THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2015 – 03052

BETWEEN

THE POWER GENERATION COMPANY OF TRINIDAD AND TOBAGO LIMITED

Claimant

AND

REGISTRATION, RECOGNITION AND CERTIFICATION BOARD

Defendant

AND

OILFIELD WORKERS' TRADE UNION

Interested Party

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Ian Benjamin instructed by Nalini Jagnarine for the Claimant

Mr Kirk Bengochea instructed by Ms Savitri Maharaj for the Defendant

Mr Anthony Bullock for the Interested Party

Date: **17 February 2017**

JUDGMENT

1. On 14 September 2015, leave was granted to the claimant, the Power Generation Company of Trinidad and Tobago Limited, (Powergen) to apply for judicial review of the decision of the defendant, the Registration, Recognition and Certification Board, RRCB (the RRCB or the Board). The decision of the RRCB as contained in three letters all dated 15 June 2015 derive from an application (Application No. 7 of 2001) made by the Interested Party, the Oilfield Workers' Trade Union, (the OWTU or the Interested Party) on 2 May 2001.

2. The decision of the RRCB concerned:

    - *Six categories of the claimant's employees were deemed to be "workers" within the meaning of section 2(3)(e) of the Act and these six (6) positions of: (i) Shift Charge Engineer, (ii) Maintenance Engineer, (iii) Despatch Engineer, (iv) Purchasing Officer, (v) Accountant and (vi) Chemist, should form Bargaining Unit No. 5;*
    - *The defendant issued a formal Notice of Determination of the appropriate Bargaining Unit No.5; and*
    - *The defendant attempted to make arrangements for an examination of the claimant's pay record documents and a certified list of employees in Bargaining Unit No.5.*

3. Powergen now seeks the following reliefs by fixed date claim form filed on 17 November 2015:

    - A declaration that the RRCB's decision is unauthorized and/or contrary to law and/or in excess of jurisdiction and/or unfair and/or otherwise invalid, null, void and of no effect;

    - A declaration that the RRCB's decision is in breach of the principles of natural justice and/or procedurally improper and/ or in breach of Powergen's legitimate expectation and/or is otherwise invalid, null, void and of no effect;

- An order of certiorari quashing the RRCB's decision;

- An order of Mandamus or an order pursuant to Section 16(3) of the Judicial Review Act compelling the RRCB to provide a statement of reasons for its decision;

- An interim order staying the RRCB's decision including the provision of information to the RRCB;

- Such other orders, directions or writs as the Court considers just and as the circumstances warrant pursuant to section 8 of the Judicial Review Act; and

- Costs.

4. On a notice of application filed on 13 November 2015, a stay of execution was granted in relation to the RRCB's decision as contained in the third letter that Powergen make arrangements for an examination of its pay record documents and a certified list of employees in Bargaining Unit No.5 until the hearing and determination of the application for judicial review or until further orders.

Background

5. By letter dated 8 November 1996 in respect of OWTU's Application No. 17 of 1995 against Powergen, the RRCB determined that six (6) categories of POWERGEN employee positions, more particularly the positions of: Shift Charge Engineer, Assistant Maintenance Engineer, Despatch Supervisor, Purchasing Officer, Chemist and Accountant ("the six Powergen positions") were not workers within the meaning of the Industrial Relations Act ("the Act") and were excluded from Bargaining Units Nos. 1 to 4.

6. Under the Memorandum of Agreement dated 10 June 1998, by letter dated 27 July 2000, the RRCB issued a Certificate of Recognition No. 380 of 2000, which referred

to only one bargaining unit and did not make any reference to the decision letter dated 8 November 1996.

7. The OWTU later sought recognition of the six (6) monthly rated positions of: Shift Charge Engineer, Maintenance Engineer, Despatch Engineer, Purchasing Officer, Chemist and Accountant by Application No. 7 of 2001 dated 2 May 2001.

8. By notice dated 1 December 2004, the RRCB notified the parties that a hearing would be held to determine whether the six Powergen positions were workers within the meaning of Section 2(3) (e) of the **Industrial Relations Act**. The RRCB met and heard oral evidence from five (5) OWTU witnesses from 2 May 2005 to 27 February 2007. However, the five year term of the office of the RRCB expired and a new RRCB was appointed on 4 March 2008. The new chairman directed that the application be heard de novo.

