

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

CV 2006-2477

**BETWEEN**

**LENNOX EDWARDS**

Claimant

**AND**

**THE ATTORNEY GENERAL**

Defendant

**Before the Honourable Madam Justice Dean-Armorer**

**Appearances:**

Mr. Kenneth Thompson for the Claimant

Ms. Anoushka Ramsaran instructed by Ms. Kavita Jodhan for the Defendant

**JUDGMENT**

1. This is an application for relief pursuant to s. 14 of the *Constitution*. The claim was initiated by a Fixed Date Claim filed on 21<sup>st</sup> August, 2006.
2. The Claimant is a police officer, who at present holds the rank of Sergeant. He had been promoted to the rank of Corporal in September, 1999 to Sergeant on 22<sup>nd</sup> May, 2002. In these proceedings, the Claimant contends that the Police Service Commission failed to promote him from Constable to Corporal with retroactive effect, following the dismissal of disciplinary charges against him. The Claimant contends that he received

less preferential treatment than officers who were similarly circumstanced and thereby he suffered a contravention of his fundamental right under s. 4 (d) of the *Constitution* to equality of treatment by a public authority.

3. The Claimant contended further that he suffered a contravention of his fundamental right under s. 4 (a) of the *Constitution* to the enjoyment of property and the right not to be deprived thereof except by due process of law.
4. The Claimant relied on his supporting affidavit filed on 21<sup>st</sup> August, 2006 and on his affidavit filed on 22<sup>nd</sup> October, 2007 in reply to the affidavit of Dawn Harding. The Defendant relied on the affidavit of Dawn Harding, Deputy Director of Personnel Administration “DPA” filed on 19<sup>th</sup> September, 2007.

### **Facts**

5. The Claimant enlisted in the Police Service as a Police Constable on 18<sup>th</sup> April, 1977. At present, he holds the rank of Sergeant, to which he was promoted on 2<sup>nd</sup> May, 2002.
6. In September, 1997, there were 238 vacancies to the rank of Corporal. The Claimant was recommended for promotion by the Commissioner of Police.
7. On the 17<sup>th</sup> November, 1997, the Commissioner of Police by Departmental Order announced the promotion of 238 constables to the rank of Corporal. The promotions were effective from 13<sup>th</sup> November, 1997, which was conceded by Ms. Harding as the day on which the Commission made its decision as to the officers to be promoted. The Claimant was not promoted.
8. By letter dated 8<sup>th</sup> October, 1997, the DPA notified the Claimant that he had been charged with discreditable conduct in respect of an incident which allegedly occurred in 1995 and in respect of which the Claimant had received a warning notice in 1995. The Claimant eventually received service of the notification of the charge on 17<sup>th</sup> October, 1997.

9. The Claimant contends that there had been unreasonable delay in informing him of the charge. It is not in dispute that the Claimant had received a warning letter in 1995, in respect of an incident which allegedly occurred in 1995. Although an investigating officer had been appointed, it was only in October 1997 that the Claimant was charged. The Claimant never brought proceedings impugning the lawfulness of the charge, which is not the subject of these proceedings.
10. The Claimant was not promoted in 1997 and made enquiries as to the cause for the withholding of his promotion. He was told that it was on account of the disciplinary charge. The Claimant was cleared of the disciplinary charge on 20<sup>th</sup> May, 1998 and was promoted to the rank of Corporal in September, 1999. Even in September, 1999, the Claimant made no complaint. His first complaint was made some five years later in a letter dated 2<sup>nd</sup> February, 2005 from Alfred Pierre, learned Attorney-at-Law for the Claimant to the Chairman, Police Service Commission.
11. By these proceedings, the Claimant alleges the existence of a practice in the Police Service, whereby promotions which had been withheld on the ground of pending disciplinary charges, are made effective from the date on which such promotions would have taken effect, had the charge not been preferred. It is not in dispute that in the case of the Claimant, he would have been promoted with effect from 13<sup>th</sup> September, 1997, were it not for the disciplinary charge.
12. The Claimant claimed that the policy of making promotions retroactive was a decade old policy. He cited the cases of officers who according to him, had been placed in similar circumstances and who had received better treatment. The Claimant cited the cases of Sergeant Raymond Hunte and Sergeant Vincel Edwards. In his affidavit in reply to the affidavit of Ms. Harding, he referred to Nizam Hosein and Officer Oswyn Allard.
13. According to the Claimant's evidence both Sergeant Hunte and Sergeant Edwards were not promoted on account of disciplinary charges against them. Upon the dismissal of the charges, they were promoted. Their promotions were made retroactive to the date on

which they would have been promoted, had there been no disciplinary charges against them.

