

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE  
San Fernando**

**Claim No. CV 2016-01460**

**Between**

**Bisnath Maharaj**

**Claimant**

**And**

**The Attorney General of Trinidad and Tobago**

**Defendant**

**Before the Honourable Madam Justice Donaldson-Honeywell**

Delivered on 7th May, 2019

**Appearances**

Mr. Anand Ramlogan, Mr. Gerald Ramdeen, Mr. Jared Jagroo  
and Mr. Douglas C. Bayley, Attorneys-at-Law for the Claimant

Mr. Douglas Mendes, Mr. Michael Quamina, Ms. Kristal Madhosingh,  
Ms. Kadine Matthew and Mr. Vincent Jardine, Attorneys-at-Law  
for the Defendant

**Ruling**

**I. Introduction**

1. The present ruling is in respect of the Defendant's Notice of Application filed on 8 February, 2019 which seeks the permission of the Court to cross-examine the Claimant on the following paragraphs of his affidavits:

- Affidavit of Bisnath Maharaj filed on May 3rd 2016:
  - Paragraphs 11, 12, 24, 25, 26 and 27 – On the issue of Damages: terms and conditions of employment and in particular the Claimant's remuneration package.

- Affidavit of Bisnath Maharaj filed on October 16th 2018:
  - Paragraphs 3, 4 and 5 – On the issue of Damages: terms and conditions of employment and in particular the Claimant’s remuneration package and his entitlement to gratuity.
  - Paragraphs 12 to 16 and 18 to 28 – These paragraphs are in direct contest to the affidavit of George Robinson filed on behalf of the Defendant setting out the “catalogue of concerning behaviours which occurred during the period when the Claimant was the Agency’s Director”.

## **II. Background**

2. The Claimant, by Fixed Date Claim Form filed on the 3rd May 2016, seeks the following relief:
  - i. A declaration that the claimant’s right to the protection of the law in accordance with Section 4 (b) of the Constitution has been violated and breached;
  - ii. A declaration that the claimant’s rights to not be deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations in accordance with Section 5 (2) (e) of the Constitution has been violated and breached;
  - iii. Damages including vindicatory damages;
  - iv. Costs; and
  - v. Such further relief orders and directions or writs as the Court might consider just and/or appropriate as the circumstances of the case warrants.
3. The Claimant summarises its constitutional claim in its submission as follows:
  - a) The SSA is established by Section 3 (1) of the Strategic Services Agency Act, Chapter 15:06. This subsection provides that the Agency shall consist of a Director and the Employees of the Agency.

- b) By Section 4, the Director shall be appointed by the President for a term not exceeding five (5) years terminable at any time and shall be eligible for reappointment at the expiration of the term.
  - c) On the 13th November 2015, the Minister of National Security wrote to the Claimant informing him that, by Instrument dated the 11th November 2015, His Excellency the President had revoked his appointment pursuant to Section 4 (1) of the Act, with effect from the 13th November 2015.
  - d) It is an undisputed fact that the Claimant was not provided with any opportunity to be heard nor was he provided with any reasons for his termination.
  - e) As such, the Claimant contends that under Section 4 (b) of the Constitution, he enjoys the right to protection of the law, including the right to natural justice.
  - f) The Claimant further contends that he had a right as a matter of due process, natural justice and procedural fairness to be given a fair hearing by the Cabinet before it decided to advise His Excellency to revoke his appointment and/or His Excellency the President before any decision was made whether or not to terminate his appointment as Director [S.5(2)(e)].
  - g) Further, contrary to the principles of natural and procedural fairness, neither the Cabinet nor His Excellency the President offered the Claimant an opportunity to be heard or a fair hearing prior to making the decision to terminate.
4. Parties filed affidavits in relation to the claim and the Defendant thereafter filed an application to cross-examine the Claimant on the specific paragraphs outlined above.

