REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. 2016-00661

BETWEEN

KEITH AARON

Claimant

AND

PUBLIC SERVICE COMMISSION

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE M. DEAN-ARMORER

APPEARANCES
Mr. Kenneth Thompson, Attorney-at-law on behalf of the Claimant
Ms. Linda Gopee-Khan, Attorney-at-law on behalf of the Defendant

JUDGMENT

INTRODUCTION

1. On March 8, 2016, the Claimant, Keith Aaron commenced proceedings pursuant to s.14 of ***the Constitution***[1]. The Claimant later obtained the Court's permission to amend his Fixed Date Claim Form and did so on July 25, 2017. By his amended Fixed Date Claim, the Claimant sought a declaration that he suffered a breach of his right to equality of treatment, as enshrined at s.4(d) of ***the Constitution***; an order that the Public Service Commission

[1] Constitution of Trinidad and Tobago Ch.1:01

(PSC) appoint him retroactively to the office of Chief Executive Officer (CEO) and finally, an order for monetary compensation.

2. Following the filing of affidavits, learned Attorneys-at Law for the Defendant filed a Notice of Application, seeking to strike out the Claim on the ground that the Claim was an abuse of the Court's process[2]. In their application to strike, learned Attorneys-at-Law for the Defendant relied on four (4) grounds: delay in instituting these proceedings; that there existed a parallel remedy: that the PSC was not the proper party to the Claim and that the Defendant was claiming a benefit to which he was not lawfully entitled.

3. In the course of this judgment, I considered the principles of law in relation to the right to inequality of treatment as enshrined at s.4(d) of ***the Constitution[3].*** I considered, as well, the issue of delay, in approaching the Court under s.14 of ***the Constitution***[4]. I also considered whether the Attorney General ought necessarily to be joined as a defendant in Constitutional Motions.

Evidence

4. The evidence, before this Court, was by way of affidavits only. The Claimant filed his principal affidavit on 8th March, 2016. He also filed an affidavit in reply on 14th July, 2017, while the Defendant relied on the affidavit of the Deputy Director of Personnel Administration (DPA), Ms. Prabhawatie Maraj. Ms. Maraj's first affidavit was filed on 27th October, 2016. The Deputy DPA later filed a supplemental affidavit on 20th July, 2017 and yet a further affidavit on 8th November, 2017. The Defendant filed an affidavit of Gracelyn

[2] Notice of Application filed on November 8, 2017
[3] The Constitution Ch. 1:01
[4] The Constitution Ch. 1:01

Bhola-Jordan, Administrative Officer IV, Statutory Authorities Service Commission. The affidavit of Gracelyn Bhola-Jordan was filed on 30th June, 2017.

Facts

5. The Claimant, Keith Aaron, began his career under the auspices of the Public Service Commission ("the PSC") when he was appointed to the post of temporary Works Supervisor I in the Ministry of Works, in April, 1985.

6. Five years later, in March, 1990, he was appointed to the office of Works Supervisor I, San Fernando City Corporation by the Statutory Authorities Service Commission (SASC). He was promoted over the years by the SASC until the year 2006, when he was appointed to the substantive post of Personnel and Industrial Relations Officer II.

7. In 2006, the Claimant applied, in response to an advertisement, to be considered for the post of Chief Executive Officer (CEO) in the Public Service. He was invited to attend an interview by way of a letter dated the 23rd August, 2006. The Claimant exhibited this letter as *KA1*.

8. As a result of the interview process, the Public Service Commission (PSC) prepared an Approved List of Candidates. The Claimant was placed at No. 3 on the list.

9. In 2007, a vacancy of CEO arose at the Sangre Grande Regional Corporation. The Claimant was appointed on secondment, and continued, in that office until 16th December, 2009, when he was placed on suspension pending disciplinary charges. His period of secondment ended on 25th November, 2012. He was directed to return to his substantive post and did so on 3rd January, 2013[5].

[5] See paragraph 6 of the affidavit of Grace Bhola-Jordan filed on 30th June, 2017.

10. Following his return to his substantive post, the Claimant was appointed to act as Chief Executive Officer (CEO) on two separate occasions. He was appointed to act as Chief Executive Officer, Point Fortin Borough Corporation from October 05, 2015 to December 31, 2015[6]. Thereafter, in the year 2016, the Claimant was appointed to act in the post of Deputy Chief Executive Officer, San Fernando City Corporation. On this occasion he acted from January 01, 2016 to February 16, 2016[7]. He was subsequently appointed to that post on April 13, 2016 with effect from February 17, 2016[8].