9. The Secretary of the RRCB wrote to Powergen on 22 December 2009, to the effect that the description of the bargaining unit in Certificate of Recognition No. 380 of 2000 be amended to reflect the bargaining unit in decision letter dated 8 November 1996. This determination was provisional and not final.

10. By letter dated 10 February 2010, Powergen submitted that the RRCB's provisional determination was in excess of the RRCB's powers and jurisdiction as it went beyond the question of whether the persons listed by the OWTU were workers. Powergen further submitted that under section 39 of the Act, any variation of a certificate of recognition would have required an application by the union, employees or employer.

11. On 25 February 2015, a new RRCB was appointed and up to that time Application No. 7 of 2001 had still not been determined finally.

12. By letter dated 15 June 2015, the RRCB determined Application No. 7 of 2001 to the effect that the six categories of Powergen employees are workers within the

meaning of section 2 (3) (e) of the Act. The RRCB further determined that the six positions should form Bargaining Unit No. 5, the decision now under judicial review.

Evidence

13. The claimant relies on affidavits of Joy Ramlogan, Director, Legal and Regulatory Affairs of Powergen, filed on 14 September 2015, 13 November 2015 and 17 November 2015, in support of the application for judicial review.

14. She outlined the history of Application No. 7 of 2001 and submitted that Powergen has challenged the decision of the RRCB as contained in the three decision letters set out above as invalid, null, void and of no effect on the basis that the RRCB's decision is ultra vires and unauthorized as being in excess of jurisdiction and/or unfair and/or in breach of the principles of natural justice and/or procedurally improper and/or in breach of Powergen's legitimate expectation.

15. She deposed that at all material times and during the period 1 January 1995 to October 2006 Powergen negotiated terms and conditions of employment for the six positions with the Senior Staff Association of Powergen ("SSA") as its representative body and that Powergen entered into four separate agreements with the SSA during that time.

16. She deposed that the RRCB is a creature of statute and is amenable to judicial review and that the decision is open to challenge.

17. An affidavit was filed by Mr Brendon Taitt, Secretary of the RRCB, on 18 March 2016 in response to the contents of the Affidavit of Joy Ramlogan dated 14 September 2015.

18. He deposed that the OWTU made Application No. 17 of 1995 for "ALL HOURLY, DAILY, WEEKLY AND MONTHLY RATED WORKERS" of Powergen and the board by letter dated 8 November 1996 determined four bargaining units.

19. Powergen and OWTU entered into a memorandum of agreement on 10 June 1998 where it was decided that Powergen is the successor to Trinidad and Tobago Electricity Commission. They also agreed that those hourly, daily, weekly and monthly rated workers who were transferred into the employment of Powergen as at the date of the agreement and as at that date were members of the bargaining unit described – Certificate of Recognition No. 107 of 1972.

20. He deposed that clarification meetings were held with the parties separately for the purpose of clarifying and examining information submitted in connection with the application or with any matter arising therefrom. He submitted that the delay in determining the matter from 2005 to 2007 was as a result of the unavailability of the attorneys representing the OWTU and Powergen as well as a witness. He noted that the RRCB did not unduly delay in determining this matter and that it is not unusual for a matter to take such a long time. The delay was not due to the Board's tardiness, but due to constant requests by the parties for adjournments and extensions of time.

21. He noted that there was sometimes delay between the expiration of the tenure of a Board and the appointment of a new Board. The new members would then have to familiarise themselves with the matters before the Board.

22. He was unable to comment on the provisional variation of Certificate No. 380 of 2000 as submitted by Powergen since he was not the Secretary at that time. However, he submitted that from his personal knowledge and perusal of the records no such variation took place.

23. In relation to whether the application should have been dealt with de novo, he deposed that both representatives from Powergen and OWTU met with a Sub Committee of the Board on 18 March 2015 and the parties were informed that there was no need to start de novo. However, the Board in its discretion after mature

deliberation considered that it had documentation that was voluminous and sufficient for it to make a determination as to whether or not the persons whose positions were contemplated in the Union's Application of 8 May 2001 were workers within the meaning of the Act. As a result the members of the Sub-Committee would examine the documentation and made a recommendation to the full Board. According to the records, he said, the parties expressed their agreement and no objection was raised. Powergen, he said, complied with the approach.

