

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-00811

BETWEEN

IAN GREEN

Claimant

AND

THE PUBLIC SERVICE COMMISSION

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. K. Thompson for the Claimant.

**Mr. R. Martineau S.C., Ms. K. Jodhan and Ms. A. Douglas instructed by Ms. K. Mark
for the Defendant.**

REASONS (oral)

The Claimant, Ian Green, seeks declarations against the Defendant, the Public Service Commission (“the Commission”), that:

- (i) its decision whereby it failed to consider and/or promote him to the First Division of the Trinidad and Tobago Fire Service was unreasonable, contrary to the rules of natural justice and section 20 of the Judicial Review Act; and
- (ii) its conduct in promoting four other officers, similarly circumstanced, to

the office of Divisional Fire Officer while failing to consider and/or promote the Claimant to the said office constitutes a contravention of the Claimant's 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.

The Claimant also seeks an order requiring the Commission to promote him to the said office or alternatively to consider the question of doing so.

By his application for Judicial Review filed on 28th February 2012 the Claimant relies on the following grounds in support of his claim:

- (i) with respect to the breach of his right to equality of treatment: he compares himself with four other fire officers, Assistant Divisional Fire Officers: Baptiste; St Louis, Browne and Tajudeen all of whom were promoted to the office of Divisional Fire Officer in November 2011. According to the Claimant these officers (hereinafter collectively referred as “the four officers”) were similarly circumstanced to him in that they, like him, were unsuccessful in their interviews for promotion, but unlike him, were subsequently promoted without being subjected to any other evaluation process.
- (ii) With respect to his contention that the decision was unreasonable and contrary to the rules of natural justice he contends that he has been unfairly treated in that had the Commission invited him and other eligible officers

to compete with the four officers in a fair and transparent assessment process the Claimant would have had very good prospects of success, having regard to his qualifications, job performance and experience. By not inviting the Claimant to compete the Claimant contends that the Commission has denied the Claimant of the chance to be promoted to Divisional Fire Officer.

Affidavits were filed by the Claimant and Justin Bowen, retired Chief Fire Officer, in support of the Claimant's case and Gloria Edwards-Joseph Director of Personnel Administration for the Commission. There was no cross-examination on the affidavits.

The relevant facts are not in dispute. The Claimant enlisted in the Fire Service on the 1st November 1982 as a fire fighter and now holds the substantive post of Fire Substation Officer in the Second Division of the Fire Service. The Claimant holds a postgraduate diploma in Human Resource and Master of Science degree in Human Resource Management.

By a letter dated the 2nd July 2008, presumably written in response to a request in this regard by the Claimant, the Chief Personnel Officer advised that there was no objection to the Claimant being exempted from writing the Management Studies examination set for promotion to the rank of Assistant Divisional Fire Officer at regulation 9 (2)(f) of the Fire Services (Terms and Conditions of Employment) Regulations 1998.

Regulation 9 of the said regulations sets out the qualifications for appointment to the First

Division of the service and in particular to the office of Assistant to the office of Divisional Fire Officer. The requirement of a pass in a written examination in Management Studies is one of the qualifications required for the office.

On three separate occasions during the period 2008 to 2010 the Claimant acted in the office of Assistant Divisional Fire Officer from: the 10th to 22nd October 2008; the 21st to 30th November 2008 and the 31st October 2009 to 23rd February 2010. In September 2009 the Claimant was among other officers recommended by the Chief Fire Officer at the time for accelerated promotion. The Claimant was then assessed by that officer as being capable of operating at the level of Assistant Divisional Fire Officer. The Claimant holds a postgraduate diploma in Human Resource and Master of Science degree in Human Resource Management.

