

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2017--01389

**IN THE MATTER OF THE FUNDAMENTAL RIGHTS AND FREEDOMS GUARANTEED BY THE
CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO (“THE CONSTITUTION”) ENACTED AS
THE SCHEDULE TO THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ACT, CHAPTER
1:01**

AND

**IN THE MATTER OF AN APPLICATION FOR REDRESS PURSUANT TO SECTION 14 OF THE CONSTITUTION
OF THE REPUBLIC OF TRINIDAD AND TOBAGO FOR THE CONTRAVENTION OF SECTION 4 OF THE SAID
CONSTITUTION IN RELATION TO THE APPLICANTS**

BETWEEN

NADIA PHILLIPS

ZORISHA HACKETT

JARED PRIMA

DEVON OLIVIER

REAH BARTON

KION ORR

DEIDRE ARCHIE

ADEKA DANIEL

DANIEL LYONS

CAMESHA PHILLIPS

AISHA ANDERSON

ROMANIE WILSON

KRISTAL GRIFFITH

KWASI BAPTISTE

Claimants

AND

THE TOBAGO HOUSE OF ASSEMBLY

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before The Honorable Justice David C. Harris

Appearances:

Mr. Martin George **for the** Claimants

Mr. Russell Martineau S.C. instructed by Ms. Akkianne Duke **for the** Defendants.

JUDGMENT

INTRODUCTION

1. There are fourteen applicants in this matter, all of whom are contract employees under the First Defendant Tobago House of Assembly (“**THA**”) and employed as “Educators.” They seek redress pursuant to s. 14 of the Constitution of the Republic of Trinidad and Tobago for the contravention of s. 4 of the said constitution – fundamental rights and freedoms. The Second Defendant is joined by reason of the State Liability and Proceedings Act Chap. 8:02.

THE CLAIMANTS’ CASE¹

2. The Claimants are teachers within Trinidad and Tobago, employed as “Educators” on contract by the THA. They are not permanent teachers, although by their qualifications they satisfy the requirements to be employed as permanent teachers and perform the same roles, functions and duties as their permanent counterparts. Further, their terms and conditions of employment vary from those of permanent teachers who are employed through the Teaching Service Commission (also referred to herein as the “**Service Commission**” or “**Commission**”) and whose terms and conditions and benefits are determined by the Chief Personnel Officer through the collective bargaining process. The Claimants therefore claim inequality of treatment by the THA, they being similarly circumstanced as teachers employed through the Teaching Service Commission.

¹ Substantially reproduced and summarized from the Claimants’ affidavits and submissions

THE FIRST DEFENDANT'S CASE²

3. The First Defendant states that because the Claimants are teachers employed on contract as “Educators,” they are not appointed by the Teaching Service Commission. Further, the teachers, although apparently qualified, must be assessed and interviewed by the Ministry of Education before being placed on a merit list and await a vacancy on the Teaching Service Establishment. The First Defendant is not the statutory body responsible for carrying out the assessment, placing on the merit list or in any event, making such permanent appointments.

THE SECOND DEFENDANT'S CASE

4. There were no pleadings, affidavits, or submissions, filed on behalf of the Second Defendant.

ISSUES TO BE DETERMINED

5. Having regard to the pleadings and submissions made by the Claimants and First Defendant, the following issues have been identified for determination by the court:
 - a) Whether the Claimants as “Educators” on contract with the THA and not appointed by the Teaching Service Commission, permanently or otherwise, are entitled to enjoy the same terms, conditions and benefits as teachers permanently appointed by the Teaching Service Commission³.
 - b) Whether the Claimants are similarly circumstanced and should be entitled to enjoy the same benefits as the teachers employed under the Teaching Service Commission.
 - c) Whether the Claimants, in all of the circumstances, are treated unfavourably and/or unequally and/or differently, pursuant to s. 4 of the Constitution and are entitled to redress pursuant to s. 14 thereof.