24. An affidavit in reply was filed by Joy Ramlogan on 1 April 2016, in which she stated that Powergen only sought three extensions of time and as far as Powergen's records show, there were no requests for any further extensions of time nor was there any tardiness or undue delay on its part. She deposed that there were hearings, meetings, pleadings and correspondence between Powergen and the RRCB from 2001 and then from 2004 to 2011. Powergen observed that it appears that the RRCB took no action for three years between April 2012 to March 2015, prior to its June 2015 decision, and did not seek to advance any explanation for its actions and the delay.

25. There was one factual issue that the court had to make a determination on. This concerned whether at its March 2015 hearing the issue of the Board going on to decide the matter on the basis of what records it had was stated or objected to. The evidence before me suggests that no issue was made of this. Mr Taitt gives evidence that this was communicated to Powergen and the OWTU. There is no clear denial that this was not done. Ms Ramlogan does not give evidence that she was present at that hearing. However, a letter sent by her dated 20 March 2015 only asked for the recusal of the Chairman from the process. In that letter there was at least a tacit acceptance that the Board would continue to make a determination of the issues before it. Further, the letters sent by Powergen shortly following the Board's decision in June 2015 did not raise this issue as to whether there was objection to that process at the March 2015 hearing. There were three letters of Ms Ramlogan dated 15 June 2015, one of 3 July 2015 and one of 16 July 2015. Further, at paragraph 45 of her 14 September 2015 affidavit, Ms Ramlogan accepts that the Board at the 18 March 2015 meeting had indicated it had sufficient evidence in order to make a determination as to whether certain positions fall within the definition of worker. She did not state that there was an issue or objection to this particular incarnation of the Board making the determination, even though these members had not in fact heard the oral evidence. To the extent that the positions of the parties

conflict on this point, I am prepared to accept that the Board had stated it was prepared to make a determination based on what was before it and that no objection was made to this course.

26. Powergen in this claim made written submissions on 4 matters. These were (1) excess of jurisdiction; (2) the lack of expedition in determining the application; (3) breach of natural justice and legitimate expectation; and (4) failure to take account of relevant considerations. Certain other matters were also raised in oral submissions which will be dealt with in consideration of these matters.

Excess of Jurisdiction

27. This was founded on **section 38 (4)** of the **Industrial Relations Act, Chap. 88:01**. The essential point was that a trade union could not apply for certification for a bargaining unit in an essential industry if it is already the bargaining unit in an essential industry. Both Powergen and its predecessor, Trinidad and Tobago Electricity Commission, were concerned in the general transmission and distribution of electricity services and therefore were in the same essential industry. Counsel for the claimant helpfully indicated they were not pursuing this argument.

Lack of Expedition / Delay

28. In this country it has become the norm to accept that it takes a very long time for simple things to be done and to say, "well that is how it is". The application for a determination of 6 types of jobs was made in 2001 by the OWTU. It was determined in June 2015, 14 years later. That this simple decision took 14 years boggles the imagination that this could be considered acceptable on any standards. What is more is that the determination spanned the administration of 4 different Boards. A Board is appointed for 5 years. That Mr Taitt could suggest in an affidavit that it is not unusual for decisions to take this long suggests the RCCB sees nothing for anybody to complain about. That he could suggest that a reason is that parties ask for adjournments and this contributes significantly to the delay bespeaks lack of sufficient awareness of the responsibility of the Board to control its process and

manage its operations efficiently. It suggests that the RCCB's position is that the tail can wag the dog. True, the Board cannot control when new Boards are appointed after the term of a particular Board is expired, but that delay cannot be divorced from the overall delay. It only makes the point that the Boards should try to determine matters with alacrity.