In the month of October 2009 the Claimant, together with other officers, was interviewed for promotion to the office of Assistant Divisional Fire Officer. Despite the recommendation for accelerated promotion the Claimant was unsuccessful in the interview. Pursuant to the interviews and based on the performance of the candidates the Commission prepared a merit list. The Claimant having attained a total of 274 marks in the interview was placed at position 27 on this list. At a meeting held on the 15th December 2009 the Commission determined that candidates who had been awarded an average of 280 marks and above were suitable for appointment to the office of Assistant Divisional Fire Officer and identified 24 such officers. The Claimant given his position on the list was not one of the officers so identified. There has been no challenge to this decision by the Claimant. Of the 24 officers placed on the merit list 20 officers were promoted to the office of Assistant Divisional Fire Officer during the period 2009 to November

2011 in the order in which their names appeared on the list. With respect to the promotion of officers to the office of Assistant Divisional Fire officer therefore based on the interviews conducted there remained 6 officers in a higher position to the Claimant on the list who were not appointed as Assistant Divisional Fire Officer. Four of whom had attained in excess of the 280 mark standard set by the Commission.

Also in the month of October 2009 the Commission interviewed other officers for promotion to the office of Divisional Fire Officer. The Claimant was not interviewed for this office. The four officers were all interviewed for promotion to the office of Divisional Fire Officer. At the said meeting of 15th December arising out of these latter interviews the Commission also established an order of merit list for the office of Divisional Fire Officer. This list comprised 11 officers all of whom were promoted to that office between January 2009 and November 2010. The four officers were not on that merit list, they having been unsuccessful in the interviews. The Claimant has not challenged the decision of the Commission not to interview him for the post of Divisional Fire Officer in October 2009.

Subsequently, at a meeting of the Commission of the 18th October 2011, the Commission was required to consider the filling of 10 positions in the First Division. These positions included four positions of Divisional Fire Officer and five positions of Assistant Divisional Fire Officer. According to the unchallenged evidence of the Commission by this time the order of merit list for Divisional Fire Officers had been exhausted. As a result the Commission promoted the four officers, they being the most senior officers holding the substantive post of Assistant Divisional Fire Officer to the four available positions of Divisional Fire Officer. The Commission contends

that this was done in accordance with the criteria specified in regulation 158 of the Public Service Regulations (hereinafter called “the Regulations”). With respect to the five positions of Assistant Divisional Fire Officer the Commission promoted the next five persons on the order of merit list in order of priority. This is the decision challenged by the Claimant in these proceedings.

According to the Commission the Claimant was not appointed to the post of Divisional Fire Officer because (i) he was not interviewed for that office; and (ii) he was not eligible for the office as he had never served for two years in the office of Assistant Divisional Fire Officer and therefore did not satisfy the job specifications as to experience. Further the Commission submits that the Claimant was not similarly circumstanced to the four officers because at the material time those officers held the substantive office of Assistant Divisional Fire Officer while the Claimant held the substantive office of Fire Substation Officer some two ranks below.

With respect to his claim of unequal treatment the Claimant must satisfy me that he has been treated differently from other similarly circumstanced persons. In my view the Claimant has not shown that the four officers are actual or hypothetical comparators. In the first place the Claimant held a substantive position in the Second Division as a Fire Substation Officer while the four officers all held substantive positions in the First Division as Assistant Divisional Fire Officers. In this regard therefore the four officers were already members of the First Division while the Claimant was not. Further the Claimant interviewed for the post of Assistant Divisional Fire Officer while the four officers interviewed for the post of Divisional Fire Officer. Unlike the four officers therefore the Claimant never interviewed for the post of Divisional Fire Officer.

The only point of any similarity between the Claimant and the four officers is the fact that they all were unsuccessful in their interviews for the particular offices. In my opinion that is not a sufficient similarity to establish the four officers as true comparators. In these circumstances the Claimant's claim as to unequal treatment fails.

