

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-04470

BETWEEN

SEUKERAN SINGH

CLAIMANT

AND

COMMISSIONER OF POLICE

DEFENDANT

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. A. Sinanan, S.C., leads Mr. K. Ramkissoon,
instructed by Mr. Lakhan.

For the Defendant: Mr. R. Martineau, S.C., leads, Mr. S. Alsaran and
Ms. C. Modeste, instructed by Ms. P. Cross.

Date of Delivery: 21st March, 2013

JUDGMENT

BACKGROUND

- [1] The Claimant, who was a Superintendent of Police at the material time, was informed by the Office of the Commissioner of Police, by letter dated the 3rd November, 2008, that he was required to sit a Written Assessment Examination on the 13th November, 2008 for advancement in the First Division of the Trinidad and Tobago Police Service (“TTPS”).
- [2] James Philbert, the Acting Commissioner of Police, deposed that this letter was signed in error on his behalf and without his authorisation¹. Thereafter, a meeting was held on the 6th November 2008 with all the Officers who were invited in error to sit the Written Assessment Examination including the Claimant. At the said meeting, the Acting Police Commissioner informed the Officers that they were in fact not eligible to sit the Written Assessment as they did not satisfy **REGULATION 21** of the **POLICE SERVICE REGULATIONS** (“the REGULATIONS”), *i.e.* they did not satisfy the twelve (12) month probationary period.
- [3] Nevertheless, the Claimant sought permission by Memorandum dated the 10th November 2008 to pursue the Written Assessment Examination. The Acting Police Commissioner, by Memorandum dated the 12th November 2008, advised him that he did not satisfy the statutory probation period and therefore could not be permitted to sit the Written Assessment Examination.

¹ Para. 6, Affidavit of James Philbert filed on the 9th March, 2009

PROCEDURAL HISTORY

- [4] On the 12th November 2008, the Claimant made an *ex parte* Application for leave for Judicial Review to challenge the said decision of the Defendant to bar and/or prevent him from sitting the Written Assessment Examination and an interim injunction directing the Defendant to permit him to sit same for promotion to the next higher rank in the TTPS. Smith J. (as he then was) refused the Claimant permission for leave to apply for Judicial Review on the same day as well as his application for the interim injunction.
- [5] The decision of Smith J. was appealed by the Claimant. On the 13th November 2008, the Court of Appeal granted him an interim order to sit the Written Assessment. In addition, the Claimant was granted leave to apply for Judicial Review.
- [6] By Fixed Date Claim Form with supporting Affidavit filed on the 17th November 2008, the Claimant sought the following reliefs:
- i. An Order of certiorari to quash the decision of the Defendant barring and/or excluding the Claimant from sitting the Written Assessment Examination;

- ii. A Declaration that the Claimant was treated unfairly and/or in breach of the principles of Natural Justice contrary to **SECTION 20²** of the **JUDICIAL REVIEW ACT, CHAP. 7:08**; and,
- iii. A Declaration that the decision to exclude and/or bar the Claimant from sitting the Written Assessment Examination is illegal, irrational and unfair.

The substantive matter was heard by this Court. On the 29th April, 2010, I dismissed the Claimant's claim for Judicial Review.

[7] The Claimant appealed this decision by Notice of Appeal filed on the 12th May 2010 on the grounds that:

- i. The decision is against the weight of the evidence and contrary to the law;
- ii. The Court erred in finding that the Appellant/Claimant was required to complete his probation period as a legal precondition or prerequisite to being eligible to sit the promotion examination for advancement in the First Division of the TTPS;
- iii. The Court erred in finding that it was not legally possible for an Officer to be allowed to sit the said promotional examination prior to the completion of his probation period. It further erred in holding that it was not possible to promote an Officer before he

² An inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner.

completed his probationary period. **REG. 21(4)** of the **REGULATIONS** makes it possible for an Officer to be promoted in his former substantive Office;

- iv. The Court erred in finding that **REG. 21(4)** of the **REGULATIONS** was *ultra vires* the **POLICE SERVICE ACT, CHAP. 15:01**; and,
- v. The Court erred in finding that it was a reasonable requirement that Officers be required to first complete the prescribed probationary period in order to be eligible to write the Written Assessment Examination so that they may be eligible to be considered for promotion to the next rank.

[8] Subsequently, by Notice of Application filed on the 4th April, 2011, the Appellant/Claimant sought an Order pursuant to **PART 64.17³** of the **CIVIL PROCEEDINGS RULES 1998** (“CPR”) and/or under such applicable provisions thereunder and/or under the inherent jurisdiction of the Court that the Court of Appeal admit fresh evidence or further evidence of the Appellant/Claimant.

