

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV2009-01581

**IN THE MATTER OF THE JUDICIAL REVIEW ACT NO. 60 OF 2000**

**AND**

**IN THE MATTER OF AN APPLICATION WITHOUT NOTICE FOR  
LEAVE TO APPLY FOR JUDICIAL REVIEW IN ACCORDANCE WITH CPR 1998  
PART 56.3**

**AND**

**IN THE MATTER OF THE FAILURE OF THE DEFENCE COUNCIL TO ARRIVE AT  
A DECISION IN RELATION TO THE INTENDED CLAIMANT**

**BETWEEN**

**NEIL HUGO OSBERT BENNETT**

**Claimant**

**AND**

**THE DEFENCE COUNCIL**

**(a body established under section 7 (1) of the Defence Act Chap. 14:01**

**First Defendant**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**(added pursuant to the order of the Honourable Mr. Justice Rajkumar  
dated 22<sup>nd</sup> January 2010)**

**Second Defendant**

**Before the Honourable Madam Justice Margaret Y. Mohammed**

Dated the 4<sup>th</sup> October, 2016

**Appearances:**

Ms Elaine V Greene instructed by Ms Margaret M. Clerk, Attorneys at law for the Claimant.

Mr Russell Martineau SC, Mr Duncan Byam instructed by Mr Sean Julien, Attorneys at law for the Defendants.

## **JUDGMENT**

1. The sole issue for determination in this matter is whether the Claimant has proven that he is entitled to damages due to the failure by the First Defendant to act on two complaints which he lodged prior to 2009.
  
2. The Claimant was enlisted in the Trinidad and Tobago Regiment from 1978 to April 2008 when he retired at the rank of Lieutenant Colonel. Prior to his retirement he had two grievances namely his non-selection to attend overseas command courses and the failure of the Chief of Defence Staff to recommend him for promotion to the rank of Colonel. On the 9<sup>th</sup> November 2006 (“the first complaint”) the Claimant made a complaint to the First Defendant concerning his non-selection to attend the army and general staff command course for 2007. On the 26<sup>th</sup> March 2008 (“the second complaint”) the Claimant made a complaint to the First Defendant with respect to the failure of the Chief of Defence Staff to recommend him for promotion to the rank of Colonel. The First Defendant did not deal with any of the complaints prior to the Claimant’s retirement date of April 2008 which resulted in the Claimant instituting the instant judicial review proceedings against the First Defendant.
  
3. By order dated the 26<sup>th</sup> April 2010 Rajkumar J (“the Rajkumar J order”) made two declarations and two mandamus orders namely :

**“IT IS ORDERED** that:

1. A Declaration be and is hereby granted that the failure or neglect of the Defence Council of Trinidad and Tobago to investigate the Claimant’s complaint (the 2006 complaint) made on 9<sup>th</sup> day of November 2006 relative to his non-selection to attend an overseas Command Course is illegal, irrational and procedurally improper.
  
2. A Declaration be and is hereby granted that the failure or neglect of the Defence Council of Trinidad and Tobago to investigate the Claimant’s complaints

relative to his (a) non-selection to attend an overseas Command Course and (b) the failure of the Chief of Defence Staff to recommend him for promotion to the rank of Colonel as embodied in his letter dated March 26<sup>th</sup> 2008 is illegal, irrational and procedurally improper.

