lapse of time was longer than it should have been.
- If the lapse of time constituted delay, the Court considered whether the delay was such that no reasonable Commission would incur."
- [14] See **SHARMA v THE REGISTRAR OF THE INTEGRITY COMMISSION AND ANOTHER** op. cit. f. n. 6

decide. In this case, the Act gives the President power to appoint. The President exercises that power on the advice of Cabinet[15]. In addition, this is not a case of an enforcement of a right or that the Claimants have a legitimate expectation. The power is entirely discretionary.[16]

[28] If the failure to exercise the power will frustrate the purpose of the Act, then the holder has a duty to act. In this case, the power to be exercised is to provide Members of the Court. The Claimants had provided **NO** evidence that spoke to if there is no decision made on their reappointments that it would be impossible to provide Members of the Court, not unless the Members are selected for some special purpose.[17]

[29] **THE ORDER FOR MANDAMUS**

Put quite simply, the heart of this point is that the issue of whether mandamus can lie in this case, based on delay cannot arise once it is established that there was no obligation or duty imposed by the Attorney General or the Cabinet to act in the way that the Claimants say he must act.

[30] **ANALYSIS AND CONCLUSION**

I have considered the arguments and the authorities as presented. As far as I see it, the answer to this case is that the Order of Mandamus does not lie and cannot lie against these Defendants. The reasons are as follows:

[15] See section 80 (1) of the Constitution: "In the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of Cabinet or a Minister acting under the general authority of the Cabinet …".

[16] Counsel distinguished the cases of **FREDERIC GUILDER JULIUS v THE RIGHT REV. THE LORD BISHOP OF OXFORD THE REV. THOMAS THELLUSSON CARTER (1879-80) L.R. 5 App. Cas. 214; STOVIN V WISE** op. cit. f. n. 3 and **ACKBARALI v BRENT LONDON BOROUGH COUNCIL [1983] 2 A.C. 309**

[17] See **SHARMA v THE REGISTRAR OF THE INTEGRITY COMMISSION** *op. cit.* f. n. 6

A. NATURE OF THE ACT

The nature of the Industrial Court as envisioned by the framers of the Act and as provided in the Act gives life to the view that "*industrial relations, not being immutable must change with the political, economic and social circumstances*"[18].

[31] **B. ELIGIBILITY OF THE CLAIMANTS FOR RE-APPOINTMENT**

The fact that a Member is eligible for reappointment does not create a right or entitlement to such reappointment.[19] The latter part of Professor Okpaluba's view quoted above to my mind provides the rationale for the provisions of Section 5 of the Act which specify the term of engagement for Members other than the President of the Court and their **being eligible** for reappointment. It is clear that qualification wise, the Claimants are eligible. But is that all?

To my mind eligibility has to be regarded in the **context** not only as to the qualifications of Members but also as to the needs, role and functions which the Court is called upon to play in the prevailing industrial relations climate, as influenced by the "*political, economic and social circumstances*". Let me say that to my mind therefore, the arguments for or against security of tenure are irrelevant and call for no discussion in this case.

[32] In relation to this particular Act and these Claimants, I asked Mr. Quamina if their positions are any different to warrant special consideration. He conceded in his oral address that the meaning of the word "eligible" or the intent and effect of it would not produce a different result or meaning in relation to the Claimants in the case at bar. I can therefore categorically conclude that based on the clear provisions of the Act there is no right or entitlement without more resident in the Claimants that they are to be re-appointed as Members of the Court.

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[18] Professor Chuks Okpaluba *op.cit.* f. n. 2

[19] Section 5(1): ***The members of the court … shall hold office for such period, being not less than three years or more than five years … BUT SHALL BE ELIGIBLE FOR REAPPOINTMENTS.*** *(*Emphasis mine).

[33] **C. PROCEDURE FOR RE-APPOINTMENTS**

There is no procedure laid down in the Act with respect to reappointments of Members to the Court.[20] There is evidence of what obtained under the previous Presidents of the Court but that does not bind or fetter the hand of successive Presidents and certainly not this incumbent.

[34] The key to this matter lies in analyzing the nature of the Statutory power given to the President as a result of the conjoined effect of Sections 4(3)(c), 5(1) of the Act and Section 80 of the Constitution.