11. The Claimant, by these proceedings, contends that he had been unfairly treated and that he was the victim of discrimination, by dint of the fact that officers under the control of the SASC had been appointed to posts in the PSC, while, he, the Claimant, had only been placed on secondment.

12. The Claimant conceded that at the time of his appointment on secondment, he had indeed been under the authority of the SASC. He contended, however, that by virtue of section 8(1) of the Statutory Authority Act Ch. 24:01 he could have been transferred from a Statutory Authority to the Civil Service[9].

13. The Claimant identified to three persons, who had held office as police officers in the San Fernando City Corporation under the control of SASC. They were Jitram Singh, Dave Brijmohan and Patricia Springer-Carter. There was no dispute, that notwithstanding their original offices, under the purview of the SASC, they had been appointed to the office of

[6]See paragraph 7 of the affidavit of Grace Bhola- Jordan filed on 30th June, 2017
[7] See paragraph 8 of the affidavit of Grace Bhola-Jordan filed on 30th June, 2017
[8] See paragraph 8 of the affidavit of Grace Bhola- Jordan filed on 30th June, 2017
[9] See paragraph 17 and 18 of the affidavit filed on March 8, 2016 by Keith Aaron

Police Corporal in the Municipal Police Service in the public service. The Claimant alleged that these officers had been transferred to the Civil Service by the operation of section 8(1) SASC.

14. In support of his contention, the Claimant points, in the first instance, to the two officers who had been placed ahead of him on the merit list, that is to say, Ms. Merlyn Calliste and Ms. Pamela Doon.

15. The Claimant also identified Mr. Lawrence Oliver, who had placed fourth on the Order of Merit List, one place after the Claimant. It was the Claimant's contention that Mr. Oliver, unlike the Claimant, was appointed to the office of CEO in the public service and that he retired in 2013, holding that position.

16. The Claimant alleged that he protested the failure of the PSC to give him a substantive post. This bald allegation, which may be found at paragraph 16 of his main affidavit, was entirely unsupported by documentary evidence or particulars. Mr. Aaron omitted to provide details as to when his protests were made or as to whether they were made verbally or in writing. He also neglected to specify the person or persons, to whom his protests were made.

17. In fact, the only indicator of any protest by Mr. Aaron appeared in the letter from the DPA dated 10th November, 2014 and addressed to him. The letter of the 10th November, 2014 was exhibited as "K.A.4"[10] and was signed for the Director of Personnel Administration (DPA). By "K.A.4", the DPA refers to two letters of the Claimant. The first letter, according to the DPA, was dated 4th March, 2013, while the second was dated 14th May, 2013. From the DPA's reference to these letters, one might infer that the Claimant's discontent in

[10] "KA4" was exhibited to the main affidavit of the Claimant, filed herein on 8th March, 2015.

respect of his appointment on secondment first surfaced in 2013, nearly six (6) years after that appointment. The Claimant has adduced no evidence to indicate any dissatisfaction, on his part, between 2007 and March, 2013, some four months after his period of secondment had ended.

18. It is also unclear whether his protests were on the ground of discrimination or some other ground. Nevertheless, the DPA, by *"K.A.4"*, alluded to the difference between the definitions of the term "officer" in *the* ***Public Service Commission Regulations***[11] and that term in the ***Statutory Authorities Act***[12]. The Director of Public Administration proceeded to state that the Claimant, not being a public officer and being an officer of the Statutory Authorities Service Commission, had been inadvertently shortlisted in 2007.

19. As to the Claimant's allegations of discrimination, the Deputy DPA, Ms. Prabhawatie Maraj and Administrative Officer, SASC, Gracelyn Bhola-Jordan set out to explain that the Claimant had not been subjected to unequal treatment.

20. The Deputy DPA explained differences between the Claimant and officers, Dave Brijmohan, Jitram Singh and Patricia Springer-Carter, who being under the SASC, were promoted, on transfer to Police Corporal, Ministry of Local Government. Ms. Maraj explained this by reference to advertisements from the PSC in 1998. It was the evidence of the Deputy DPA, that the 1998 advertisements were circulated throughout the Police Service, Municipal and Regional Corporations.