### III. Law and Analysis

5. As submitted by the Claimant, cross-examination in judicial review or constitutional claims is a rare event. Bereaux J (as he then was) in **HCA NO. 1066/99 In the matter of an Application by the Chairman, Alderman, Councillors and Electors of the Region of Tunpuna/Piarco** explained at page 33:

*“...Cross-examination in cases of judicial review is rare. The Court is normally required to resolve the issues on the affidavit evidence. In O’Reilly v Mackman 1982 AC 237 Lord Diplock said at page 282 thus:*

*... “the grant of leave to cross-examine deponents upon applications for judicial review is governed by the same principles as it is in actions begun by originating summons; it should be allowed whenever the justice of the particular case so requires.””*

6. The law on this area is also neatly encapsulated in the decision of **Mr Justice Robin Mohammed in Pamela Hunt v Jennifer Daniel and Others CV 2014 -02496**. The Claimant cites paragraphs 21 to 24 of the decision as follows:-

*“[21] The authorities submitted by both parties make it clear that cross-examination in judicial review proceedings is rare and will only be allowed if there is a dispute on a critical factual issue and it is necessary to resolve that issue by cross-examination.*

*The local case of Gopichand Ganga and Ors v Commissioner of Police referred to the Court of Appeal decision of Patrick Manning v Sharma which stated that cross-examination in judicial review proceedings would be allowable if:*

- i. There are glaring omission which amount to a failure to observe the duty of frank disclosure of a party in judicial review; and/or*
- ii. There needs to be a resolution of disputes of fact which is necessary for determining jurisdiction to grant judicial review relief.*

*[22] The English Court of Appeal in Jones & Jones v Secretary of State for Wales stated that cross-examination would be allowed when the justice of the case requires and the decision whether justice so requires is a matter for the discretion of the judge.*

*In Jones supra, the case of George v Secretary of State for the Environment was cited in which Forbes J stated:*

*“However, where you have a complete conflict over a question of fact, and it is accepted that the case would turn on whose version is to be accepted, then it does seem that justice can only be done by allowing cross-examination.”*

[23] *Balcombe L.J. in Jones, however, warned of the dangers of too frequently allowing cross-examination in judicial review matters:*

*“While there is jurisdiction to order cross-examination in such proceedings as this, it is to be exercised extremely sparingly, only where the justice of the case requires it. One of the principal reasons for this is if it is sought to cross-examine an inspector or a magistrate, it is, in general, undesirable that such application should be acceded to because inspectors and magistrates occupy, in one case, quasi-judicial, and, in other, judicial office. There are great risks and dangers in bringing about a state of affairs where officers of that kind may be required to justify what they have said in later proceedings in the witness box. The Court would only accede to an application of this kind if the justice of the case so compellingly pressed for that result that there was no proper alternative.”*

[24] *In analyzing the application for Zorisha to be cross-examined, the Court must therefore consider (i) whether there is a complete conflict over a question of fact between the Claimant and the 1st and 2nd Defendants; (ii) if so, does the case turn on this conflict of fact; and (iii) whether there is no proper alternative to resolve this material conflict other than by cross-examination.”*

7. In the present case, the paragraphs the Defendant has applied to cross-examine can be separated into two main categories:
  - a) Issues dealing with the “catalogue of concerning behaviours which occurred during the period when the Claimant was the Agency’s director”; and
  - b) Issues dealing with the terms and conditions of employment and the Claimant’s remuneration package/gratuity.
  
8. The Claimant argues that that neither of these categories are relevant to the issues to be determined by the Court in the context of the Claimant’s narrowed, constitutional claim. With regard to the first category the Claimant submits that any behaviours that

purportedly informed the reason for termination of the Claimant are not relevant to the challenge in natural justice of the process used by the Defendant in its termination.

9. At paragraph 5 of the Defendant's submissions, they appear to accept that *"The Claimant is also correct when pointing out that the process which was followed leading to the revocation, about which the Claimant in the main complains as having violated his constitutional rights, is not in dispute"*.

10. Further, the following concession is made at paragraph 9 of the Defendant's submissions:  
*"It is therefore quite evident from the foregoing that the Defendant is not in any way contending that proper process was or was not followed nor is the Defendant in the main disputing the facts with respect to process as reported by the Claimant. Process is not in issue, and no cross-examination is being sought in that regard."*

11. In these paragraphs, the Defendant is unambiguously stating that (i) the facts surrounding the process is not in dispute, and (ii) that the process is not in issue. The Claimant's case is that the process was flawed and that was a breach of his constitutional rights. The Claimant submits therefore, that if the facts relating to process followed are not in dispute then there is absolutely no need for cross-examination.

