

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO**

Claim No. CV2017-00076

LEANNA BHARAT

Claimant

AND

THE PUBLIC SERVICE COMMISSION

First Defendant

THE COMPTROLLER OF CUSTOMS AND EXCISE

Second Defendant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Third Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 25th October 2017

Appearances:

**Ms Jayanti R. Lutchmedial, Ms. Chelsea J. Stewart and Ms. Alana Rambaran for
Claimant**

**Ms. Kelisha Bello instructed by Ms. Nisa Simmons and Ms. Ryanka Ragbir for
Defendants**

JUDGMENT

1. Ms. Leanna Bharat's claim in these public law proceedings¹ raises the issue of the impact of administrative errors by the Public Service Commission in the course of the appointment of persons to the civil service. Ms. Bharat's claim in this regard is not unique. In recent cases of **Romauld James v The Attorney General of Trinidad and Tobago** [2010] UKPC 23 and **Ravi Doodnath Jaipaul v The Public Service Commission and The Ombudsman of Trinidad and Tobago** Civil Appeal No. 162 of 2011 civil servants were

¹ Fixed date claim form for judicial review and constitutional relief filed on 2nd February 2017.

prejudiced by administrative oversight where documents had either not been passed to the relevant authorities or the staff of the relevant Service Commission failed to contact persons to ascertain their availability for appointment. In those cases there were first findings of administrative error and oversight which resulted in declaratory relief for breaches of constitutional rights and damages where the case warranted such an exercise of the Court's discretion. Of course not every breach of a constitutional right automatically entitles an applicant to damages. As indeed not every administrative error and oversight would warrant a Court's exercise of its discretion in public law whether in granting a declaration in judicial review or constitutional law where the exercise is rendered academic by the relevant Service Commission itself rectifying the alleged error or oversight.

2. In the case of Ms. Bharat, she had successfully applied for the post of Customs and Excise Officer I (CEO I). However, she allegedly indicated in writing to the Second Defendant, the Comptroller of Customs and Excise (the Comptroller) and First Defendant (the Public Service Commission) that she was seeking a deferral of her appointment to a later time. When she was later available and allegedly so indicated to the Comptroller and the Public Service Commission, other persons who were her juniors in the Order of Merit List were promoted, effectively bypassing her in the process. Ms. Bharat's complaint is that having acted on the representation made by an officer of the Comptroller to indicate her desire to defer her appointment, no person her junior should have been appointed in the service ahead of her after she had subsequently indicated her desire and readiness to assume duty. To do so, she contends, is a breach of her legitimate expectation that she would have been appointed upon her indication that she is ready to assume duty and would be a breach of her "right to equality treatment" under section 4(d) of the Constitution of the Republic of Trinidad and Tobago.
3. If indeed the Public Service Commission, as Ms. Bharat contends, received the communication from her that she was seeking a deferral and was ready to take up her position as CEO I, there is nothing in the evidence to suggest that the Public Service Commission lawfully would not have made her appointment in the service faithfully pursuant to the Merit List when she was available to assume duties. The difficulty in this case however, is that the Public Service Commission contends that it never received the alleged request for deferral by letter nor her indication that she was interested in the appointment at the later date. Blissfully unaware of her status, the Public Service Commission only realized her complaint by letter dated 16th September 2016 from Ms.

Bharat's attorneys. In response to that letter the Public Service Commission extended the life of the Order of Merit List for the office of CEO I from 7th October 2016 to 31st December 2016. She was then appointed to temporary position as CEO I by letter of 13th January 2017 from her date of assumption on 19th January 2017 to 31st March 2017.

4. Ms. Bharat eventually obtained her temporary appointment to the post of CEO I, albeit during the course of these proceedings. Despite this however, she still pursues this claim seeking a declaration that her constitutional rights of the "right to equality of treatment" were infringed and that the Defendants acted unlawfully and in breach of her legitimate expectations.
5. The very narrow issues culled from the submissions of the parties in this case are as follows:
 - (a) Whether the proceedings are academic, Ms. Bharat having been already appointed to the post of CEO I on 19th January 2017;
 - (b) Whether Ms. Bharat communicated to the Defendants that (i) she would defer her appointment to September 2015 when she will be available to assume duties and (ii) she did subsequently indicate to the Defendants that she was ready and available to assume duties. If so, at what date was this communication made;
 - (c) If the communications were made by Ms. Bharat, whether the Defendants acted in a manner which was in breach of her legitimate expectation of a substantive benefit of an appointment upon her notification that she was available to be assume duties; and
 - (d) Whether she was bypassed for an appointment in the circumstances as alleged by her and therefore treated unequally to other persons similarly circumstanced.
6. In my view, for the reasons expressed in this judgment, I am not convinced that Ms. Bharat did communicate her intention to defer her appointment to the Public Service Commission. In any event, when she did in my view indicate to the Public Service Commission that she was interested in writing to assume duties those persons, her junior, had by then already been appointed to temporary positions and she could have no legitimate complaint.