[11] Public Service Commission Regulations Ch. 1:01
[12] Statutory Authorities Act Ch. 24:01

21. Thus at paragraph 12 of her main affidavit, the Deputy DPA alluded to the decision of the PSC to advertise the position of Police Corporal, Municipal Police Service both within the Police Service and throughout all Municipal Corporations. To this end, a circular memorandum dated 14th September, 1998, under the hand of the Permanent Secretary, Ministry of Local Government was sent to the Commissioner of Police, City Clerks and Town Clerks, Chief Executive Officers of Municipal Corporations[13].

22. Ms. Maraj, by paragraph 14 of her affidavit, contrasted the 1998 advertisement with the advertisement dated 11th August, 2005, that is to say, the advertisement to which the Claimant responded. According to Ms. Maraj, the later advertisement targeted the public service only. In support of her allegation, Ms. Maraj exhibited the advertisement by Circular Memorandum, dated 11th August, 2005*[14]*. Ms. Maraj noted that the circular memorandum from the DPA was addressed to Permanent Secretaries and Heads of Departments. It was significantly not addressed to Statutory Authorities.

23. The Claimant, in his reply affidavit filed on 14th July, 2017 denied that this circular memorandum was addressed to public officers only. The Claimant asserted:

> *"The said office was advertised and was intended to be advertised both within the Public Service and the Statutory Authorities …[15]"*

I considered this denial and found it to be a bald assertion unsupported by any evidence. The Claimant omitted to say how he came by knowledge as to the intentions of the DPA.

[13] See paragraph 13 of the affidavit of Prabahawatie Maraj on 27th October, 2016.
[14] Ibid at paragraph 4 and PM1.
[15] See the Claimant's Reply affidavit at paragraph 5.

More significantly, he omitted to say why the circular memorandum should be read, as impliedly including statutory authorities, to whom it was not expressly addressed.

24. Accordingly, I accepted the evidence of Ms. Maraj as virtually unchallenged that the Circular Memorandum of 11th August, 2005 was addressed to Permanent Secretaries, who are heads of departments within the Public service, and that the Circular Memorandum was not directed to persons outside of the Public Service.

25. Ms. Maraj, responded to allegations concerning Merlyn Calliste, and testified that the Claimant was no different from Ms. Merlyn Calliste, saying that the latter had also been appointed on secondment, in like manner to the Claimant. Ms. Calliste, unlike the Claimant declined the appointment on secondment and was later appointed by SASC as CEO, Arima Borough Council[16].

26. Ms. Maraj, by her evidence also demonstrated that Pamela Doon was different from the Claimant. Pamela Doon was a public officer properly under the authority of the Public Service Commission and therefore completely different from the Claimant. Ms. Doon was fully eligible to respond to the advertisement by Circular Memorandum of 11th August, 2005[17].

27. The Deputy DPA then explained Mr. Lawrence Oliver, who had been appointed to the post of Human Resource Officer III in the Ministry of the Attorney-General in August, 2001 which was a public service position. Accordingly when he was interviewed in 2006, he was properly under the purview of the PSC and, in that way, different from the Claimant[18].

[16] See paragraph 9 of the affidavit of Prabhawatie Maraj filed on October 27, 2016.
[17] Ibid of paragraph 10.
[18] Ibid at paragraph 16.

Issues

28. At paragraph 2 of his affidavit, filed on 8th March, 2016, the Claimant identified his grievance, as the decision of the Public Service in 2007 to appoint him substantively to the post of CEO, in the Sangre Grande Regional Corporation. The Claimant has therefore levelled his complaint at the decision of the Public Service Commission in April, 2007.

29. In the course of his claim, the Claimant's grievance is placed in the context of discrimination contrary to s.4(d) of *the* ***Constitution***[19].

30. Accordingly, the substantive issue which arose was whether the Claimant had discharged the burden of proving that persons, who were comparable to him, received preferential treatment.

31. Learned Attorney-at-Laws for the Defendant canvassed a preliminary objection that the claim should be struck out as being an abuse of the Court's process. Their reasons were fourfold: there had been undue delay in instituting these proceedings; there was an adequate parallel remedy; the Claimant was seeking a benefit to which he was not entitled in law and the Attorney-General was the proper party to these proceedings.