12. The Defendant's main contention is that if the constitutional provisions are in fact applicable, the case becomes one of whether the concerns with respect to the Claimant's activities/performance ("catalogue of concerning behaviours which occurred during the period when the Claimant was the Agency's Director") were such that it does not matter that he was not afforded his constitutional rights, or that the concerns are such that the Court may decline to exercise its discretion in the Claimant's favour. The Defendant cites no authority in support of the proposition that where the process is found to be unfair, the court can delve into the merits of the decision to determine whether a fair process would have made a difference to the decision.

13. On the other hand, the Claimant cites Staughton LJ in **R v Ealing Magistrates Court Ex Parte Fanneran [1995] EWHC J1122-5**:

*“The argument that it would not have made any difference ‘is to be treated with great caution’. Down that slippery slope lies the way to dictatorship.”*

14. The Claimant argues further that examination of these behaviours goes to the merits of the decision and is an attempt to provide some form of justification for the termination ex post facto.

15. Indeed, there will be no relevance to any evidence concerning reasons why the dismissal was justified if none of those reasons formed part of the undisputed process as it is the issue of process that will determine whether there was a breach.

16. As in the dicta of Jones J in **Nizam Mohammed v AG CV2011-04918** (which was cited with approval by the Privy Council in **Sam Maharaj v Prime Minister [2016] UKPC 37**), the right to procedural fairness is protected under the Constitution. In that decision, no analysis is made of the merits of the decision and the Court simply concerned itself with the process utilised to terminate the claimant. At para 63 the learned judge states:

*“Looking at these facts objectively I am satisfied that the Claimant was not given a fair opportunity to meet and treat with the allegations made against him and the conclusions drawn from these allegations. To my mind the circumstances under which the decision was reached when examined objectively do not demonstrate ‘fair play in action’. This is without a doubt an unfortunate situation but at the end of the day the issue for my determination is not whether the decision of the President is right or wrong but whether the circumstances under which it was made afforded the Claimant a proper opportunity to answer the case made out against him.”*

17. I agree, therefore with the submission of the Claimant that the Defendant's position that it should be allowed to cross-examine the Claimant on his responses to the affidavit of George Robinson, dealing with the so-called "catalogue of concerning behaviours" is irrelevant to the processes that were utilised to terminate the Claimant as Director of the SSA. It is clear to me that the only relevant consideration for the Court in determining the substantive claim is the processes utilised to that end which have in fact been agreed by the Defendant. There will be no relevance of an analysis of whether or not the Defendant had cause to terminate the Claimant.

18. With regard to the application to cross-examine on the second category i.e. issues dealing with the terms and conditions of employment and the Claimant's remuneration package/gratuity, the parties are in agreement that this is in relation to an assessment of damages if they do arise. Indeed, as the Claimant admits, the comparative or common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this is merely a guide as the award of compensation in a constitutional motion is discretionary - **The Attorney General of Trinidad and Tobago v Siewchand Ramanoop [2005] UKPC 15.**

19. The Claimant submits that the issue of damages could be determined upon an examination of the undisputed facts and therefore, cross-examination is unnecessary. However, the Defendant raises issues of a gratuity payment that should be set off in any award. There appears, therefore to be some dispute as to the amount the Claimant would have lost due to the termination and an assessment of such loss could be assisted by cross-examination.

20. However, in my view this exercise would best be undertaken separately before the Master. Accordingly, my decision will be to split the Trial and make a determination as to whether the Constitutional Rights of the Claimant were breached. If I find that they were, the assessment of damages will be referred to the Master for a hearing in which cross-



examination as to the paragraphs of the parties' affidavits that are relevant to damages may be allowed.

**IV. Conclusion**

21. In conclusion, the Defendant's application to cross-examine in relation to:

- Paragraphs 12 to 16 and 18 to 28 of the Affidavit of Bisnath Maharaj filed on October 16th 2018 is denied.

22. A determination as to whether the Claimant's constitutional rights were breached will be made and the assessment of damages, if necessary based on that determination, will be referred to the Master. At that stage cross-examination in relation to issues surrounding damages can take place if allowed by the Master.

23. Costs of the Application will be the Claimant's costs in the cause certified fit for senior counsel.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely JRC 1