

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2011-04757

BETWEEN

RODNEY KHADAROO

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT



Before the Honourable Madam Justice C. Pemberton

Appearances:

For the Claimant: Mr. N. Ramnanan instructed by Ms. Debra Bridgelal

For the Defendant: No Appearance

DECISION

[1] **BACKGROUND**

On December 6, 2011 the Claimant, Mr. Rodney Khadaroo, caused a Fixed Date Claim Form to be filed against the Attorney General of Trinidad and Tobago seeking Constitutional relief. I think that it is important to set out Mr Khadaroo's claim and affidavit in full, subject to my interlineations. The relief prayed read as follows:

- (i) *A declaration that the Defendant had been **guilty** of unequal discriminatory treatment of the Claimant in*

contravention of his right to equality of treatment from any public authority in exercise of any functions enshrined in section 4(d) of the Constitution of Trinidad and Tobago; (Emphasis mine)

- (ii) *A declaration that the Claimant should be interviewed by the Promotion Advisory Board and placed on the Order of [M]erits List dated 11th May 2010 for promotion to the rank of Corporal.*
- (iii) *Special damages for loss of earnings from rank of Corporal.*
- (iv) *Damages and/or compensation including aggravated and/or exemplary damage for contravention of the [A]pplicant's fundamental rights and freedom guaranteed by the Constitution of Trinidad and Tobago;*
- (v) *All such further orders and directions as are necessary and appropriate to secure and enforce the fundamental rights and freedoms to which the [A]pplicant was entitled to at all times;*
- (vi) *Any further and/or other relief as the [C]ourt may think just and reasonable in the circumstances; and*
- (vii) *Costs.¹*

[2] The grounds in support were as follows:

- (i) *The Defendant's unequal treatment of the Claimant in breach of his right to equality of treatment from any public authority in exercise of any function as enshrined in section 4(d) of the Constitution of Trinidad and Tobago;*

¹ Claim Form filed December 6, 2011.

- (ii) *The right to equality of treatment from any public authority in exercise of any functions as enshrined in section 4(d) of the Constitution of Trinidad and Tobago includes the right to equality on matters of employment of the State. This is a corollary and incident of the application of the concept of equality to all public officers;*
- (iii) *The Applicant was treated unequally when he was not assessed and interviewed for promotion to the rank of Corporal on the basis that he did not pass the qualifying examination at the time that the evaluation stage commenced to be considered for the interview which was needed in order to be placed on the Order of Merits List for promotion to the rank of Corporal.*
- (iv) *This unequal and thus treatment of the applicant was further intensified by the fact that, the applicant informed the Police Commissioner by letter dated [June 21, 2011] that he was unfairly treated but received no response.*
- (v) *The Applicant was denied the promotion to the rank of Corporal on the aforesaid basis. However, the reasons given for his non-promotion were not invoked as a bar to other officers who were similarly circumstanced but were nevertheless given promotions with retroactive effect, despite the fact that during the assessment period in question they qualified together with the Applicant.*
- (vi) *The Applicant has been treated in a discriminatory or unequal manner as a result of which his career advancement was illegally stymied and/or frustrated.*

He would have been entitled to further promotions to the rank of Sergeant to date.

- (vii) The Applicant's right to equality of treatment from a public authority in the exercise of its functions has been breached.*
- (viii) The [A]pplicant passed the qualifying examination for the rank of Corporal in 2008 and was not interviewed by the Promotion Advisory Board, which was integral for the purpose of promotion, and which was wrong, due to the decision not to interview officers who recently qualified, through no fault of the [A]pplicant. He was therefore bypassed. In the circumstances the [A]pplicant had a right to make representations about the non-interview for promotion, which he did but was still refused interview and promotion.*
- (ix) The Applicant through his Attorney-at-Law Ms. Debra Bridgelal sent two letters dated 21/06/2011 and 29/07/2011 respectively to the Commissioner of Police informing him of the matter, but no action was taken in relation to same.*
- (x) The criteria for promotion was arbitrarily applied which deprived the [A]pplicant his just due.*
- (xi) The procedure regarding promotion is stated at Regulation 20 of the Police Service Regulations 2007 which is an Act of Parliament [of] Trinidad and Tobago.*
- (xii) This procedure has not been changed and therefore the [A]pplicant is subjected to the procedure outlined by the Police Service Regulations 2007 Section 20, for promotion in the Second Division of the Trinidad and Tobago Police Service.*