Discussion

32. Learned Counsel for both parties provided the Court with very helpful submissions on the issues presented[20]. Reference will be made their submissions in the course of the following discussion, where I have first considered the preliminary issues. Lastly, I have considered the issues of substance.

[19] Chapter 1:01

[20] Claimant's Written Submissions filed on January 31, 2018, Defendant's Written Submissions filed on May 07, 2018 and Claimant's Written Submissions in Reply filed on June 11, 2018

Delay and the Availability of an Alternative Remedy

33. In ***Durity v. the Attorney General [2002] UKPC 20,***[21] their Lordships considered the issue of delay, in proceedings instituted under s.14 of ***the Constitution.*** In 1989, Durity, a sitting Senior Magistrate, had been suspended pending the hearing of disciplinary charges. It had been alleged that Magistrate Durity had granted bail to an accused man in the sum of twenty-five thousand ($25,000.00), when a judge of the High Court had previously ordered that the bail be set in a larger sum. In 1996, Magistrate Durity took early retirement and the disciplinary proceedings were discontinued. In 1997, nine years after his suspension, Magistrate Durity instituted proceedings under s.14 of ***the Constitution,*** claiming that the decision to suspend him contravened his rights under s.4(b), s.(2)(e) and (h) of ***the Constitution***.

34. On the cross-appeal on behalf of the Attorney General, their Lordships, emphatically rejected the submission that *the* ***Public Authorities Protection Act***[22] required constitutional motions to be filed within one year of the alleged breach[23].

35. Their Lordships observed that the submission on the Public Authorities Protections Act, had been made on a limited basis and that the Court of Appeal, had not addressed the preliminary issues of abuse of process by delay. Accordingly, their Lordships remitted the proceedings to the Court of Appeal to continue with the appeal in the light of their Lordships' decision[24].

[21] Durity [2003] 1 AC 405
[22] The Public Authorities Protection Act has now been repealed by the Limitations of Certain Actions Act 1997.
[23] See [2003] 416 a - b
[24] [2003] 1A.C. 417

36. At the end of his judgment, Lord Nicholls of Birkenhead made general observations on behalf of the Board on the issue of abuse of process by delay and at paragraph 35, Lord Nicholls had this to say:

> *"In this context the Board consider it may be helpful if they make certain general observations. When a court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. The principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in Harrikisson v Attorney General of Trinidad and Tobago [1980] AC 265, 268. An application made under section 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process.*

37. On the basis of this authority, I proceeded to consider the dual question of whether the Claimant, had at his disposal, a parallel remedy and whether the Court's process has been abused by undue delay.

38. At the outset I accepted the submission of learned Counsel for the Claimant[25] that the principal item of relief claimed by the Claimant was a declaration that there had been a contravention of his fundamental right under section 4(d) of *the Constitution*. The Claimant also sought monetary compensation and a substantive order requiring the Public Service Commission to appoint him retroactively to the post of Chief Executive Officer.

39. I also accepted the submission of learned Counsel for the Claimant that the grounds upon which judicial review may be obtained s.5(3) of ***the Judicial Review Act*** do not include a ground of discrimination[26]. In my view, it was clear that there was no parallel remedy, by which the Court could have investigated discrimination against the Claimant. I therefore proceeded to consider whether the Claimant's delay in approaching the Court constituted an abuse of process by reason of delay[27].

40. In support of their arguments on delay, learned Attorney-at-Law for the Defendant cited and relied on a decision of Justice Sealy, (as she then was) in ***Farouk Warris v. Comptroller of Customs and Excise*** HCA #2354 of 1990. The brief historical facts of Farouk Warris were set out by Justice Sealy at page 6 of her judgment. In 1984, the Comptroller of Customs

[25] See the submission of the Claimant filed June 6, 2018

[26] See Section 5 of the Judicial Review Act Ch. 7:08

[27] In 2002, the Privy Council heard the substantive of the claim in **Durity**. This had been remitted for the attention of the Court of Appeal, which in turn remitted it to the High Court. The claim was heard by Justice Gobin. Justice Gobin, hearing the substantive application found in favour of Durity and, her decision was upheld by their Lordships. See ***Durity v Attorney General*** [2008] UKPC 59[27]. In the second ***Durity*** their Lordships found delay on the part of the Judicial and Legal Service Commission and not on the part of Magistrate Durity. There was no question of his having abused the Court's powers by delay.

and Excise seized the goods of Farouk Warris. The goods remained with the Comptroller until 1991, when the Comptroller instituted condemnation and criminal proceedings. At the hearing at the Arima Magistrates Court, learned Attorney-at-Law for the DPP, Mr. Mark Mohammed (as he then was) decided not to pursue the criminal charge. The Magistrate dismissed the condemnation complaint and ordered the return to the applicant of all the seized goods. The Claimant, Mr. Warris instituted proceedings under s.14 of ***the Constitution*** on the 5th July, 1990.