Facts

7. The main facts are not in dispute between the parties. The Public Service Commission advertised the vacancy for the post of CEO I. Ms. Bharat applied for employment in the Public Service by filling out an application form on 31st October 2013. She was interested in the job as she was attracted by the benefits of overtime, a good salary, standard working

hours, a pension plan and the permanency of the position. When she applied she was not at that time employed. Ms. Bharat was among 9,600 applicants who responded to the Notice of Vacancy and the advertisements. She was among 5,567 applicants who later sat the Civil Service Entrance Examinations for the post of CEO I. These sheer numbers alone demonstrates how important it is that a written record is made in order to verify dealings, representations and conversations with applicants by the Public Service Commission and vice versa.

8. By its meeting on 7th October 2014, the Public Service Commission decided that persons scoring 71 marks and above and who were ranked from numbers 1 to 126 will be placed on the Merit List. Eventually, the Public Service Commission contacted Ms. Bharat by letter of 27th October 2014 indicating to her that she was successful and will be placed on the Order of Merit List. The Merit List would be valid for two (2) years expiring on October 2016 and she would be considered for future acting and temporary appointments. Although the Public Service Commission did not indicate to her at that time what rank she was in the Order of Merit List, there is no dispute between the parties that she was ranked 57 out of 126 successful applicants. Accordingly, following the Service Commission's principles of appointment, she would have been in the normal course of things the 57th person to be appointed to a position of either temporary or acting post in the service all things being equal. Importantly, neither of these positions would have been permanent appointments nor a prelude to permanent appointments. It is also conceded by the Claimant's attorneys that there could be no quarrel with the Public Service Commission if persons ranked below her (that is from 58 to 126) would be appointed before her if she was unavailable to assume duties.
9. As it turns out, the first 87 persons were all offered temporary appointments at the Customs and Excise Division, Ministry of Finance. Naturally, as Ms. Marcia Pile- O'Brady deposes, a period of training and assessment would be necessary for the appointees to prove themselves qualified for a permanent position. Ms. Bharat being one of the persons in that "group" was notified in November 2014 that she was appointed CEO I. From her letter of appointment, she would have been appointed to serve for a limited period of time from the date of her assumption of duty to 30th April 2015. Her letter of appointment dated 29th October 2014 stated:

"Dear Madam

Public Service Commission has appointed you as Customs and Excise Officer I (Range 22/31), Customs and Excise Division, Ministry of Finance and the Economy on a temporary basis from the date of your assumption of duty to 30th April, 2015.

Your salary is in Range 22/31: \$4,939-\$6,051/\$6,515/\$6,316-\$7,952/\$8,531 per month (2011).

Your appointment is subject to all the Laws, Acts of Parliament and Regulations (Regulations made under relevant Acts), for the time being in force, that govern the appointment and termination of appointment of public officers in the Public Service.

You should note that the procedure for the termination of a temporary appointment, prior to its date of expiry, is set out at Regulation 123 of the Public Service Commission Regulations at Chapter 1:01 of the Laws of the Republic of Trinidad and Tobago.

Please report to the Ministry of Finance and the Economy, Level 7, Twin Towers, Port of Spain with an acceptable form of identification bearing a photograph, that is, Identification Card, Passport or Drivers' Permit."