(xiii) *The [A]pplicant was appraised for the period which was considered for assessment to be interviewed and was graded outstanding and given a box 1. He therefore possessed the necessary points to be considered for interview to the rank of Corporal in accordance with Regulation 20 of the Police Service Regulation 2007.²*

[3] **AFFIDAVIT EVIDENCE**

Mr. Khadaroo submitted the following affidavit evidence to the Court:

3. *I was not considered and interviewed for promotion to the rank of Corporal by the Promotion Advisory Board. I passed the qualifying examination in the year 2008 and was eligible for interview. A true copy of the results is attached and marked “R.K. 1”.*
4. *I was unfairly treated and discriminated against.*
5. *By letter dated the 21st June, 2011 my Attorney-at-Law, Ms. Debra Bridgelal, wrote to the Commissioner of Police and brought to his attention the fact that I was not interviewed and considered for promotion. A true copy of the letter dated 21st June, 2011 is now produced and shown to me hereto exhibited and marked “R.K. 2”.*
6. *A second letter was sent on the 29th July, 2011 by my Attorney, Ms. Bridgelal but no action was taken in relation to same. A true copy of the letter dated 29th July, 2011 is now produced and shown to me hereto exhibited and marked “R.K. 3”.*
7. *I went to the office of the Human Resource Manager sometime in April 2009 whilst interviews were taking*

² Id.

place and made enquires as to my interview for the promotion to the rank of Corporal and I was told by the said manager that the interview process commenced before I received examination results and I was therefore illegible for interview.

8. *I cited Regulation 20 of the Police Service Regulation 2007 which outlines the criteria for Promotion and brought to the attention of the Human Resource Manager that my annual performance Appraisal Report indicates that I was graded as outstanding for the period but not for assessment and that I had passed the qualifying exams and should be interviewed.*
9. *Sometime in 2010, I heard and read through the media both print and electronic that promotions to the Rank of Corporal were made in the Police Service.*
10. *Many of the officers who have bypassed me and were promoted are my juniors and would now be senior to me. I was as qualified as these officers at the time of their consideration for promotion. I do not understand why I was treated differently from these officers notwithstanding that I was similarly circumstanced, as all of the officers who were considered for promotion and I was entitled to be considered for promotion to the rank of Police Corporal.*
11. *Sometime in 2011, I heard and read through the media both print and electronic in Police Service and an officer who was similarly circumstanced and passed examination the same time with me was promoted retroactively.³*

³ Affidavit of Claimant. Filed Dec. 6, 2011

On December 9, 2011, the papers came to my attention. After reading the Fixed Dated Claim Form and the supporting affidavit, I surmised that a preliminary issue to be determined. I framed the issue in this way: **DOES THIS MOTION SATISFY THE EVIDENTIAL REQUIREMENTS OF A CLAIM BROUGHT PURSUANT TO SECTION 4(d) OF THE CONSTITUTION OF TRINIDAD AND TOBAGO?**

[4] Attorney for Mr. Khadaroo, Mr. Ramanan, filed submissions on this issue on January 31, 2012. I was unassisted by the Attorney General's Office as I received no submission from it. A further Case Management Conference was scheduled for March 27, 2012, at which I delivered a ruling dismissing the Claim. These are my reasons.