² Substantially reproduced and summarized from the First Defendant's affidavits and submissions

³ A preliminary fact in issue here is whether the Claimants or any of them knew at the relevant times that they were being contracted/or appointed on the permanent establishment by the THA as opposed to the Teaching Service Commission.

THE LAW

6. As stated in their submissions and pleadings, the Claimants rely on the following sections of the Constitution:

4. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

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.

7. The Claimants also placed emphasis on the authorities of ***Anissa Webster and Ors. v Attorney General of Trinidad and Tobago***,⁴ ***Mohanlal Bhagwandeem v Attorney General of Trinidad and Tobago***,⁵ and ***Sanatan Dharma Maha Sabha v Attorney General of Trinidad and Tobago***⁶ in support of their case.

⁴ [2015] UKPC 10 at para 24

⁵ [2004] UKPC 21

⁶ HCA No. 2065/2004

8. For the First Defendant, certain sections of the Constitution and the Tobago House of Assembly Act chap. 25:03 (the “**THA Act**”) are also cited, along with various authorities:

Section 125 of the Constitution, which states:

“Subject to the provisions of this Constitution, power to appoint persons to hold or act in the public offices in the Teaching Service established under the Education Act, including power to make appointment on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices and to enforce standards of conduct on such officers shall vest in the Teaching Service Commission”

Section 25(2)(b) of the THA Act:

*“For better performance of its functions, **the Assembly is hereby empowered to do all such acts and take all such steps as may be necessary** for, or incidental to the exercise of its powers or **for the discharge of its duties** and in particular the Assembly may-*

(a).....

*(b) **enter into such contracts** as it deems fit for the efficient discharge of its functions; [Emphasis of the Defendant]*

9. In relying on these sections of the Constitution and the THA Act, the Defendant further submits:

The Education Act Chap 39:01 by virtue of section 53 establishes a Teaching Service for Trinidad and Tobago which is classified in accordance with the Classification of Offices set out in the First Schedule and the Third Schedule.

Under the Tobago House of Assembly Act Chap 25:03 section 25 deals with the functions of the Assembly. Section 25 (1) speaks of the Assembly’s responsibility in relation to Tobago of matters set out in the Fifth Schedule. Section 25 (2)(b) goes on to give the first Defendants the power to enter into contracts.

It is evident that the only form of employment or recruitment that can be undertaken by the first Defendant is through a contractual basis. Any appointment or engagement in a permanent position within the Public Service or the Teaching Service is catered for under the Constitution. The Education Act goes on to state the names of the respective offices

*that has been classified for the Teaching Service. There was no such classification of offices established for the Tobago House of Assembly when recruiting on contract. So from the onset the Claimants' recruitment on contract is a significant difference that should be noted in comparison to the permanent teachers.*⁷

10. The authorities cited in furtherance of the Defendant's case are ***Tobago House of Assembly v Attorney General of Trinidad and Tobago***,⁸ ***Maruko v Versorgungsanstalt de Deutschen (Case 267/06)***,⁹ and ***Mohanlal Bhagwandeem*** (supra), also cited by the Claimants in support of their case.

EVIDENCE

11. There is an abundance of evidence in this matter. The evidence from the Claimants however is directed, in this court's view, substantially to the establishment of the similarities between the roles and functions of the teachers on contract with the THA and those on the permanent establishment (or on contract) with the Service Commission. Further, much of the evidence is concerned with what in essence are breach of contract claims in relation to outstanding gratuity payments. That the contract teachers work side by side and perhaps even entirely interchangeably with those on the permanent establishment/Service Commission is reflected extensively in the affidavit evidence before the court. There is no sufficient evidence from any source, to contradict this narrow and discreet assertion of the Claimants.
12. The Claimants each narrate certain facts peculiar to their individual experience. In each case however, their accounts of the procedure for engagement as teachers/educators either on contract with the THA, or, engagement by the permanent establishment, appears to be informed by their expectations from wheresoever derived and not necessarily moored in the law or the actual established procedure in practice. In fact, the tenor of the affidavits suggests that the Claimants are committed to the position that their benefits not only ought to be, but were in fact substantially, if not entirely, that which applied to the permanent/Service commissioned teachers as adjusted from time to time. The affidavit of Mr Raye Sandy, Mrs

⁷ See s. 63(1)(c) Education Act Chap 39:01

⁸ CV2013-00153 Kangalo J.