29. That the delay was inordinate is patent. Mr Taitt's explanation was unsatisfactory. But, it is the consequence of that delay that is relevant now. What should the court do, having regard to the delay that took place? Should it quash the decision as contended by the claimant? Or should the decision stand as contended by the OWTU and the Board? Ultimately, this decision must turn on the fairness of the decision standing in all of the circumstances. Both Powergen and OWTU and the workers are affected. The court has to consider the prejudice to the respective parties.

30. Both Ms Ramlogan and Mr Taitt's affidavits detail the various steps that were taken, hearings conducted and representations and correspondence passing.

31. On behalf of Powergen, certain matters can be discerned from the affidavits and submissions. The company now has to look at pay records over 16 years to provide information to the Board. Powergen, in the meantime, from 2002 decided to restructure its operations which impacted on 5 of the 6 positions (para 18 of 14 September affidavit). Between 1995 and 2006 the company negotiated terms and conditions of employment for these 6 positions with the Senior Staff Association (para 19). At paragraphs 33 to 40, Ms Ramlogan sets out its concerns which were expressed to the Board about its provisional determination of whether the persons listed by OWTU were workers. This all took place in 2010 and 2011 however. Powergen cannot realistically seek to challenge the provisional determination now. It could have availed itself of appropriate legal remedies at that time had it chosen to.

32. No evidence was put in by OWTU. Thus no prejudice to them has been specifically advanced by evidence. However, having to wait for 14 years for a decision can reasonably be expected to be of some prejudice. They would have had the benefit

of those categories of persons being members earlier had a decision been made before.

33. Apart from having to find old records, however, it is difficult to see how the restructuring or the past agreements with the Senior Staff Association can prejudice the claimant to any significant degree. All that the decision does is to determine that persons holding these classifications are workers within the meaning of the Act and can be represented by the OWTU in respect of negotiations and in the collective bargaining process. The representation just shifts from the Senior Staff Association to the OWTU. If the positions have become redundant then it would not make a difference.

34. In deciding whether to grant relief on the matter of delay, the court must consider whether this would not lead to further delay in the determination of the issue. The court will grant relief on the delay issue only in limited circumstances.

35. As explained in the text, **Judicial Review**, **Principles and Procedures, Johnathan Auburn and Others, Oxford University Press, at para 9:30**:

> "Cases where an individual seeks to prohibit a public body from proceeding to perform the relevant function or to take the relevant decision or, where the function has already been performed or the decision has already been taken, to have that quashed, usually involves attempts by individuals to prohibit a public body from taking regulatory or disciplinary action against them or from taking a decision in favour of an opposing party. In such cases, there will be competing interests at stake: there will not only be the interests of the individual whose case has been subject to unlawful delay, but there may also be the public interest or the interests of complainants or an opposing party in having the proceedings properly resolved on the merits.
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> As a result, in such cases the courts will only generally intervene to halt proceedings, or to quash acts already done, on the ground that there has been unlawful delay, in two circumstances. First where the delay has given rise to serious prejudice to the individual such that the proceedings cannot be, or

were not fairly resolved. Secondly, where exceptionally, even though a fair trial could still (or did) take place there is some other compelling reason why it would be (or was) otherwise unfair to continue the proceedings. Such exceptional cases might include those where there has been bad faith, manipulation, or other unlawful conduct on the part of the public body, or possibly those where there has been particularly egregious delay.

However, where the proceedings before the public body involve the resolution of a dispute between two parties, such that halting the proceedings at the behest of one party will deprive the other party of the opportunity to have an adjudication on his or her rights, it will hardly ever be appropriate to halt proceedings (or to quash a decision already taken) on the ground that there has been unlawful delay. To do so would risk the latter party suffering a greater injustice than the former party would suffer if the proceedings continued."

36. While I am prepared to hold that the delay was inordinate and inexcusable, on the evidence presented before me, the consequence of the determination at this stage has not impacted disproportionately on the claimant. The claimant, on the evidence, has not demonstrated serious prejudice to them by the fact of delay. There is also no evidence before me of unfairness on account of bad faith, manipulation of process or other unlawful conduct. I will consider fairness in relation to the process adopted for decision later on.

