THE REPUBLIC OF TRINIDAD AND TOBAGO
IN THE HIGH COURT OF JUSTICE

CV 2011-02619

IN THE MATTER OF THE
CONSTITUTION OF
THE REPUBLIC OF TRINIDAD AND TOBAGO

BETWEEN

DR TREVOR ANATOL **CLAIMANT**

AND

NORTH CENTRAL REGIONAL HEALTH AUTHORITY **DEFENDANT**

Before the Honourable Mr Justice R. Boodoosingh

Appearances:
Mr Ian Benjamin and Ravi Heffes-Doon instructed by Ms Marcelle Ferdinand for the Claimant
Mr Neal Bisnath for the Defendant instructed by Ms Alana Bissessar

Dated: 19 July 2012

REASONS

1. This is an application by the defendant by Notice of Application dated 28 October 2011 to have the claimant's constitutional motion struck out on the ground of abuse of process. It is being dealt with as a preliminary point.

2. By fixed date claim form and supporting affidavit filed on 13 July 2011, the claimant brought constitutional proceedings against the defendant for its alleged discriminatory decision not to remunerate him in respect of clinical surgical services rendered to the defendant as Honorary Consultant in their Paediatric Surgical Department for the periods January 1991 to May 1997 and April 1998 to September 2008. The claimant retired in 2008.

3. He claims that by the defendant's failure to remunerate him, it has breached his rights under sections 4 (a) and (d) of the Constitution.

4. The claimant was permitted to file an affidavit in reply to the defendant's application to strike out the claim. This was filed on 21 December 2011.

Claimant's Evidence

5. The claimant says by letter dated 2 June 1993 he was appointed as an Honorary Consultant in the Department of Surgery on the medical staff of the defendant's predecessor, Eric Williams Medical Sciences Complex Authority (EWMSCA), with effect from 20 July 1990. He discharged his duties and provided services in the specialty area of Paediatric Surgery. Following the establishment of the Regional Health Authorities (RHAs) in 1994 he continued to act in the capacity of Honorary Consultant to the defendant Authority. He says during these periods the services he rendered to the defendant were equivalent to its full time consultant surgeon employees.

6. The claimant also says during the period 1990 – 1997 he was the sole paediatric surgical consultant at the EWMSC. Further, he established the Paediatric Surgical Services Unit at the EWMSC and started the first outpatient clinics in or around September 1990. Additionally, from April 1998 to September 2008 he was rostered for on call duties on an equal or similar basis with consultants in the full time employ of the defendant. Further, the duties performed by full time consultant surgeons at the RHAs were similar to the services he provided to the defendant, for which he received no remuneration.

7. By his affidavits, the claimant says from at least 1981 the Ministry of Health paid academic clinicians (like himself) attached to public health institutions a special allowance of 30% of the salary of non-academic clinicians/ specialist medical

officers employed by the Ministry. He says he knew and was aware of this practice on taking up his appointment with the defendant.

8. Further, the claimant says by a decision of its Board of Directors on 24 August 2006, the defendant decided that a special institutional allowance and a guaranteed payment of 20 hours overtime allowance should be paid to clinical consultants of the University of the West Indies (like him) attached to the defendant institution. It is significant that the claimant says he was not aware that such a decision had been taken until November 2011, after the filing of his claim.

9. Importantly, the claimant says his letter of appointment did not mention any remuneration. However, he says he commenced and continued to perform his duties assuming that the quantum of remuneration would be worked out and in the expectation that he would be treated similarly to persons who were similarly circumstanced. Additionally, he had a reasonable expectation that some remunerative allowance or honorarium would be paid to him having regard to:

   - that the defendant was deriving a benefit from his services equivalent to or exceeding those provided by non-academic clinicians in the full time employ of the defendant;
   - that academic clinicians/ honorary consultants attached to the public health institutions including the defendant were/ are being paid allowances/ being remunerated for their services.

10. The claimant says he made numerous requests of the defendant to provide him with an allowance/ honorarium/ compensation. He formally brought the issue to the attention of the Dean of the Faculty of Medical Sciences by letters dated 15 August 2001 and 10 April 2003. His attorneys first wrote to the defendant on 8 June 2007 requesting reasonable remuneration be paid to the claimant for his services over the years as Honorary Surgical Consultant with the defendant Authority.