⁹ [2008] ECR I-1757 at paras 63-73

Nadja Harnanasingh, Mrs Elsa McCardy-Clarke and that of Martha Clarke-Jack, Human Resource officer II, of the THA, in the court's view has set out dispassionately and accurately the established procedure required to be complied with by the parties¹⁰. Mrs Martha Clarke-Jack's evidence along with the other said deponents, is internally consistent, follows a procedural logic and contains fine detail, all consistent with a fundamental understanding and accurate description of the employment engagement process. There is no sufficient evidence to contradict her assertions nor is there any sufficient evidence to contradict that of the other defendant witnesses on the same point.

13. Suffice it to say, the court looks to the evidence directed to the fundamental issue here; issue "2" above; *"Whether the Claimants are similarly circumstanced and should be entitled to enjoy the same benefits as the teachers employed under the Teaching Service Commission"*.
14. The upshot of the evidence for the Claimants on this all-important issue is that in this instance, the suitable comparators would be the pool of permanent teachers employed by the Teaching Service Commission, teaching in schools throughout Tobago. Further, there is also a second potential pool of comparators, that being contract teachers in Trinidad who according to the case for the Claimants, appear to enjoy more favourable benefits than Tobago contract teachers¹¹.
15. The terms and conditions of the teachers appointed by the Service Commission and those of the contract workers are set out in the evidence. This evidence is not contested by the Defendant. Notwithstanding some benefits of the THA contract workers similar to that of their counterparts or arguably more favourable than that of the other classes of teachers; such as the gratuity payments and school vacation times etc; that the terms and conditions of the teachers appointed by the Commission are more favourable than that of the THA contract workers, are for the most part sufficiently proved on the evidence. The disparity between the Commission's contract teachers in Trinidad with that of those in Tobago is less clear. In any event – in prematurely introducing now, the main theme of this court's decision - the Trinidad contract teachers are not contracted by the THA.

¹⁰ See also the Affidavit in response filed June 6, 2017 by Raye Sandy, Chief Administrator of the THA in Tobago.

¹¹ See the written closing submissions of the Claimants; see also, for example; exhibit 'KB1' of Kwasi Baptiste and indeed all the affidavits filed in support of the claim.

16. The Claimants' testimony do not establish that they are employed by the Trinidad and Tobago Teaching Service Commission on the permanent establishment.
17. Every Claimant has asserted that he/she were engaged to teach by the THA, under the impression that they were employed on the permanent establishment of the teaching service. The evidence of the Claimants suggest that the First Defendant did not inform them at the time of engagement of the nature of their engagement for their signature. They testify that for the most part it was at a later date, when to their surprise, a contract with the THA was proffered to them for signing and without affording them the opportunity to negotiate their terms.
18. The court notes that the impression that the Claimants might have had as to their individual circumstances and status of employment is not the sole determinant of what in fact their legal status was. As a starting point let me say that those that signed more than one contract at different times cannot reasonably argue that upon signing at least the second contract, they were still not aware of it contents; that is, that they were not engaged by the Service Commission but separately engaged by the THA on contract on the terms and conditions set out therein. But, even those that allege - and I accept their evidence on the following narrow point only - that they were called upon to sign successive contracts for successive periods for which they had already worked, all at the same time, in the courts view, they still have not persuaded the court that they were ignorant of the fact that they were being hired by the THA (with its attendant terms and conditions) and not the Teaching Service Commission. Further still the court is not persuaded that the Claimants were ignorant of the fact that the procedure for appointment to a permanent position by the said Commission was a separate and independent process.
19. The evidence in opposition to the claim is pellucid. The Claimants were informed of their circumstances. Indeed, even the Claimants refer to their objection over the years to being deprecatingly referred to as "Educators" as opposed to "Teachers". The distinction was known to the Claimants. From the very first 'pay-check'/pay slip it would have been clear that they were not on the same terms as that which attended the permanent establishment teachers. Further, the logic in the argument of the Claimants as to their ignorance of the facts and their legal status, in all the circumstances, is incoherent and inconsistent with their elevated education and training. Finally, on this point, quite apart from those observations and findings above, it would be entirely missing a very salient factor; that given the size of Tobago's

