

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

SAN FERNANDO

Claim No. CV 2017-03718

BETWEEN

Stephen Bissessar

Claimant

And

Petroleum Company of Trinidad and Tobago

Defendant

Before the Honourable Mme. Justice Donaldson-Honeywell

Date of Delivery: January 15, 2019

Appearances:

Mr. Anand Ramlogan SC, Mr. Alvin Pariagsingh and Ms. Alana Rambaran, Attorneys-at-Law for the Claimant.

Mr. Russel Martineau SC, Ms Shivani Maharaj and Miss Amirah Rahaman, Attorneys-at-Law for the Defendant

Judgement

A. Introduction

1. The issues determined in this Judgement arise from the Claimant's request for information pertinent to his belief that he has been bypassed unfairly for promotion. He received some but not all of the information requested from his employer, the Defendant. An application

was therefore filed by him pursuant to **Section 39 of the Freedom of Information Act 1999 (“FOIA”)** seeking access to information from the Defendant on:

- the performance Appraisal Reports that were used to promote Ken Joseph, Elton Noel, R. Ramdeen, Daniel George, Steve Singh, Curtis Foster and Lloyd Straker; and
 - the qualifications, experience and skills of Ken Joseph, Elton Noel, R. Ramdeen, Daniel George, Steve Singh, Curtis Foster and Lloyd Straker.
2. This information was required, he says, in order to determine whether he was treated unfairly and/or bypassed for promotion, without any explanation, for the three posts of Process Plant Foreman (LPG), (Bond Yard) Assistant Bond Supervisor and Daylight Focus Operator. The request for information was denied by the Defendant on the ground that it amounted to the unreasonable disclosure of personal information on other officers.
3. The court granted leave in chambers to the Claimant to apply for Judicial Review. The Claimant then filed a Fixed Date Claim commencing the Judicial Review Proceedings against the Defendant on October 27, 2017, claiming:
- *An order of certiorari to quash the decision of the Respondent/ Intended Defendant to deny access to the “Performance appraisal reports that were used to promote Ken Joseph, Elton Noel, R. Ramdeen, Daniel George, Steve Singh, Curtis Foster, Lloyd Straker; and the qualifications, experience and skills of Ken Joseph, Elton Noel, R. Ramdeen, Daniel George, Steve Singh, Curtis Foster, Lloyd Straker.” as requested by the Claimant in his FOIA request dated the 2nd day of May, 2017;*
 - *A declaration that the decision of the Respondent/Proposed Defendant to refuse and/or deny access to the requested documents without giving due consideration to the provisions of Section 35 of the Freedom of Information Act (FOIA) is illegal;*
 - *Alternatively, an order of mandamus directing the Intended Defendant to provide the requested information in accordance with Section 16 (2) of the FOIA within seven days hereof;*

- *An order of mandamus to compel the Proposed Defendant to provide the requested documents to the Applicant/Claimant pursuant to his FOIA request within seven (7) days hereof in accordance with Section 16(2);*
 - *An order pursuant to Section 21 of the Judicial Review Act remitting the request to the Respondent/ Intended Defendant to consider Section 35 of the FOIA;*
 - *Costs;*
 - *Such further other orders, directions or writs as the Courts considers just and as the circumstances of this case warrant pursuant to Section 8 (1) (d) of the Judicial Review Act 2000;*
4. Thereafter at Case Management conferences commencing on the November 28, 2017 and ending on June 26, 2018, directions for filing of Affidavits and Submissions were given. There were several extensions of time granted to the parties for compliance. Several paragraphs of the Claimant's final Affidavit were struck out as either merely repeating what was in the initial Affidavit or as inappropriately making points of law. Eventually, written submissions were exchanged by November 26, 2018. The Claimant thereafter filed submissions in reply on December 21, 2018.

B. Factual Matrix

Facts alleged in the Claimant's Affidavits:

5. The Claimant has been employed at Petrotrin as a Process Plant Attendant since the 5th August 2002 and has been acting as a Process Plant Foreman (LPG) for the period 28th July 2008 to present.
6. Over the years whilst the Claimant has been employed with the Defendant, he claims he has been unfairly bypassed for numerous promotions in the Refining and Marketing Department.