3. An order of *mandamus* be and is hereby granted compelling the Defence Council of Trinidad and Tobago to investigate and otherwise act in accordance with section 194 of the Defence Act Chapter 14:01 as if the 2006 complaint had been dealt with within a reasonable time of its receipt, within 90 days hereof in relation to the Claimant's complaint made on the 9<sup>th</sup> day of November 2006 relative to his non-selection to attend an overseas Command Course and provide written reasons for its decision.
4. An order of *mandamus* be and is hereby granted compelling the Defence Council of Trinidad and Tobago to investigate and otherwise act in accordance with section 194 of the Defence Act Chapter 14:01 as if the 2008 complaints had been dealt with within a reasonable time of receipt, within 90 days hereof in relation to the Claimant's complaints made in his letter dated the 26<sup>th</sup> day of March 2008, that is to say his (a) non selection for an overseas Command Course and (b) failure to recommend him for promotion to the rank of Colonel and provide written reasons for its decision.
5. That damages if any to be paid by the Second Named Defendant ( The Attorney General) to be assessed subsequent to the investigations described in 3 and 4 aforesaid"

4. The effect of the said declarations and mandamus orders were that the First Defendant was to investigate the complaints relative to the Claimant's non-selection to attend overseas command courses and the failure of the Chief of Defence Staff to recommend him for

promotion. The Court also ordered that damages, if any, be paid by the Second Defendant to the Claimant to be assessed subject to the investigations mentioned in the declarations.

5. It was common ground that the law with respect to the granting of damages in judicial review proceedings was articulated by de la Bastide CJ in **Jospehine Millettev Sherman McNichols**<sup>1</sup> as:

“ Damages are only recoverable in judicial review proceedings if they would have been recoverable in an ordinary action brought either by writ or by some other form of originating process eg. Constitutional motion.”<sup>2</sup>

6. The principles laid down by de las Bastide CJ has been codified in section 8 (4) of the **Judicial Review Act**<sup>3</sup> which provides:

“ (4) On an application for judicial review, the Court may award damages to the applicant if-

- (a) The applicant has included in the application a claim for damages arising from any matter to which the application relates; and
- (b) The Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making the application, the applicant could have been awarded damages.”

7. Procedurally the Claimant must comply with Part 56.7 (3) and (4) (b) (ii) of the Civil Proceedings Rules 1998 as amended (“the CPR”) which provide for the Claimant to file an affidavit with the Claim Form and he must state if he is seeking “damages, restitution or recovery of a sum due or alleged to be due setting out the facts on which such claim is based and where practicable, specifying the amount of any money claimed.”

---

<sup>1</sup> Civ App No 155 of 1995 at page 14

<sup>2</sup> Supra at page 14

<sup>3</sup> Chapter 7:08

8. The onus was on the Claimant to provide the Court with evidence to support his claim for damages. In the Privy Council decision of **Romauld James v Attorney General of Trinidad and Tobago** Court was of the view that the Claimant must prove that he suffered actual loss.
9. It was submitted on behalf of the Claimant that he has discharged his statutory and procedural responsibilities under the **Judicial Review Act** and the CPR since his Fixed Date Claim which was filed in the instant proceedings included a claim for damages and the affidavit evidence filed in support of the claim supports his claim for damages on the bases of breach of his substantive legitimate expectation to be sent on the senior command course and that he would be recommended for promotion. As such the Claimant would be and is entitled to bring a constitutional motion alleging a breach of section 4(b) of the **Constitution of the Republic of Trinidad and Tobago** which guarantees the right of an individual to equality before the law and the protection of the law.
10. To support the aforesaid contentions the Claimant relied on **Rees v Crane**<sup>4</sup> where Lord Slynn of Hadley stated that :

“ ...the “protection of the law” referred to in section 4(b) upon which the respondent also relies would include the right to natural justice. A claim under a constitutional motion and on the application for judicial review thus raise the same issue.”
11. The Claimant also relied on the authority of **Ameena Ali v North West Regional Health Authority, the Minister of Health and the Permanent Secretary, Ministry of Health**<sup>5</sup> to support his contention that where a cause of action at common law for damages exists, damages may be awarded for the unlawful frustration of a substantive legitimate expectation and the high court judgment of Jamadar J ( as he then was) of **Ronnie Samaroo v The Principal of Point Fortin Junior Secondary School and the Minister of Education**<sup>6</sup> to support his position that the breach of the right of natural justice amounts to a contravention of the right to protection of the law and that the applicant in that case

---

<sup>4</sup> (1994) 43 WIR 444

<sup>5</sup> Civ App No 11 of 2005

<sup>6</sup> HCA S 536 of 1998

could have succeeded on the matters raised in those proceedings in a claim under the Constitution for breach of his fundamental right to protection of the law and he would have been entitled to damages.