population and the size of the THA and the cadre of teachers, both appointed by the Service Commission and on contract working side by side in the same institutions, it is highly unlikely (allowing for the possibility to the contrary) that any one of the Claimants would have long, or at all, gone on without coming to the knowledge of the two parallel systems of engagement and the disparity between them.¹²

20. I accept the First Defendant's evidence of the structural differences in the system that hires the contract teachers and that which provides for the permanent appointments and the synergy between the two. The allegations made by several Claimants of the First Defendant's failure to facilitate them in submitting their interests, requests and supporting documents and the First Defendant's requests to the Commission, cannot be sustained. The Claimants have for the most part concluded this 'failure' on two bases; firstly and erroneously it appears, that the First Defendant is duty bound – contractually or by law - to control and facilitate the process though to the Commission and the appointment, beyond the act of submitting its 'manpower' need to the Commission. Secondly and following from the first, that because of the painfully slow responses from the Commission for appointing teachers nationally, that the First Defendant must have failed to do something they are required to do. This court does not accept that the THA is required to administer and control the Claimants' individual applications entirely through to the Commission and subsequent appointment to the extent alleged by the Claimants. But even if they were, the allegation that the First Defendant had defaulted somewhere in the process is substantially speculative, not sufficiently particularized, and met with the clear assertion by the evidence of the First Defendant that it did not default. Indeed, notwithstanding the fact it does not have the obligation to act as alleged by the Claimants, the THA's evidence – and accepted by the court – is that it has indeed furthered the process and done all that it could do to facilitate and further the Claimants' applications for appointment to the permanent establishment by the sole authorized body; the Teaching Service Commission. I accept this evidence from the First Defendant as unassailable.

21. The evidence is clear. The Claimants are employed by the THA on contract and not by the Service Commission either on contract or on the permanent establishment of the teaching service. The Claimants complain of not having been afforded the opportunity to negotiate their

¹² Further still, this court accepts the reasoning of the First Defendant on this point as expressed in its written submissions filed in this matter.

contract for none of them were ever proffered the contract prior to taking up the position. Further, the Claimants contend that when well into their engagement they were proffered the contract for the period or previous periods, they were not given the option to negotiate and in any event they felt individually fearful that their employment would have been terminated or a renewal would have not been forthcoming.

22. The court is not entirely sure what the purpose of this evidence is for, but notes that the ultimate contractual terms and conditions accepted by parties are influenced by the relative bargaining strengths of the respective parties. Either party is free to walk away from the contract. The Claimants were free to walk away from the contract. No evidence has been put before the court of coercion. No evidence has been put before the court that the Claimants attempted to formally counter-propose with different terms and conditions acceptable to them. The upshot of the evidence gleaned by the court, from the Claimants, is that they, at the very least, acquiesced. In this reasoning I have not missed the point – which I have addressed and rejected above - made by several of the Claimants, that at the beginning they were not aware that they were being engaged on contract.
23. The Service Commission is notoriously known to be very long in making appointments to the permanent establishment or indeed temporary or contractual appointments. This fact is borne out in any event, in the saga of each of the Claimants in this case. It is not being alleged nor has it been proved that other (non-parties) THA contract teachers 'jumped' the que as it were, to get permanent Commission appointments ahead of the Claimants. The THA has stepped in under its general powers to enter into contracts for the *"...better performance of its functions..."* The evidence of the separate engagement streams of the THA contracts and the Service Commissions permanent or temporary appointments and the these separate authorities that are constitutionally authorized to engage and/or appoint respectively is abundantly set out in the evidence in a combination of the evidence of both the Claimants and Defendant. This is even more pointed in the evidence of the First Defendant. To state the conclusion on the evidence ever so briefly: the THA identifies and selects the teachers on contract along with the terms and conditions of the contract and the Services Commission assesses, processes and appoints those on the permanent establishment. There is some overlap in function when the THA refers the assessment of the status of the academic qualifications to a department of the said Commission. The evidence also supports the position that the remuneration package of the contract teacher