41. One of the issues considered by Justice Sealy, was whether the applicant should be denied redress in a constitutional court by reason of his delay between 1984 and 1990.

42. After citing, a number of Indian authorities[28], Justice Sealy considered the facts closely and found that the Claimant had offered no explanation for his silence between the years 1984 and 1990.

43. Justice Sealy alluded to a duty on the part of the Applicant to act promptly and had this to say in conclusion:

> *"an applicant who has slept on his rights should not come to the Court to allege a breach of his constitutional rights. I agree with Attorney-at-Law for the Respondent that section 14 of the Constitution … demands urgent applications[29]."*

[28] Justice Sealey relied on Durga Prashad v. Chief Controller of Imports & Exports & Others [1969] 2 SCR 861, Kamini Kumar v. The State of West Bengal [1972] All India Reports 2060, Tilokchand Motichand & Others v. H.B. Munshi & Another[1969] 2 SR 824

[29] See page 11 of the judgment of Justice Sealey, Warris v. Attorney General HCA #2454 of 1990.

44. Ultimately, Justice Sealey held that the Court must be afforded some explanation for the delay in order to exercise its jurisdiction. I was grateful for the guidance of Justice Sealey in respect of the obligation on an applicant to avoid sleeping on his rights and to explain his delay.

45. However, I respectfully find myself in disagreement with Justice Sealey in respect of the obligation to act promptly. I find it useful at this stage to set out the provisions of s.14 of the Constitution:

> *14. "(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.*
>
> *(2) The High Court shall have original jurisdiction— (a) to hear and determine any application made by any person in pursuance of subsection (1); and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4), and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.*

(3) The State Liability and Proceedings Act shall have effect for the purpose of any proceedings under this section.

(4) Where in any proceedings in any Court other than the High Court or the Court of Appeal any question arises as to the contravention of any of the provisions of this Chapter the person presiding in that Court may, and shall if any party to the proceedings so requests, refer the question to the High Court."

It is in my view, clear, that section 14 does not place a duty on the Applicant to act promptly. In fact, it was 0.53, under the 1975 Rules of the Supreme Court, rules which were extant when the application of Warris was heard, which required the applicant for judicial review to act 'promptly'. Accordingly, I was not persuaded by the reasoning in ***Warris v. Comptroller of Customs and Excise*** and respectfully declined to follow it.

46. On the issue of delay, learned Attorney-at Law also referred to and relied on the decision of Justice Moosai, (as he then was) in ***Annissa Webster v. Attorney General***[30]. In that case, Annissa Webster, a Special Reserve Police Officer, invoked the Court's jurisdiction under s.14 of ***the Constitution.*** Together with five hundred and ninety-one (591) other SRPs, she claimed that there had been a contravention of her right to equality of treatment under s.4(d) of ***the Constitution***.

47. In the course of his judgment Justice Moosai quoted their Lordships in ***Durity***:

"at the forefront of the Constitution is a resounding declaration of fundamental human rights and freedoms. It is axiomatic that

[30] CV 3562 of 2003

these rights and freedoms expressly declared are not to be cut down by other provisions in the Constitution save by language of commensurate clarity[31]."

48. Justice Moosai distilled the principle in these words:

"When one examines the express words of the Constitution any suggestion regarding rigid timeframes or limitation periods with respect to initiating constitutional proceedings is absent[32]."

49. Justice Moosai once again quoted their Lordships in ***Durity[33]***:

"the Court should therefore be very slow indeed to hold that by a side wind the initiation of constitutional proceedings is subject to a rigid and short time span[34]."