37. Mr Benjamin referred me to **section 32 (1) of the Industrial Relations Act** which provides: "The Board shall expeditiously determine all applications for certification brought before it…" Even without this statutory provision it is just good administration to decide matters as quickly as reasonably possible. No doubt the statute provides this because Parliament recognised the importance of the function performed by the Board. The provision is meant to underscore the importance of expedition. In particular neither a Union nor an employer, much less an employee, should be made to wait indefinitely on the Board. There are implications on the decision. It affects whether a party can have access to the Industrial Court. It affects if employees can be represented by a Union. It affects the ability of employers to contract directly with persons, and so on. All of these functions underscore the importance of expedition. Counsel for the Interested Party has also advanced a

historical perspective in the passage of the Industrial Relations Act and the functions of the Board in respect of the certification of trade unions and in the facilitation of collective bargaining. That too underscores the importance of expedition. The section is meant to set the ethos for the Board's way of operating. But I do not think lack of expedition in that context would be meant to invalidate the decision in the absence of specific serious prejudice or other exceptional circumstances as mentioned above.

38. Failure to be expeditious does not necessarily mean that the Board has breached a duty that leads to the decision being rendered unlawful. This is consistent with the decision in **Herbert Charles v The Judicial and Legal Service Commission, PC Appeal No. 26 of 2001** where breach of a statutory time limit was held not to invalidate the further proceedings. I am prepared to say that the Board breached its duty to act expeditiously. However, this alone did not render the decision unlawful. It also does not lead to the decision having to be quashed. It is sufficient for the court to make a declaration that the Board failed to act expeditiously in accordance with **section 32** of the **Industrial Relations Act**. Such a declaration ought to contribute to good administration by guiding the future conduct of the Board.

Breach of Natural Justice and Legitimate Expectation / He Who Hears Must Decide

39. In **Raj-Kumar v Medical Board of Trinidad and Tobago**, Mendonca JA observed:

> "What it means to act fairly depends on the circumstances of each case. In de Smith's Judicial Review (6th edition) (at para. 7-039) the point is made, with which I agree, that, "the content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject matter." As Lord Mustill stated in R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531, 560:
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> "(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential

factor of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken."

40. In **Trinidad and Tobago National Petroleum Marketing Company Limited v RRCB, HCA 3078 of 2004**, Myers J. observed at paragraphs 81 to 83 that the Board is the master of its own procedure. It can decide whether to hold an oral hearing. It can ask for evidence and arguments in writing. It could permit cross examination. Whether or not it decides to hold an oral hearing will not necessarily be in breach of natural justice principles. I agree with the learned judge.

41. What then happened here? We can piece it together from the affidavits of Ms Ramlogan and Mr Taitt. Each party had an opportunity to submit evidence or to make applications before the Board. There was some oral evidence and cross-examination on the evidence presented. Submissions were made. This happened over a span of years and involved differently constituted Boards. The Board which decided the matter had available to it, from the evidence, the entire record of proceedings, which was described as voluminous.

42. It is a general principle and uncontroversial law that a tribunal that hears the evidence ought to decide the matter. This is generally the case for the judicial process such as claims and cases before the Magistrates' and High Court. This would be so also for disciplinary tribunals where evidence is presented and there is cross-examination. There are a number of decision making bodies where it would be critical for the members of the body who heard the cross-examination to decide the matter. This is so particularly where issues of credibility and reliability of the evidence are concerned and the body must make findings on these matters.

43. These circumstances primarily relate to matters brought forward on cross-examination where demeanour and reaction to answers would be relevant. Anybody can read evidence in written form, documents and submissions and come to conclusions on them.

44. It is equally the case that there are bodies where the persons who heard the cross-examination need not decide the issue. The determination of the issue may not call for that. Two things work against Powergen in this regard. First, Powergen knew in March 2015 that the Board intended to decide the matter on the records before it. They knew it was a differently constituted Board to the one that heard the cross-examination. No objection was made. It would have been open to Powergen at that stage to challenge that decision of the RRCB to decide the matter on the records, by judicial review proceedings. They did not do so. The second matter is that there is no evidence put before me by Powergen to show what prejudice was suffered by Powergen by the Board's reliance on that cross-examination or oral hearing. This court does not know what was revealed at the oral hearings which the Board that decided the issue did not have that would have been capable of making a difference to their determination.

