

**THE REPUBLIC OF TRINIDAD AND TOBAGO:**

**IN THE HIGH COURT OF JUSTICE  
Port of Spain (Virtual Hearing)**

CV 2017-03672

Between

**Dr. Colin Furlonge**

Claimant

And

**The Attorney General of Trinidad and Tobago**

Defendant

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

Delivered on: 8 January 2021

**Appearances:**

Mr Fyard Hosein SC, Mr Rishi Dass, Mr Aadam Hosein and Ms. Anjali Maharaj,  
Attorneys at Law for the Claimant

Ms Tinuke Gibbons-Glenn and Ms Diane Katwaroo, Attorneys at Law for the  
Defendant

**JUDGMENT**

**A. Introduction**

1. The Claimant, a medical doctor, is a retired public servant having served over 33 years. He held the substantive position of Medical Chief of Staff [“MCOS”] at the time of his retirement. He seeks relief for alleged breach of his terms of employment as to certain

entitlements. Specifically, the Claimant alleges being by-passed for acting appointments in the higher position of Chief Medical Officer [“CMO”], non-receipt of remuneration commensurate with such acting appointments and the non-payment of compensation equivalent to counterparts employed in the Regional Health Authorities, to which he was entitled based on a 2008 Memorandum.

2. The Claimant included in the Claim filed on 19 October 2017, a request for an account of all payments made by the Ministry of Health. The parties engaged in settlement negotiations from the outset of the proceedings. The negotiations included detailed accounting reconciliation attempts on both sides, manifested in repeated amendments to the pleadings.
3. By Re-Re-Amended Claim Form and Re-Re-Amended Statement of Case filed on 16 December, 2019, the Claimant seeks the following reliefs:
  - a. Damages for breach of contract comprising:
    - i. The difference between the salary for the post of CMO and the Claimant’s substantive post as MCOS for the period of delay in appointing him to act as Chief Medical Officer for various periods commencing in 2011;
    - ii. The difference between the salary for the post of CMO and the Claimant’s substantive post as MCOS for the period after his appointment to act as CMO from 22 October 2013 to 16 December 2015;
    - iii. Damages and/or loss suffered as a result of the loss of earning arising out of a shortfall in the Claimant’s entitlement to salary and pension as a consequence of the aforesaid;
    - iv. An account of the true entitlement of the Claimant regarding his salary, allowances and entitlements for the period of 2004 and 2015 as well as the gratuity and pension he was entitled to as of December 2015 pursuant to the matters set out hereinabove.

- b. Further to or in the alternative, damages in the sum of the difference between the gross monthly earnings received as MCOS and the gross monthly compensation of the Medical Director/Director of Health on contract to the Public Hospitals for the period 27 July 2004 to 04 March 2012.
  - c. Damages and/or exemplary damages and/or vindictory damages for breach of equality rights protected under the Constitution by sections 4 (b) and (d).
  - d. Further or in the alternative, damages for arrears on the basis of the difference between the salary for the post of CMO and the Claimant's substantive post of MCOS over the period February 2012 to December 2015 plus commensurate increases in gratuity and pension.
4. Attempts at resolution *inter partes* were ongoing for several years and ultimately the matter was heard at a virtual Trial on 26 October 2020. At the trial, the issues for determination were narrowed due to admissions made by the Defendant in pleadings and filed Witness Statement. There were also admissions made, in an opening Statement on behalf of the Claimant on the Trial date, as to monies paid to him after the filing of this action.
5. The Trial was not lengthy as there was minimal cross-examination. The Claimant's written evidence in his filed Witness Statement was unchallenged by the Defendant.
6. The Defendant's evidence was contained in the Witness Statement of Mr. Dalip Rajkumar, who holds the post of Accounting Executive II at the Ministry of Health, which was also filed on 05 May 2020. The Defendant's witness, while not discredited under cross-examination, admitted that he could not speak to matters of personnel administration. He essentially testified as to amounts paid to the Claimant without being in a position to give evidence justifying the Defendant's case as to the policy basis for such payments.