is broadly 'pegged' to that of the Service Commissions appointees. This court does not accept as is alleged by the Claimants that the remuneration package is in essence tied to that of the service commission package. The reality is that it is in fact not so tied, hence, in part, why the claimants are before the court. It appears to the court that if the THA is going to succeed in attracting qualified teachers the remuneration package would need be a competitive one in relation to the market place – i.e. the Commission's package for permanent teachers (or the private schools for that matter). Further, having regard to the evidence of the THA contracting with the teachers; the source of the funds to pay the contract teachers and the legislative provision that allows for such a contract, the Claimants have not put sufficient evidence before this court to establish the connection between the Service Commission and the THA contract.

24. There is an abundance of evidence in support of several of the Claimants' allegations that, sadly, they have not been paid their gratuity for varying periods. There is evidence from several Claimants, albeit somewhat inconclusive in relation to several parties having regard to the assertions of: Mr Raye Sandy at para 27 of his affidavit; that of Mrs Nadja Harnanasingh at para 5 thereof in relation to Mrs Adeka Daniel specifically; and Mrs Martha Clarke Jack at para 41 in relation to the post 2016 period, with respect to certain claimed gratuity payments. The First Defendant's evidential response to the gratuity claims is not robust at all. That several Claimants are owed gratuity, based on their actual contractual salaries (not their claimed Service Commission appointee's salaries) is hardly in dispute on the evidence¹³. Some reconciliation of the figures may have to be done, but that is largely a matter of mathematics it appears.

ANALYSIS AND FINDINGS

25. This case turns on the definition and conclusions with respect to the concept of "similarly circumstanced". What amounts to being similarly circumstanced, and are the THA contract teachers' comparators and similarly circumstanced to the Commission appointed teachers such that the constitutional provision is evoked? The short answer to this question is No, the THA contract teachers are not similarly circumstanced and are not comparators with the Service Commission's permanent teachers nor the Commissions contract teachers.

26. In Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago [2004] UKPC 21, Privy Council Appeal No. 45 of 2003 (Bhagwandeem) the Privy Council indicated what must be proved

¹³ Save for a part of that of the First Claimant it appears re: sick leave issues.

to constitute infringement of the section 4(d) right. At paragraph 18 it was stated: "*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...*"

27. The court's conclusion on this point is that the THA cannot put the Claimants in the position that they claim, for that is the sole purview and authority of the Service Commission, an entirely different body than that of the THA. There is no evidence before this court that the THA can supplant the processes laid down by the constitution itself and then by the Commission, for the appointment of teachers, including for instance the preparation of a merit list, the management of such merit list, the assessment of the academic qualifications, the Commission's own interview process and so on. It probably would not be disputed that teachers contracted in a private educational institute with similar teaching functions, educational qualifications and hours or work etc cannot claim by virtue of that, to be similarly circumstanced and a comparator with the Commission's teachers in the State schools. Similarity of function, qualifications and perhaps most terms and conditions, is not sufficient. Like the private school teachers, the THA teachers are hired and contracted by a different contractor than the Commission.
28. Further still, this court, on the evidence does not accept the Claimants' contention that the THA failed to facilitate the process in such a way so as to ensure the Commission's appointment of the Claimants/Applicants. The allegation is not proved. The allegation is best levelled at the Commission itself. To be clear, no action has been brought here, directed to the Commission.
29. The claim by way of a "Constitutional Motion" was filed on the 21st April 2017. It, in great detail, sets out the components of the claim. The claim is centered on a breach of the Claimants' rights to equality of treatment as expressed in Section 4(d) of the Constitution of Trinidad and Tobago. There is no evidence, nor is there any attempt to lead evidence of any THA contract teachers being hired on more favourable terms than that of the Claimants.
30. The Claimants contend in this instance, that the suitable comparators to the THA contract teachers would be the pool of permanent teachers employed by the Teaching Service Commission and teaching in schools throughout Tobago. The Claimants also contend that there is a second potential pool of comparators, that being contract teachers in Trinidad, who appear to enjoy more favourable benefits than Tobago contract teachers. This court disagrees. The