7. Specifically, he complains firstly of having been bypassed for appointment to the post in which he has been acting since 2008. He says other officers junior to him were so appointed, namely Ken Joseph, Elton Noel, R. Ramdeen and Daniel George.
8. Secondly, he claims that in 2006 and 2008 he applied for the position of Assistant Bond Supervisor but persons he alleges were junior officers, namely Daniel George and Steve Singh were promoted ahead of him.
9. Thirdly, in the same time period he applied for the position of Daylight Operator and he says junior officers Steve Singh and Curtis Foster were appointed instead. The Claimant says he has always maintained excellent performance appraisal reports while acting as Process Plant Attendant and was even recommended by Mr. Daniel George to be promoted to the post of Process Plant Foreman in his last performance appraisal report dated 27th March 2015.
10. The Claimant says he was denied being fairly considered for promotion to the said posts by Mr. Lloyd Straker. He says this was done notwithstanding his experience, seniority and qualifications. No interviews were held for promotion to the posts and no reason or justification was given to him as to why he was not considered. The Claimant believes he was unfairly by-passed for promotion by junior officers of a lower grade, with qualifications and performance records inferior to his own.
11. As a result of these alleged unfair, arbitrary and unlawful decisions to by-pass the Claimant for promotions, he says he has suffered grave depression and his career is now stagnant. His promotional prospects, such as to the posts of Bond Supervisor and Plant Superintendent have been adversely affected as a result. The Claimant believes he has been treated unequally without any explanation contrary to **section 4 (d) of the Constitution**.

12. By Freedom of Information application and covering letter dated the 2nd day of May 2017, the Claimant, through his Attorney at Law, applied to the Petroleum Company of Trinidad and Tobago Limited (hereinafter referred to as the Defendant or "Petrotrin") for:

- The entire personal file of Stephen Bissessar from Petrotrin;
- Copies of the criteria, policies and procedures which govern acting appointments and promotions in Petrotrin and/or in particular for the posts of Process Plant Foreman Daylight Operator, Assistant to Bond Supervisor and Bond Supervisor since 2008 to present;
- Copies of the criteria, policies and procedures that were utilized for the acting appointment and promotions in Petrotrin and/or in particular for the posts of Process Plant Foreman, Daylight Operator, Assistant to Bond Supervisor and Bond Supervisor since 2008 to present;
- Copies of the list of the requirements and qualifications needed for promotion to the offices of Process Plant Foreman, Daylight Operator, Assistant to the Bond Supervisor and Bond Supervisor since 2008 to present;
- Information as to whether any interviews were held for promotion to the position of Process Plant Foreman for the aforementioned promotions when Ken Joseph, Elton Noel, R. Ramdeen (retired) and subsequently Daniel George (retired) were promoted to the office of Process Plant Foreman;
- Information as to whether any interviews were held for promotion to the position of Assistant to Bond Supervisor for the aforementioned promotions when Daniel George was promoted to the office of Assistant to Bond Supervisor;
- Information as to whether any interviews were held for the aforementioned promotions to the position of Daylight Operator when Steve Singh and Curtis Foster were promoted to the office of Daylight Operator;
- **List of the eligible candidates who were qualified to be considered for promotion to the office of Process Plant Foreman, Daylight Operator and Assistant to Bond Supervisor since 2008 to present;**

- **Seniority list (s) for the post of Process Plant Foreman, Daylight Operator and Assistant to Bond Supervisor since 2008 to present;**
- All commendations, or letters of recommendations, performance appraisals and staff reports of Stephen Bissessar between 2008 to present;
- **Performance appraisal reports that were used to promote Ken Joseph, Elton Noel, R. Ramdeen, Daniel George, Steve Singh, Curtis Foster, Lloyd Straker;**
- **The qualifications, experience and skills of Ken Joseph, Elton Noel, R. Ramdeen, Daniel George, Steve Singh, Curtis Foster, Lloyd Straker.** [Emphasis added in this Judgement to highlight the Information not provided to date]

13. By letter dated June 14th 2017, the Defendant asked for clarification as to the requests for some of the information sought, namely:

- List of the eligible candidates who were qualified to be considered for promotion to the office of Process Plant Foreman, Daylight Operator and Assistant to Bond Supervisor since 2008 to present;
- Seniority list (s) for the post of Process Plant Foreman, Daylight Operator and Assistant to Bond Supervisor since 2008 to present;

14. The Defendant in the same letter expressed, for the first time, its decision not to disclose the performance appraisals, qualifications, experience and skills of the persons believed by the Claimant to have been promoted unfairly. The reason stated was that it was exempt under **Section 30 of the FOIA**. The Defendant however, provided access to some of the documents as follows:

- The entire personal file of Stephen Bissessar from Petrotrin;
- Copies of the criteria, policies and procedures which govern acting appointments and promotions in Petrotrin and/or in particular for the posts of Process Plant Foreman Daylight Operator, Assistant to Bond Supervisor and Bond Supervisor since 2008 to present;

- Copies of the criteria, policies and procedures that were utilized for the acting appointment and promotions in Petrotrin and/or in particular for the posts of Process Plant Foreman, Daylight Operator, Assistant to Bond Supervisor and Bond Supervisor since 2008 to present;
- Copies of the list of the requirements and qualifications needed for promotion to the offices of Process Plant Foreman, Daylight Operator, Assistant to the Bond Supervisor and Bond Supervisor since 2008 to present;
- Information as to whether any interviews were held for promotion to the position of Process Plant Foreman for the aforementioned promotions when Ken Joseph, Elton Noel, R. Ramdeen (retired) and subsequently Daniel George (retired) were promoted to the office of Process Plant Foreman;
- Information as to whether any interviews were held for promotion to the position of Assistant to Bond Supervisor for the aforementioned promotions when Daniel George was promoted to the office of Assistant to Bond Supervisor;
- All commendations, or letters of recommendations, performance appraisals and staff reports of Stephen Bissessar between 2008 to present.

15. The Clarification sought by the Defendant from the Claimant, regarding the Claimant's request for eligible candidates and seniority lists, was according to the Claimant, provided in a Pre-action protocol letter sent by his Attorneys to the Defendant on July 4, 2017. Further, the letter refuted the Defendant's contention that the requested information as to appraisals, qualifications etcetera was exempt. Accordingly, that letter demanded that those documents be disclosed to the Claimant failing which litigation would be commenced.

16. By letter dated the 15th day the September 2017, the Defendant refused for a second time, access to the following documents:

- Performance Appraisal Reports that were used to promote Ken Joseph, Elton Noel, R. Ramdeen, Daniel George, Steve Singh, Curtis Foster, Lloyd Straker;

- The qualifications, experience and skills of Ken Joseph, Elton Noel, R. Ramdeen, Daniel George, Steve Singh, Curtis Foster, Lloyd Straker.

17. The reason for the decision was based on the information being personal information under **section 30 (1) and (3)** as defined by **section 4(b) and (g) of the FOIA** and due to there being no consent from the individuals named in the documents. The letter also set out in lengthy detail certain human resource and administrative considerations that the Defendant believed rendered disclosure of personal information of this nature as not in the public interest.

18. As to the other information requested, namely the eligibility and seniority lists, the Defendant indicated that they could not be provided because no such lists exist.

19. Thereafter, the instant proceedings commenced challenging the decision of the Defendant not to provide the information requested on the appraisals and qualifications of the alleged junior officers promoted ahead of the Claimant. Since the filing of the Claim the Defendant has averred that attempts were made to obtain the consent of the promoted individuals to give access to their personal information. Three persons have consented to disclosure of their appraisal reports and these have therefore since been disclosed. However, the Defendant states that no consent has been obtained from the remaining four persons.

20. The Claimant submits that this conduct and/or decision of the Defendant was illegal and in breach of several statutory duties imposed by the FOIA as follows:

- The reason given was wrong as the requested information is not in fact exempt as it does not fall within the definition of 'personal information'. Alternatively, even if it did, the disclosure of same would not have been 'unreasonable': Section 30 of the FOIA.

- The Defendant breached Section 14 of the FOIA because it did not assist the Applicant in providing any of the requested information, even in an edited form confirming the qualifications of the persons requested;
- There has been a breach of Section 35 of the FOIA because there is no indication in the responses given by the Defendant of consideration of the public interest in having the Claimant look at the requested information even though it may include exempt documents, so as to prevent injustice to himself, abuse of power by authorities or neglect in their performance of their duty. As such the Defendant failed to consider whether access is justified in the public interest even if the documents fall within the exempt category.

Facts disputed by the Defendant:

21. The factual response filed by the Defendant is in the Affidavit of Alvin Stephenson, Senior Manager Human Resources. He was the author of the September 15, 2017 letter containing the challenged decision refusing to give certain information to the Claimant. The Claimant, from the Pre-action letter to the filing of the Claim, had focussed on accessing information on the appraisals and qualifications of the promoted officers. The Affidavit of the Defendant focussed mainly on justifying its denial of that access.
22. In so doing however, the Defendant also sets out some facts relevant to the Claimant's initial request for information which included the request for the eligibility and seniority lists. Although all that the Defendant required in that regard was clarification, which was provided, the lists were never disclosed. Instead the Defendant claimed, in the September 15, 2017 letter, that they do not exist.
23. Having not provided the seniority list information requested by the Claimant, the Defendant by Affidavit of Alvin Stephenson filed February 26, 2018, attacked the premise of the Claimant's need for information by citing facts regarding the eligibility and seniority of the promoted officers. Particular note is taken of facts stated at paragraphs 17, 18, 19, the last two sentences of paragraph 23, and the second to last sentence of paragraph 25.