7. There appeared to be little in dispute at the end of the Trial as the Defendant admitted that certain sums remained due and payable to the Claimant. No sworn evidence was presented by the Defendant to challenge the Claimant's case as to the commencement date of his claimed entitlements to remuneration as Acting CMO.
8. Questions remained as to the calculation of the amounts to be paid and the impact on pension and gratuity entitlements. Parties therefore undertook to have discussions in an attempt to agree on the appropriate resolution of the matter. It was expected that on 06 November 2020 at a status hearing in the matter, parties would present a unified position outlining their agreement as to the outstanding issues in this matter and suggesting the terms of the Order to be made by the Court.
9. The expected unified position did not materialize. According to Counsel for the Claimant, attempts to engage the Defendant's representatives in such discussions were not reciprocated. Accordingly, the parties were directed to file written closing submissions. Both sides complied. The submissions filed by the Claimant excluded any reference to the initially pleaded claims for exemplary or vindictory damages. As such the considerations for final determination have been further narrowed.
10. Counsel for the Defendant sought, in the written closing submissions, to raise objections to the sworn evidence of the Claimant despite the fact that no evidential objections were filed in accordance with prior directions given to the parties. Counsel for the Defendant further sought to persuade the Court that documents filed in an unagreed bundle of documents should be considered in favourably considering the Defendant's case.
11. Having fully considered the pleadings and the sworn evidence presented, my conclusion is that the Claimant has proven his case as to the very narrow remaining issues to be determined. On a balance of probabilities, the Claimant is entitled to:
  - a. The payment to cater for the difference in the salaries, benefits and entitlements that he received as a public servant, and those received by his counterparts appointed by the Regional Health Authorities.

- b. Salaries, benefits and entitlements for the position of CMO for those periods when he was entitled to act but was bypassed.
  - c. Salaries, benefits and entitlements for the position of CMO for those periods which he acted as CMO over the period February 2012 to December 2015 less those periods for which he has already been credited.
  - d. Gratuity and pension recalculated to take account of the above increases in his salaries, benefits and entitlements.
12. It is appropriate that, as claimed by the Claimant, there should also be a taking of accounts by the Registrar as to remuneration due and payable to him.
13. The reasons for these conclusions are further explained hereafter.

**B. ISSUES**

14. There was no meeting of the parties to settle on a statement of the remaining issues to be determined, however, both sides identified issues in their written submissions. From the issues identified by the parties, it is clear that one of them is actually not in dispute as it is admitted in the Defendant's Witness Statement. It is no longer in dispute that the Claimant is entitled to be paid for the period April 2004 to January 2012 the salaries, entitlements, allowances and benefits payable to Hospital Medical Directors of the Regional Health Authorities (RHA). A declaration to that effect will be included in the Order disposing of this case.
15. The other remaining issues are summarized as to whether the Claimant is:
- i. Entitled to be paid the salaries, entitlements, allowances and benefits for the post of Acting Chief Medical Officer for the period commencing February 2012 to the date of his retirement in December 2015, less those periods therein for which he has already been credited.
  - ii. Consequentially entitled to have his gratuity calculated based on the increased benefits receivable by him consistent with (i) above and his undisputed entitlement to the RHA level remuneration mentioned.

- iii. Entitled to have his pension calculated based on having held the position of Acting CMO from February 2012 to December 2015, being a period exceeding three (3) years.

### **C. BACKGROUND**

16. At the time of his retirement, when the Claimant held the substantive post of MCOS, he was also the Acting CMO in the Ministry of Health. However, he was not confirmed in the post of CMO despite being entitled to act in that post for a period in excess of three years. It was for that reason that the Claimant sought in these proceedings:

- The payment of salaries, benefits, entitlements and allowances owed to him fairly for periods in which he was legitimately entitled to act in the position of Chief Medical Officer but was bypassed.
- The payment of salaries, benefits, entitlements and allowances for the post of Chief Medical Officer, which were not paid to him following his appointment to act as Chief Medical Officer.
- The payment of the difference between the salaries, benefits, entitlements and allowances paid to him as an appointed public officer by the Public Service Commission and those, which were paid to his counterparts who were employed in the Regional Health Authorities.
- The payment of adjusted pension payments and gratuity based on the above calculations.

### **D. The Evidence and Submissions**

17. The undisputed evidence of the Claimant as set out in his written submissions was as follows:

- a. *The difference in salaries, entitlements, allowances and benefits payable to Hospital Medical Directors of the RHAs and the Claimant's undisputed entitlement thereto*