[9] This evidence was contained in his Affidavit filed on the 4th April, 2011 and a Supplemental Affidavit filed on the 5th April, 2011. The evidence which the Appellant/Claimant sought to adduce was that he received

³ (2) The court may receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which has occurred after the date of the trial or hearing) may be admitted except on special grounds.

information that another Officer, Peter Reyes, was permitted to sit the Written Assessment Examination for promotion with the First Division of the TTPS after serving only ten (10) months and seven (7) days in the rank of Assistant Superintendent of Police.

[10] On the 23rd May, 2011, the Court of Appeal heard the Claimant's Application and granted an Order that the new evidence be admitted. The matter was then remitted to this Court for consideration of the issues that arose consequent upon the admission of the new evidence.

[11] I granted leave to the Claimant on the 6th October, 2011 to use his Affidavit filed on the 4th March, 2011 and his Supplemental Affidavit filed on the 16th May, 2011 in the Court of Appeal.

[12] I also granted leave to the Claimant to cross-examine the Defendant's witnesses as follows:

- i. Paragraphs 5 and 6 of the Affidavit of Erla Christopher, Acting Superintendent of Police, filed on the 18th May, 2011 which reads:

"5. The data retrieved indicated that the police officer with badge number E09931 which is the badge number of Assistant Superintendent Peter Reyes was acting for the period November 2nd, 2007 to April 28th, 2008, which would have covered the stipulated one year probationary period. It also referred to Departmental Order No. 117/08. There is hereto annexed and marked "E.C.1" and

“E.C.2” true copies of the said data record and Departmental Order No. 117/08 respectively.

6. This data entered in respect of Mr. Peter Reyes was erroneously recorded in his records as this was data concerning Assistant Commissioner Clyde Reyes. From the basic information retrieved, it would not have been possible to detect this error, since Mr. Peter Reyes was recorded and treated as having acted from the wrong date, that is to say from November 2nd, 2007 to September 8th 2008 when he was promoted to the substantive position of Assistant Superintendent. The period of his acting in that position together with his substantive holding of the position covered the one year probation period.”

- ii. Paragraph 8 of the Affidavit of James Philbert, Acting Police Commissioner, filed on the 9th March, 2009 which reads:

“I arranged a meeting with these officers on November 6, 2008 and advised them that they were not eligible because of their failure to satisfy the requirement of the 12 month probationary period. The Claimant would in fact have completed 11 months and 24 days of his probationary period by the date of the written assessment. I had sought and received legal advice on the requirement of the 12 month probationary period and based my decision on same. Further, my decision was not in respect of the Claimant alone but of all officers who fell short of the 12 month probationary period.”

THE EVIDENCE ILLICITED IN CROSS EXAMINATION

JAMES PHILBERT

- (i) The Claimant was invited to write the promotional assessment examination by means of a letter that was signed on behalf of the Commissioner of Police but without his knowledge and authorization.
- (ii) Soon thereafter Mr. Philbert was informed by the Human Resource Department of the Police Service that the Claimant and other officers were not eligible to write the promotional assessment examination because they had not completed their one year probationary period in the next higher office.
- (iii) Mr. Philbert thereafter sought legal advice on the issue of whether the Claimant and other officers should be allowed to write the examination notwithstanding the fact that they had not completed the one year probationary period referred to above. Mr. Philbert could not recall whether the legal advice was given either orally or in writing or indeed whether the request for such advice was made orally or in writing.
- (iv) The former Commissioner of Police could not produce the legal advice despite searches that had been undertaken for same. He, however, relied upon that advice in deciding that officers who did not complete the one year probationary period could not sit the assessment examination.
- (v) Mr. Philbert called a meeting to advise the Claimant and other officers of this decision.

- (vi) The decision to not allow the Claimant and other officers to sit the assessment examination was based on a policy that flowed from the application of the Police Service Regulations. At the time that this decision was made, Mr. Philbert was unaware of any other person who had been allowed to sit the said exam without completing the probationary period.
- (vii) Mr. Philbert identified one Mr. Calvin Bennett who was also not allowed to sit the probationary exam because he fell short of the probationary service requirement.