11. By letter dated 12 June 2008 from the defendant's legal adviser, the claimant was advised that an *"honorarium is given on a case by case basis to University lecturers who it is determined by the Regional Health Authority provide exclusive services which cannot be sourced elsewhere and which are absolutely necessary for the continuation of overall medical services of the Regional Health Authority's"* and that the claimant's services didn't fall within that category. The letter admitted that the claimant was an Honorary Surgical Consultant with the Authority. However it denied that the claimant initiated clinical services in Paediatric Surgery or that there existed a custom for university medical consultants providing clinical services to the Ministry or to the RHA's to receive allowances.

12. The claimant says even using the criteria stated by the defendant in this letter, he would have been entitled to be remunerated. By its failure to remunerate or

compensate him howsoever, he says the defendant authority has treated him differently/ less favourably than other persons identically or similarly circumstanced to himself who are, at present, being paid an allowance/ honorarium.

Defendant's Submissions

13. By its Application and written submissions, the defendant's main contentions are as follows:

(i) The claimant has failed to establish he was discriminated against and failed to lead evidence of specific individuals similarly circumstanced to himself and who were treated in a different manner.

(ii) There has been inordinate and unexplained delay in instituting this action almost 20 years after his cause of action accrued making it an abuse of process. Further the claimant's belated attempt to explain the delay in his second affidavit lacks merit and in any event should not be entertained.

(iii) The claimant's complaint is essentially a dispute between him and his employer on the question of remuneration, and therefore has no public law element capable of constitutional redress.

(iv) The defendant's decision not to remunerate the claimant was susceptible to adequate redress by a timely application to the court in its ordinary non-constitutional jurisdiction – i.e. either by a private law action for remuneration

based on an implied term of contract; or assuming there was a public law right, by the claimant challenging the decision of 12 June 2008 by judicial review.

(v) The defendant is severely prejudiced by the claimant's extreme delay in bringing the claim in that it is unable to obtain the relevant documentation/ records to properly dispute/ defend the claim.

Abuse of Process/ Delay

14. Since the Privy Council decision in **Felix Durity v Attorney General,** P.C. Appeal No. 52 of 2000, it is now accepted that there is no time limit for bringing constitutional proceedings. Delay alone ought not to hinder a claimant's claim to constitutional relief. However delay may still be a basis that could render a constitutional action under section 14 an abuse of process or disentitle a claimant to relief. Further, it would appear that any such delay must be "so inordinate" if it is to operate so as to deny relief.

15. Both counsel for the claimant and defendant cited the case of **de Bourg v Attorney General,** H.C.A. 1844 of 1997 in which Jamadar J., as he then was, summarised the relevant considerations for the court in exercising its discretion whether a constitutional claim should be struck out for abuse of process and delay: (see page 17 of judgment)

(a) Whether the impugned decision was susceptible of adequate redress by a timely application to the court in its ordinary, non-constitutional jurisdiction.

(b) Whether there is an explanation for the delay, which explanation ought to "sufficiently explain the delay."

(c) Whether there is any prejudice to the Respondent that may have been caused by reason of the delay. Or, put in a broader frame of reference, whether the unreasonable delay will render the specific relief sought unjust.

(d) The conduct of the relevant parties, including relevant delay if any.

(e) The merits and importance of the constitutional issues raised.

16. The crux of the defendant's submissions is that the genesis of the claimant's claim originated from a legitimate expectation since 1990 when he commenced his duties as Honorary Consultant that he would receive some remunerative allowance or honorarium for the services he provided. Despite it originating since 1990, the claimant took 11 years to formally bring the issue to the Dean of the Medical Faculty and a further 6 years before his attorneys first wrote to the defendant. He then took a further 4 years to file this action. The defendant says this delay of 20 years is inordinate and which the claimant cannot and has not sufficiently explained.

17. The defendant says the claimant cannot seek to take his own time to commence proceedings, 20 years, and then try to maintain that because the defendant has denied his claim it is in a position to properly defend such an old matter.

18. A relevant question therefore is, when did the alleged breach arise? When and how was the claimant's rights breached? From when can it be said was the claimant unequally treated? From when does he claim to be unequally treated? When did the claimant come to the view that he was being unequally treated compared to others in a similar position?

19. While the starting point of the claimant's complaint goes back to when he was appointed, the decision being challenged is the defendant's decision in 2008 not to remunerate the claimant. It is by this decision which the claimant says his right to equality of treatment was violated by the defendant – albeit his expectation to be remunerated goes back to 1990/ 1993. It can be said therefore that the "breach" only arose when the claimant was definitively told that he was not entitled to any compensation in 2008.