12. The Defendants submitted that the Claimant is not entitled to damages for the following reasons. There is no action for damages which the Claimant could have brought against the Defendants when he made his application for judicial review. Even if there is, the First Defendant is not responsible for promotions and there is no causal link between the Minister failing to advise the President to promote the Claimant and the failures of the First Defendant. In this regard, the First Defendant has no authority to reinstate the Claimant and even if it did, it would have done so in accordance with the law. Further the Claimant's claim was not a claim for substantive legitimate expectation and even if it was, it could not have been against the First Defendant. In any event the Court in making an order for damages to be assessed, if any, did not declare that there was breach of substantive legitimate expectation and there was no declaration that the First Defendant failure to act on the two complaints amounted to a breach of the protection of the law provision in the Constitution.

13. Was there any cause of action for damages which the Claimant could have brought against the First Defendant when he made his application for judicial review? The simple answer to this question is no for several reasons. Firstly, the Claimant had no right to promotion. In **Crane v Rees**<sup>7</sup> the Court of Appeal in this jurisdiction made the following definitive pronouncement on the right to promotion as :

“This leads me to the claim for loss of opportunity of promotion to the Court of Appeal. The trial judge found that the complaint that the appellant was not elevated to the Court of Appeal was in no way related to the breach of his constitutional right to be heard. Again he must have considered that that there was no causal link between the breach and the loss. The appellant had testified that at least four other judges, junior to him, had been elevated to the Court of Appeal when he was on

---

<sup>7</sup> Civ App 181 and 2001 of 1997 per Hamel-Smith JA

suspension. In cross-examination however, it was revealed that even before his suspension at least four other judges, also junior to him, had been appointed ahead of him. This counsel for the respondents submitted, tended to neutralise the claim. The submission misses the point. Promotion is never as of right and that alone makes it virtually impossible for anyone to assert that he was denied promotion at any particular time. In any event, whatever the prospects, by the time his suspension was removed the age of retirement was around the corner. All chance of promotion was lost. This must have added to his distress but to make a finding that he was entitled to some form of pecuniary loss as a result of his non-promotion is untenable.”<sup>8</sup>

14. In pursuing his claim for damages the Claimant complaint is that he was not nominated to go on an overseas command course and that there was a practice that attendance at such a course was a condition precedent to promotion. There is no provision in the **Defence Act** which makes the attendance of such a course a condition precedent for promotion. Even the Claimant’s evidence at paragraphs 5 and 6 of his affidavit filed on the 8<sup>th</sup> May 2009 appears to support the position that the attendance on an overseas command course was not a condition precedent since someone who did not meet the criteria which he says is necessary for promotion to the rank of Colonel was so promoted. Paragraphs 5 and 6 states:

“5. In accordance with the established guidelines for professional training and development in the TTR, I have met all the criteria, being service at rank of Lt. Col., experience in command at Battalion level, command experience as (Acting) Commanding Officer of the Regiment for posting in a higher staff appointment and seniority, only to be bypassed for this training which would have positioned me for promotion to the next higher rank of Colonel.

6. However, two officers my junior, Lt. Colonel Maharaj and Col Mitchell who were both commissioned to the rank Second Lieutenant on 30 August 1980, having enlisted on 1 March 1979 and 27 Aug 1979 respectively have been sent on the Command and Staff College training, and one officer Col Albert Griffith, who was

---

<sup>8</sup> Supra at paragraph 1 on page 16

commissioned to the rank of Lt Col on 1 October 2002, one year after me, and has been promoted to the next higher rank of Colonel on November, 2007. In addition to meeting none of the criteria he has not attended professional development training at Command and General staff course overseas. He has less service in the rank of Lt Col, has never commanded at battalion level, has never acted as commanding officer of the Regiment nor was ever posed in a higher staff appointment.’