ERLA CHRISTOPHER

The following is a summary of Ms. Christopher's evidence from her cross examination:

- (i) Ms. Christopher supervises the department which is responsible for preparing the list of officers eligible to sit promotional assessment examinations. This list is then forwarded to the Commissioner of Police. She testified that the data entry section of this department was responsible for submitting the information that is used to compile this list.
- (ii) She said that human errors are sometimes made in the data entry process and that the data entry clerks, who were inexperienced, are in the habit of making errors. In this case she assumed that an error had

- been made, since she, as supervisor, did not check the information herself because she was also involved as a candidate in the promotional assessment exam.
- (iii) She acknowledges that the error “should have been picked up”; she went on to proffer that this error would have been difficult to detect by someone who was not familiar with, or trained in, the layout of the database.
 - (iv) She explained that data, which pertained to one Gilbert Reyes, Assistant Commissioner of Police, that was entered into Peter Reyes’ record that had the effect of taking Peter Reyes’ probationary service over the required one year period.
 - (v) She went on to explain that the officer responsible for gathering the data would most likely not have seen the second page of “E.C. 1” attached to her affidavit in which the error is clear. However, she admitted that the second page would form part of the database.
 - (vi) Ms. Christopher also testified that the badge numbers of high ranking officers are not used when searching for information on the database. The search would instead be conducted using the last name of the officers. She went on to suggest that this may have been the reason why the information pertaining to Gilbert Reyes was confused with that of Peter Reyes.
 - (vii) Ms. Christopher denied that the error was as a result of deliberate action; she gave as reasons for her belief that this was an honest mistake

- the inexperience of the data entry clerks, the fact that they regularly make mistakes, as well as her knowledge of how the Human Resource Department functions. She also gave as possible explanations for the error that occurred the fact that the data entry section is currently under staffed and the supervisor in charge of that department also had responsibility for “regular duties”.
- (viii) Significantly, Ms. Christopher also noted that the screen shots shown in “E.C.1” would not have been sent up to the Commissioner of Police but would have been used to compile the information that was given him.

ISSUE

- [13] The issue for determination by this Court is whether the decision of the Defendant in refusing to allow the Claimant to write the Written Assessment Examination is illegal, irrational and/or unfair in light of the new evidence of the promotion of Officer Peter Reyes.

ANALYSIS

- [14] I wish to reiterate at the outset that this matter was remitted by the Court of Appeal for reconsideration on the specific point of whether the fresh evidence of the Defendant’s promotion of Officer Peter Reyes - without his completion of the twelve (12) month probationary period - is capable of affecting the validity of the decision previously made by this Court.

- [15] It is the evidence of the Defendant that Officer Peter Reyes was only able to sit the Written Assessment Examination due to an administrative error. Erla Christopher, under cross-examination, explained that the information regarding Officer Clyde Reyes was inadvertently entered into the electronic record of Officer Peter Reyes. This had the effect of carrying Officer Peter Reyes' probationary service over the required twelve (12) month period and making him mistakenly eligible to sit the Written Assessment examination for promotion.
- [16] Erla Christopher acknowledged, under cross-examination, that this error "should have been picked up" but given the nature of the error - *i.e.* information stored by last names - and the fact that the data entry section is understaffed, it would have been difficult to do so. She vehemently denied that the error was a product of deliberate action but rather one of human error.
- [17] The Claimant has imputed that the promotion of Officer Peter Reyes is shrouded by misconduct on the part of the Defendant. This allegation is made with specific reference to his assertion that there has been a breach of his constitutional right to equality of treatment.
- [18] In **The Attorney General v Mohanlal Bhagwandeem**⁴, Kangaloo JA opined:

"It is appropriate to remember the warning of Sharma JA (as he then was) in Civ. App. No. 12 of 99 The Police Service Commission of Trinidad

⁴ Civ. App. No. 23/2001

and Tobago & The Attorney General of Trinidad and Tobago v Wayne Hayde (unreported) that: ‘A claim that a public authority has violated a citizen’s right to equal treatment is one that must be supported by cogent evidence’ ... because as the Learned Judge continued in that case: ‘It is of utmost importance for us to assume that those who hold high office would act with the greatest constitutional propriety. Were it otherwise, it would also be a recipe for disaster. It is expected that holders of high office (who after all in most instances are appointed by the President after consultation with the Prime Minister and the Leader of the Opposition – in other words, by the people of Trinidad and Tobago) would act with probity and rectitude at all times in the discharge of their function’.”

