

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2012-04089

BETWEEN

KENNY GOPAUL

CLAIMANT

AND

THE PUBLIC SERVICE COMMISSION

DEFENDANT

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. Kenneth Thompson

For the Defendant: Mr. Russell Martineau S.C.
Leads Ms Allison Douglas
Instructed by Ms. Kerry Ann Oliverie

Date of Delivery: 19th February, 2013

DECISION

PLEADINGS

[1] On the 5th October, 2012, the Applicant filed an Application without Notice applying for Leave to make a claim for Judicial Review seeking the following reliefs:

- i. A Declaration that the decision of the Defendant's ("the Commission") failure to promote the Applicant to the office of Assistant Chief Fire Officer ("ACFO") while promoting another officer, to whom the Applicant was similarly circumstanced, contravened the Applicant's fundamental right to equality of treatment from a public authority in the exercise of a public function guaranteed by **SECTION 4(d)** of the **CONSTITUTION OF TRINIDAD AND TOBAGO**;
- ii. A Declaration that the aforesaid decision was unreasonable and, contrary to the rules of Natural Justice and **SECTION 20** of the **JUDICIAL REVIEW ACT**;
- iii. A Declaration that the Applicant had a legitimate expectation to be promoted to the office of ACFO by virtue of his performance, qualifications, fitness and seniority, and the aforementioned decision had violated and/frustrated that expectation;
- iv. An Order requiring the Commission to promote the Applicant to the office of ACFO, or alternatively, requiring it to consider the question of doing so;
- v. A Declaration that the decision of the Commission whereby it failed to invite the Applicant to be interviewed for promotion to the office of Deputy Chief Fire Officer ("DCFO") but so invited and interviewed other officers to whom the Applicant was similarly circumstanced, contravened his fundamental right to equality of treatment from a

public authority in the exercise of a public function, as guaranteed by **SECTION 4(d)** of the **CONSTITUTION**;

- vi. A Declaration that the Applicant had legitimate expectation to be invited by the Commission to be interviewed for appointment to the office of DCFO, by reason of his qualifications, seniority, fitness and performance, and the decision of the Commission in failing to so invite and interview the Applicant has violated and frustrated the said expectation;
- vii. A Declaration that the decision of the Commission in failing to invite and interview the Applicant as aforesaid was unreasonable, contrary to the rules of Natural Justice and **SECTION 20** of the **JUDICIAL REVIEW ACT**; and,
- viii. An Order requiring the Commission to invite the Applicant to be interviewed for the appointment to the Office of DCFO and to so interview him.

BACKGROUND

[2] The Applicant was enlisted as a Fire Fighter on the 1st February, 1980 and has served in various Divisions of the Fire Service, including the Northern, Central and Southern Division. He is currently in charge of the Southern Division.

[3] In 2009, while he held the office of Fire Station Officer, the Commission interviewed a number of Officers who also held that post, including him, in order to determine their suitability for promotion to the Office of Divisional Fire Officer. Based on the performances of the Officers at the said interview, an Order of Merit list was prepared by the Commission wherein Nayar Rampersad occupied the first position, the Applicant the second, William Shephard the third

and Roosevelt Bruce the fourth. The Applicant, along with Officers Rampersad, Shephard and Bruce were promoted to the office of Divisional Fire Officer.

- [4] In November, 2001, there were three (3) vacancies in the office of ACFO. Officer Rampersad was promoted to this office without conducting any interviews among the eligible candidates for such office, including the Applicant, or engaging in any other transparent process with a view to determining the suitability of officers for the office. The Applicant was not promoted to this office despite being second on the Order of Merit list.
- [5] Thereafter, in 2010, the Commission advertised the vacancy of DCFO and invited suitable applications from officers to fill same. The Applicant applied for the position, in addition to Officers Bruce, Rampersad, Dana Roach and John Springle. Officers Roach and Springle are junior to the Applicant.
- [6] On the 9th July, 2012, Officers Rampersad, Roach and Springle were interviewed for the position of DCFO while the Applicant was never interviewed for same nor did he ever receive a response to his application for the said position.
- [7] The Applicant contended that the course of conduct taken by the Commission is in breach of his fundamental right to equality of treatment, his right to Natural Justice and **SECTION 20** of the **JUDICIAL REVIEW ACT**. Further, he stated that by virtue of his fitness, qualifications, seniority and performance he had a legitimate expectation to be promoted to the office of ACFO and to be interviewed for the position of DCFO.

ANALYSIS

- *Whether there was delay in commencing proceedings with respect to the Applicant's promotion to the office of ACFO*

[8] The Commission argued that that the Applicant instituted these proceeding on the 5th October, 2012 which is in excess of the three (3) months after which the decision was taken on the 18th October, 2011 to promote Officer Rampersad.

[9] The Applicant contended that it was only on the 18th October, 2012 – after the commencement of these proceedings – that the promotion of Officer Rampersad was published in No. 13/2012 for the information of the general membership of the Fire Service. Further, that it was only through “unofficial sources” that the Applicant became aware of the promotion of Officer Rampersad before it was published. Therefore, the question of delay does not arise.

[10] Further, the Applicant’s Attorney-at-Law wrote to the Commission on the 24th July, 2012 regarding the failure of the Applicant to be interviewed for the position of DCFO. The Commission acknowledge receipt of the letter on the 28th September, 2012 and stated that the matter was “under urgent consideration” and an appropriate response would be forwarded at a later date. It was not until by letter dated the 18th October, 2012 – after the commencement of these proceedings – that the Commission invited the Applicant to be interviewed for the office of DCFO.