10. The Public Service Commission contends that as it did not hear from Ms. Bharat her appointment was cancelled in March 2015, which would have been upon the expiry of her term of appointment. Subsequently, 19 other persons were given temporary appointments as vacancies arose in priority of the Order of Merit List. These appointments were made by letters issued in July 2015 and January 2016. These persons all ranked lower than Ms. Bharat on the Merit List but in doing so the Public Service Commission claims that it was unaware of Ms. Bharat's availability or interest in the position.
11. Ms. Bharat conversely alleges that when she received her letter of appointment in November 2014, she reported to the Customs House- Customs and Excise Division and spoke to one Ms. Lenore Samuel, the Senior Human Resources Officer. She had a conversation to the effect that she was at that time on a one year contract with the Ministry of Works and Infrastructure which would have expired in September 2015. She indicated that although she was willing and interested in assuming duties as CEO 1, she would have preferred not to lose her gratuity. Ms. Samuel indicated that Ms. Bharat could defer her appointment by writing to her and she would inform the Public Service Commission and she could take up the appointment when she indicates her availability. Based on that representation, she sent her letter to Ms. Samuel on 27th November 2014.

12. She also contends, albeit belatedly, in her supplemental affidavit that she also sent such a letter to the Public Service Commission. Upon completing her contract at the Ministry in September 2015, she alleges that she liaised with Ms. Julianna Trotman in the Public Service Commission in September 2015 and later in 2016 to indicate her availability. She also sent letters to Ms. Trotman and Ms. Linder Foster, Senior Human Resource Officer at the Customs House- Customs and Excise Division on 10th May 2016. By that time, however, according to the evidence of the Public Service Commission, her appointment was cancelled. The letters dated 10th May 2016 exhibited by Ms. Bharat however were unsigned letters as she explained that she did not keep copies of the documents sent to the Public Service Commission nor the Comptroller nor did she think it necessary to sign the letters before exhibiting same because she did not think that the Defendants would deny receiving the said letters. The letters which were exhibited in her principal affidavit were copies which she printed off her computer.²
13. Ms. Bharat's attorneys wrote in 16th September 2016 in effect making an FOIA request but also highlighting the plight of Ms. Bharat. That letter confirms that it is her case that the first time that she wrote to the Public Service Commission was in May 2016. Taking her case therefore at its highest, no person was issued any letters of appointment to any temporary position subsequent to May 2016, except of course eventually Ms. Bharat on 13th January 2017.
14. In response to the letter from Ms. Bharat's attorney in September 2016 however, the Public Service Commission extended the life of the Order of Merit List and in January 2017 appointed her in the temporary position of CEO I. She therefore eventually received the same benefit which she was seeking in November 2014, a deferral of her temporary appointment to the post of CEO 1.
15. Clearly, a number of persons who were her junior were appointed in temporary positions in January 2016. The very narrow issue therefore is whether at that time the Public Service Commission had knowledge or was aware that (a) Ms. Bharat had made a request to defer her appointment to assume on a later date and (b) that they were aware that she was ready to assume duties since September 2015 or at latest in January 2016.

² Supplemental Affidavit of Leanna Bharat filed on 25th January 2017.

16. I have considered the evidence filed in these proceedings and the written submissions³ and I am not convinced of Ms. Bharat's view that the Public Service Commission would have so been aware for the following reasons:

- (a) She annexed unsigned letters to her principal affidavit alleging that those were the letters sent to Ms. Samuel and alleges belatedly that she also sent a letter to the Public Service Commission of her request to defer but fails to annex any copy of such a letter.
- (b) She contends she was in commutation with Ms. Trotman at the Public Service Commission but equally on the file of the Public Service Commission no such record is made. In any event she was aware that she had to make such requests in writing and so any oral communications or follow up with Ms. Trotman are of no moment or consequence.
- (c) Her letter to the Customs Division indicating her interest in deferring was not copied to the Public Service Commission and indeed if this was a letter which found its way to the Public Service Commission it is uncertain how the staff of the Public Service Commission would have treated with it as it was not addressed to them. It is more probable than not that the letter improperly addressed would not have been received by the Public Service Commission.
- (d) Ms. Bharat was aware of the need to send her communications in writing evidenced by her belated attempt in May 2016 to alert the Public Service Commission of her plight. However, at that time the Public Service Commission had already made the appointments of other persons by letters dated January 2016 of which complaint is being made and who assumed office by February 2016.
- (e) Even the contents of her letters are ambivalent. In one letter she indicates that she would be ready to assume duty in January 2015⁴ which is clearly wrong and in

³ Affidavit of Leanna Bharat filed on 6th January 2017.

Supplemental Affidavit of Leanna Bharat filed on 20th January 2017.

Supplemental Affidavit of Leanna Bharat filed on 25th January 2017.

Affidavit of Leanna Bharat filed on 2nd February 2017.

Affidavit of Marcia Pile-O'Brady filed on 27th March 2017.

