

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2007-00587

BETWEEN

AUDINE MOOTOO

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

THE PUBLIC SERVICE COMMISSION

DEFENDANTS

BEFORE THE HONOURABLE MADAM JUSTICE J. JONES

Appearances:

Mr. A. Ramlogan instructed by Ms. C. Bhagwandeem for the Claimant

Mr. D. Byam instructed by Mr. H. Ramkarransingh for the First Defendant

Mr. R. Martineau S. C. and Ms. Baptiste for the Second Defendant

JUDGMENT

1. This is an application by Audine Mootoo (“the Claimant”) for administrative orders pursuant to Part 56 of the Civil Proceedings Rules 1998 as amended, (“the CPR”).

2. In the action as originally framed the Claimant alleged that the failure of the Public Service Commission (“the Commission”) to appoint her to act in and/or promote her to three different posts over the period August 2004 to March 2006 breached her right to the equality of treatment from a public authority as guaranteed by section 4(d) of the Constitution. The action was brought against the Attorney General.

3. During the course of the proceedings I refused an application by the Attorney General to dismiss the action on the ground that the Attorney General was the wrong party to the suit and that the proceedings were an abuse of process and ordered that the Commission be joined as a Defendant to the action. No reasons were given at the time. In my view however the conjoint effect of **sections 14(3) and 75(2) of the Constitution** rendered the Attorney General a proper party to the action. In any event I am of the opinion that the joinder of the Attorney General was particularly necessary in order to give effect to any orders for monetary compensation which may be made in favour of the Claimant.

4. The actions complained of however were the actions of the Commission, a Service Commission made independent from the State under the Constitution. In those circumstances, in my view, the Commission ought to have been joined as a party to the action. With respect to the submission as to the abuse of process it seemed to me that an adjudication of such was more appropriate when all the parties and all the relevant facts were placed before the court. At the same time leave was given to the Claimant to amend

the claim form in terms of a draft filed and to make the necessary amendments consequential on the joining of the new Defendant.

5. Insofar as it is relevant the amended Claim Form did two things. It amended the declaration originally sought to delete the words “the Defendant” and to substitute the words “the Attorney-General”. The amendment also included another declaration specifically directed towards the actions of the Commission.

6. The result is that the Claimant now seeks the following relief:

- (i) A declaration that the Attorney General of Trinidad and Tobago has been guilty of unequal and discriminatory treatment of the Claimant in contravention of her right to equality of treatment from any public authority in exercise of any functions as enshrined in section 4(d) of the Constitution of Trinidad and Tobago.
- (ii) Damages and/or compensation including aggravated and/or exemplary damage for the contravention of the applicant’s fundamental rights and freedom guaranteed by the Constitution of Trinidad and Tobago
- (iii) A declaration that the Claimant was treated unfairly and/or illegally and/or irrationally by the Public Service Commission contrary to the principles of natural justice and section 20 of the Judicial Review Act.

7. Given the manner in which the relief now sought was brought before the Court, in order to properly identify the issues for determination it is necessary to consider **Part 56**

of the CPR in some detail. Part 56 deals with the following types of applications: judicial review; original motion under section 14 of the Constitution; declarations in which a party is the State, a court, a tribunal or any other public body and applications in which by virtue of any enactment the court has the power to quash specified actions or decisions of a minister or government department: Part 56.1. The Rule therefore covers a number of different types of actions collectively referred to as administrative actions and describes the procedure to be followed in bringing such actions.

8. Broadly speaking Part 56 identifies two different types of procedure, procedure specific to applications for judicial review and procedure relevant to the other types of administrative orders. The latter includes applications pursuant to section 14 of the Constitution.

9. Part 56.7 specifies the procedure common to all administrative actions. It provides for the application to be made by a fixed date claim identifying the nature of the application, that is the type of administrative order sought: Part 56.7(1). With respect to an application under section 14 of the Constitution the rule specifically provides that the Claim Form shall serve as the Originating Motion mentioned in the section and shall be headed “Originating Motion”: Part 56.7(2).

10. An affidavit must be filed with the Claim Form: Part 56.7(3). According to Part 56.7(4) the affidavit must state:

- (i) The name, address and description of the Claimant and the Defendant,

- (ii) The nature of the relief sought including whether any interim relief is sought, whether the Claimant seeks damages, restitution or recovery of a sum and setting out the facts on which such a claim is based and where practicable specifying the amount of money claimed.
- (iii) In the case of a claim under section 14 of the Constitution, the relevant provision of the Constitution.
- (iv) The grounds on which such relief is sought
- (v) The facts upon which the claim is based;
- (vi) The Claimant's address for service and
- (vii) The names and addresses of all Defendants to the claim.