20. What the claimant is saying is that he expected and assumed that he would be remunerated for his services just as his colleagues in the same class as him were and are presently being paid. He is further saying that his constitutional right to equality of treatment by the defendant was breached by their decision in 2008 that he was not entitled to remuneration. This would mean he was unequally treated

as compared to those similarly positioned to him for the entire period he rendered his services to the defendant as honorary consultant – that is from 1991. However, can it be said his right of action accrued then in 1990?

21. When did the alleged breach of his constitutional right occur? Is it at the time of his appointment or when he was told that he was not entitled to be remunerated? What the claimant is challenging is the defendant's decision in 2008 that he was not entitled to be remunerated. He is saying this decision is a breach of his right to equality of treatment. I am of the view that even if there was some cause of action prior to this, there was an equally valid claim arising from the defendant's decision in 2008. It is the decision in this letter by which the claimant says his right has been breached. It matters not that the genesis of the breach goes back 20 years.

22. The "wait and see" approach of the claimant in the circumstances is not in my view entirely unreasonable or inappropriate. I am not of the view that this is a case of the claimant merely sitting on his rights.

23. As the defendant itself states, the claimant had no contractual entitlement to remuneration. His was an honorary position for which he expected to be remunerated for his services based on the practice of which he was aware. He may have reasonably believed that he would eventually be paid at some point or as he says that his remuneration would be worked out in due course.

24. As the defendant also says in its submissions, the claimant had not been claiming unequal treatment all along. He had been raising the issue of payment for honorary consultants like himself periodically. The claimant says discussions were ongoing between the various stakeholders regarding the issue. There was no indication or decision until 2008 that he would not be remunerated or that he would be treated differently from others similarly positioned to him.

25. The defendant's decision that the claimant was not entitled to compensation was only communicated to him by the letter of 12 July 2008 in response to the claimant's letter of 8 June 2007. The relevant date therefore with respect to any delay in filing this action in my view is 12 July 2008. This is when the Claimant was told that he was not entitled to be remunerated. Any delay in bringing his claim must therefore be explained from then.

26. The claim was filed in July 2011 – 3 years after the date of the impugned decision. This is not an excessive or inordinate period of delay in my view. It is sufficiently explained by the negotiations that were ongoing between the parties after the defendant's letter of 12 July 2008. During this period there was also significant delay on the part of the defendant in responding to the claimant. When the negotiations failed the claimant wasted little time in seeking to obtain some form of redress for what he believed to be a breach of his constitutional rights.

Alternative redress? Is there a public law element?

27. While there may have been a claim in judicial review following the defendant's decision in 2008, this was followed by a period of negotiation and exchange of correspondence between the parties with a view to settlement. When this failed the time would have long passed for filing a judicial review claim.

28. It is also difficult to see what claim, if any, the claimant would have had in private law before the date of the impugned decision.

29. There was no contract expressed or implied for the receipt of the allowance/ honorarium which the claimant claims. The claimant's position was that of an honorary appointment. It was not a term of contract.

30. I agree that the claimant's claim is concerned with an alleged breach of a public duty imposed on the defendant authority and not solely, if at all, out of any private right in contract – see **R v East Berkshire Health Authority ex parte Walsh [1984] 3 All ER 425. Purchas L.J.**

31. According to Jamadar J at page 21 of **de Bourg**:

"In determining whether delay should succeed in limine as a basis upon which to strike out section 14 constitutional proceedings, all the circumstances must be

considered. Too compartmentalized an approach is not in my opinion consistent with the proper approach to be taken by the Constitutional Court to complaints about alleged breaches of fundamental rights and freedoms. The constitutional status of these rights and the importance of upholding them to the preservation of a democratic way of life, especially in developing democracies, demands a generous approach to applications such as this one."

32. In my view, on the evidence before me at this stage, the claimant has made out an arguable case of unequal treatment/ discrimination arising from the decision of the defendant in 2008 not to remunerate him. This particularly arises from the evidence put forward of the so called practice of the Ministry and the apparent decision of the defendant's Board in 2006 to pay such an allowance to a certain class of persons of which the claimant says he is a member.

33. This in my view calls for a response from the defendant by evidence and full submissions.

34. I also accept that there is sufficient evidence, **at this stage**, of the claimant's comparators (i.e. the class of persons), although no specific individuals are named, for the court to examine the issue of inequality of treatment.

35. Further, any prejudice suffered by the defendant, if any, is in my view limited to the pre-1998 period for which the Defendants says it has no records. In any event,

the defendant is not blameless with respect to delay in this matter and any prejudice it suffers is outweighed by the importance of the constitutional issue raised.

36. I therefore find that claimant's claim is not an abuse of process and decline the defendant's application to strike out the claim.

Ronnie Boodoosingh
Judge