[11] **SECTION 11** of the **JUDICIAL REVIEW ACT** provides:

“(1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose

unless the Court considers that there is a good reason for extending the period within which the application shall be made.

(2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considered relevant."

Further, **PART 56.5** of the **CIVIL PROCEEDINGS RULES 1998** addresses delay in making an Application for Leave and provides:

"(1) The judge may refuse leave or grant relief in any case in which he considers that there has been unreasonable delay before making the application...

(3) When considering whether to refuse leave or grant relief because of delay the judge must consider whether the granting of leave or relief would likely to –

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration."

[12] I am of the view that time did not begin to run on the 18th October, 2011, as alleged by the Commission, when the decision was made at a meeting of the Commission to promote Officer Rampersad to the office of ACFO. The Applicant was not present at such meeting and he only became aware of such a decision through what one might term "office gossip". There was no official notice of the

promotion of Officer Rampersad until the 18th October, 2012 when it was published in the Fire Service Order.

[13] Further, it was not until the Applicant was denied the opportunity to be interviewed for the post of DCFO that he quite reasonably, in my view, consulted an Attorney-at-Law who sent a letter to the Commission on the 24th July, 2012. When favourable response was forthcoming, these proceedings were instituted on the 5th October, 2012.

[14] Accordingly, time began to run from the 28th September, 2012, when it was made known to the Commission that the Applicant was twice denied the opportunity to be considered and/or interviewed for positions for which he was suitably qualified for. However, after no further response was forthcoming, the Applicant instituted these proceedings on the 5th October, 2012. In **R v London Borough of Harrow ex p. Carter**¹, the court held that it would be premature to commence Judicial Review Proceedings where the possibility of a resolution between the parties “remained alive”. Therefore, it was only practical that the Applicant waited for a possibly favourable response from the Commission before instituting proceedings, which he did.

[15] Further, in **R v Commissioner for Local Administration, ex. p. Crydon London Borough Council**², Woolf LJ opined that the delay provisions should not be construed technically and strictly against an applicant who has behaved sensibly and reasonably in the circumstances of the case. Accordingly, I hold that there was no delay in making this Application.

¹ (1994) 26 H.L.R. 32

² [1989] 1 All E.R. 1033, 1045

- *Whether the Commission's failure (i) to promote the Applicant to the office of ACFO and (ii) to invite the Applicant to be interviewed for promotion to the office of DCFO was unreasonable, unfair and in breach of the Applicant's fundamental rights and to natural justice*

[16] The Commission contended that the Applicant was not a true comparator to Officer Rampersad, as the latter was senior to him and as such was promoted to the office of ACFO ahead of him. Therefore, the Applicant was not treated unfairly, unreasonable or in breach of his fundamental rights and to natural justice.

[17] Further, the Commission stated that at its meeting of 16th October, 2012 it considered the representations of the Applicant and decided that the Selection Board be reconvened and the Applicant be invited to interviewed for the office of DCFO. This, the Commission, argued illustrated that the Applicant was not discriminated against and/or treated unequally in breach of his fundamental rights.

[18] I will firstly deal with the issue of the Commission's failure to promote the Applicant to the office of ACFO. The Commission gave no reason, except that Officer Rampersad was senior to the Applicant, as to why the Applicant was not considered for this office despite there being three vacancies at the material time. If, as the Commission contended, Officer Rampersad was promoted in accordance with the Merit List, where he placed No. 1 then the Claimant who was placed No. 2 and Officer Shepherd who was placed No. 3 should have been promoted to fill the remaining two (2) vacancies for the said office. However, this was not done and no plausible reason was given for the failure to do so. Further,

by virtue of the Merit List, it is clear to me that the Claimant was a proper comparator and similarly circumstanced to Officer Rampersad.

[19] With regard to the failure of the Commission to invite the Applicant to be interviewed for promotion to the office of DCFO, again no reason was put forward for omitting to interview the Claimant yet interviewing other officers who were less senior and/or less qualified than him.

[20] In my view, the course of conduct adopted by the Commission – without reason – can arguably be deemed to be *Wednesbury* unreasonable³. The Applicant has made out an arguable case with a realistic prospect of success of that the Commission treated the Applicant unfairly and unreasonably by failing to promote him and interview him for positions for which he is qualified. The fact that they are now seeking, through letter dated the 18th October, 2012, to interview the Applicant for the office of DCFO to my mind supports an arguable case that he was suitable and qualified for the position and should have been considered by the Commission.

[21] The decision now taken by the Commission, some three (3) months after the other officers were interviewed for the office of DCFO is not remedial as the Commission has not challenged the fitness, experience or qualifications of the Applicant to assume the offices of ACFO and DCFO. Therefore, there is seemingly no reason why the Applicant was not promoted to the office of ACFO or previously interviewed on the 9th July, 2012 for the office of DCFO.

[22] Based on the above, the Applicant has made an arguable case with a realistic prospect of success that he had a legitimate expectation both to be promoted to

³ Lord Greene in Associated Picture House v Wednesbury Corporation [1948] 1 KB 228, “It is true that if a decision of a competent authority is so unreasonable that no authority could ever have come to it, the Court would interfere.”

the office of ACFO by virtue of his position on the Merit List and to be interviewed for the office of DCFO.

CONCLUSION

[23] In the circumstances, I make the following orders:

- i. Leave for Judicial Review is granted;
- ii. The Respondent to pay the Applicant's costs in the application, to be assessed in default of agreement.

Joan Charles

Judge