These paragraphs all underscored, without attaching any supporting documentation and having never disclosed same to the Claimant that the Claimant was not senior to any of the persons promoted.

24. The Defendant disputes the veracity of certain facts alleged by the Claimant. Firstly, through production of the Claimant's Employee Profile, it has been shown that his initial employment began as a "Gauger B" hired on a temporary basis from month to month from August 2002 until August 2003. The Profile states that his permanent employment began in September 2003 when he became a Process Plant Attendant in the Oil Stocks Department. The profile also states that he held the position of Foreman Process Plant, apparently in an acting role, for intermittent periods between 2008 and 2015.
25. The Defendant highlights that the Claimant's performance has not always been excellent as alleged, as his profile shows ratings between 3.2 and 4.2 out of 5.0. Further, contrary to his allegation that he was recommended to the post of Process Plant Foreman by Daniel George in his Performance Assessment Report, the Defendant contends that the report shows only a statement that he should be considered for the position. An examination of that report shows, however, that although Mr. George comments only that he should be considered for promotion, there is an additional comment on the report from a Skip Level reviewer, Mr. Lloyd Straker, which states "Recommended for promotion to Foreman Process Plant (LPG)".
26. The Defendant alleges that Ken Joseph and Elton Noel were promoted to the position of Foreman Process Plant in 1998 and 1991 respectively, long before the Claimant commenced his own permanent employment. The Defendant also alleges that both Daniel George and Steve Singh were more qualified for the position than the Claimant, having 17 and 13 years' experience as opposed to the Claimant's 5 years as a permanent employee. No documents were attached to prove this eligibility/seniority although same had been requested by the Claimant.

27. Regarding the Claimant's claim that he was bypassed for the position of "Daylight Operator", the Defendant alleges that there exists no such position and that the records show that Steve Singh and Curtis Foster never held such a position.

C. ISSUES

28. The issues as identified by the parties are as follows:

- i. Whether the requested information amounts to personal information which falls within the exemption from disclosure at **Section 30 of the FOIA**;
- ii. Whether the disclosure of the Performance Appraisal Reports and Qualifications, Skills and Experience of Ken Joseph, Elton Noel, R. Ramdeen and Steve Singh involve reasonable disclosure of their personal information such that the exemption does not apply; and
- iii. Whether, even if the documents are exempt, the Defendant should, pursuant to the public interest override at **section 35 of the Act**, give access to the requested Performance Appraisal Reports and Qualification, Skills and Experience because:
 - a. There is reasonable evidence of significant injustice to the Claimant; and/or
 - b. Giving access to the documents is justified in the public interest of accountability of public authorities and transparency in their hiring processes;or

Whether alternately, it would not be in the public interest to disclose the personal information on appraisals and qualifications of employees because it would have an adverse effect on management and assessment of personnel by inter alia inhibiting full and frank expression of opinions during the appraisal process.

29. The Defendant raised another issue, belatedly in closing submissions, that the Defendant is not a state enterprise and therefore not subject to the FOIA. However, this was not raised in either the Defendant's pre-trial letters in response to the FOIA request or in its affidavit in response to the Claimant's Affidavit after this Claim was filed.

30. Further, as submitted by the Claimant in Reply submissions, the Defendant has complied with the other aspects of the FOIA request, seemingly accepting the jurisdiction of the FOIA. The belated challenge to the applicability of the FOIA to the Defendant is therefore not a properly raised issue to be considered in the present application. This is so because, even if the point is valid, by not raising it earlier on, the Defendant caused the Claimant to incur the costs of this litigation without being given a proper opportunity to consider alternate litigation options.

31. In any event Counsel for the Claimant underscored in Reply submissions the lack of merit to the contention that Petrotrin is not a public authority subject to the FOIA. Counsel indicated that had it been raised at the appropriate time a declaration in relation to that issue too would have been added to the relief sought herein.

D. LAW AND ANALYSIS

32. The sections of the FOIA governing the present matter are as follows:

“30. (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information of any individual (including a deceased individual).