Affidavit in reply of Leanna Bharat filed on 20th April 2017.

Supplemental Affidavit of Marcia Pile-O' Brady filed on 8th June 2017.

Defendants' submissions filed on 25th August 2017.

Claimant's submissions filed on 28th August 2017.

Claimant's submissions in reply filed on 21st September 2017.

Defendant's reply submissions filed on 10th October 2017.

⁴ Exhibit "L.B.5" in affidavit of Leanna Bharat filed on 6th January 2017. Letter dated 27th November 2014.

another letter indicated that she was ranked 27⁵ on the Merit List which is also wrong.

- (f) I also take into account the fact that Ms. Bharat possessed a diploma in Civil Engineering and the rudiments of proper letter writing and keeping a record of her correspondence when it comes to serious matters much as her employment would be taken seriously by her.
- (g) There is nothing to indicate that Ms. Bharat followed up with Ms. Samuel or the Public Service Commission to confirm that either received her letters seeking her request for a deferral or to confirm that her request for a deferral has been approved.
- (h) Further as a matter of law the knowledge of Ms. Samuel at the Comptroller could not impute knowledge of the Public Service Commission. See **R v Department of Health** [2005] EWCA Civ 154. It is the Public Service Commission who has been conferred with the constitutional mandate to make appointments.⁶ The insulation of the Service Commissions and the sensitivity about the risk of executive influence in the process of making appointments analyzed in **Thomas v The Attorney General of Trinidad and Tobago** (1981) 32 WIR 375 was the subject of recent comment in **Mohammed v Public Service Commission and others** [2017] UKPC 31. Indeed it would be improper and unlawful for Ms. Samuel or any person not properly authorized by the Public Service Commission to make representations in relation to the assumption of office of an appointment which falls outside the clear terms of the Public Service Commission's terms of appointment. In this case the Public Service Commission offered a temporary appointment for a specific period and it does not lie with Ms. Samuel an employee of the Comptroller to alter those terms to permit Ms. Bharat to assume office beyond that time. Administratively and more importantly constitutionally Ms. Bharat's dealings in that regard must be with the Public Service Commission or its authorized delegate. In **R v Department of Health** Lord Sedley explained the famous "Carltona Principle" emphasizing that it establishes that the acts of a duly authorized civil servant is in law the act of his/her minister. It was legal authority for the practical reality of modern government in relation to the devolution of department function. It would however be

⁵ Exhibit "L.B.6" in affidavit of Leanna Bharat filed on 6th January 2017. Letter dated 10th May 2016.

⁶ Section 121 of the Constitution of Trinidad and Tobago and Chapter III of the Public Service Commission Regulations.

inappropriate on the facts of the case to impute Ms. Samuel's knowledge and representations as that of the Public Service Commission.

17. In these circumstances, there could be no foundation to assert that the Public Service Commission had unlawfully bypassed Ms. Bharat or acted unlawfully when they were unaware of (a) her request for deferral and indeed did not communicate to her any response to such a deferral, nor was there confirmation from Ms. Samuel that the Public Service Commission confirmed receipt and had agreed to defer her appointment and (b) her readiness to assume duty in September 2015. At the very latest if Ms. Bharat is to be believed, her first written communication to the Public Service Commission was in May 2016 but at that time letters were already dated and issued by the Public Service Commission to persons she identifies as having "bypassed" her.
18. To accept Ms. Bharat's story would be to assume that the Public Service Commission ignored her for over two (2) years which I am not prepared to accept based on the uncertainty of her own evidence.

Adverse Inferences

19. I do take into account the criticism made by Ms. Bharat that there is no affidavit of Ms. Samuel nor of Ms. Trotman. However, it is a stretch to submit as Ms. Bharat has done to say that there is no evidence by the Attorney General. The Public Service Commission's evidence is clear and straightforward. The affidavit of Ms. O'Brady was filed on behalf of all the Defendants. There is, of course, a high duty on public authorities to assist the Court with full and accurate explanations of all relevant facts to the issue. However, as pointed out in **The Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Limited** [2002] EWCA Civ 1409, the real question is to examine where in the evidence put forward on behalf of the Defendants has it given a true and comprehensive account of the way in which the relevant decision was arrived at.
20. In **Tweed v Parades Commission for Northern Ireland** [2007] 1 AC 650 Lord Bingham of Cornhill commented:

"Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skillfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness

in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says...”⁷

“...it is a well-established principle that once permission to bring a claim for judicial review has been given public authorities are under a duty of candour to lay before the court all the relevant facts and reasoning underlying the decision under challenge...”⁸

per Lord Brown.