50. Justice Moosai quoted, however, their Lordships pronouncement on the inherent jurisdiction of the Court to prevent abuse in constitutional proceedings:

"Clearly, the inherent jurisdiction of the High Court to prevent abuse of its process applies as much to constitutional proceedings as it does to other proceedings. And the grant or refusal of a remedy in constitutional proceedings is a matter in respect of which the Court has a judicial discretion …[35]"

51. Justice Moosai concluded:

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[31] See paragraph 21 of Annissa Webster CV 3562 of 2003 and paragraph 30 of Durity [2003] 1 AC 405
[32] Annissa Webster v. Attorney General CV 3562 of 2003 at paragraph 21
[33] Durity [2003] 1 AC 405
[34] Webster paragraph 21 and Durity [2003] 1 AC 405 at paragraph 30 of the judgment
[35] See paragraph 21 of Annissa Webster CV 3562 of 2003 and paragraph 30 of Durity [2003] 1 AC 405

"this hints of the fact that the Courts are exercising a discretion and more explicitly states that if there is delay for which no cogent explanation is preferred relief may in fact be refused."[36]

52. Ultimately, Justice Moosai formulated the test in this way:

"… given the extraordinary sanctity of our fundamental human rights and freedoms, the Courts are reluctant to shut out a deserving applicant on the mere ground of delay. However, where the delay is inordinate, then failing a cogent explanation a Court may deny an applicant relief. Everything must depend on the circumstances including the particular right or rights involved."[37]

53. Justice Moosai referred to the treatise ***Basu's Commentary on the Constitution of India*** and made this comment:

"In other words, the test is not 'unreasonable delay' but 'unexplained delay'[38]*.*

54. I proceeded therefore to consider whether there was unexplained delay on the part of this Claimant in seeking constitutional relief.

55. The acts of which the Claimant complained occurred in April 2007. For many years, he remained silent. Three of his comparators Dave Brijmohan, Jitram Singh and Patrice Springer-Carter had allegedly received preferential treatment since 2004, two years before the incident, which constituted the breach of s.4(d). One would have expected the Claimant to have protested immediately upon being appointed on secondment.

[36] See paragraph 22 of Annissa Webster CV 3562 of 2003
[37] See paragraph 26 of Annissa Webster CV3562 of 2003
[38] Ibid

56. In March, 2013, six years later, his silence was broken. Even in respect of his 2013 complaint, the Claimant failed to furnish the Court with the particulars of his complaint and left the Court to speculate as to his grievance, from the reply which was furnished by the Defendant.

57. After having received the Defendant's reply dated 15th November, 2014, the Claimant once again lapsed into silence until 2016. Once again no explanation was offered for the second period of delay of one year.

58. It was my view that the Defendant, offered no explanation for either period of delay. Learned Counsel, Mr. Thompson, suggested that the Claimant acted after having received the explanation of the Commission in November, 2014 and that his delay thereafter was not extensive.

59. The foregoing explanation emerges from submissions, where it should have been stated by the Claimant himself in evidence. Even if the Court accepts the explanation of Mr. Thompson, one finds that the Claimant has not only failed to provide an explanation for his delay in complaining to the Public Service Commission, but has failed to indicate the date on which he made the complaints. The Court was therefore deprived of any evidence, on the basis on which it could determine whether there was a delay on the part of the Commission or whether the Claimant simply arose from his slumber, like the fictitious character Rip Van Winkle[39], after six years of enjoying his appointment on secondment.

[39] Rip Van Winkle is a short story by an American author, Washington Irving and published in 1819. Rip Van Winkle arose from slumber after twenty years to find his world had changed.

60. It was my view that delay for a period of six years was inordinate. That in itself would not be sufficient to deny the Claimant access to his inviolable fundamental rights. However, the inordinate delay combined with the absence of any explanation, any suggestion that he had sought advice or had taken any steps to assert his rights, leaves the Court with no doubt that the Claimant slept on his rights. It is axiomatic that wherever the Court exercises its discretion in granting relief, it will not extend favour to one who has slept on his rights. It was therefore my view and I hold that the Claimant fell within the category of litigants, whose inordinate delay together with the absence of an explanation amounted to an abuse of the Court's process. As a result the Court will refuse relief.

61. It was also my view that pursuant to the authority of ***Sahadeo v Teaching Service Commissioner PCA No. 48 of 2005*** the Claimant had no ground for complaint by reason of the removal of a benefit to which he was not entitled. He had not been entitled to an appointment to the post of CEO in the Public Service. He was appointed on secondment in error. He cannot now insist on a retroactive appointment based on the error of the PSC.