(2) Subject to subsection (4), the provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

(3) Where a request by a person other than a person referred to in subsection (2) is made to a public authority for access to a document containing personal information of any individual (including a deceased individual) and the public authority decides to grant access to the document, the public authority shall, if practicable, notify the individual who is the subject of that information (or in the case of a deceased individual, that individual’s next-of-kin) of the decision and of the right to apply to the High Court for judicial review of the decision and the time within which the application for review is required to be made.

(4) Nothing in this Act shall be taken to require a public authority to give information as to the existence or non-existence of a document of a kind referred to in subsection (1) where information as to the existence or non-existence of that document, if included in a document of a public authority, would cause the last-mentioned document to be an exempt document by virtue of this section.

4. "personal information" means information about an individual, including—

...

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

...

(g) the views or opinions of another individual about the individual;

...

35. Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant—

(a) abuse of authority or neglect in the performance of official duty; or

(b) injustice to an individual has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so."

Purpose of the Section

33. The Claimant submits that the FOIA was drafted with the intention of promoting disclosure of information held by public authorities to the public, as opposed to suppressing or refusing access to information. Such an intention, it is submitted, has been held to be rooted in the principles of openness, transparency and accountability within a democratic society - **Ashford Sankar v the Public Service Commission CA 58 of 2007; Osland v Secretary to the Department of Justice [2008] HCA 37.**

Burden of proof

34. As submitted by the Claimant, the burden of proof rests on the public authority that is claiming the exemption - **Ashford Sankar**. The public authority must satisfy the court of the reasonableness of a claim of exemption - **Caribbean Information Access Limited v The Minister of National Security CA 170 of 2008**.
35. Further, as stated by Bereaux JA in **The Minister of Planning and Sustainable Development v The Joint Select Consultative Council for the Construction Industry Civil Appeal No. P 200 of 2014 (“JCC”)**, it may be that an applicant can establish the need for the public interest override provided for in S.35 through evidence, but if there is no such evidence the duty falls back to the public authority and ultimately to the court to establish this S.35 override.

Issue (i) - Personal information

36. The claimant argues, citing **Department of Social Security v Dryenfurth 1988 15 ALD 232**, that the information requested does not fall within the meaning of S.30 and that to the limited extent that it does, it is within the Defendant’s remit to have made any appropriate deletions/redactions.
37. The Claimant also cites **Re. Dyki and Federal Commissioner of Taxation (1990) 22 ALD 124** as authority for the proposition that applications of successful candidates were disclosable because the fact of their promotion would be in the public domain and any right to anonymity would be lost. The information sought in that case, however, was in relation to an application for promotion and not appraisal and qualifications as sought in the present case.
38. The Defendant, citing both **Ravi Jaipaul v Public Service Commission & Ombudsman CA 162 of 2011** and **Rampersad v Public Service Commission HCA S262 of 2005**, submits that

the appraisals requested do amount to personal information. In **Jaipaul** it was held at paragraph 18 that marks awarded by interviewers amounted to personal information:

“The categories of personal information that are enumerated in Section 4 of the FOIA are neither exhaustive nor exclusive. Section 4 of the FOIA merely enumerates what is “included” in the definition of personal information. This suggests that other matters may be personal information even if they are not expressly stipulated in Section 4 of the FOIA. On the present facts, I find that the marks awarded to the individual candidate are referable to that specific individual and, in any event, would be personal information for the purposes of Section 30 (1) of the FOIA.”

39. In **Rampersad** the Court, considering the wording of S.4 FOIA at paragraph 14, held that the rank and scores of public officers did constitute personal information:

“I have no doubt that they constitute personal information which is defined in section 4 to “include” a number of things set out in that section. The word “include” suggests that personal information is not confined to the class of information set out in section 4 but includes any information which is of a sufficiently personal nature as to require protection of the Act. I consider the rank and score of public officers to be sufficiently personal as to fall within the definition.”

40. Given that the FOIA does not specifically state all categories of information which constitute personal information, in the present case, the performance appraisals and work experience and qualifications of the individuals named can constitute personal information as is protected under the Act. This is so due to the personal nature of the documents which would contain information about the individual’s life experiences as well as commentary from their superiors on their performance.

41. Further, the performance appraisals in particular fall squarely within the category of “the views or opinions of another individual about the individual” as outlined in S.4 (g) and the work experience and qualifications fall under “employment history” of S. 4(b).