21. Whereas Ms. O’Brady simply says that her notes from the file reveal that Ms. Bharat indicated that she was not interested in the post, I agree with Ms. Bharat that I expected more from the deponent by way of exhibiting correspondence of inter departmental memos or notes. However, this does not take away from the fact that even Ms. Bharat is ambivalent in her own evidence on the essential fact that she communicated directly to the Public Service Commission in writing of her request for a deferral. Without any such evidence, and there is none, Ms. Bharat is left with the discussions she had with Ms. Samuel and the representations made to Ms. Bharat by Ms. Samuel. Her vague record of “liaising with Ms. Trotman” the recruitment officer of the Public Service Commission takes her case nowhere. In my view, the representations of Ms. Samuel could not bind the Public Service Commission and cannot support her contention that an unambiguous representation was made to her which would found a claim that there was a breach of her legitimate expectations.

Legitimate Expectations

22. The law of legitimate expectation to a benefit is now settled and is not in contention between the parties.

“...to qualify for protection to be legitimate – the expectation of the substantive benefit of advantage must contain the following qualities:

- a. The expectation must be induced by the decision-maker either expressly-by means of a promise undertaking or implicitly by means of settled past conduct of practice.
- b. An express promise or undertaking can take the form of (a) a general representation, issued either to the world or to a class of beneficiaries; (b) a specific representation addressed to a particular individual or individuals.

⁷ **Tweed v Parades Commission for Northern Ireland** [2007] 1 AC 650 paragraph 4.

⁸ **Tweed v Parades Commission for Northern Ireland** [2007] 1 AC 650 paragraph 54.

- c. A general representation may take various forms including that of a circular letter or statement of policy... A person who seeks to rely upon a representation must be one of the class to whom it may reasonably be expected to apply... Whether a general representation will be held to give rise to a legitimate expectation does not depend upon the intention of the decision-maker. The question is where the representation may reasonably induce a person within the class to rely on it. The context of the representation is therefore important...
- d. A specific representation may take the form of a letter, or another considered assurance, undertaking or promise of a benefit or advantage or course of action which the authority intends to follow. To be binding, the representation must fulfill the following conditions:
 - a. The representation must be based on full disclosure...
 - b. The representation must be made by a person with actual or ostensible authority to make the representation...
 - c. The representation must be “clear, unambiguous and devoid of relevant qualification” ...”⁹

23. **Francis Paponette v AG** [2010] UKPC 32 highlighted the obligation of the Respondent to justify frustration of a legitimate expectation once it has been satisfactorily proven.

“37. The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

38. If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in *Nadarajah v Secretary*

⁹ Judicial Review of Administrative Action- De Smith, Woolf and Jowell 5th ed para 13-030.

of State for the Home Department [2005] EWCA Civ 1363 at para 68: “The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.” It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified.

42. It follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant’s legitimate expectation. Without evidence, the court is unlikely to be willing to draw an inference in favour of the authority. This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the applicant to give the reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority. As Schiemann LJ put it in *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237, at para 59, where an authority decides not to give effect to a legitimate expectation, it must “articulate its reasons so that their propriety may be tested by the court”.¹⁰

24. In my view, there is no evidence of a clear and unambiguous representation made by a person with actual or ostensible authority to make the representation. First, the alleged representation is a critical one in relation to an appointment policy and the appointment of officers in the civil service. Ms. Samuel obviously does not have the authority to make any such representation. Indeed, as an officer in the civil service it would be dangerous to arrogate unto herself such powers which has been vested exclusively and for good reason in the insulated office of the Public Service Commission. See **Thomas v The Attorney**

¹⁰ See **Francis Paponette v AG** [2010] UKPC 32 at paragraphs 37, 38 and 42.

General of Trinidad and Tobago (1981) 32 WIR 375. There is no evidence that the Public Service Commission delegated an authority to Ms. Samuel in relation to the recruitment policy in the civil service. Second, there is no communication in writing by Ms. Samuel to Ms. Bharat of such a representation and it is extraordinary that a public officer possessing Ms. Bharat's qualifications would receive a letter from the Public Service Commission in relation to her employment yet fail to engage the very Public Service Commission in relation to her date of assumption of duty. One would expect that notwithstanding that the letter indicates she must report to Human Resource Department of the Comptroller, that she would immediately seek the intervention of the Public Service Commission on her difficulty in relation to accepting her appointment or altering the terms of her appointment.

25. Third, Ms. Samuel's alleged representation is not altogether clear. She says that Ms. Bharat has the "option to defer" and that she must indicate so in writing to "them". Was the "them" to the Comptroller and to the Public Service Commission or the "them" as in the "other" body the Public Service Commission? Certainly there is no letter addressed to the Public Service Commission by Ms. Bharat and her belated attempt in her supplemental affidavit to affix knowledge by the Public Service Commission of any such correspondence which is not exhibited is unconvincing. Moreover, it is clear that Ms. Bharat is aware of the need to communicate with the Public Service Commission as she sought to do so in May 2016. Importantly, in that letter she does not indicate to the Public Service Commission or make reference to her earlier letter nor to her alleged conversations with officers of the Comptroller nor the Public Service Commission nor any alleged representation made by Ms. Samuel to her.

26. For these reasons, I find it difficult to accept that the Public Service Commission acted unfairly towards Ms. Bharat or in breach of her legitimate expectation as articulated in her submissions and her claim. Indeed, her claim that she was unlawfully bypassed carries with it the constitutional dimension of whether her constitutional right to equal treatment was breached. However, this submission too fails in light of the late notification by Ms. Bharat of her availability to assume office.

Inequality of Treatment

27. Ms. Bharat submitted that she was treated unequally and unfairly because unlike her counterparts, she was not in fact appointed based on and in accordance with her position on the Merit List. She was entitled to be so appointed subject to the deferral option which

was available to her and she was not. Having been advised that she was entitled to defer her appointment and that consideration would be given to her for the next available appointment upon her indicating her availability, her claim to such appointment was then repeatedly ignored.

28. The concept of section 4(d) of the Constitution of Trinidad and Tobago is set against the backdrop of inherent inequalities in society. It seeks to demarcate a line to define discriminatory treatment as unconstitutional. In the recent judgment of Moosai JA in **The Attorney General of Trinidad and Tobago v Ravi Doodnath Jaipaul** the test for determining inequality of treatment under our Constitution was analyzed as a comparative concept, examining like cases and determining the reasons and rationale for any difference in treatment. It was observed:

[45] Equality is a comparative concept. In a constitutional setting not all differential treatment would be discriminatory. The concept is neither Orwellian nor Utopian. Rather, the constitutional right to equality before the law connotes the right to equal treatment with others in similar circumstances. In *Bhagwandeem v Attorney General* Lord Carswell propounded the test for inequality of treatment: "A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has 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 E R 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same or not materially different in the other."

[51] In my view the judge was correct in adopting the test for equality established in *Graham*, namely that where a claim is brought for inequality of treatment under section 4(d) of the Constitution, a claimant need only raise a prima facie case that he was treated less favourably than one similarly circumstanced. The onus then shifts to the public authority to justify on an objective basis the difference in treatment.

[52] I also agree with the trial judge that Ms. Wallace and Mr. Clauzel were actual comparators. Both were similarly circumstanced as they too had applied for the vacant post of Customs and Excise Officer I, were selected on the basis of written competitive examinations and interviews, were placed on the Order of Merit List and were to be

contacted sequentially in accordance with established practice and procedure. Both Ms. Wallace and Mr. Clauzel were ranked at numbers 52 and 56 on the Order of Merit List, which was within close proximity to the respondent who ranked at number 53 thereof. The judge was therefore correct when she held that the point of comparison arose when those two individuals were contacted by the PSC to ascertain their interest in the post of Customs and Excise Officer I, whereas the respondent, through nothing more than an error, was not similarly contacted. This surmounted the first hurdle of raising a prima facie case that he was treated differently from his comparators. It was then for the PSC to objectively justify the difference in treatment. In my view the judge was also correct when she found the following at paras 7 and 8 of her judgment:

"7. The Defendant in the instant case has failed altogether to offer any explanation. Far from providing an explanation, the deponent for the Defendant has invited the Court to speculate. At paragraph 22 of her affidavit, Ms. Edwards Joseph suggested that the Defendant's inability to find a record of a letter to the claimant "... could mean one of several things." The deponent then proceeded in her affidavit to identify three possible scenarios, the last of which was that the Claimant was not contacted at all.

8. In my view, this falls far short of the explanation envisaged by the Court of Appeal in *Graham*. The Defendant has failed altogether to discharge its burden to explain and justify their failure to contact the Claimant to ascertain the Claimant's interest in the post."

29. The current approach to section 4 (d) has been neatly summarized by the Privy Council in ***Annissa Webster and others v The Attorney General of Trinidad and Tobago*** [2015] UKPC 10 at paragraph 24:

"The current approach to section 4(d) of the Constitution of Trinidad and Tobago may therefore be summarised as follows: (1) the situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment. (2) Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment. (3) To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. (4) Weighty reasons will be required to justify differences in

treatment based upon the personal characteristics mentioned at the outset of section 4: race, origin, colour, religion or sex. (5) It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged).”

30. There is of course no other comparator in this case who like Ms. Bharat requested and obtained a deferral of their assumption of duty from the Public Service Commission and who was appointed by the Public Service Commission at a later time upon their indication that they were interested in assuming duty. Her case fails on the basis of that analysis.

31. However, the other dimension of Ms. Bharat’s claim (as in **Audine Mootoo v The Attorney General and the Public Service Commission** C.A.CIV.38/2009) is that she was entitled to be treated fairly in comparison to others on the order of the merit list. This argument could be persuasive if only that Ms. Bharat only indicated her interest after the appointments were already made. In **Mootoo**, Moosai J.A observed:

“Notwithstanding the failure of the appellant to establish that the persons relied on were valid comparators for the Extension post, her case had another dimension to it. As part of her claim to unequal treatment, the appellant also relied on the unfair and arbitrary treatment by the respondent in its application of the regulations to her in this post of Extension, as well as the posts of Horticulture (Ministry of Agriculture), Crop Production and Horticulture (Ministry of Public Utilities). Essentially the appellant focuses on non-compliance with regulations 25 to 28. In spite of that, the trial judge, in my respectful view, omitted to deal with this additional feature of the appellant’s claim to unequal treatment. Once she ascertained that the persons relied on by the appellant in the Extension post would not be appropriate comparators, the judge incorrectly concluded that there was no breach of the right to equality of treatment. It must be borne in mind that the constitutional concept of equality of treatment is significantly wide to encompass the duty to act consistently. Accordingly, like cases should be treated alike.

It would follow that what was further required was a consideration of the constitutional implications of the contention as to the arbitrary and inconsistent application of the regulations towards her in these posts, while other similarly circumstanced persons in the respective fields (Bheekoo, Baksh, Fortune and Simon) were treated differently.”¹¹

¹¹ **Audine Mootoo v The Attorney General and the Public Service Commission** C.A.CIV.38/2009 at paragraphs 83 and 84.

32. The fact is, ultimately, regardless of how this case is analyzed, Ms. Bharat was at the highest offered a temporary appointment which in the first instance was for a period of 6 months from November 2014 to March 2015. Based on her own admission she was not available and could not have assumed duties for that period. Eventually, the Public Service Commission, when a vacancy arose, offered her another temporary employment for the period January 2017 to March 2017 conferring on her the benefit of the temporary appointment which she originally sought in her claim. Although it is for a shorter period than the first offer, no complaint is made in these proceedings of such a period and indeed no complaint could be made having regard to the nature of the employment being of a temporary nature. Indeed no assurances or representations were made at all by the Public Service Commission with regard to the nature or the term of service which would be eventually offered to her even if it is accepted that the Public Service Commission agreed to defer her appointment. In short the proceedings are largely academic.

An academic issue

33. In **Kamla Jagessar v Teaching Service Commission** CV2009-01445 it was observed that the Court would exercise caution in public law proceedings to exercise its discretion to grant relief where the consequences would largely be academic and where there is no need for clarification of the law on an issue of public importance. This edict is directly applicable here. Declaratory relief would only be granted if it served a practical purpose or indeed some clarification of the law was needed. No such purpose is served in this case. Indeed Ms. Bharat in her claim seeks a declaration to make her appointment retroactive. This, clearly, the Court cannot do for the reasons set out by Moosai JA in **Ravi Jaipaul**¹². Ms. Bharat's case clearly is not on all fours with **Ravi Jaipaul** who suffered a material four and

¹² **Ravi Doodnath Jaipaul v The Public Service Commission and The Ombudsman of Trinidad and Tobago** Civil Appeal No 162 of 2011, paragraphs 83 and 85 provides:

"[83] There being no evidence to support the respondent's broad assertion that retroactive promotions in the public service are routinely made, I agree with the appellant that the trial judge erred in declaring that the respondent's appointment was to have retroactive effect in accordance with his position on the Order of Merit List. The PSC's reaction to the claim was to promote the respondent in accordance with his place on the Order of Merit list, from the date of his assumption of duties. The PSC did so in accordance with its powers of retrospective appointment as provided at section 42 of the Interpretation Act as follows:

42. An appointment (however described or designated) under a written law may be made to have effect retrospectively from the date upon which the person appointed in fact first performed any of the functions of his appointment.

[85] I have concluded that the court cannot lawfully backdate the respondent's appointment to a date prior to when he first performed the duties of Customs and Excise Officer I. The lack of power of the judge to backdate the respondent's appointment in the instant circumstances meant inevitably that the issue of a declaration of retroactive appointment should have been excluded from determination in accordance with part 26.1(1)(l) of the CPR."

a half years loss in seniority. In this case, there is no evidence of any detriment to be suffered by her in the alleged loss in seniority. Her temporary appointment in any event expired legitimately in March 2015 in the first instance and March 2017 in the last instance.

34. Even if a declaration was conceivably available this did not automatically entitle Ms. Bharat to damages. The Privy Council's guidance in **Romauld James** on this issue is equally instructive.

“36. To treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is invested in the court by section 14 of the Constitution. It would also run directly counter to jurisprudence in this area. In *Inniss v Attorney General of St Christopher and Nevis* [2008] UKPC 42, in considering this issue Lord Hope of Craighead said this in para 21: - “The question ... is whether a declaration that there has been a contravention of s 83(3) would be sufficient relief for the Appellant in the circumstances. The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate the right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief.”

37. The very least that these statements make obvious is that there will be cases where the vindication of the constitutional right will be achieved by the making of a declaration. Where there has been no major impact on the claimant, a declaration is more likely than not to suffice. This has notable relevance for the present case. Although it was found that the appellant had been discriminated against, this does not appear to have affected him in any material way whatever. Despite having been denied the exemption, he was in fact promoted and has continued in the rank of acting sergeant even after the error was detected. He has now secured an exemption through the legal proceedings that he instituted. This is not, therefore, even a case such as that envisaged by Lord Hope of there not having been a significant effect yet; the appellant has not suffered nor will he, because of the declaration that has been made, suffer such an effect.

38. Lord Brown (in the passage from *Suratt* quoted above at para 33) had referred to the analogy to be drawn with claims for compensation in cases where a breach of ECHR had occurred. As well as the case of *Greenfield* (to which Lord Brown alluded), in

Anufrijeva and another v Southwark London Borough Council [2004] QB 1124, the Court of Appeal addressed the question of the adequacy and efficacy of declaratory judgments in cases where there had been a violation of human rights. At para 53 Lord Woolf CJ said: -

“Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. This is reflected in the fact that, when it is necessary to resort to the courts to uphold and protect human rights, the remedies that are most frequently sought are the orders which are the descendants of the historic prerogative orders or declaratory judgments. The orders enable the court to order a public body to refrain from or to take action, or to quash an offending administrative decision of a public body. Declaratory judgments usually resolve disputes as to what is the correct answer in law to a dispute.”

35. In this case there is no real loss to Ms. Bharat as her alleged entitlement would have been to obtain a temporary appointment for a term which she eventually obtained. She could not lay claim to loss of earnings between the periods of September 2015 to January 2017 for the reason that it resides with the Public Service Commission to offer a temporary appointment for a term and there is no guarantee to Ms. Bharat that such appointment would have been a prelude to permanent or further extension of her appointment for any significant period. Further, there is no warrant in this case, even taking Ms. Bharat's claim at its highest, of an alleged administrative error and oversight for an additional award to highlight the Court's outrage of a breach of or a vindication of a constitutional right. Her situation may have been unfortunate but cannot achieve to the heights of actionable rights in public law or sound in additional awards of damages usually reserved for more serious public law matters.

Conclusion

36. For the reasons set out above the claim would be dismissed. However, it is a fact that but for the proceedings Ms. Bharat would not have obtained the benefit of her temporary appointment and for that reason the litigation did produce a positive result for her.

37. The claim would be dismissed. On the question of costs unless I receive submissions to the contrary within fourteen (14) days of this order, there will be no order as to costs.

Vasheist Kokaram
Judge