[35] **D. NATURE OF A STATUTORY POWER – DUTY OR POWER?**

I agree that there are instances where a statutory power is cast in such a way that the repository of the power is burdened with a duty to act. Those instances were clearly seen in all of the authorities cited by Mr Quamina[21]. However, is that the case here? What are the conditions for the court to find that such a duty exists?

[36] **(a) EXPRESS LEGISLATIVE PROVISIONS**

One of the most obvious is that such a duty is expressed in a statute. I agree with both Mr Martineau and Mrs Peake that the legislative framework under consideration – The Act (Sections 4(3) (c) and Section 5(1) and The Constitution (Sec. 80) do not so provide in relation to the President and moreover to the Cabinet or the Attorney General. There is no duty imposed on them; to appoint or re-appoint members to the Court. The Claimants have brought no other legislation to fortify their positions that there is such a duty cast by statute. From that standpoint I conclude that there is no express duty laid upon either the President to re-appoint members and moreover on the Cabinet or the Attorney General **to advise the President to re-appoint** the Claimants as members of the Court.

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[20] See **SAM MAHARAJ v P.A.M. MANNING PRIME MINISTER AND HEAD OF CABINET H.C.A. No.203 of 2004** and **PAUL LAI v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO** H.C.A. 3367 of 2003 per Myers J para.36

[21] See f.n. 5,6 and 7 *infra*.

[37] **(b) IMPLIED DUTY TO ACT – AN EXAMINATION OF THE INDUSTRIAL RELATIONS ACT AND THE CONSTITUTION**

A duty to act can be implied from a consideration the legislative framework in which the power is granted. The test is whether the failure to exercise that power will be inimical to the purpose for which the power is granted. In this case the question is ***whether the alleged delay by either the Cabinet or the Attorney General would either create vacancies in the court which would in turn impair the proper functioning of and role that the Industrial Court plays in this society***?

[38] **(1) THE INDUSTRIAL RELATIONS ACT** –

(i) WHETHER THERE HAVE BEEN VACANCIES CREATED ON THE COURT?

Mr. Quamina stated that the Claimants' departure has created vacancies on the court which needed to be filled. The Act makes provision for the appointments of a President and a Vice-President. The Act goes on to define the complement as ***"such number of other members as may be determined by the President from time to time".***

[39] My understanding of these matters is that a vacancy can only arise if there is no one holding a particular position where there is a definite provision regarding the number of persons required to perform the particular function. In the Act, the definite positions of President and Vice-President are provided for[22]. If there were no President or Vice-President holding those positions, then one may speak of a vacancy arising. The provision dealing with Members is different. There may be one, two or three Members at any given time. The Act allows the President the flexibility to appoint or re-appoint such number as may be determined from time to time[23]. Nothing is cast in stone. I do not share the view that the issue of vacancies arises in these circumstances and therefore is not a leg permitted to the Claimants.

[22] See Section 4(3) (a) and (b) – f.n. 3 *infra*.
[23] See Section 4(3) (c) f.n. 3 *infra* and Section 5(1) f.n. 19 *infra* provides

[40] **(ii) WERE THE COURT'S ROLE AND FUNCTION IMPAIRED?**

Cases are successfully prosecuted on evidence. The Claimants proffered no evidence that the decision whether or not to reappoint them has had an adverse effect on the Court's ability to function. The letters exhibited show recommendations by the then President in their favour, but if scrutinized, there is no statement made that these Claimants possessed unique skill sets or any other factors which would have placed them in any special category. The support from their colleagues, whilst admirable and commendable, does not carry their quest any further.

[41] **(2) SECTION 80 OF THE CONSTITUTION.**

The Act provides that His Excellency, President may appoint and by necessary implication may reappoint "*such number of other members*" to the court. Section 80 of the Constitution details how the President should exercise his functions, that is, "*on the advice of the Cabinet"*. The Attorney General is the member of Cabinet charged with the responsibility over affairs concerning the Industrial Court. It is he who takes the Notes to Cabinet to secure the wishes and desires of the Court in the appointment or reappointments of Members.

[42] The fact that the Attorney General conducts his own enquiries to determine whether or not to recommend Members' reappointments, may be viewed by some as troubling but without alleging mala fides or unreasonableness or irrationality which is not the Claimants' case, the Court makes no definitive finding but to say that it does not carry the Claimants' case anywhere on the grounds in support of the relief claimed.