- In or about February/April 2004, the Claimant was appointed to act as the Medical Chief of Staff at the San Fernando General Hospital. From 01 July 2006, he assumed the post of Medical Chief of Staff at the Port of Spain General hospital having been appointed as Medical Chief of staff in July 2004, (paragraph 2, Witness Statement of Colin Furlonge)
- At all material times, the Claimant was appointed as a public official through the Public Service Commission. However, the organizational structure of the health services in Trinidad and Tobago began changing administratively with the inception of the Regional Health Authority Act of 1994 and the establishment of the Regional Health Authorities (“RHAs”), (paragraph 3, Witness Statement of Colin Furlonge)
- There developed a parallel system of appointments thereof for Medical Chiefs of Staff, as new appointments were done by the RHA. Those appointed by the RHAs had an enhanced salary package that was much higher than that paid to those appointed by Service Commission, such as the Claimant. By letter dated 09 January 2008, the Chief Personnel Officer advised the Permanent Secretary of the Ministry of Health that approval was granted for the compensation package for a Medical Chief of Staff in the Public Service to be equivalent to the compensation package for a Medical Chief of Staff in the RHAs (Exhibit A, Witness Statement of Colin Furlonge). Persons who held the position of Medical Chief of Staff in the Public Service were therefore entitled to receive an ex-gratia or parity payment to achieve equivalence of compensation with the position of Medical Chief of Staff of the RHAs.
- Pursuant to that directive, the Claimant learned that several colleagues who held the position of Medical Chief of Staff in the Public Service received the ‘parity payment’, but no such payment was ever made to the Claimant, (paragraph 7 Witness Statement of Colin Furlonge). The Claimant was entitled to be paid according to the remuneration paid to those Medical Chiefs of Staff appointed by the RHAs for the period February 2004 to January 2012. The Claimant was therefore entitled to be paid the difference between the two salaries, (paragraph 8 Witness Statement of Colin Furlonge).

*b. The Claimant's entitlement to act as CMO and to receive remuneration for same*

- In or around February 2012, the Chief Medical Officer, Dr. Anton Cumberbatch, went on pre-retirement leave. At that time, the Claimant was entitled to act in the position of Chief Medical Officer but was illegally bypassed on several occasions and denied the opportunity to so do. As a result of **HCA 2098 of 2003 Colin Furlonge v O'Brien**, it was held that the senior qualified public officer in the Ministry of Health should be appointed to act in situations where there is a vacancy which is not a prelude to a permanent appointment. At the time, the Claimant was the most senior public officer at the Ministry of Health.
- The Claimant was bypassed in favour of Dr. A Misir and Dr. Melville who both held positions which were junior to the Claimant's position at the time. The Claimant was appointed to act as CMO intermittently. This was communicated to the Claimant by letters which were written by the Director of Personnel Administration to the Ministry of Health. Paragraph 27 of the Witness Statement of Colin Furlonge sets out a table of dates for which the Claimant acted as CMO. Since 13 March 2012, the Claimant was given acting appointments as CMO after the Ministry of Health obtained legal advice. However, he was not always appointed as, at times, others were appointed. By letter dated 22 October 2013, the Permanent Secretary in the Ministry of Health advised the Claimant, while he was acting as CMO, that he would continue to act as CMO up to the time of his retirement on 15 December 2015, (paragraph 25 Witness Statement of Colin Furlonge, Exhibit H).
- As a result of the Defendant's refusal to consistently appoint the Claimant to the position of Chief Medical Officer since February 2012 when he was so entitled to be appointed, he suffered loss and damage. Between 2012 and 2013, the Claimant was bypassed for approximately 534 days. The table found at paragraph 34 of the Witness Statement of Colin Furlonge provides a breakdown of the months and corresponding days the Claimant was entitled to act as CMO, less those days he was appointed to act as CMO.



c. *The Claimant's entitlement to Pension and Gratuity calculated to include the entitlements at a. and b. above.*

- The Claimant's gratuity payment and monthly pension that he now receives were calculated on the basis of the remuneration that he received as MCOS at the Port of Spain General Hospital and his previous appointments. They did not take into account his acting appointments as Acting Principal Medical Officer or Acting Medical Chief of Staff, including the period of time in which he was entitled to be appointed to act as CMO but was bypassed, (paragraph 35, Witness Statement of Colin Furlonge)
- Furthermore, based on the Claimant's case that he was entitled to act as CMO since February 2012, he would also be entitled to have his gratuity and monthly pension payments calculated based on the CMO position, and also the disparity between what he earned as a public servant and what was paid to Medical Directors appointed by the RHAs.

18. The Claimant's Witness Statement was entered into evidence with all its attachments as "CF 1". A letter dated 05 April 2013 from the Permanent Secretary, Ministry of Health to the Director of Personnel Administration was also entered into evidence through the Claimant as "CF 2". This letter recommended that the Claimant be appointed to act as CMO with immediate effect based on the advice received from the Office of Solicitor General.