15. Secondly, even if the Claimant had a right to promotion the First Defendant is not the party charged with the responsibility for promotion under the **Defence Act**<sup>9</sup>. The Claimant’s claim against the First Defendant when he brought his action for judicial review was that it had failed to act and it did not make a decision initially with respect to the two complaints which he had lodged with it.
  
16. Part III of the **Defence Act** establishes the Defence Council and sets out its composition, role, powers and duties. According to section 7 the Minister is the Chairman of the Council and it is responsible under the general authority of the Minister for the command, administration and discipline of all matter relating to the Force<sup>10</sup>. Part IX establishes the office of Chief of Defence Staff and it then sets out the chain of command and the relationship between the officers of different ranks in the force.
  
17. Sections 10 to 16 of the **Defence Act** deal with appointments and promotions. For the promotion to the rank of Major the Commissions Board established by section 10 of the **Defence Act** advises the President and the First Defendant has oversight of any aggrieved candidate who appeals to it. Section 12 empowers the Minister, after consultation with the Prime Minister, to advise the President on appointments to commissions and promotions in the Force *above* the rank of Major/ Lieutenant Commander. Therefore while the First Defendant is given an appellate role with respect to the promotions of lower ranking officers it is given no role with respect to the promotion to the higher ranks which is not absurd since the Chairman of the Council is the Minister. According to the **Defence Act**

---

<sup>9</sup> Chapter 14:01

<sup>10</sup> Section 8



it is the Minister who must advise the President as to the appointment to the rank of Colonel after consulting with the Prime Minister. Therefore the persons involved in the promotions to the rank of Colonel are the Minister, the Prime Minister and the President and none of them is a party to the instant action. While the Minister is part of the First Defendant he was not a separate party to the instant action since the First Defendant is made up of five persons with the Minister being the Chairman.

18. The Claimant also alleged that he was not promoted since the Chief of Defence Staff advised him that he was not recommending his promotion due to certain allegations namely that the Claimant had leaked official documents to a weekly newspaper; an allegation of an improper relationship between the Claimant and an officer of a junior rank; the Claimant took his daughter to lunch at the Officer's Mess and that the Claimant had disclosed information about an appointment to be made by Chief of Defence for the Family Support team. The Claimant stated that he was not given the opportunity to refute these allegations. In my opinion, if the Minister did not promote him without allowing him to refute the aforesaid allegation, the Claimant's recourse is against the Minister and not the First Defendant.

19. Thirdly, there was no practice that to be promoted to the rank of Colonel it was a condition precedent to attend and overseas command course. According to the Claimant there is a recognized practice for promotion to the rank of Colonel in the Trinidad and Tobago Regiment which is having successfully completed a senior command course; experience in command at Battalion and Regiment and having held a senior staff officers appointment and seniority. He sets out his basis for arriving at this conclusion at paragraphs 12 to 17 of his affidavit filed on the 6<sup>th</sup> May 2009 as:

“12. In 2004 I was promoted to the rank of Lieutenant Colonel with seniority to count from 1 August 01 after meeting the requirements of seniority, performance and recommendation by the Commanding Officer of the Regiment. The criteria for promotion to the next higher rank of Colonel has been the attendance of a professional development course commonly referred to as the senior Command Course, which is usually offered at a