[43] It is clear that where there are no statutory provisions which guide a decision maker in coming to his decision, it is for the decision maker **himself** and not a court to decide upon the relevance of the issues and information he needs to arrive at that decision[24]. The Attorney General must make his decision as to relevance and be guided only by

[24] See **CREEDNZ v GOVERNOR GENERAL** [1981] N.Z.L.R. 172 cited with approval in **TRINIDAD AND TOBAGO CIVIL RIGHTS ASSOCIATION v PATRICK MANNING H.C.A. No. 47 of 2004** per Dean-Armorer J.

reasonableness in the **WENDESBURY** sense. I am of the view that the evidence relating to the actions taken by Attorney General in fulfilling his role and mandate under the Constitution must be viewed in this context.

[44] **EVIDENCE**

An examination of the evidence reveals that there can be no argument against the view that the issues raised by the Attorney General for him to consider in arriving at his decision were reasonable. It seems that the issues under consideration were *"guided by the policy and objects of the governing statute…".*[25]

[45] I adopt the dicta in the **VENABLES CASE** as applicable to this case and I make it one of the bases of my decision. The Court in that case stated that "*when Parliament confers a discretionary power exercisable from time to time over a period, such power **must** be exercised on each **occasion in the light of the circumstances at that time**. In consequence, the person on whom the power is conferred **cannot** fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc".* [Emphasis mine]. In other words, a decision maker cannot fetter in any way, his discretion when it comes to making a decision that he has a statutory mandate to make.

[46] Can this court be heard to say that the Attorney General must act blindly, or should the Attorney General not inform himself sufficiently so that whatever he takes to the Cabinet is proper and accords with logic and good sense? I do not think that anyone would hesitate to agree that the latter view is to be preferred. This finds support as well in the **VENABLES CASE.** I go so far in this case to say that from the volume of correspondence on the issue of the Claimants' reappointments, the Attorney General seems to be "bending over backwards" in an attempt to properly inform himself on what to present in his Note to Cabinet. In the circumstances, I can make a positive finding that this matter was not dealt with capriciously at all.

[25] See **CREEDNZ** *infra.*

[47] Therefore the question whether the statutory powers which are vested in the **President** by virtue of the conjoint effect of the Act and the Constitution created an implied duty to act on the part of the Cabinet and the Attorney General must be answered in the negative.

[48] **E. SEPARATION OF POWERS**

The argument that the actions of the Attorney General in seeking further information upon which to base his recommendation to Cabinet in the form of a Note for its consideration violates the doctrine of the separation of powers cannot be successfully advanced. In fact Myers J. dealt succinctly with the entire issue of re-appointments and the separation of powers in the SAM MAHARAJ and OAUL LAI case. [26] The learned judge disagreed with this proposition and I agree with his stance and reasoning and adopt it in this case.

[49] **F. THE CABINET**

There is no trigger in existence, that is, no Note has been presented so as to cause the Cabinet to act in accordance with Section 80 of the Constitution.

[50] **G. LEGITIMATE EXPECTATION**

I would be so bold as to say that being "**eligible"** without more does not create in the Member a legitimate expectation to be reappointed. What obtained under previous Presidents cannot amount to a settled practice as to the procedure regarding reappointments of Members to the Court given the nature of the court and its functions and the fact that the reappointment of members is governed by a provision in flexible terms allowing for reappointments of "*such number of other members as **may be determined by the President from time to time***". In any event, a court would not give effect to an expectation if it would mean that a public authority had to perform acts

[26] In the **SAM MAHARAJ** and **PAUL LAI** cases, Myers J dealt with the issue as argued by the Claimants in this case that the decision not to reappoint them violated the doctrine of the separation of powers. See paras. 44 – 55.

contrary to the terms of a statute,[27] and I would add to perform acts not contemplated at all by the Legislature.

[51] **H. THE INCUMBENT PRESIDENT**

I must comment on this issue as, although the parties did not address this in much detail. I think this is at the heart of the matter.

(i) NO EVIDENCE OF RECOMMENDATIONS BY THE INCUMBENT PRESIDENT.

There is no recommendation from the **incumbent President** of the Court concerning the reappointments of the Claimants. One may argue that this came late in the day, but this to me is a crucial hurdle to cross. There is no duty on the incumbent President to accept recommendations made by a predecessor and far be it from a court to hold otherwise.