19. The Claimant was briefly cross-examined. He was challenged on only the issue of whether he prepared the accounts set out in the table at paragraph 8 of his Witness Statement. The Defendant did not challenge the Claimant under cross-examination as to his entitlement to be paid the same salaries, allowances, benefits and entitlements as the Chief of Staff of the RHA from February 2004 to January 2012.

20. The Claimant was neither challenged nor was there any evidence that the Claimant was not entitled to act as CMO from February 2012. There was no evidence to contradict that the Claimant did act as CMO for the periods set out at paragraph 23 of

his evidence or that he was bypassed for 534 days from acting as CMO and was thus entitled to remuneration for those days as acting CMO.

21. No witness attended to give evidence on behalf of the Defendant to establish that the Claimant's present pension and gratuity ought not to be calculated on the basis that he was entitled to the pension and gratuity of a CMO on 15 December 2015. The Claimant's case that he was entitled to have his acting allowance, his pension and gratuity recalculated remained unchallenged under cross-examination.

21. The written evidence and oral testimony of the Defendant's sole witness did not effectively contradict or rebut the Claimant's claims. The said evidence relates primarily to the identification of payments which were made to the Claimant. It was used by the Claimant in identifying those payments made to him, and the periods for which they were made. It was based on this analysis by the Claimant that, as aforementioned, an opening statement was made at trial admitting to receipt of almost all the payments listed in the Witness Statement for the Defendant.

22. At paragraph 11 of the Defendant's Witness Statement, it is admitted that there was a disparity in the remuneration between the medical officers attached to the RHAs and those employed under the Ministry of Health such as the Claimant. The Witness Statement further concedes that the "Ministry of Health has commenced the processing of the payment of the revised rates of Special Incentive Allowance and Additional Special Incentive Allowance in favour of the Claimant."

23. The Defendant's sworn evidence did not address:

- the Claimant's entitlement to act in the position of CMO from February 2012;
- the Claimant's failure to be paid the salaries, entitlements, and benefits of the CMO for those periods he did act as CMO; or
- the Claimant's entitlement to have his Gratuity and Pension Plan payment recalculated and adjusted to account for the further payments that he had received since the Claimant's retirement or those payments which he is entitled to after the determination of this matter.

24. The Defendant's position, based on calculations made after the proceedings were in progress, was that the Claimant is now only owed the sum of \$15,692.06. This, they contend, is the only payment which remains outstanding to the Claimant as arrears for the difference in salary between MCOS and acting CMO for the period 2012 to 2015. There was insufficient evidence on oath explaining this calculation. As such, the Registrar will be better-placed to address the matter in the taking of accounts.

25. As to the claim for re-calculated pensions and gratuity, the Defendant's case, as explained in submissions, is that these calculations are in the remit of the Comptroller of Accounts. Section 16A of the Pensions Act provides: -

*"16A (1) Where an officer who immediately prior to (a) the date of his compulsory retirement or (b) the date on which he proceeds on annual leave prior to the date of his compulsory retirement, has acted in a higher office for a period of 3 continuous years, that officer shall be eligible to have his pension, gratuity or other allowance calculated as if he were confirmed in that higher office and for the purpose of computing such pension, gratuity or allowance, he shall be deemed to be an officer to whom regulation 11(a) of the Regulations applies.*

*(2) Where an officer who immediately prior to (a) the date of his compulsory retirement or (b) the date on which he proceeds on annual leave prior to the date of his compulsory retirement, has acted in a higher office for a period of one (1) continuous year but less than 3 continuous years, that officer shall be eligible to have his pension, gratuity or other allowance calculated as if he were confirmed in that higher office during that period and for the purpose of computing such pension, gratuity or allowance, he shall be deemed to be an officer to whom regulation 11(c) of the Regulations applies."*

26. Counsel for the Defendant underscored in submissions that to be considered for pension, gratuity or other allowance at the higher office, the retiring officer has to be acting in the said position for at least one (1) continuous year immediately prior to the date of his retirement/pre-retirement leave. According to Counsel for Defendant, the Claimant himself has indicated that his periods of acting as CMO for the year of his

retirement (2015) were 13 April 2015 to 15 October 2015 and 08 November 2015 to 06 December 2015. This would not have amounted to a continuous year.

27. However, this fails to take into account the un-contradicted evidence for the Claimant. His evidence was that he was entitled to act as CMO, from February 2012 until his retirement in December 2015. He should therefore, be paid the salaries, allowances and benefits for the position of Acting CMO for the entire period of February 2012 - December 2015, less those periods for which he has already been credited.