14. The Claimant was cross-examined as to the circumstances of Sergeant Hunte, Sergeant Vincel Edwards, officer Narine and Inspector Allard. Under cross-examination the Claimant conceded that both Sergeant Hunte and Sergeant Vincel Edwards had been exonerated after 2003. The Claimant also agreed that Sergeant Hosein was exonerated in 2003, but could not recall the month. He conceded as well that no disciplinary charge ever laid against officer Oswyn Allard.
15. In answer to the Claimant's allegation, the Defendant, Attorney-General relied on the testimony of Ms. Dawn Harding, whose affidavit was filed herein on 19<sup>th</sup> September, 2007.
16. Ms. Harding on the date on which she swore her affidavit was the Executive Director, Human Resource Management and Acting DPA. Ms. Harding told the Court that she represented the DPA at all meetings of the Police Service Commission.
17. Ms. Harding alluded to a policy adopted by the Police Service Commission in September, 2003. The effect of the policy ("*the backdating policy*") was that officers whose disciplinary charges had prevented their promotions would be promoted retroactively, as long as their charges had been dismissed. Their promotions, following the dismissal of charges, would take effect from the date on which they would have been promoted, were it not for the disciplinary charges which had been dismissed.
18. It was on the basis of this policy that Ms. Harding sought to explain how Sergeants Hunte and Vincel Edwards were in circumstances which were dissimilar from those of the Claimant. According to Ms. Harding, Sergeant Hunte had been promoted to the rank of Sergeant on 3<sup>rd</sup> June, 1991. He was suspended on 29<sup>th</sup> November, 1999 pending disciplinary charges but was exonerated on 21<sup>st</sup> December, 2004. Sergeant Hunte was promoted to the rank of Inspector with retroactive effect from 24<sup>th</sup> May, 2001.

19. Ms. Harding also supplied particulars of Sergeant Vincel Edwards who had been promoted to the rank of Sergeant from 2<sup>nd</sup> May, 2002. He was exonerated and promoted in 2006 to the rank of Inspector, with retroactive effect from 8<sup>th</sup> September, 2005.
20. Ms. Harding deposed that the Applicant had been informed of the policy by a letter dated 29<sup>th</sup> May, 2007. This letter had been written in response to the letter dated 14<sup>th</sup> July, 2006 from K. Thompson learned Attorney-at-Law for the Claimant. Ms. Harding admitted, as she respectfully had no choice but to admit, that the letter of 29<sup>th</sup> May, 2007 followed the institution of the proceedings which now engage my attention.
21. Ms. Harding proceeded to cite cases, which in her view were similar to the Claimant. They were P.C. Best #8655; and P.C. St. Rose #7194. According to Ms. Harding these officers had been recommended for promotion in November, 1997. Their promotions had been withheld pending disciplinary charges. On exoneration from their disciplinary charges, they were promoted with effect from 21<sup>st</sup> September, 1999.
22. Ms. Harding was cross-examined as to the alleged policy. This witness was confronted with a memo dated the 14<sup>th</sup> August, 2006 from the DPA to the Solicitor General. The memo was signed by “K. Mahong” on behalf of the DPA and sent to learned Attorney-at-Law for the Claimant under cover of a letter dated 14<sup>th</sup> August, 2006 on behalf of the Chief State Solicitor. The memo recited the Claimant’s history. At the last paragraph of the memo, the author, K. Mahong stated on behalf of the DPA:

*“At present action is being taken in the matter concerning Mr. Edwards request to pursue the backdating of his promotion. A letter of acknowledgement is also being prepared in response to the letter dated 14<sup>th</sup> July, 2006 from Kenneth Thompson ...”*
23. It is not in dispute that the letter which was being prepared in August, 2006 was finally despatched in May, 2007.