Proper Defendant- Carmel Smith

62. Learned Attorneys-at-Law Defendant argued that the Attorney-General was the proper defendant to these proceedings. Both parties relied on ***The Attorney General v. Carmel Smith***[40]***.*** In ***Carmel Smith***, it was alleged that the Statutory Authorities Service Commission had discriminated against Mrs Carmel Smith, and treated her unequally in violation of her rights under section 4(b) and (d) of ***the Constitution***.

[40] [2009] UKPC 50

63. In her originating motion, only the Attorney-General was named as Defendant. Learned Attorney-at-Law for the Defendant contended that the Attorney General ought not to have been a party to the proceeding, and argued that the Statutory Authorities Service Commission was the proper party. At first instance, Justice Moosai, as then was, upheld the Attorney General's objection and granted leave to amend the motion, to strike the Attorney General and to include the SASC.

64. Mrs. Smith appealed the order of Justice Moosai, and her appeal was allowed by the Court of Appeal. The order of Justice Moosai was set aside, and the Court of Appeal ordered that the SASC be struck from the proceedings, and that the Attorney General be the sole party. The Attorney General appealed to the Privy Council.

65. The issue before their Lordships was whether the Attorney General was the proper Defendant to a claim for constitutional redress under section 14 of the Constitution of Trinidad and Tobago.

66. In the course of his judgment, Lord Walker stated:

> *"[18] When the new Constitution was being drafted and considered the Service Commissions were already in existence, carrying out the important functions described by Lord Diplock in Thomas v A-G of Trinidad and Tobago. SASC was already in existence carrying out similar functions in relation to statutory authorities. The fact that the former but not the latter were given constitutional status may reflect Parliament's view that the functions of the Service Commissions are closer to what are sometimes called 'core functions'. … But whether or not that is correct, it is inconceivable that Parliament did not have it well in mind, in making the*

amendments, that they were making an important procedural distinction between the four Service Commissions, on the one hand, and the Integrity Commission, the Salaries Review Commission, and the SASC, on the other hand.[41]*"*

67. The Privy Council held that upon a proper construction, the scheme, as well as the language of ***the State Liability and Proceedings Act*** were clear. The term 'Service Commissions' is defined at s.3(1) of ***the Constitution*** to mean the Judicial and Legal Service Commission, the Public Service Commission, the Police Service Commission and the Teaching Service Commission. Where the impugned actions are those of one of the four Service Commissions, which were included in the definition of 'Service Commissions' at section 3(1) of the Constitution, the Attorney-General ought properly to be the Defendant. Where the impugned actions were those of one of the non-core Commissions, as in ***Carmel Smith***, the Commission, itself would be the correct Defendant.

68. In the proceedings before me, the Claimant has impugned the actions of the PSC, one of the Service Commissions exercising core functions. Following ***Carmel Smith***, I held that the Attorney-General was properly the Defendant in these proceedings.

69. It was therefore my view that Attorneys-at-Law for the Defendant succeeded in the preliminary objection that the Constitutional proceedings ought to be struck out as an abuse of the Court's process. In the event that I was wrong in this finding and out of deference to both the Claimant and his Attorney-at-Law, I proceeded to consider the substantive arguments in this matter.

[41] The Attorney-General v. Carmel Smith (2009) 75 WIR 457, 467

Inequality of Treatment

70. Section 4(1)(d) of ***the Constitution*** enshrines unto the individual the right to equality of treatment by a public authority. The authorities on s.4 (d)[42], both ancient and modern, speak with one voice: the S.4 (d) right may be invoked by persons who have been treated less preferentially than like persons. The Claimant must therefore first point to a person who was similarly circumstanced and in that way, must identify a comparator.

71. Accordingly in ***Mohanlal Bhagwandeen v. the Attorney General,[43]*** an authority cited by learned Counsel for the Claimant, their Lordships stated the test in this way:

> *"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.[44]"*

72. In ***Audine Mootoo v. the Attorney General***, Civil Appeal 38/2009, also an authority relied on by learned Counsel for the Claimant, Justice of Appeal, Moosai referred to the decision of the Privy Council in ***Annissa Webster v the Attorney General,*** where Lady Hale clarified the test in this way:

> *"(1) The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment.*

[42] Constitution Ch. 1:01
[43] [2004] UKPC 21
[44] [2004] UKPC 21 at paragraph 18 of the judgment

(2) Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment.