Further, in **Special Reserve Police v The Attorney General of Trinidad and Tobago**⁵, Moosai J opined:

“In coming to that decision in *Central Broadcasting Services Limited, Hamel-Smith* at para. 19 agreed with **Persaud JA in AG v KC Confectionary Ltd. (1985) 34 WIR 387 [CA]** that “proof of mala fides is not always necessary in claims under s. 4(d). At para. 25 his Lordship went on to state:

‘The requirement that an applicant prove mala fides as a prerequisite may be to place a fetter on the right itself. Discrimination can be practiced, and usually is, by stealth. That feature makes it difficult to discern particularly when the applicant is on the outside depending, so to speak, on the good faith and integrity of the decider on the

⁵ CV2003-03562, para. 11

inside. I agree with Persaud JA that where there is an allegation of mala fides then the applicant must prove it in order to succeed'."

[19] From a reading of the foregoing cases, it is clear that the burden of proving any allegations of *mala fides* on the part of the Defendant and/or its agents and/or servants rests with the Claimant. The Claimant, to my mind, has not produced any evidence to discharge this burden. The Claimant has alleged *mala fides* on the part of the Defendant without cogent and concrete evidence of same on a balance of probabilities.

[20] The Claimant has invited me to find on the totality of evidence that the reasons given for the error are not plausible, that such an error could not reasonably be made; that the only inference to be drawn is that the Commissioner wilfully deprived the Claimant of the opportunity to sit the examination. His decision was therefore unfair and amounted to unequal treatment.

[21] However, I accept the evidence of Mr. Philbert and Ms. Christopher that Officer Peter Reyes was allowed to sit the Written Assessment Examination only through human error and not as a deliberate act of discrimination and/or unequal treatment.

[22] Further, I am of the view that allowing Officer Peter Reyes to sit the Written Assessment has in no way affected the decision of the Defendant to prevent the Claimant from doing the same. It was only because of the electronic error and the mistaken belief that Officer Peter Reyes served the required probationary period that he was allowed to sit the Written

Assessment Examination. In any event, the prerequisite for Officer Peter Reyes to sit the Written Assessment Examination was completion of the probationary period, which the Claimant failed to satisfy at the material time. The Claimant cannot rely on what he has alleged as an “illegality” to entitle him to similarly sit the Written Assessment.

[23] In Gursharan Singh and others v New Delhi Municipal Committee and Others⁶, Singh J. opined:

“There appears to be some confusion in respect of the scope of Article 14 of the Constitution which guarantees equality before the law to all citizens. This guarantee of equality before the law is a positive concept and it cannot be enforced by a citizen or court in a negative manner. To put it in words, if an illegality or irregularity has been committed in favour of any individual or a group of individuals, the others cannot invoke the jurisdiction of the High Court or of this Court, that the same irregularity or illegality be committed by the State, or in an authority which can be held to be a State authority within the meaning of Article 12 of the Constitution, so far as petitioners are concerned, on the reasoning that they have been denied the benefits which have been extended to others although in an irregular or illegal manner. Such petitioners can question the validity of the order which are said to have been passed in favour of persons who were not entitled to the same, but they cannot claim orders which are not sanctioned by law in their favour on a principle of equity before the law.”

⁶ [1996] AIR 1175, SCC (2) 459

Further, in Central Broadcasting Services Limited, Sanatan Dharma Maha Saba of Trinidad and Tobago v The Attorney General of Trinidad and Tobago⁷, Warner JA opined:

“... the appellants cannot, in my view, rely on acts which they regard as irregular to establish a case for a grant of a license in light of the procedure established by the regulatory authority.”

Also, Kokaram J. in Romauld James v The Attorney General of Trinidad and Tobago⁸ opined:

“It would appear that the applicant in a discrimination case must have been asserting that a lawful right has been denied to him, while it has been conferred on others. It is doubtful whether the applicant can insist on an illegality being perpetuated even though others may have benefited from such an illegality.”

CONCLUSION

[24] In the circumstances, I hold that the fresh evidence adduced by the Claimant cannot affect the decision that I previously made in these proceedings since

- (i) it does not amount to proof of unequal treatment of the Claimant by the Commissioner of Police,

⁷ Civ. App. No. 16 of 2004

⁸ HCA No. 1112-2004

- (ii) it does not amount to proof of *mala fides* on the part of the Commissioner such as to vitiate his decision.
- (iii) the fresh evidence establishes on a balance of probability that Peter Reyes was allowed to sit the promotional examination solely as a result of administrative error.

[25] In the circumstances,

- i. The Claimant's case is dismissed;
- ii. I make no order as to costs on this application in the exercise of my discretion.

JOAN CHARLES

JUDGE