Issue (ii) – Unreasonableness of disclosure

42. The Claimant's main contention under this point is that the disclosure of the information would not be unreasonable as it is relevant to the Claimant's potential constitutional claim in discrimination as the Claimant would be required to show comparators who were treated differently from him.
43. The Defendant argues that it would be unreasonable to disclose as the information is not relevant to the discrimination claim and that there is no credible evidence of the seniority relied upon by the Claimant to support these claims. The Claimant objects in its Reply submissions to the assessment of whether the information is relevant on the basis that this does not have to be proven in order to access information under the FOIA. However, this consideration is in my view relevant firstly, to the determination of whether it is reasonable or not to disclose information falling under one of the exempt categories and secondly, to public interest override considerations. Relevance of the information to a potential discrimination claim will therefore be considered in determining reasonableness of disclosure of the personal information requested.
44. Although the Defendant has set out some statements in the Affidavit herein to show that the promotion of Mr. Joseph occurred long before the present Claimant would have been eligible for the post, the information relating to Mr. Singh and Mr. Ramdeen is not conclusive of the fact that they could not be comparators. Despite having been requested, the eligibility and seniority lists that would be needed to disprove that the Claimant was senior were not provided. The Defendant said they do not exist. It is therefore incomprehensible that at this stage, having denied the information existed, the Defendant is relying on it to challenge the premise of the Claimant's request for the other information he seeks, namely the appraisals and qualifications of his promoted fellow employees.

45. In fact, the relevance of this information to the Claimant's potential claim becomes more apparent by the Defendant's highlighting of these new alleged facts in relation to experience and seniority. At paragraph 48 of its submissions the Defendant underscores that Mr. Stephenson explained in his Affidavit that Mr. Singh was more qualified in terms of experience and competence. These averments without support from the disclosed documents do not conclusively decide the issue of whether unfair treatment was experienced by the Claimant. In fact, it raises more questions than answers since the eligibility/seniority lists were said not to exist. These questions must therefore be assessed based on information required in the documents requested.

46. The Defendant makes the further argument that the information is now useless given the closure of the Defendant Company and retrenchment of its workers. However, the seniority and position of workers may have an effect on possible damages to be awarded in the contemplated subsequent Claim as to discrimination and/or the retrenchment and/or pension benefits to be received upon dissolution.

47. In **Jaipaul**, the Court of Appeal considered the trial judge's reasons for considering that disclosure of documents that contained personal information was unreasonable in an instance where the Claimant was alleging he was bypassed for promotion. Among the trial judge's considerations in that case was that there was insufficient evidence provided that the Claimant was wrongly bypassed for the promotion.

48. The Court of Appeal observed that the trial judge considered a higher standard than was required to prove reasonableness for disclosure. Citing **JCC**, it stated that where the pros and cons are evenly balanced, the presumption in favour of disclosure in Section 3(2) (of the FOIA) will tip the balance. The Court therefore held that no further evidence to prove the reasonableness of the request was necessary:

"The Appellant was seeking information relevant to his having been bypassed for appointment to the post of CEO I. Like Bereaux J held in the Clyde Rampersad case, the marks of other candidates were relevant to this inquiry. This would have assisted the

Appellant in a challenge to the failure to appoint him to the post. The Appellant's need for the marks of the other candidates outweighed any public interest factors (such as privacy rights) that may have otherwise justified this non-disclosure. In these circumstances, I find that disclosure of the other marks would not have been unreasonable when the request was made for them."

49. In the present case, the Claimant has outlined the facts leading to his conclusion that he was unfairly bypassed. The Defendant disputes certain of these facts. However, the Defendant relies on information that has not been disclosed to the Claimant in coming to its conclusions (at paragraphs 48 and 28 of its submission) e.g. the years of experience of Mr. Singh in permanent service, the fact that he never worked as a Daylight Operator and that he was more qualified than the Claimant in terms of competence and experience.

50. In relation to the records of Mr. Joseph only, the Defendant submits that the undisputed evidence is that his promotion took place long before the Claimant was a permanent employee. However, the seniority/ eligibility information requested was never provided to the Claimant that could have assisted him in deciding whether his belief that he was senior was valid or not. Furthermore, even if he was not senior to the Claimant for promotion, he may still be considered a comparator in the potential discrimination claim by the Claimant. His treatment, based on his experience, qualification and appraisals, may be adjudged to have been different from the Claimant.

51. In the present circumstances, I find that the information sought is directly relevant to the Claimant's contentions and would assist him in coming to an informed conclusion as to his rights. I find that the disclosure of the personal information requested would not be unreasonable.