[5] **CLAIMANT'S SUBMISSIONS**

Inequality of Treatment Section 4(d) of the Constitution

In highlighting the inequality of treatment, to which Mr. Khadaroo was subjected, Mr. Ramnanan cited **MOHANLAL BHAGWANDEEN v. THE ATTORNEY GENERAL**⁴, in which he cited Lord Carswell as saying,

*A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons.*⁵

Additionally, Mr Ramnanan submitted that discrimination is evident when "a person who is entitled to a public benefit or service from a public authority is deprived of it while others, similarly circumstanced, receive it **without any reasonable or justifiable explanation being given for the denial**"⁶.

[6] **Appropriateness of the Preliminary Point / Judicial Review**

⁴ PC 45 of 2000

⁵ Submissions on Behalf of the Claimant. Para. 2.2

⁶ Submissions on Behalf of the Claimant. Para. 2.2. Filed Jan. 31, 2012. See **SANATAN DHARMA MAHA SABHA OF TRINIDAD AND TOBAGO V. THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**. Cv.A. No. 16 of 2004.

Mr. Ramnanan then sought to address the Court on the “*appropriateness of the preliminary point in a constitutional claim*” in the instant matter. Counsel stated that by raising the issue of the preliminary point, the Court

*seeks to determine on the evidence of the Claimant only, as to whether or not he has satisfied the evidential requirements for a claim under section 4(d)*⁷.

He stated,

*What the court is in effect doing therefore is imposing the “filter” of a leave stage which is synonymous to judicial review claims. The rules set out a fundamentally different procedure for applications for redress under section 14(1) of the Constitution and that for Judicial Review, in that leave is required for the latter and no leave is required for the former.*⁸

Counsel informed the Court that even at the leave stage of a Judicial Review, the hurdle is very low, and “*only a wholly unmeritorious claim*” would fail at that stage.⁹ Mr. Ramnanan submitted that because of the low hurdle which must be crossed in Judicial Review matters,

*a constitutional claim which does not as a matter of procedure have a leave stage can attract no higher standard than that where leave is an express requirement. For all the reasons set out hereunder it is submitted that the Claimant’s case cannot on the face of the evidence be considered as wholly unmeritorious and patently unarguable. The Respondent must therefore be called upon to answer the case of the Claimant.*¹⁰

⁷ Submissions on Behalf of the Claimant. Para. 3.1.

⁸ Id. at para. 3.3.

⁹ Id. at para. 3.5.

¹⁰ Id. at para. 3.6.

[7] **Burden of Proof**

Mr. Ramnanan submitted that even though *“it is trite law that he who asserts bears the burden of proof...what is necessary is to consider what standard of proof is required for the Claimant to shift the burden to the Defendant.”*¹¹

Counsel referred to **DENNIS GRAHAM v. THE POLICE SERVICE COMMISSION ET AL**¹². Here, the learned Honourable Justice of Appeal Jamadar posited, *“if upon apparently discriminatory treatment being shown the onus shifts unto the public authority/official to justify it.”*¹³ Mr. Ramnanan also referred the Court to **ANNISSA WEBSTER AND OTHERS V. THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**¹⁴, in which the Honourable Mr. Justice Moosai stated, *“where apparently discriminatory treatment is shown, it is for the alleged discriminator to justify it as having a legitimate aim”*. Counsel summarized this point by stating the following,

- (a) *All that is required of the Claimant is to show a **prima facie** case of discrimination, once the Claimant discharges this burden then the onus shifts to the defendant for justification.*
- (b) *Once the burden shifts, the Defendant is then required to justify apparent discrimination (with full disclosure and candour).*
- (c) *The Court is then required to undertake an evaluation of **all** the evidence to determine whether the Claimant has shown both a difference in treatment and a lack of any legitimate or lawful reason for that treatment.*¹⁵

¹¹ Id. at para. 4.1.

¹² **DENNIS GRAHAM V. THE POLICE SERVICE COMMISSION, THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**. Ca. A No. 8 of 2008.

¹³ Id. At para. 24.