11. It must be noted that insofar as the claim for relief under the Constitution is concerned the affidavit and Claim form do not comply with the requirements of Part 56(7)(3). No point is taken by the Defendants as to the failure to comply with these requirements. However of some concern to me is the failure by the Claimant to provide any basis for a monetary award in her favour. As I understand the rule, Part 54(7)(3)(ii), if monetary compensation is claimed, in the affidavit in support the Claimant is required to set out the facts upon which such claim for monetary compensation is based and as far as practicable to specify the amount of money claimed. In my view the facts required by the rule are the facts upon which the Court may assess the monetary loss to the applicant. In other words the facts relevant to an assessment of damages.

12. In the instant case, apart from sweeping statements that the acts of the Commission resulted in a loss of income and opportunities for promotion, the Claimant gives no specific evidence to allow for the assessment of this loss. In my opinion such failure is contrary to the requirement set out in Part 56(7)(3)(ii) and fatal to a claim for monetary compensation.

13. Parts 56.2 to 56.4 specifically deal with applications for judicial review. In particular Parts 56.3 and 56.4 deal with the question of leave to apply for judicial review. Although Part 56.5 does not in its description specifically refer to judicial review in my opinion from its contents, and given the substantive law, it is clear that the intention is to deal with delay on an application for leave or relief in an application for judicial review.

14. Insofar as the second declaration sought is concerned therefore the question that arises is whether the Claimant seeks relief under the Judicial Review Act and if so whether such relief is open to the Claimant at this stage? The Claimant seeks a declaration that she was treated unfairly and/or illegally and/or irrationally by the Commission contrary to the principles of natural justice and section 20 of the Judicial Review Act.

15. By her amended Claim Form she challenges the acts of the Commission in by-passing her for the promotions. In particular the Claimant pleads that the conduct of the Commission is challenged on the following grounds “pursuant to section 5(3) of the Judicial Review Act.” In fact, one ground apart, the grounds relied are those specified in

section 5(3) (a), (c), (d), (e), (f), (i), (m) and (o). The additional ground is that the Commission ignored relevant considerations such as the Claimant's qualifications, seniority and its own previous practice and policy when making similar action appointments and promotions in the past.

16. **The Judicial Review Act** ("the Act") states an application for judicial review of a decision of an inferior court, tribunal, public body, public authority or a person acting in exercise of a public duty or function in accordance with any law shall be made to the Court in accordance with this Act and in such manner as may be prescribed by Rules of Court: section 5(1). It is clear that the new case presented by the Claimant against the Commission is not based in a contravention of any of the rights enshrined in the Constitution but is in fact an application for the review by the Court of the decisions of the Commission.

17. **Section 6(1)** of the Act states: "No application for judicial review shall be made unless leave of the court has been obtained in accordance with the Rules of the Court." It cannot be disputed that the procedure for applying for judicial review has not been followed in the instant case. With due respect to the Claimant, the obtaining of permission to amend the claim form does not constitute an application for leave to bring application for judicial review nor is it a substitute for such leave. Further, in my view, even if the proper procedure had been applied the application would have failed at the leave stage for delay.

18. Part 56.5 provides:

“ (1) The judge may refuse to grant leave or to grant relief in any case in which he considers that there has been unreasonable delay before making the application.

(3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to-

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration.”

19. Save with respect to one decision which the Claimant claims she discovered in April 2007 it is not in dispute that the decisions complained of all occurred in the year 2006 or earlier. These decisions involved rejecting the Claimant’s applications to act in or to be promoted to a higher post and the Commission appointing other persons in her stead. The amendment to the claim seeking judicial review of the Commission’s decisions was filed on the 28th September 2007. With respect to all the decisions sought to be challenged, including the decision discovered in April 2007, the question of unreasonable delay arises. I find as a fact that there has been unreasonable delay in the bringing of the application.

20. As a result of all of these decisions is not only that persons have been appointed to act and/or have been promoted into the posts but there must have also been consequential

appointments, whether acting or permanent, made with respect to the resulting vacancies. In my opinion to grant leave at that stage, September 2007, would have been be detrimental to good administration and substantially prejudice the rights of the persons now holding the various offices. Further it follows that, even if it were now open to the Claimant to seek the relief specifically sought against the Commission, to grant such relief at this stage would be even more detrimental to good administration and prejudicial to the rights of other officers. In the circumstances I find that it is not now open to the Claimant to seek judicial review of the decisions of the Commission.