permanent teachers employed by the Commission are not suitable comparators and are clearly differently circumstanced as set out above. The THA is a different employer governed by different legislative moorings. Secondly, the Trinidad contract teachers are also not suitable comparators and indeed are differently circumstanced. As pointed out earlier, they are not contracted by the THA. Further still, the Claimants have not shown that the Claimants, like the Trinidad contract teachers (if that is what is being contended at all), are contracted by the Service Commission.

31. Somewhat casual reference has been made in the claim form to the THA “as *agent for the State of Trinidad and Tobago*”. Indeed it is in several respects, perhaps. However, the fact has not been fleshed out, pursued or established in any event, that the THA was agent for the Commission in all its facets of operation so as to ascribe to the THA the authority to ultimately appoint any of the Claimants as Service Commission’s contract teachers or to the permanent establishment of the teaching service.

DISPOSAL

32. The Claimants have asked for a declaration that the failure and/or refusal of the First Defendant as agent for the State of Trinidad and Tobago to pay the Claimants’ outstanding gratuities “...*earned as Contract Teachers (Educators) employed in Tobago as opposed to...*” This court does not accept that the Claimants were employed by the Service Commission. They were employed by the THA under a discreet contract. The Claimants are entitled as of right to the payment of their gratuities earned and have claimed its payment under para 9 of the Motion.¹⁴ The payment of earned gratuities to some teachers and the failure to pay others is a section 4(d) contravention of their rights thereunder. It might well be that by the time this decision is delivered the gratuity claims would have been settled.

33. Save for the gratuity claims, the claim is substantial unproved however.

34. The gratuity claim is substantially successful. The court notes that the circumstances of this case with respect to the failure to pay the gratuities on time or at all, approaches perilously close but falls short of that which supports Exemplary Damages.

35. There is no case made out that affects the Second Defendant.

¹⁴ The other nine reliefs sought are not sustainable.

ORDER

36. For the reasons provided above, IT IS HEREBY ORDERED:

- i. The case against the First Defendant is substantially dismissed save for “ii – iv” below;
- ii. It is declared that the failure and or refusal of the First Defendant to pay the Claimants, any or some of them, the said Claimants’ (any or some of them) outstanding gratuities earned as THA Contract Teachers (Educators) employed in Tobago amounts to a contravention of the Claimants’ rights to equality of treatment from any public authority in the exercise of any function as expressed in Section 4(d) of the Constitution of Trinidad and Tobago;
- iii. It is declared that the failure and or refusal of the First Defendant to pay the Claimants, or any of them, the said Claimants’ outstanding gratuities earned as THA Contract Teachers (Educators) employed in Tobago also constitutes a breach of the Claimants’ rights to enjoyment of property as set out in section 4(a) of the Constitution of Trinidad and Tobago;
- iv. The First Defendant by this order of Mandamus is compelled to immediately pay all outstanding monies and/or gratuities lawfully due and owing to the Claimants;
- v. That the other substantive reliefs claimed are dismissed in their entirety;
- vi. Interest at the rate of 2.5% per annum on the gratuity and/or monies due and owing to the Claimants from the date of the filing of the Claim to the date of this judgment;
- vii. Statutory interest at the rate of 5% per annum on the gratuity and/or monies due and owing to the Claimants from the date of this judgment until full satisfaction.
- viii. That each part to bear its own Costs.

DAVID C. HARRIS
HUGH COURT JUDGE
JANUARY 9TH, 2020