¹⁴ CV 3562 of 2003.

¹⁵ Submissions on Behalf of the Claimant. Para. 4.4.

[8] **What is a Prima Facie Case?**

The “*key elements*” for establishing a *prima facie* case has been set out in Mr. Khadaroo’s affidavit. They are:

- a) *The fact that [he] has passed the qualifying examination and was therefore eligible for interview by the PAB.*
- b) *He has properly identified the Class of persons who are his comparators (those who passed the examination at the same time as himself).*
- c) *And he has also identified circumstances which show that there was no reason to distinguish him from his comparators and that his circumstances are either the same or not materially different from his comparators.*
- d) *He has not been given any reasons for this apparently discriminatory treatment and has received no response to his pre-action letters.*¹⁶

Mr. Ramnanan submitted that based on the above, the information set out in the affidavit of Mr. Khadaroo is enough to make a *prima facie* case.

[9] **Particulars**

Counsel admitted that “*the Claimant’s evidence lacks certain particulars*”¹⁷ Mr. Ramnanan stated that the “*name, regimental numbers and circumstances of the Claimant’s proposed comparators are likely to be in the bosom of the Defendants.*”¹⁸ Additionally, it is admitted that other material documents such as sick leave records of Mr. Khadaroo and other similarly circumstanced officers are not in ambit of knowledge of Mr. Khadaroo, but within the precincts of the Attorney General. Thus he is freed from particularising any further than he already has.

¹⁶ Id. At para. 5.4.

¹⁷ Id. At para. 6.1.

¹⁸ Id.

[10] **Court's Action Premature of Requesting Submissions on the Preliminary Issue was premature**

Mr. Ramnanan “*respectfully submitted*” that the Court acted prematurely in raising the issue of the preliminary point. Counsel noted that because Mr. Khadaroo had “*discharged his burden of making out a prima facie case, the [C]ourt ought to have allowed the Respondent to justify its decision and provide all material in its possession.*”¹⁹ Mr. Ramnanan additionally submitted that in any event, Mr. Khadaroo still had the option of making an application for “*specific disclosure to get the relevant particulars before the [C]ourt in order to make a fair and just determination of the issues before it.*”²⁰

[11] **Amendment of Fixed Dated Claim Form**

Counsel referred the Court to Part 20.1(1)²¹ of the **CIVIL PROCEEDINGS RULES, 1998 (CPR 1998)** and submitted that it gives Mr. Khadaroo the power to “*amend his affidavit by way of supplemental affidavit at any time prior to the first Case Management Conference (CMC) without leave of the [C]ourt.*”²² He quotes in support, Ibrahim J. (as he then was), who stated,

*This case is tried on affidavit evidence. There are no pleadings in the general sense. The affidavits take the place of the pleadings, therefore the rules that are applicable to pleadings are equally applicable to affidavits in this case.*²³

[12] Mr. Ramnanan reiterated that Mr. Khadaroo has made out a *prima facie* case before the Court evident in his affidavit of December 2, 2011. He stated,

There is a sufficient case for the Defendants to answer accordingly the Claimant herein respectfully submit that the preliminary point ought to be dismissed and that all

¹⁹ Id. At para. 8.1.

²⁰ Id.

²¹ This Part states, “*a statement of case may be changed at any time prior to a case management conference without the court's permission.*”

²² Submissions on behalf of the Claimant. Para. 8.2

²³ Id. At para. 8.2. See **Nickson Mungroo et al –v- His Worship Algernon Jack.**

*consequential directions be given for the progress of this Claim.*²⁴

[13] **ANALYSIS, LAW AND CONCLUSION**

It is evident on the face of the Fixed Date Claim Form by way of Motion that it is lacking several particulars and this is admitted in no uncertain terms by Mr. Ramnanan. The question is as I posed, is this sufficient to render the Motion as filed, to continue?