24. Confronted with this memo, Ms. Harding admitted that it was almost three years after the alleged policy decision had been taken. Notwithstanding the date of the letter, the author omitted to mention, on behalf of the Police Service Commission, that the policy of promoting retroactively applied only to officers whose charges had been dismissed after September, 2003.
25. Ms. Harding stated that the alleged policy had been reduced to writing on the files of the Commission but had never been produced in these proceedings.
26. The issue of fact which arises for my determination is whether the backdating policy was, as contended by the Claimant, a decade old policy or whether it was a policy taken in 2003 and applicable only to officers, whose charges had been dismissed after 2003.
27. In the absence of a cut off date for the policy, there would be no material difference between the Applicant and Sergeant Hunte, Vincel Edwards and Nizam Narine. On the other hand, if on a balance of probabilities, the Police Service Commission had decided in 2003 to implement the policy from that date, the alleged comparators would be materially different from the Claimant.
28. He who alleges must prove. The burden of proving that the backdating policy was a decade old practice rests on the Claimant. The extent of the Claimant's evidence in support of the decade-old policy was his reference to Sergeants Hunte, Vincel Edwards, Nizam Hosein and Oswyn Allard.
29. The Claimant also sought to undermine the contention of the Defendant in cross-examination. As stated supra, the witness for the Defendant was confronted with the DPA's memo dated August, 2006 to the Chief State Solicitor. There was a suggestion that the DPA's omission to mention the September, 2003 cut off date in the August 2006 implied that there was no cut off date.
30. Ms. Harding, witness for the Defendant, was also asked whether the policy was reduced to writing. She stated that it was written on the files of the Commission. It is

regrettable that the Court never had sight of the endorsement on the file of the Commission, notwithstanding that, it was open to learned Attorney-at-Law to call for the file as indeed he called for the return of service of the letter dated 8<sup>th</sup> October, 1997.

Learned Attorney-at-Law never called for the file and the Court is now required to weigh the available evidence bearing in mind that the Claimant carries the burden of proof, and that the Police Service Commission is protected by the presumption of regularity.<sup>1</sup>

31. Reference to potential comparators was really the Claimant's only evidence. Under cross-examination, the Claimant admitted that three of the officers who had been identified as comparators had been exonerated of their charges after September, 2003. The fourth Oswyn Allard, the Claimant admitted, had never been charged.
32. In the absence of any positive proof, the Claimant derives minimal advantage from any weakening of the Defendant's case by way of cross-examination. The memo dated August, 2006, with which Ms. Harding was confronted suggests that the DPA attempting to backdate the Claimant's promotion. The memo does not constitute clear evidence that the backdating policy was decades old. The memo is consistent with a number of different fact theories only one of which was that the backdating policy was decades old. It may simply have been that the Commission was minded to assist the Claimant. It may have been that the faceless author of the memo was unaware himself of the cut off date. It would be dangerous for the Court to conjecture and the Court would decline to do so. It is clear, however, that the memo, of itself simply by its lack of clarity provides no assistance to the Claimant in discharging the burden of proof.
33. On the other hand, and in support of the contention of the Defendant, the Court has the evidence of Ms. Harding of police officers #8655 Best and #7194 St. Rose. Like the Claimant, officers Best and St. Rose were recommended for promotion in November, 1997 to the rank of Corporal. Both officers Best and St. Rose were denied their promotion in November, 1997, on account of pending disciplinary charges. Both officers, like the Claimant were promoted after exoneration with effect from 21<sup>st</sup> September, 1999.

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1. See Attorney General v. K.C. (1985) 34 WIR 387 per Persaud J. Act at p. 404 h

34. The Claimant provided no evidence in opposition to the evidence as the P.C.s Best and St. Rose.
35. In my view, the evidential balance is tilted in favour of the Defendant. On the evidence before me, it is my view that it is more probable that the Police Service Commission decided to implement the back-dating policy from September, 2003 and that the policy applied to those officers exonerated after 2003.

