

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2017-00324

In the matter of an application for Judicial Review pursuant to part 56 of the Civil Proceedings Rules 1998 and pursuant to section 6 of the Judicial Review Act Chap 7:08

AND

In the matter of an application without notice by Shermatie Pardassie, Chandrawattee Ramkumar, Winston Paul, Debbie Lalla and Swarsatie Bahal, public servants attached to the Ministry of National Security, for leave to apply for Judicial Review

BETWEEN

Shermatie Pardassie

Chandrawattee Ramkumar

Winston Paul

Debbie Lalla

Swarsatie Bahal

Claimants

AND

The Public Service Commission

Defendant

Before Her Honour Madam Justice Eleanor Donaldson-Honeywell

Appearances:

Mr. Ganesh Rampersad, Attorney-at-Law for the Claimant

Mrs Josefina Baptiste Mohammed, Ms Monica Smith, Ms Jinai Chong Sing and Ms Savitri

Maharaj, Attorneys-at-Law for the Defendant

JUDGEMENT

A. Introduction

1. The Claimants have brought this claim in judicial review against the Defendant to challenge:
 - i. the decision of the Defendant to require the Claimants to pass a written examination in order to be eligible for promotion and/or appointment to the substantive office of Administrative Assistant; and
 - ii. the decision of the Defendant not to promote the Claimants to the office of Administrative Assistant when other Officers in the Public Service who were junior and/or similarly circumstanced were promoted in the past without having to sit an examination.

2. The Claimants by way of Fixed Date Claim Form and Affidavit in Support filed 13th February 2017 seek:
 - i. A declaration that the decision of the Defendant dated the 16th day of December 2016 and communicated to the Claimants by letter of even date to hold examinations for appointment to the office of Administrative Assistant and to not appoint and/or promote the Claimants to the substantive office of Administrative Assistant without being required to write an examination and to do so retroactively and/or otherwise is unlawful, unreasonable, irrational, procedurally improper, in breach of the principles of natural justice, null and void and of no legal effect;
 - ii. An order of Certiorari to bring into the High Court of Justice and quash the said decision of the Defendant not to appoint and/or promote the Claimants to the substantive office of Administrative Assistant retroactively and/or otherwise;
 - iii. A Declaration that the decision of the Defendant by Notice dated the 16th day of December 2016 and communicated to the Claimants by letter of even date that would require the Claimants to sit an examination to be considered for promotion to the office of Administrative Assistant is unlawful, unreasonable, irrational,

procedurally improper, in breach of the principles of natural justice, null void and of no legal effect;

- iv. An order of Certiorari to bring into the High Court of Justice and quash the said decision of the Defendant to require the Claimants to sit an examination to be considered for promotion to the office of Administrative Assistant;
- v. A declaration that the Claimants were each the beneficiaries of a legitimate expectation that they would be appointed to the position of Administrative Assistant (substantive) after obtaining the Certificate in Public Administration acting in the Administrative and Human Resource Series for more than (2) years with the relevant seniority, qualifications, knowledge, skills and abilities as well as satisfactory performance appraisal reports;
- vi. A Declaration that the Claimants were each the beneficiaries of a legitimate expectation that they would be appointed to the position of Administrative Assistant (substantive) after obtaining the Certificate in Public Administration (CPA) and acting in the Administrative Stream and Human Resource Series for more than (2) years with the relevant seniority, qualifications, knowledge, skills and abilities as well as satisfactory performance appraisal reports for the office of Administrative Assistant without having to sit an examination;
- vii. A Declaration that the continuing failure and/or omission and/or neglect of the Defendant to appoint the Claimants as Administrative Assistants is irrational, unreasonable, unlawful, procedurally improper and in breach of the principles of natural justice;
- viii. A Declaration that the failure of the Defendant by Notice dated 16th day of December 2016 not to promote the Claimants to the office of Administrative Assistant when other Officers in the Public Service who were junior and/or less qualified and/or similarly circumstanced were promoted to the office of Administrative Assistant without having to sit an examination is irrational, unreasonable, illegal, procedurally improper and in breach of the principles of natural justice and contravened the Claimants' 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 of Trinidad and Tobago;

- ix. An order that the Claimants are eligible for retroactive appointments and/or appointments to the office of Administrative Assistant to the dates that each of the respective Claimants are found by the Court to have been eligible for same;
- x. An order that the Defendant retroactively appoint and/or appoint the Claimants to the office of Administrative Assistant to the dates that each of the respective Claimants are found by the Court to have been eligible for same;
- xi. An order for monetary compensation to be assessed in favour of the Applicants;
- xii. Costs;
- xiii. Interest;
- xiv. Pursuant to the Judicial Review Act Chapter 7:08, any further orders, directions or writs as the court considers just as the circumstances warrant.

B. Factual Background

- 3. The Claimants have all been public servants at the Ministry of National Security for over twenty years. They are appointed to the substantive posts of Clerk II and Clerk III but are acting Human Resource Officers II and III. They, along with many other public servants, submitted applications in response to the Defendant's Vacancy Memorandum issued on March 19, 2015 for the office of Administrative Assistant. Thereafter, several of the applicants were notified by Memorandum dated August 2016 of their promotion to the said office. The claimants were not among those promoted and they claim that they were bypassed in favour of some persons who were promoted.
- 4. The Defendant, by Notice dated December 16, 2016 invited the Claimants along with others persons who had not yet been promoted to write an examination in order to be eligible by competition for the Administrative class of positions. The Claimants challenge this decision on the basis that:
 - i. It is an illegal decision as it is contrary to Regulation 18 of the Public Service Commission Regulations ("PSC Regulations");
 - ii. It is procedurally unfair as they should have been given an opportunity to make representations on the proposed examination;

- iii. It is in breach of their legitimate expectation of a procedural benefit, namely, that applications would be invited and interviews held which would determine suitability for the post; and
 - iv. It was irrational and unlawful as it is oppressive and based on improper or unstated motives.
5. The Claimants allege that due to their length of service and experience in their acting appointments, they have attained the requisite qualifications, knowledge, skills, training and abilities and also obtained good to excellent performance appraisals throughout their employment. They allege that pursuant to Regulation 18 of the PSC Regulations these qualifications make them eligible to be promoted into the Administrative class, without more.
6. The Defendant states that, while the Claimants may possess the required qualifications and experience for the Administrative class, they were not bypassed. Promotion, according to the Defendant, is not an automatic entitlement. The Defendant submits that it was acting within its powers to require the Claimants to take a written examination in order to be eligible to be considered for the post. More specifically, the Defendant says that in keeping with Regulation 14 of the Public Service Commission Regulations it decided that a job related examination must be held to shortlist candidates and that successful candidates thereafter be interviewed when there are in excess of 100 qualified applicants for a vacancy.
7. The Defendant asserts that the Claimants are mistaken about the overriding relevance of their alleged seniority in relation to others who have been promoted before them and contends it has a discretion to take into account all factors in Regulation 18 in determining who is to be promoted.

C. Issues

8. The issues in the present case therefore are:
- i. Whether the Claimants were bypassed for promotion by junior officers;

- ii. Whether the Defendant's decision to require the Claimants to take an examination to be eligible for promotion into the Administrative stream is:
 - i. Ultra vires
 - ii. In breach of the Claimants' legitimate expectation;
 - iii. Procedurally unfair or in breach of the rules of natural justice.

D. Law and Analysis

Issue (i)

9. The Defendant cites Regulations 9(3) and 9(4) of the Civil Service Regulations:

*“(3) Notwithstanding subregulation (1), appointments to the grade of Administrative Assistant shall be open to officers from the Clerical Class, who after the date of the coming into effect of these Regulations, **held office in a grade not lower than the grade of Principal Officer**; and who—*

 - (a) are suitable for appointment on grounds of merit, experience, character and temperament; and*
 - (b) have passed a written examination set for the purpose by an examination board appointed by the Public Service Commission.*

(4) Notwithstanding subregulation (1) or (2), an officer who has obtained a university degree or other approved qualifications and who possesses the qualities specified in subregulation (3)(a) shall be eligible for appointment to the office of Administrative Assistant.”[Emphasis added]
10. These provisions stipulate the qualifying level for appointments to the post of Administrative Assistant. Criteria regarding this level were stipulated in Circular Memorandum E06/15, wherein applications were invited from officers performing at a level no lower than Range 24E in the Clerical Class. The Defendant submits that none of the Claimants at the time of their application had attained this qualifying level of Range 24E.
11. The Defendant submits that it has the discretion to determine eligibility in the context of the Regulations and to restrict consideration to a particular grade of officer. The decision

of the Court of Appeal in **The Public Service Commission v Ashford Sankar & Others Civil Appeal 163 of 2006** at [14] supports this contention:

“In determining “eligibility”, in the context of the Regulations, it is well within the discretion of the Commission to restrict consideration to a particular grade of officer, as an incident of the power to appoint. To put the issue starkly, it would be senseless if the Commission was required to consider an interminable number of applicants who clearly could not qualify because they did not meet basic and essential prerequisites. We understand eligibility as used in this regulation to mean “qualified to be chosen.” At the end of the exercise though, the Commission’s aim is to find the person most suited to fill the vacancy.”

12. The Claimants contention, as gleaned from their affidavit of 1 November, 2017 and the written submissions of their Attorney, is that their acting appointments are the relevant performance level at which to assess their seniority. They argue that the Circular Memorandum to which they responded when the position was advertised required only that the persons possess “experience at least at the level of Range 24E”. [Emphasis added]

13. Despite the wording of the Memorandum, however, Regulation 9(3) of the Civil Service Regulations provides that a person must have “held office” in a grade not lower than the grade of Principal Officer. The meaning of “holding office” is not defined in the Act nor in the Regulations. However, it can be seen at Regulation 30 Civil Service Regulations that holding office and acting are used alternatively and therefore must have separate meanings within the Regulations:

“30. A public officer who, immediately before the coming into force of this Act holds or is acting in a public office, that by section 3 is deemed to be an office in the Civil Service shall continue to hold or act in the like office in the Civil Service.”

14. It is the Defendant’s assertion, that on a proper construction taking into account Regulations 30, the respective ranges of the Claimants in their acting positions should not be considered for the purpose of determining whether the Claimants satisfied the

requirement of holding office in Range 24E. The Claimants have not provided any authorities in submissions that contradict the Defendant's assertion.

15. Factually, the Defendant has set out in its supporting Affidavit the employment history of each of the Claimants, underscoring that as at the date of their application for the vacant positions they had not attained the substantive position of an office in Range 24E. There was no other person among the pool that had responded to the same March 19, 2015 Vacancy Notice as the Claimants that was junior to them and promoted.
16. In closing submissions by the Defendants much was made of the promotion of one Ms. Roughty Rampersad. Her application was submitted in response to the March 19, 2015 notice but by a different Memorandum dated April 8, 2015 she was promoted to the Range 24E level of Clerk III effective March 1st 2015. Thus in effect she was senior to the Claimants as at the vacancy notice date. The factual circumstances of her application and appointment have not been shown by the Claimant to be relevant for comparison with the treatment by the Defendant of their applications.
17. It is my determination that it is clear, from a plain reading of the Regulations as a whole that the Defendant's assertion is correct. The Claimants not having held at the time of their applications the substantive position of Principal Officer required for the Administrative Assistant post, have not been unfairly bypassed for promotion by any decision of the Defendant to promote others who had attained that level.

Issue (ii)

18. In addition to the qualifying requirements as stated above, Regulations 14 and 18 of the Public Service Commission Regulations govern the procedure to be adopted generally in carrying out appointments on promotion:

“14. Whenever in the opinion of the Commission it is possible to do so and it is in the best interest of the particular service within the public service, appointments shall be made from within the particular service by competition, subject to any

Regulations limiting the number of appointments that may be made to any specified office in the particular service...

"18. (1) In considering the eligibility of officers for promotion, the Commission shall take into account the seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such officers, and in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy.

(2) The Commission, in considering the eligibility of officers under sub-regulation (1) for an appointment on promotion, shall attach greater weight to –

(a) seniority, where promotion is to an office that involves work of a routine nature, or

(b) merit and ability, where promotion is to an office that involves work of progressively greater and higher responsibility and initiative than is required for an office specified in paragraph (a).

(3) In the performance of its functions under sub-regulation (1) and (2), the Commission shall take into account as respects each officer –

(a) his general fitness;

(b) the position of his name on the seniority list;

(c) any special qualifications;

(d) any special courses of training that he may have undergone (whether at the expense of Government or otherwise);

(e) the evaluation of his overall performance as reflected in annual staff reports by any Permanent Secretary, Head of Department or other senior officer under whom the officer worked during his service;

(f) any letters of commendation or special reports in respect of any special work done by the officer;

(g) the duties of which he has had knowledge;

(h) the duties of the office for which he is a candidate;

(i) any specific recommendation of the Permanent Secretary for filling the particular office;

(j) any previous employment of his in the public service, or otherwise;

(k) any special reports for which the Commission may call;

(l) his devotion to duty.

(4) In addition to the requirements prescribed in sub regulations (1), (2), and (3), the Commission shall consider any specifications that may be required from time to time for appointment to the particular office."

19. As submitted by the Defendant, these provisions are to be read together – **Ashford Sankar & Ors v Public Service Commission [2011] UKPC 27.**

20. The Claimants submit that they do not dispute the Defendant's power to set an examination under the Regulations, but rather the manner in which it was done and the failure of the Defendant to take relevant considerations into account. The relevant considerations, they suggest, would be the Claimants' seniority and the effect of Regulations 14, 15 and 18.

21. The Claimants submit that the interview method and not an examination was the common settled practice of selecting persons for promotion by competition. They say that fairness required that they ought to have been notified of their suitability for promotion based on their service and then afforded the opportunity to make representations regarding the written examination before the decision was taken.

22. By these submissions I understand the Claimants to be suggesting that in fulfilment of the duty to act fairly the Defendant was required to handpick the most senior officers out of the pool. According to the Claimants, at that point the Defendant should have used the previous practice of selection based on an interview, applying same only to the Claimants and thereafter applying the examination to the remaining pool. This suggested approach to meeting fairness requirements is not backed by any authority cited by the Claimants.

23. It is submitted by the Defendant at paragraph 35 of its submissions that it cannot make an exception to the examination requirements for the Claimants by applying uncertain, undefined criteria related to their level of experience. Instead, the Defendant is duty-bound to follow the Regulations and apply all factors outlined therein when assessing persons for promotion.

24. As highlighted by the Defendant in submissions, “competition” as provided for in Regulation 14, was defined in **Ashford Sankar** as “*a test, written or oral, using various methods of evaluation, limited only by reference to Regulation 18*”.

25. Regulation 19 is also instructive in supporting that an examination may be used to assess persons for promotion under the PSC Regulations. It states:

“19. Promotion to the Administrative Class as prescribed by the Civil Service Regulations shall be determined by the order of merit in an examination fixed for the purpose, and such examination shall be open to all officers in the Civil Service holding an office not lower than that of Principal Officer or other comparable office.”

26. It is clear therefore that it is within the Defendant’s powers and discretion to carry out a ‘competition’ in the form of a written examination in making decisions on appointments, once the factors outlined in Regulation 18 are taken into account.

27. Regarding unfairness and unreasonableness, the Defendant correctly highlights the standard to be met in deeming a decision unreasonable or unfair. As held by Lord Diplock in **Council of Civil Service Unions & Others v Minister for the Civil Service (1984) 3 All ER 935**, a decision of a public authority is unreasonable where it is “*so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*”.

28. Further, in order to vitiate a decision of a public authority on the ground of unfairness what is required is “*conspicuous unfairness*” - **Gillette Marina Ltd v Port Authority of Trinidad and Tobago Civil App No 106 of 2003, per Kangaloo JA**.

The institution of a written examination does not violate any rules of natural justice or fairness as the examination and its results are an objective assessment of an applicant’s merits. The decision of the Commission in this instance to require applicants to write an exam does not amount to conspicuous unfairness and certainly is not in defiance of logic or accepted moral standards.

29. The Claimants have failed to show any prejudice that will be suffered if they are required to take the written exam either on the basis of their long service or on their experience in acting positions. The majority in fact took the exam, after an application for an interim injunction was denied earlier in these proceedings, thereby benefiting from the same opportunity to have their knowledge of the job assessed as other persons interested in the promotion.

30. As it relates to the alleged duty of the Defendant to consult with the Claimants prior to instituting the examination, the Claimants have failed to establish such a duty in the present case. Per Kokaram J. in **The Public Services Association of Trinidad and Tobago v the Permanent Secretary Ministry of Energy and Energy Industries CV2017-02934**:

“There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (R (Cheshire East Borough Council) v Secretary of State for Environment, Food and Rural Affairs [2011] EWHC 1975 (Admin) at paras 68 – 82, especially at 72).”

31. The Claimants have not referred to any authority in support of its propositions as to the need to consult. There is no basis for the Court to infer which factors may be relevant in the present case and whether the facts of the case meet the standard for requiring consultation. There has been no assertion that the duty to consult in this case is statutory, nor has there been an assertion of a promise to consult or a settled practice of consultation. There remains for consideration the fourth circumstance highlighted in **CV2017-02934**—conspicuous unfairness. However, as determined above, there was no conspicuous unfairness in the instituting of an examination to make assessments for promotions.

32. There is no unfairness in the lack of consultation with the Claimants as the Defendant’s decision to institute the examination applies across the board to any applicants for the

position of Administrative Assistant who had not attained the required grade level. Further, the Claimants have not outlined any good reason in their case that they should not be made to undergo the examination. It is apparent that the Defendant is within its powers under the Regulations and therefore cannot be said to have acted in breach of their duty of fairness.

33. The Claimants submit that they had a legitimate expectation of promotion to the office of Administrative Assistant without having to sit an examination, having acted in the Administrative/Human Resource Streams for more than two years and having obtained the Certificate in Public Administration. They assert that there is a settled practice that eligible officers would be notified of their suitability for promotion and subsequently be allowed to apply for the advertised post.

34. The UK Supreme Court in the decision of **(R (Davies) v HMRC [2011] UKSC 47, [2012] 1 All ER 1048, [2011] 1 WLR 2625** at [49] and [58] considered that to create a legitimate expectation:

“[T]he promise or practice . . . must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured”: R (Bhatt Murphy) v The Independent Assessor [2008] EWCA Civ 755, per Laws LJ at 43. The result is that the Appellants need evidence that the practice was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it.”

35. As decided above, the Defendant is within its powers to carry out promotions by way of competition whether it be by a written or oral test, limited only by reference to Regulation 18. Further, it is undisputed that the 2017 examination was not the first. A written examination was mandated by the Defendant before in 1998. The Claimants have not sufficiently shown evidence of an unambiguous, well-established practice as would give rise to a legitimate expectation.

E. Conclusion

36. Based on the analysis above, it is my determination that the Claimants have not established any grounds for judicial review of the decision of the Defendant (i) to promote certain other officers before them or (ii) to require an examination for eligibility for promotion to the post of Administrative Assistant.

37. The reliefs sought are therefore refused and an award of costs to be assessed by the Master if not agreed, is made in favour of the Defendant.

Delivered on June 27, 2018

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Eleanor Joye Donaldson-Honeywell
Judge.

Assisted by: Christie Borely JRC 1