[14] **Inequality of Treatment Section 4(d) of the Constitution**

Counsel correctly cited Lord Carswell when he mused that to claim relief under Section 4(d) of the Constitution, the claimant must have been discriminated against when others in similar circumstances were treated differently. That is a matter of evidence as well as law. The question I have is, where are the other similarly circumstanced persons mentioned on the Fixed Date Claim Form? I do not see any. I can safely conclude that there is no evidence in this case and as such, the very first hurdle has not been crossed.

[15] **Appropriateness of the Preliminary Point / Judicial Review**

I begin to take issue with Counsel for Mr. Khadaroo when he compares the preliminary issue to a “*filter*” of a leave stage in Judicial Review. The posing of this issue is **NOT** intended to be akin to the leave stage in Judicial Review proceedings.

[16] The Court’s duty is to deal with cases justly. Part 25.1 of the **CPR 1998** places on the Court a duty to manage cases. Part 25.1 clearly states,

The court must further the overriding objective by actively managing cases, this may include -

(a) identifying the issues at an early stage; and

²⁴ Id. At para. 9.1.

(b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

Additionally, Part 26.1(k) of the **CPR** empowers the Court to dismiss or give judgment on a claim after decision on a preliminary issue. This is what this Court has done in these proceedings.

[17] **Burden of Proof**

Whilst Mr. Ramnanan has provided the Court with relevant authorities, his application of the principles is unhelpful. Discriminatory treatment complained about **must be apparent** from the Motion filed and the affidavit evidence in support thereof. Mr. Khadaroo's affidavit clearly does not provide any evidence in the manner necessary to support this case so as to cross this hurdle. The question of the burden shifting from Mr. Khadaroo to the Attorney General simply does not arise since the affidavit does not provide sufficient evidence to start the process.

[18] **Prima Facie Case and Particulars**

Mr. Ramnanan has stated in his submissions that a *prima facie* case has been set out in Mr. Khadaroo's affidavit. I find the evidence before me contradictory of this statement. There is no evidence to support the allegation of discrimination since the above statement is that other similarly circumstanced individuals were treated differently without the necessary particulars.

[19] From my reading, Mr. Ramnanan appears at odds with himself by stating on one hand that he has established at least a *prima facie* case of discrimination, while on the other hand, he admits that Mr. Khadaroo's case has not been fully set out, both factually and evidentially. Which is it? What is the Court to do? My view is that Mr. Ramnanan cannot expect to bring a deficient Motion before the Courts and seek to rely on the Defendant to supply the necessary information to have a cause of action even without trying to enlist the

Defendant's support. Mr. Ramnanan should have done his investigations, written his letters of enquiry and gathered the necessary particulars required to sustain a Motion under Section 4(d) of the Constitution.

[20] **Rectification of Deficiencies in Evidence**

Mr. Ramnanan proffers that he may cure the deficiencies in his Motion by amending the evidence by way of a supplemental affidavit. A rule of thumb is that a claimant cannot amend his pleaded case to make a cause of action when none exists on the original pleadings.

[21] That aside Mr. Ramnanan sought to put in a supplemental affidavit which does not carry Mr. Khadaroo's case any further. Mr. Ramnanan still has not cured the defect of providing evidence of similarly circumstanced person or persons by which the Court can compare their treatment to his alleged misfortunes.

[22] **CONCLUSION**

I wish to re-iterate that the preliminary point was not raised prematurely and therefore the point is not going to be "dismissed". In fact what I propose to do is to dismiss the entire Motion as not satisfying the evidential requirement of a claim pursuant to Section 4(d) of the Constitution.

[23] Since the Attorney General did not respond, I make no orders to costs. I wish to place on record though my feelings of disquiet at the apparent nonchalance with which the Attorney General treated with this matter.

IT IS HEREBY ORDERED AS FOLLOWS:

1. That the Claimant's Fixed Date Claim Form filed on December 6, 2011 be and is hereby dismissed.
2. No orders to Costs.

Dated this 27th day of March, 2012.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE