

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. 2008/00264

BETWEEN

RAVI DOODNATH JAIPAUL

CLAIMANT

AND

ATTORNEY GENERAL OF  
TRINIDAD AND TOBAGO

DEFENDANTS

**BEFORE THE HONOURABLE MADAME JUSTICE DEAN-ARMORER**

**APPEARANCES**

Mr. A. Ramlogan & C. Bhagwandeem for the Claimant.

Mr. Sieuchand for the Defendants.

**JUDGMENT**

**Introduction**

1. This is a constitutional motion in which the Claimant alleges that his right to equality of treatment by a public authority, that is to say, the Public Service Commission was contravened in relation to him. The Claimant seeks a declaration that the he has been treated in an illegal and discriminatory manner contrary to section 4(d) of *the Constitution*<sup>1</sup> as well as a declaration that he is entitled to be appointed and/or promoted

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<sup>1</sup> Ch. 1:01

to the office of Customs and Excise Officer (CEO 1) with retroactive effect in accordance with his position on the Order of Merit List.

2. In this judgment, the Court considered the factors that must be proved by a Claimant who seeks redress under section 4(d) of the *Constitution*. In so doing, the Court relied on the recent Court of Appeal decision of *Graham v Police Service Commission; The Attorney General of Trinidad and Tobago*<sup>2</sup>.

### **Procedural History**

1. On January 23, 2008, The Claimant initiated legal proceedings against the Defendant by filing a Fixed Date Claim Form together with an affidavit in support thereof.
2. The Defendant filed a Notice seeking the dismissal of the Claim on the ground that it constituted an abuse of the Court's process. In a written ruling on 23<sup>rd</sup> January, 2009, I dismissed the Defendant's application and gave directions for the filing of affidavits and written submissions. Judgment was reserved on 24<sup>th</sup> February, 2010.

### **Facts**

1. The evidence in these proceedings was by way of affidavits which were as follows:
  - a. The supporting affidavit sworn by the Claimant and filed herein on 23<sup>rd</sup> January, 2008;
  - b. The affidavit of Gloria Edwards-Joseph of the Service Commissions Department filed on behalf of the Respondent/Attorney General on 19<sup>th</sup> May, 2009; and
  - c. The affidavit in reply sworn by the Claimant and filed on 22<sup>nd</sup> June, 2009.

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<sup>2</sup> Civil Appeal No. 8 of 2008

2. There was no cross-examination and the facts were largely undisputed.
3. On the 25<sup>th</sup> December, 1994, the Claimant had been appointed to the post of Clerk 1 in the Ministry of Works and Transport.
4. Three years later, on the 30<sup>th</sup> December, 1997, the Claimant applied for the position of Customs and Excise Officer (CEO) 1, a post in the Ministry of Finance.
5. In the year 2000, the Claimant was informed that he had been accepted to write the supplemental civil service examination and in July of that year the Claimant was informed of his success in the civil service examination.
6. The Claimant later attended a promotion interview on 25<sup>th</sup> September, 2000 and was interviewed by a three-member panel for about thirty minutes.
7. The Claimant deposed that the Chairman of the interview panel informed him that candidates would be promoted on the basis of a merit list which is compiled by reference to the candidates' performance and score in the interview. This evidence was congruent with the evidence of Ms. Gloria Edwards-Joseph who deposed as follows:

*“The Public Service Commission is guided in respect of the criteria for appointment by regulation 12 of the Public Service Commission Regulations ... which provides that candidates for permanent appointment shall be selected on the basis of written competitive examinations and interviews. As a result an order of merit list is*

*compiled of all the candidates for permanent appointment in respect of the post for which they had applied ...”*

8. Ms. Edwards-Joseph deposed further that when a post becomes vacant in the public service, eligible officers are contacted sequentially in order to ascertain whether they are interested in the vacant post.
9. Following the September, 2000 interview, the Claimant was informed of the appointment of another applicant to the position for which he had applied.
10. The Claimant made enquires as to his own status with no success. Thereafter, the Claimant embarked on an intense quest for information by way of applications under the *Freedom of Information Act*<sup>3</sup>.
11. It would be fair to comment that the information which the Claimant sought was not readily forthcoming. Having sought the production of the Order of Merit List in July, 2006, it became necessary for the Claimant to send a pre-action protocol letter in August, 2006.
12. Following the pre-action protocol letter, the Service Commission Department made partial disclosure of the merit list, showing the names of officers, but omitting their ranks or placement numbers.

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<sup>3</sup> Ch. 22:02.