28. The Claimant submits that the entitlement to act in the position of Acting CMO is derived from the judgment of Jamadar J, as he then was, in **HCA 2098 of 2003 Colin Furlonge v O'Brien**, as well as the Memorandum from the Solicitor General dated 03 April 2013.

29. Neither in the Defendant's Witness Statement nor during cross-examination did the Defendant challenge the Claimant's entitlement to act in the position of Acting CMO from February 2012 to December 2015. Accordingly, with respect to pension and gratuity, the un-contradicted position of the Claimant was that had he been properly appointed to the position of Acting CMO in February 2012, he would have occupied that position for over three (3) continuous years prior to his retirement in December 2015. He would thereby be entitled to a pension and gratuity calculated on the basis of an Acting CMO position. In those circumstances, his pension and gratuity ought to be properly adjusted and/or revised to take into account the position of Acting CMO and not MCOS.

#### **E. Conclusion**

30. The Court accepts the Claimant's evidence as having proven his case on a balance of probabilities. The first finding of fact, accordingly, is that the Claimant is entitled to a payment to cater for the difference in the salaries, benefits and entitlements which he received as a public servant, and those received by his counterparts appointed by the RHAs.

31. Secondly, the Claimant was entitled to act in the position of CMO since February 2012. As a result, the Claimant is entitled to be paid the salaries, benefits and entitlements for the CMO for those periods in which he was entitled to act but was bypassed.

32. Thirdly, the Claimant is entitled to be paid the salaries, benefits and entitlements for the position of CMO for those periods which he acted as CMO over the period February 2012 to December 2015 less those periods for which he already been credited for.

33. Finally, the Claimant is entitled to have his gratuity and pension recalculated to take account of the above-mentioned entitlements. .

**34. IT IS HEREBY ORDERED:**

- i. A declaration that, for the period February 2004 to January 2012, the Claimant was entitled to receive the same remuneration as the Chief of Staff of the RHAs.
- ii. A declaration that the Claimant was entitled to act as CMO from February 2012 until his retirement on 15 December 2015 and having been entitled to so act he is entitled to have his gratuity and pension calculated in accordance with this substantive entitlement of the CMO.
- iii. The Defendant is directed to abide by the declarations at i. and ii. in calculating the amounts payable to the Claimant regarding his salaries, allowances, benefits and entitlements from the period February 2004 to December 2015 and such calculation shall take into consideration the following:
  - a. the total amount of remuneration paid to the Claimant before the commencement of this action
  - b. the total amount of remuneration paid to the Claimant after the commencement of this action

- c. the remuneration paid to the Claimant as a lump sum payment amounting to \$844,000 regarding the buyout of the Claimant's leave
  - d. the true entitlement of the Claimant from February 2004 when he was appointed as MCOS to January 2012 when he ought to have been promoted to act as CMO, having regard to his entitlement to be paid the same salaries, allowances, benefits and entitlements as the Chief of Staff of the RHAs
  - e. the Claimant's true entitlement to receive an acting allowance as Acting CMO from February 2012 to his retirement on 15 December 2015, after taking into consideration the periods when he acted.
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- iv. Furthermore, the Ministry of Health, in completing this exercise, is required to file and serve on the Claimant's attorneys-at-law on or before 27 January 2021 its calculations relating to the above matters. Such calculations are to be presented in the format of a monthly tabulation giving a clear indication of the Claimant's entitlements, the amount paid, the dates paid and the amounts due.
  - v. A date is to be fixed before the Registrar for the taking of accounts including falsifying and surcharging the accounts.
  - vi. Upon the settlement of the accounts, the Defendant is directed to forward the settled accounts to the Comptroller of Accounts for the recalculation of the Claimant's pension and gratuity. Such calculation is to be presented to the court for its approval with an explanation as to the areas where the previous calculations were deficient.
  - vii. On conclusion of the taking of accounts, the Defendant is to pay the Claimant's costs on the prescribed scale assessed based on the value of the Claim calculated as the amount determined by the Registrar as payable at the date of commencement of the Claim to the Claimant.

- viii. The Defendant is to pay to the Claimant statutory interest at the commercial rate, which the Claimant has agreed to accept at the lower statutory rate of 5% per annum, from the date of this order to the date of payment.
  
- ix. Liberty to apply.

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Eleanor Joye Donaldson-Honeywell

Judge