[52] **(ii) LEGITIMATE EXPECTATION**

I wish to visit this as it pertains to the reality of a new President of the Court. Even if I am wrong to find that there is no settled practice, and in fact there is, the reality is that the President in the chair has **not** made a recommendation and there is no evidence that the incumbent President has held out to the Claimants that they would be reappointed. It really would be inelegant of this Court to order the Attorney General to make a decision on whether or not to reappoint the Claimants without any reference to the President of the Court.

[53] What is even more crucial is the reality that it is, I think the President of the Court, who must be allowed to make the first call in matters such as these. However, the President of the Court is not a party to this action. Put another way, the effective residence of the power and the duty to recommend reappointments of Members rests not in the Defendants, the Cabinet and the Attorney General, but in the President of the Court

[27] See **REGINA v SERETARY OF STATE FOR EDUCATION AND EMPLOYMENT *ex parte* BIGBIE [2000]1 W.L.R. 1115; RAMDEO RAMTAHAL v THE DEFENCE COUNCIL CV 2008-03436.**

who is not named in these proceedings. Not naming the President of the Court as a party to this action or even alluding to the role and function in this matter, seems to me to be unfavorable to the Claimants argument that there is a **settled practice** with respect to reappointment of members.

[54] It would be further inelegant of this Court to even suggest to the President of the Industrial Court, a superior Court of Record, that the incumbent must be bound by the administrative decisions made by predecessors. How can this Court attempt to as it were traverse that preserve through the back door?

[55] **I. THE ATTORNEY GENERAL**

From the above it cannot be doubted that the Attorney General is the Minister who exercises the general power of Cabinet in relation to decisions to re-appoint members of the Court. However, an order of mandamus cannot lie against him in the absence of all the necessary and relevant information including a recommendation from the incumbent president of the Court.

[56] **J. DELAY**

The issue of delay does not arise in relation to the Defendants at bar since they cannot act in the absence of their respective triggers – in the case of the Attorney General, the recommendation of the incumbent President, (moreso when there is argument in favour of settled practice) and in the case of the Cabinet, the presentation of a Note for Cabinet's consideration.

[57] **K. ORDER FOR MANDAMUS**

The last reason, that the failure of the Claimants to establish that there was an obligation of duty imposed on the Attorney General or the Cabinet to consider whether to reappoint the Claimants and that there was a delay in the exercise of that duty are crucial to the determination of the question whether the Court can grant an Order of

Mandamus against the named Defendants. To my mind, the Defendants' actions are hinged upon these issues.

[58] In my view, an Order for Mandamus against the named Defendants will not serve any purpose and will be of no effect since the effective trigger to the process has not been established – the recommendation of the President of the Court.

[59] **L. OTHER ISSUES**

I do not think much turns on the other issues so they shall not be addressed in any detail. Heavy weather was made by Mr. Martineau's submitting on the issue of whether the Cabinet's or the Attorney General's actions may have amounted to maladministration and faults in administration as opposed to being amenable to judicial review[28]. I have decided that this is not a case in which an order for mandamus would arise. I do not think that there is sufficient evidence or even arguments to hazard an opinion on maladministration. I say no more.

[60] **CONCLUSION**

In the premises, the Claimants' application for judicial review fails. The Claimants must now pay the Defendants' costs. I would add though that this matter screams for delicacy in its handing and this court trusts that the relevant processes will be timely and efficient.

ORDER

1. **That the Claimants' claim for judicial review seeking an order of Mandamus against the Cabinet and the Attorney General of Trinidad and Tobago fails and is dismissed.**

2. **That the Claimants' do pay the Defendants' costs to be assessed if not agreed.**

[28] See **HILDA AMOO-GOTTFRIED v LEGAL AID BOARD (No. 1 Regional Committee) 2000 WL 1741402**

3. **That the Defendants do file their Statements of Costs on or before September 28th 2012.**

4. **Responses if any to be filed and served on or before 19th October 2012.**

5. **Assessment of costs to take place on 23rd November 2012 at 10:30 a.m. POS #17.**

Dated this 2nd day of July, 2012.

/s/CHARMAINE A.J. PEMBERTON

HIGH COURT JUDGE