45. It would have been ideal that the Board that heard the evidence should have decided the matter. Other than for the fact that a differently constituted Board decided the issue, the court has no evidence that this caused any unfairness or prejudice.

46. What happened was a lengthy process. Both parties appeared during the course of that process. They presented evidence and made submissions. They challenged the other side's case. While the making of the decision by a differently constituted Board to the one that dealt with earlier stages was not ideal, it cannot be said it was unfair. The alternative would have been for a full de novo hearing. That would only have delayed the process further.

47. It is clear enough that Powergen did not object to the March 2015 constituted Board determining the matter on the basis of the record of proceedings at the time. Had there been a challenge to the Board proceeding to make a decision at the time it proposed to do so, with evidence being presented as to the specific prejudice suffered, the result may have been different. However, Powergen cannot have failed to raise any objection and only seek to complain after the decision goes against them. Powergen could not have had any legitimate expectation in these circumstances. There was no representation which could give rise to any such expectation. Further there was also no objection by Powergen that they were not

given an opportunity to present evidence. That too ought to have been raised before the Board.

48. Further, if the court grants the relief sought by Powergen the result will likely be that the matter would have to be heard de novo in any event. A different tribunal to the one that heard the oral evidence would have to decide the matter anyway. Thus Powergen will be faced with the same situation of which they now complain.

49. Another issue raised by Powergen is that we do not know whether the factors enumerated by **section 33 (1)** of the **Industrial Relations Act** were considered by the Board and how they were considered. In fact the suggestion is that they could not have considered these factors by their rendering this decision. But this is linked to the delay point. Equally it could be said that we do not know that these factors were not considered. I am unable to conclude that the Board did not consider or weigh the section 33 (1) factors. In consideration of them, the weighting would be a matter for the Board and the court could not substitute its views on the weighting to any particular factors in preference to the Board unless the Board's weighting was shown to be irrational or unreasonable.

50. On the issue of reasons for its decision, while it is a commendable practice consistent with good administration that decision makers should give reasons for its decision, given the functions of the Board and the statutory regime in place there is no legal duty for the Board to provide reasons for its decision. I considered this issue in **CV 2014 – 01230 Pan American Life Insurance v RRCB** and rely on the reasons stated there. This, however, may be a matter which the legislature may wish to revisit particularly in light of the provisions of the Judicial Review Act, which has underlined the importance of public bodies giving reasons for its decisions. It would also give satisfaction to the parties that their views were heard and carefully considered. Reasoned decisions promote good administration.

51. It would be remiss to end without making a final comment on the delay of the Board in determining this matter. This matter spanned the period of the operation of four different Boards, each being appointed for 5 years. Mr Taitt deposed that delays as

happened here are not unusual. That cannot be satisfactory given the important powers of the Board.

52. Further, it was explained that when the life of a Board comes to an end, there is often considerable delay in appointing a new Board. All matters get stalled in the process. Those charged with the responsibility of appointing the Board ought to know when the terms of the members are coming to an end. Thus they should act promptly to appoint members so the operations can continue smoothly and so the Board can satisfy its statutory mandate to act expeditiously. When a new Board comes in, the members must necessarily start afresh to look at the pending matters. Some sort of case management /tracking system should be implemented to ensure matters can be determined within a reasonable time and generally within the life of a specific Board, especially where the decision is being made having heard oral evidence.

53. It is hoped that the Board will take guidance on the need to avoid delays like what occurred in this case in future so that it can better fulfil its mandate under the law.

54. The declaration I would grant is that the RRCB breached its statutory duty to act expeditiously in making a decision in the matter before it. This relief was not specifically asked for in those words, but I consider it is appropriate to make this declaration in all the circumstances under the court's power to grant further or other relief having regard to section 32 of the Act. I do not think any further relief should be granted and the decision of the Board must stand. Powergen has not persuaded me that any additional relief should be granted. The stay of execution on the provision of information by Powergen to the Board is also removed. I consider the appropriate order in these circumstances is that each party should bear its own costs. I thank the attorneys for their very helpful submissions.

Ronnie Boodoosingh

Judge