21. In my opinion the fact that the relief sought is in the form of a declaration makes no difference. Indeed the Act specifically acknowledges that a declaration is one of the remedies open to an applicant for judicial review. In the circumstances second declaration sought is refused. The Claimant's case therefore stands or falls on her claim with respect to inequality of treatment.

Has the Claimant's right to equality of treatment been contravened?

22. " A Claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 as actual or hypothetical comparators.....The comparison must be such that the relevant circumstances in the one case are the same or not materially different, in the other. ": Lord Caswell in **Mohanlal**

**Bhagwandeem v The Attorney General of Trinidad and Tobago Privy Council
Appeal No. 45 of 2003 at page 6 paragraph 18.**

23. Despite the plethora of facts raised by the Claimant the case as presented on her Claim Form insofar as the Defendant's unequal or discriminatory treatment of the Claimant is concerned is that she was treated unequally when she was passed over for acting appointments/or promotions on the basis that a post-graduate qualification in the particular field specific to that higher office was a prerequisite to appointment. She pleads that this policy was not applied to other similarly circumstanced officers who nonetheless received acting appointments and/or promotions to higher offices and indeed was not applied to her when she was subsequently appointed to act in one of the posts. This is the case presented by the Claimant pursuant to section 14 of the Constitution.

24. On these allegations the Claimant must therefore satisfy this Court that: (i) there was such a policy (ii) this was the reason for the Commission's refusal to appoint her to the posts and (iii) that other persons similarly circumstanced were treated differently. In these circumstances it is necessary to examine the evidence presented with respect to this issue.

25. As may be expected no evidence was presented on behalf of the Attorney General. Affidavits were however filed on behalf of the Claimant and the Commission. It is important to note that there was no cross-examination of any of the deponents. In this regard I adopt the principle expressed in the case of **R. v Reigate Justices, ex parte**

Curl (1991) C.O.D 66, that in the absence of cross-examination where there is a dispute of fact on the affidavit evidence the Court ought to proceed on the basis of the affidavit evidence of the person who does not have the onus of proof. In the instant case the onus of proof is on the Claimant accordingly where there was a dispute of fact between the evidence of the Claimant and the evidence presented by the Commission I resolved that dispute in favour of the Commission.

26. The Claimant holds a Master's degree in Horticulture. Her substantive post is of Biochemist II with the Ministry of Agriculture, Land and Marine Resources ("the Ministry"). While in that substantive post on the 25th August 2004 by way of a memorandum signed by the Claimant and four other officers, she, together with the other officers, applied to the Commission to be considered to act in the post of Deputy Director Extension Training and Information Services ("the first post"). With respect to this application the Commission made no response to the Claimant until the 31st July 2006. By a memorandum of that date the Commission refused her request and indicated that it considered that post-graduate training in the specific field of agricultural extension more relevant to the first post than the post graduate training received by the Claimant. Meanwhile it would seem another officer with post-graduate training in agricultural extension was appointed to act in the post.

27. During the period 2nd May 2005 to 24th June 2005 the Claimant was appointed to act in the post of Deputy Director (Crop Production). In June 2005 she applied to the Commission to be considered for promotion to the post of Technical Officer

(Horticulture) (“the second post”). The Commission never received this application. From the 19th September 2005 until the 28th February 2006, however, the Claimant acted in the second post as a result of a vacancy arising from the pre-retirement leave and subsequent retirement of the holder of that office. Thereafter her acting appointment was terminated and another officer, Mr. Nadeer Baksh, who was senior to the Claimant, appointed in the post.

28. The Claimant claims that by notice dated the 16th March 2006 she was asked whether she was interested in acting in the post of Deputy Director Agricultural Services Division (Crop Production) (“the third post”), a post in which she had acted previously. The Commission denies that it offered the position to the Claimant by the said notice. In accordance with the Reigate Justices case I accept the evidence of the Commission. According to the Claimant however she did not indicate her interest in the third post but rather asked to be reconsidered for appointment to the second post.

29. The Claimant was on the 12th November 2007, after these proceedings were filed, appointed to the second post with effect from the 16th October 2007 upon the promotion of the said Nadeer Baksh.

30. The Claimant alleges that she was by passed for acting appointments and or promotion to the three posts on the basis that she did not possess a post-graduate qualification in the particular field specific to the higher post. She says that in this regard she was treated differently than other similarly circumstanced officers.

31. In support of her case, with respect to the reasons for the refusal to promote or allow her to act in the higher posts the Claimant relies on the memorandum from the Commission dated the 31st July 2006 and conversations between the Acting Permanent Secretary and Director of the Human Resources of the Ministry (“the Ministry Officials”) and herself.