13. The Claimant had recourse once again to the *Freedom of Information Act*<sup>4</sup>. For a second time, the Public Service Commission made partial disclosure, on this occasion refusing to disclose the entire list showing the names of all officers interviewed and their actual scores.
14. In March, 2007, the Claimant made his third application under the *Freedom of Information Act*, seeking criteria for the selection of officers for training and appointment to the office of CEO 1.
15. Meanwhile, the Claimant through his attorneys persevered in his effort at obtaining disclosure of the full merit list. The Claimant sought the assistance of the Ombudsman and when this attempt proved fruitless, the Claimant instituted proceedings, which at the date of his affidavit were pending before the High Court.
16. The Public Service Commission eventually made disclosure of the complete merit list, confirming that the Claimant had been placed at No. 53. The Public Service Commission disclosed further that officers Knox Laltha and Tessa Greenidge, who had actually been appointed, were placed at 81 and 82 respectively and therefore at ranks lower than the Claimant.
17. The Public Service Commission, through their deponent, Gloria Edwards-Joseph, readily admitted that the Claimant had been by-passed for promotion. It was their contention

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<sup>4</sup> Ch. 22:02

however, that it was only upon perusal of the Claimant's "*J.R. Claim*"<sup>5</sup> that they became aware for the first time that the Claimant had been by-passed for promotion.

18. According to Ms. Edwards-Joseph, inquiries were made "*relative to why the Claimant's name was not submitted to the Public Service Commission ...*"<sup>6</sup> It is a cause for regret that Ms. Edwards-Joseph fell short of specifying the agency by whom inquiries were conducted. Nevertheless, enquiries revealed that the Claimant fell among a group of persons who were contacted in January, 2003 in order to ascertain their interest in the post of CEO 1.
19. Ms. Edwards-Joseph admitted that two persons, Ms. Nicolette Wallace and Mr. Victor Clauzel, who were among the group into which the Claimant fell, placed at numbers 52 and 56 and were promoted. Ms. Edwards-Joseph deposed that the Claimant fell among the group of persons, which included Ms. Wallace and Mr. Clauzel. According to the evidence for the Defendant, there was no record of a letter having been sent to the Claimant. Ms. Edwards-Joseph invited the Court to speculate as to the reason why the Public Service Commission had no record of a letter sent to the Claimant.
20. The Public Service Commission promoted the Claimant on the 11<sup>th</sup> March, 2008. He was not required to act as a prelude to his appointment.

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<sup>5</sup> "*J.R. Claim*" alluded to by Ms. Edwards-Joseph at paragraph 20 of her affidavit dated May 19, 2009.

<sup>6</sup> *Ibid.*

## Law

1. By *section 4(d) of the Constitution*<sup>7</sup>, (“the section 4(d) right”) the law of Trinidad and Tobago enshrines the right of the individual to equality of treatment by public authorities.
2. The person who alleges that the section 4(d) right has been or is likely to be contravened in respect of him may seek redress under section 14 of the *Constitution*<sup>8</sup>.
3. Traditionally the Claimant who sought redress in respect of the right to equality of treatment by a public authority had been required to prove the presence of two factors:
  - a. That he was subjected to treatment different from that afforded to persons similarly circumstanced; and
  - b. There had been *mala fides* on the part of the public authority.<sup>9</sup>
4. The requirement of the presence of mala fides had however been doubted for several decades. The correctness of this requirement was examined by Courts at every level in the jurisdiction of Trinidad and Tobago.
5. The law has now been finally settled by the Court of Appeal in *Graham v Police Service Commission; The Attorney General of Trinidad and Tobago*<sup>10</sup>. Justice of Appeal

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<sup>7</sup> Ch. 1:01.

<sup>8</sup> Ch. 1:01

<sup>9</sup> L.J. Williams v Smith (1981) 32 WIR 395

<sup>10</sup> Civil Appeal No. 8 of 2008.

Jamadar, while concurring with the main judgment of Justice of Appeal Mendonca had this to say:

*“Section 4 (d) of the Constitution, on a plain and ordinary reading of the text, imposes no such demands of proof for enforcement of or limitations on entitlement to the protected right. That is, on a plain reading of the text, the protection is not from spiteful or deliberate or even intentional discrimination, it is from inequality of treatment simpliciter. Therefore, to impose a requirement to establish mala fides or intentionality is, in my opinion, not warranted by the plain meaning of the text. In my opinion, to do so would be to introduce elements of subjectivity into the test for proof of inequality, when the section itself points to an objective test – one based on causation and effects.”<sup>11</sup>*

6. At paragraph 24 of his judgment, the Learned Justice of Appeal went on to say:

*“In my opinion, the consequence of continuing to insist that either proof of malice or of intentionality is necessary in order to establish inequality of treatment contrary to section 4(d) of the Constitution, can only operate to inhibit accountability by public authorities and officials for unequal and/or discriminatory treatment of individuals. Such a state of affairs in a politically and ethnically plural society, where party politics and hence Government is determined largely along ethnic lines and where suspicions about discrimination are rife, is not conducive to establishing public trust*

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<sup>11</sup> *Ibid.*, at paragraph 22.