With respect to his claim that the failure to consider or promote him to the First Division of the Trinidad and Tobago Fire Service was unreasonable, contrary to the rules of natural justice and section 20 of the Judicial Review Act on the evidence it is clear that by the interviews conducted in 2009 the Claimant was given the opportunity to be considered for promotion to the First Division albeit the lower post of Assistant Divisional Fire Officer. The Commission considered the Claimant's position but failed to appoint him as he did not attain the necessary standard to be appointed to that lower post.

The Claimant submits that what he relies on is not that he was not given an opportunity to be heard but that in promoting the four officers in the given circumstances the Commission did not give the Claimant an opportunity "to press his claims" to be promoted to the office thereby denying him procedural fairness.

I do not agree with this submission. To my mind it cannot be said that the procedure adopted by the Commission with respect to the promotions to either post was unfair. The Claimant at all material times held the post of Fire Substation Officer and was provided the opportunity to interview for the next higher post that of Assistant Divisional Fire Officer. The Claimant never interviewed for the post of Divisional Fire Officer. Insofar as the appointment to the post of

Assistant Divisional Fire Officer was concerned there were available for promotion persons who ranked higher than the Claimant in the interviews. The decision to rank the Claimant in that particular manner has not been challenged.

Insofar as the post of Divisional Fire Officer is concerned the Claimant has not established that the appointments of the four officers were in any way contrary to regulation 158 of the Public Service Regulations. Or that the decision to make the appointments in accordance with that regulation was in any way irrational or unreasonable.

On the evidence it is clear that there were persons who had operated at the level of Assistant Divisional Fire Officer for a much longer period than the Claimant. The Claimant has not established that he was better or as qualified, by way of academics and/or experience, than any of the officers appointed to the First Division, including the four officers, between October 2009 and October 2011. The mere fact that the Commission may not have had notice of the fact that he held a Master's degree does not in my opinion establish that the Claimant was better qualified than the other officers. Neither is the Claimant's witnesses' observation that he knows of no similar instance where officers who failed an interview for promotion were promoted to that office without passing a further interview or assessment of any assistance. In this regard the Claimant has not pointed me to any requirement that the Commission do so in the circumstances.

The fact remains that at the end of the day the Claimant, like all the other officers, was given an opportunity to be considered for appointment to the First Division by way of the interviews conducted in October 2009.

At the end of the day the Claimant has not shown that the decision of the Commission to fill the vacancies in the higher office of Divisional Fire Officer by reference to Regulation 158 was irregular, irrational or in any way “Wednesbury unreasonable”. In the particular circumstances and having regard to the fact that Claimant has not succeeded in his interview for the lower office and that there were other officers in a better position with respect to the interviews for that office than the Claimant I cannot come to the conclusion that the procedure adopted by the Commission in appointing the four officers to the post of Divisional Fire Officer was somehow procedurally unfair to the Claimant.

Finally, by way of his written submissions, the Claimant seeks to rely on what he terms a legitimate expectation, procedural in nature, that his claims to promotion to the First Division would be objectively considered created by the promulgation of Regulation 9 and the grant of the waiver contained in the letter of the 2nd July 2008. To my mind this is another non starter not only does this not form one of the grounds upon which leave was granted but there is nothing before me to suggest that the Claimant’s claims to promotion to the First Division were not objectively considered. The Claimant was interviewed for a post in the First Division, that of Assistant Fire Officer and ranked less favourably than those persons appointed to the post. In any event it is clear from the terms of the letter of the 2nd July that all the letter does is exempt the Claimant from writing the Management Studies examination set for promotion to the rank of Assistant Divisional Fire Officer at regulation 9 (2) (f) of the Fire Services (Terms and Conditions of Employment) Regulations 1998. It does not as is suggested by the Claimant exempt him from the requirements specified in the Regulation.

In all the circumstances it is not necessary for me to consider the delay point raised by the Commission. I am satisfied that on the evidence before me the Claimant has not established that he is entitled to any of the declarations or the order sought. This application is accordingly dismissed.

Dated this 18th day of March, 2013.

Judith Jones
Judge