32. According to the Claimant, with respect to the first post, she was told by the Ministry Officials that notwithstanding her seniority over the person appointed in the first post she would not be appointed because her master’s degree in horticulture was insufficient because the preferred candidate possessed a master’s degree in agricultural extension. She states that she was told by the Ministry Officials that a new policy had been introduced and seniority was not the guiding factor for acting appointments as before, “a specialist masters in the relevant discipline for the higher office to which acting appointment and/or promotion was sought was now a pre-requisite.”

33. With respect to the other similarly circumstanced officers the Claimant states:

“The vast majority of officers who had previously held the first prospective post [the first post] were not subjected to the pre-requisite of possession of a masters degree in agriculture extension. Most of the officers appointed to act did not possess a master’s degree in agricultural extension. Examples would include Mr. Samuel Rivers, Mr. Vernon Douglas, Dr. G. Bola, Ms Mona Jones and Mr. Mohammed Halim.”

34. She says, as well, that she was appointed to act in the post of Deputy Director (Crop production) CADP from the 2nd May 2005 to the 24th June 2005 even though she did not possess a master's degree in crop production.

35. The Commission on the other hand says that with respect to the first post the Commission gave more weight to post-graduate training in agricultural extension rather than horticulture and appointed an officer with the more relevant post-graduate training. With respect to the persons whom the Claimant alleges were treated differently the Commission says that it has no record of Mr. Samuel Rivers acting in the post; all the other appointments referred to by the Claimant were made prior to the publication of Circular 1 of 2004. This circular, the Commission submits, identified a change in policy with regard to the training and experience requirements for certain offices.

36. With respect to the conversations between the Claimant and the Ministry Officials the Commission denies that these conversations occurred; denies that the Ministry Officials were authorised to speak to the policy of the Commission except as stated by the Commission and says that the policy of the Commission conveyed to the relevant Ministries was as stated by Circular No.1 of 2004 dated the 8th December 2004 and published in a daily newspaper on the 15th June 2005.

37. In the absence of cross-examination I accept the evidence of Verna Johnson, one of the Ministry Officials, as to the contents of the conversation. In particular I find that the Claimant was not told that a master's degree in the relevant discipline was a pre-

requisite for appointment to a higher office and find that the conversation was guided by the contents of Circular No1 of 2004.

38. In this regard the Circular states: “Effective from the 3rd January 2005 the Commission would no longer consider recommendations for acting appointments and/or promotions in respect of officers who do not satisfy the training and experience requirements for the particular office. Exceptions may be made in special circumstances.”

39. The case with respect to inequality of treatment as presented by the Claimant is in respect to the failure to appoint her to the three posts the Commission did not treat her in the same manner as it treated persons who had previously been appointed to the first post. In order to succeed the Claimant must show that the circumstances that applied to the other officers were the same or not materially different from the circumstances that applied in her case. The Commission submits that the circumstances were different in that the appointments of the other officers were all made prior to the Circular.

40. In support of this submission the Commission states:

- (i) Mr. Mohammed Halim acted in the first post on various occasions from 15th April 1996 to 31st December 2004. His last appointment was for the period 29th December 2003 to 31st December 2004;
- (j) Mr. George Bala acted in the post from 1st March 2002 to 25th March 2002;
- (k) Ms. Mona Jones acted in the post on two occasions in 1997 and
- (l) Mr. Vernon Douglas acted in the post from 1st July 1981 to 30th April 1986.

41. While not denying the dates of these appointments the Claimant says that her application for promotion into the post was made long before the Circular was ever published or came into effect. In response the Commission states that at the time of the application the position was not available as the holder of the office Mr. Mohammed Halim remained in that position until the 31st December 2004.

42. It is clear from the terms of the Circular that the Commission was changing the policy that had previously applied with respect to acting appointments and promotions. I accept the evidence of the Commission and find as a fact that the appointments of the other officers were made prior to the Circular. I also find that at the time of the Claimant's application the post was not as yet available and only became available after the 31st December 2004. I also find that at the time of the Claimant's application the post was not yet available and only became available after the 31st December, 2004 Accordingly the Circular would have applied in the Claimant's case unlike the case of the other officers. In my opinion the other officers were not proper comparators and the Claimant has therefore failed to establish that the Commission is guilty of unequal treatment and has contravened her right to equality of treatment from any public authority in the exercise of its functions. In the circumstances the Claimant's case is dismissed.

Dated this 29th day of January , 2009.

.....
Judith A. D. Jones
Judge