*and confidence in public administration. In my opinion, given the societal perceptions and realities in Trinidad and Tobago, public trust in public administration would be better served in the context of section 4 (d) of the Constitution, if upon apparently discriminatory treatment being shown the onus shifts unto the public authority/official to justify it, and that the court undertake this evaluation with all of the relevant explanations and documents before it.<sup>12</sup>”*

7. The Learned Justice of Appeal further stated:

*“I therefore remain convinced, that in order to establish a section 4(d) breach of the Constitution all that is required is proof by an aggrieved party that he was less favourably treated than other similarly circumstanced persons and/or that they were more favourably treated than he was. This determination is to be undertaken by a court on a consideration of all of the evidence, both of the claimant and of the respondent. The duty of all parties is of candour. The presumption of bona fides is facilitative of full disclosure by a public authority which has nothing to hide and is genuinely interested in accountability and transparency and in achieving good public administration. Once a prima facie case of the violation of the right to equality of treatment is raised, **the onus shifts to the public authority to explain and justify its decision and to show that there is no breach of the right.** (Emphasis mine). It is in this context, of an evaluation of all the evidence (in which the role of the*

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<sup>12</sup> Graham V A.G. (supra) at paragraph 24

*court may be viewed in somewhat of an investigate light), that the presumption of regularity may play a role in determining the outcome of that exercise. At the end of the process it remains for a claimant to show both a difference in treatment and a lack of any legitimate or lawful reason for that treatment. In my opinion, this approach is clear, fair and balanced. It is also an approach that would make sense and be acceptable to the ordinary Trinidadian and Tobagonian.”<sup>13</sup>*

### **Reasoning and decision**

1. In this Claim, the Defendant has admitted that the Claimant had been by-passed for promotion. The Defendant has also admitted that persons who fell within the Claimant’s group, but who ranked lower than the Claimant, were promoted.
2. In my view, there could be no question that Ms. Wallace and Mr. Clauzel, identified in the affidavit of Ms. Edwards-Joseph, were comparators.
3. Learned Counsel for the Defendant have argued in their written submission that there was no comparison between the Claimant and the proposed comparators, since the Claimant’s name was never put before the Public Service Commission. In my view, the point of comparison occurred at an earlier time, that is to say when persons falling within the Claimant’s group were contacted to ascertain whether or not they were interested in the post.

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<sup>13</sup> Civil Appeal No. 8 of 2008, at paragraph 25.

4. It was the evidence of the deponent for the Defendant that persons falling in the very group of the Claimant had been contacted in January, 2003. It was at this time, through inadvertence or otherwise, that the Claimant had not been contacted and had therefore been treated differently from his comparators.
5. It is therefore my view and I hold that the Claimant has surmounted the first hurdle of proving that he was treated differently from his comparators.
6. In accordance with the decision of the Court of Appeal in *Graham v Police Service Commission; The Attorney General of Trinidad and Tobago*<sup>14</sup>, the burden shifts to the Service Commissions Department to “*explain and justify its decision and to show that there is no breach of the right ...*”<sup>15</sup>
7. The Defendant in the instant case has failed altogether to offer any explanation. Far from providing an explanation, the deponent for the Defendant has invited the Court to speculate. At paragraph 22 of her affidavit, Ms. Edwards-Joseph suggests that the Defendant’s inability to find a record of a letter to the Claimant “*...could mean one of several things.*” The deponent then proceeded in her affidavit to identify three possible scenarios, the last of which was that the Claimant was not contacted at all.
8. In my view, this falls far short of the explanation envisaged by the Court of Appeal in *Graham*<sup>16</sup>. The Defendant has failed altogether to discharge its burden to explain and justify their failure to contact the Claimant to ascertain the Claimants interest in the post.

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<sup>14</sup> *Supra.*

<sup>15</sup> *Ibid.*, at paragraph 25

<sup>16</sup> *Supra* at paragraph 24

9. Accordingly, it is my view and I hold that the Claimant has satisfactorily proved the requirements of a breach of section 4(d) of the *Constitution* in relation to him.
10. I hold further that he is entitled to the declarations sought at paragraphs (a) (i) and (ii) of his Fixed Date Claim Form filed on 23<sup>rd</sup> January, 2008 pursuant to *Part 56.7 (2) of Civil Proceedings Rules 1998*.
11. As to the claim for damages, it is my view that there has been neither evidence nor submission in support thereof. The claim for damages is therefore refused.
12. The Claimant is however entitled to his costs fit for advocate attorney-at-law to be taxed in default of agreement.

## **ORDERS**

It is hereby adjudged and declared:

- (i) That the Claimant has been treated in an illegal and discriminatory manner contrary to the constitutional right to equality of treatment from a public authority in the exercise of its functions.

- (ii) That the Claimant is entitled to be appointed to the office of CEO 1 with retroactive effect in accordance with his position on Order of Merit List.
- (iii) The Defendant do pay to the Claimant the Costs fit for advocate attorney-at-law to be taxed by the Registrar in default of affidavit.

Dated this 17<sup>th</sup> day of January, 2011.

Mira Dean-Armorer  
Judge

Judicial Research Assistant    Camille Warner  
Judicial Secretary                Irma Rampersad