### **Law**

1. Section 4 (a) of the *Constitution*<sup>1</sup> enshrines the right of the individual to the enjoyment of property and to the right not to be deprived thereof except by due process of law.
2. Section 4 (d) enshrines the right of the individual to equality of treatment by a public authority.
3. In order to prove a contravention of s. 4 (d), the Claimant is required to prove, in the first place, that persons similarly circumstanced had been treated differently. In *Mohanlal Bhagwandeem v. Attorney General of Trinidad and Tobago* P.C. 45 of 2003, Lord Carswell, who delivered judgment on behalf of their Lordships stated:

*“A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from other similarly circumstanced person or persons described by Lord Hutton in *Shamoon v. Chief Constable of Royal Cluster Constabulary ... as actual or hypothetical comparators ...*”<sup>2</sup>*

At paragraph 18, Lord Carswell stated:

*“... the comparison must be such that the relevant circumstances in the one case are the same or not materially different in the other ...”<sup>2</sup>*

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1. Ch. 1:01  
2. *Mohanlal Bhagwandeem v. Attorney General of Trinidad and Tobago* P.C. 45 of 2003 of p. 7 para 18

4. In Trinidad and Tobago, there has traditionally been the requirement of a second element, that is to say, the presence of *mala fides* on the part of the public authority.
5. The debate as to the necessity for proof of mala fides continues. See *CBS and Maha Sabha v. Attorney General*<sup>1</sup>, in which their Lordships stated that there was a majority in favour of the Appellant on the issue of inequality of treatment, “both on the basis that *mala fides* was not a prerequisite and it seems ... on the basis that it was ...” Happily, however, in these proceedings it is not necessary for this Court to take sides in the debate.

### **Reasoning and Decision**

1. The Police Service Commission is invested by the Constitution with power to appoint, promote and discipline police officers.<sup>2</sup> The exercise of the powers may be challenged by the usual grounds of illegality, procedural impropriety and irrationality, as well as on other grounds set out at s. 5 (3) of the *Judicial Review Act* No. 60 of 2000.
2. As a matter of fact, it is my finding that the Police Service Commission created the backdating policy in September, 2003 and decided to implement it from that date. There is no submission that the creation and implementation of the policy fell outside of the Commission’s constitutional powers. It must therefore be regarded as accepted in these proceedings that the creation and the implementation of back-dating policy, including the setting of a cut-off date was within the lawful exercise of Commission’s power.
3. The fact that the Commission identified a date from which the back-dating policy would take effect divides the Claimant from the alleged comparators and renders them materially different from him.
4. Under cross-examination, the Claimant has admitted that, save for Mr. Allard, who never faced disciplinary charges, all the officers had been exonerated after cut-off-date of the policy.

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1. Central Broadcasting Limited, *Sanatan Dharma Maha Sabha v. AC PC*. 49 of 2005 at para 18

2. S. 123 of the Constitution Ch. 1:01

5. Because those advanced as comparators are materially different, from the Claimant, he has failed to establish the first limb of a claim under s. 4 (d).<sup>1</sup> His claim under s. 4 (d)<sup>1</sup> is accordingly without merit and is hereby dismissed.
  
6. The claim under s. 4 (a)<sup>1</sup> is also dismissed. There is no allegation in these proceedings of deprivation. The Claimant's case is that he was never given a retroactive promotion, as distinct from a claim that what was already his was taken away. Even if I am incorrect, the withholding of the promotion was not unlawful. It would have been unlawful for the Commission to have discriminated against the Claimant. The absence of discrimination, the withholding of the promotion could not be without due process as required by s. 4 (a).<sup>1</sup>
  
7. Even if I am not correct, the Applicant has no proprietary rights in a public rank or office, even one which he in fact held. The Claimant has no power to transfer or assign any interest in a public or police service rank or office. The rank therefore does not constitute property for the purpose of s. 4 (a) of the *Constitution*. See *Patrice Kareem v. The Attorney General*.<sup>2</sup>

The claim under s. 4 (a)<sup>1</sup> is also dismissed.

Dated the 16<sup>th</sup> January, 2009

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Mira Dean-Armorer  
Judge

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1. Of the Constitution Ch. 1:01  
2. Patrice Kareem v. AG CA No. 71 of 1987 per Davis, JA p. 25