(3) To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(4) Weighty reasons will be required to justify differences in treatment based upon the personal characteristics mentioned at the outset of section 4: race, origin, colour, religion or sex.

(5) It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged)."

Lady Hale added the proviso that:

"… that there is a considerable overlap between the "sameness" question at (1) above and the justification question at (3). This is because the question of whether a difference between the two situations is material will to some extent at least depend upon whether it is sufficient to explain and justify the difference in treatment."[45]

73. At paragraph [101] of his Judgment, Justice of Appeal Moosai had this to say:

> *"Equality of treatment recognizes that decision-makers must be consistent in the procedure and criteria and procedure that they apply and that like cases should be treated alike*[46].

[45] See Annissa Webster v. Ag [2015] UKPC 10.

[46] See Audine Mootoo v. the Attorney General Civil Appeal 38 of 2009 at paragraph [101].

74. Applying this principle to the case before me, it was my view that Mr. Lawrence Oliver, and Pamela Doon were already public officers, they were clearly not like the Claimant. They could not therefore be comparators for the purpose of a claim and under s.4(d) of ***the Constitution***.

75. In respect of the officers, Jitram Singh, Dave Brijmohan and Patricia Springer-Carter, they were found to be broadly similar, though not identical to the Claimants. In each case, these officers, like the Claimant had originally been under the authority of the SASC. Each officer, like the Claimant, had responded to an advertisement, by way of a circular memorandum, for a position in the public service. Unlike the Claimant, however, these officers were transferred and appointed.

76. The Claimant contends that the three named officers had been transferred and appointed pursuant to section 8(1) of the *Statutory Authorities Act* Ch. 24:01. In support of this allegation, the Claimant annexed a copy of a letter dated May 4, 2004 which informed Ms. Ms. Patricia Springer-Carter of her promotion.[47] An examination of this letter reveals that it makes no mention of s.8(1) of *the Statutory Authorities Act*[48].

77. Nonetheless, having found that the Claimant was broadly similar to his comparators, I considered whether the PSC succeeded in justifying the difference in treatment.

78. The PSC explained the difference in treatment by pointing to differences in the advertisements, to which the different actors responded. Jitram Singh, Dave Brijmohan and Patricia Springer-Carter all responded to a circular memorandum dated September 14,

[47] See the exhibit KA5 which is annexed to the affidavit filed by Keith Aaron on March 8, 2016.
[48] Ch. 24:01

1998 under the hand of the Permanent Secretary, Ministry of Local Government advertising the post of Police Corporal, Municipal Police Service to the Commissioner of Police, City Clerks/ Town Clerks and Chief Executive Officer of Municipal Corporations. By her affidavit, the Deputy DPA, Ms. Prabhawatie Maraj explained that all officers under the Commission and throughout all Corporations were eligible to apply.

79. By contrast, the circular memorandum to which the Claimant responded was directed only to Permanent Secretaries and Heads of Departments within the public service.

80. Ms. Maraj did not disclose any policy reason for the difference in the groups to which the advertisements were addressed. I was not of the view that Ms. Maraj was under an obligation, so to disclose. The advertisements were for different posts and pertained to different time periods. Accordingly, the advertisement to which the Claimant responded was for the office of CEO, an executive position, whereas the advertisement, to which the comparators invited applications for the post of Corporal of Police.

81. It was my view that the DPA, was entitled, as a matter of policy to decide the ambit of personnel from which a selection would made. It was further my view that the decision to invite applications from the public service only, on the one hand, and the world at large on the other, was in no way disproportionate.

82. Accordingly, it was my view that the Defendant, PSC had justified the difference in treatment between the Claimant and Jitram Singh, Dave Brijmohan and Patricia Springer-Carter and no claim can be made that these officers received preferential treatment for the purpose of s.4(d).

83. In fact the only officer who was identically comparable to the Claimant was Ms. Merlyn Calliste. She was treated in the same way as the Claimant and was offered an appointment on secondment. This, she declined and subsequently accepted a position of CEO with the SASC.

84. It follows that it is my view that the Claim should be dismissed.

85. Costs to be quantified by the Registrar of the Supreme Court on a date to be fixed by the Registrar of the Supreme Court.

Dated this 17th day of May, 2019.

M. Dean-Armorer