Issue (ii) - Public Interest considerations

52. Section 35 of the FOIA reads as follows:

“Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant—

(a) abuse of authority or neglect in the performance of official duty; or

(b) injustice to an individual; or

(c) danger to the health or safety of an individual or of the public; or

*(d) unauthorised use of public funds, has or is likely to have occurred or in the circumstances **giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.**”*

53. According to Justice of Appeal Beraux in the **JCC** decision, the approach of the Court to an interpretation of Section 35, must be a purposive one having regard to the intention of the FOIA. Beraux J.A. continued that Section 35 creates a presumption in favour of disclosure in the exercise of any discretion under the FOIA:

“[64] It creates a presumption in favour of disclosure in the exercise of any discretion conferred under the FIA. Section 35 is expressed in mandatory language but it does confer a discretion. Of course public interest considerations are paramount. But where the pros and cons are evenly balanced, the presumption in favour of disclosure in section 3(2) will tip the balance; that is to say, the public authority is mandated to give access.”

54. The Defendant has stated by letter dated 15th September, 2017 and in its Affidavit in Response, that consideration has been given to the Section 35 override in favour of disclosure of the requested information. The Defendant argues that the reason for its denial is based on the fact that there would be substantially less candour and frankness in reports if it were known that there was the likelihood that such reports may have to be disclosed, resulting in reduced reliability in such reports.

55. In particular at paragraph 19 of submissions, the Defendant argues that disclosure would have an adverse effect on the management and assessment of personnel as disclosure would:

- Inhibit the full and frank expression of opinions on employee performance;
- Reduce the efficiency and quality of staff selection and restrict the application of the merit principle and thereby threaten the company's ability to obtain the best qualified employee for the job;
- Impair and hamper the management of the company if there were no channels of confidential communication;
- Adversely affect working relationships between employee and supervisors and also affect the morale of employees;
- Promote job dissatisfaction with the selection process;
- Create strained relationships between participants in the promotion system;
- Open employees to public scrutiny of their shortcomings and areas of weakness which will lead to grave embarrassment. It would be likely to cause damage or distress to employees and may hinder their future employment. It would also expose any wrongdoings or suspicion of wrongdoings by employees as well as any recommendations for disciplinary action. Such disclosure would compromise any intended investigation by the company undertaken in furtherance of disciplinary action.

56. The Defendant in submissions underscores alleged discrepancies in the Claimant's factual allegations concerning his seniority and good performance record to argue that his claim as to entitlement to the information requested is without merit. The Defendant contends that it would be unreasonable to make disclosure of personal information in these circumstances.

57. In the High Court decision of **Ashford Sankar v PSC CV2006-00037**, the trial judge considered certain UK authorities which held that the notion that any competent and

conscientious public servant would be inhibited in the candour of his writings by consideration of the off-chance that they might have to be produced in a litigation is untenable – See **Burmah Oil Co. Ltd. v. Bank of England [1980] AC 1090 at 1133; Conway v. Rimmer [1968] AC 910 at 993.**

58. Nevertheless, the trial judge came to the conclusion that the situation was different in local circumstances as *“some public servants involved in the formulation of government policy would be legitimately inhibited in expressing their views or giving advice were it apprehended that those views or that advice might be disclosed.”* The Court of Appeal in **CA 58 of 2007** held, however, that there was no evidential basis for such a conclusion:

“Accordingly, there was no evidence to support the trial judge’s finding that public servants in Trinidad and Tobago do not possess the same level of maturity as their counterparts in the United Kingdom which will equip them to handle criticism, and this will cause them to be inhibited in their views if they apprehend that their views may be disclosed. It follows that this finding of the trial judge cannot stand.”

59. Similarly, in the present case, there is no evidence that officials of the Defendant Company would likely be inhibited in their frankness due to the mere possibility of disclosure in legal proceedings, as suggested by the Defendant. Particularly instructive is paragraph 33 of the Court of Appeal decision cited above which states:

“Interestingly, the trial judge noted that the possibility of future disclosure is capable of acting as a deterrent against advice which is “specious or expedient or otherwise inappropriate,” in an environment in which annual performance appraisals reports and executive decisions are regularly subjected to judicial scrutiny. In the judge’s view the possibility of future disclosure may in fact benefit the public interest by ensuring that such reports or advice contain only the honest opinions of those participating in the deliberative processes. These sentiments are entirely consistent with the main object of the Act which is to provide freedom of information to the public, so as to ensure transparency and accountability in executive decisions.”

60. Following this line of reasoning, the application of the merit principle would not be restricted as suggested by the Defendant but promoted if the information is disclosed. Further, where there is the chance that an appraisal may be subjected to judicial scrutiny, there will likely be a greater sense of accountability and duty of fairness in making such assessments. The likelihood of selecting objectively the best candidate for the job would increase.

61. It is noted further that two of the promoted persons, Mr. Ramdeen and Mr. George, are retired thus the adverse effects outlined by the Defendant may no longer be applicable or particularly compelling as it relates to them. The Defendant also makes the argument that the closure of the company renders this application useless as all employees have been retrenched. On the other hand in my view, the closure of the company may also render irrelevant all the human resource management related reasons given by the Defendant as to why disclosure of this personal information would be prejudicial. The concerns regarding staff morale, embarrassment within the company etc. highlighted at paragraph 19 of submissions would no longer be of concern.

62. As submitted by the Claimant, Section 35 requires a mandatory balancing act, weighing the public interest to disclose the exempted documents against the public interest to remain undisclosed. This is the statutory requirement which provides for instances where the public may, despite the exemptions, be entitled to information from highly confidential, polarising or controversial public authority documents. This is clearly a contextual exercise, and the facts of each case justifies where the scale tips.

63. In summary, due to inter alia to the closure of the Defendant Company, the reasons advanced for non-disclosure are no longer applicable or relevant. The benefit of disclosing the performance appraisal reports that were used to promote employees of the Defendant appears to be far greater than the damage that may be done by disclosing same. The

Claimant's discrimination case is yet to be tried and does not appear to be wholly inarguable despite alleged discrepancies outlined in the Defendant's submissions. Although it is clear that the Defendant expressly purports to consider the Section 35 provision, it exercised its discretion wrongly in coming to its decision not to disclose.

E. CONCLUSION

64. Although the information requested can be considered personal information under the FOIA, it is relevant to the Claimant's potential discrimination claim and therefore it is not unreasonable to disclose it. Even if it were considered to be unreasonable, there are significant public interest considerations which outweigh any other interest outlined by the Defendant.

65. As submitted by the Claimant, the Defendant is a state enterprise and is ultimately owned by and managed for and on behalf of the public. It is in the public interest that there is a system of meritocracy to determine promotions in this company given its critical role in the energy sector and its strategic importance to the economy. The requested information would assist in determining the following questions:

- what were the grades of the other employees in comparison to the Claimant's according to their relevant performance appraisals;
- whether these other employees were indeed better suited to be appointed to the various posts the Claimant contends that he was bypassed for and whether they were eligible to be considered for these promotions;
- whether the Claimant was senior to the persons promoted and
- Whether the Claimant was unfairly by-passed for promotion to the posts of Process Plant Foreman (LPG) and (Bond Yard), Assistant Bond Supervisor and Daylight Focus Operator.

66. Due to the nature of the request, it does not appear that an edited or redacted version of the documents would practically protect the privacy of the individuals concerned as they had been named. They could also be identifiable by certain aspects of their qualifications or experience. In any event, I find that the public interest in disclosing for the purposes of the Claimant's claim would outweigh that of non-disclosure for the reasons provided by the Defendant.

67. As submitted by the Claimant, the best course is to remit the matter for reconsideration by the Defendant. This will allow the Defendant to consider more fully the public interest in providing the information in light of the arguability of the Claimant's belief that he was unfairly bypassed for promotion, which may justify a future claim as to discrimination. It is clear that the Defendant did not provide him with any of the information it now relies on to suggest that he could not have been considered senior to those promoted. The Defendant said the requested lists did not exist. Accordingly, the basis of their current reliance on alleged junior status of the Claimant in denying the validity of his belief that he was bypassed must be further considered, along with all other factors cited by the Claimant relevant to the public interest override, in deciding what information to give to the Claimant.

F. Order

68. It is hereby ordered as follows:

- a. A declaration that the decision of the Defendant to refuse and/or deny access to the requested documents without giving due consideration to the provisions of Section 35 of the Freedom of Information Act (FOIA) is illegal.
- b. An order pursuant to Section 21 of the Judicial Review Act remitting the request to the Defendant to further consider Section 35 of the FOIA.

- c. The Defendant is to pay the costs of the Claimant certified fit for senior, junior and instructing counsel, to be assessed by the Registrar if not agreed by the parties.
- d. Liberty to Apply.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely, JRC I