foreign military institution. This training is usually offered at the US military academy at Leavenworth, Kansas, Texas and is referred to as the United States Army Command and General Staff Course, (CGSC). Other military institutions which offer an equivalent level of training are the US Joint Forces Staff College, Canadian Forces Staff College and the UK Military Forces Staff College. Senior officers who have attended in order of seniority in accordance with the criteria, have successfully completed the course offered in the US and were subsequently promoted very soon after their return to T&T. These officers are in order of seniority: then Lt Col Alfonzo who attended both the Canadian Forces Staff College and the UK military Forces Staff College, followed by Lt Col Thompson (deceased), he attended CGSC in the US followed by then Lt Col Sandy, then Lt Col Antoine, June 1999-June 2000 (age 46); Lt Col Joseph, April-June 2000 (age 49, six months short of 50) (Joint Forces Staff College); Lt Col Dillon, June 2000-June 2001 (age 45), before Lt Col Williams who was assigned to NEMA at the time. Lt Col Williams April-June 2001, (age47) (Joint Forces College); then Lt Col Bishop (ret'd), June 2001-May 2002 (Age 47). The US offered no space on the Command and General Staff Course for the year 2002/2003. The following year Lt Col Robinson (ret'd) who was next in order of seniority attended from June 2003- June 2004 (age 47), then Lt Col Maunday from June 2004 – June 2005 (age 48) in that order. Lt Col Bennett being next in order of seniority.

13. I have attained and surpassed all of the criteria of training at the senior command and staff course. Since 2004 I was listed as the alternate to my immediate senior then Lt Col Maunday. However; the following year 2005/2006 the US military institution was unable to offer the Government of the Republic of Trinidad and Tobago the allotted space for my attendance.

14. The recognized practice for promotion to the rank of Colonel in the Trinidad and Tobago Regiment is having successfully completed a senior command course; experience in command at Battalion and Regiment; having held a senior staff officers appointment and seniority.
15. The system for selection to train at an overseas institution and subsequent promotion is governed by good military practice and seniority. The Minister of National Security is required to act in accordance with this principle and in accordance with the provisions of the **Defence Act Chapter 14:01** of the Laws of the Republic of Trinidad and Tobago. The Minister of National Security is responsible for the TTR in Trinidad and Tobago.
16. The principles for selection for professional development training in the rank of Lt Col are embodied in **Section 190 (3)** of the **Defence Act**.
17. Further to this the authority is vested in the Minister to grant approval for any Officer or Other Rank to undergo training outside of Trinidad and Tobago in accordance with Section (5) of the **Defence Act Chapter 14:01.**

20. The aforesaid paragraphs appear to be the Claimant's conclusion of the alleged practice based on his observations. While such opinion is usually not admissible evidence, in **R v Davies**<sup>11</sup> the Court accepted the impression of an ordinary witness but it was conditional on him following his impression with an explanation as to what led him to arrive at this belief. In the instant matter, the Claimant does not provide any explanation which permitted him to arrive at the aforesaid conclusion for example he did not say that during a particular period a number of persons were promoted from the rank of Lieutenant Colonel to Colonel after attending such a course and being subsequently recommended by the Chief of Defence Staff for promotion. Indeed, the Claimant's own evidence at paragraphs 5 and 6 of his affidavit filed on the 6<sup>th</sup> May 2009 in my opinion undermines and weakens his

---

<sup>11</sup> (1962) 3 All ER 97 at page 98

assertion of such a practice since based on his evidence officer Albert Griffith was promoted to Colonel although he did not have the benefit of a senior command course.

21. Fourthly, even if there was such a policy, there was a duty not to adopt an over-rigid policy since the adoption of an inflexible and invariable policy is unlawful. In **Fordham's Judicial Review Handbook**<sup>12</sup> referring to Lord Browne –Wilkinson in **Secretary of State for the Home Department , ex p Venables**<sup>13</sup> summarized the position as:

“When Parliament confers a discretionary power...the person on whom the power is conferred [is not precluded] from developing and applying a policy as to the approach which he will adopt in the generality of cases... But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful.”

22. Based on the Claimant's evidence at paragraphs 5 and 6 of his affidavit filed on the 6<sup>th</sup> May 2009 there was a departure from the policy when Albert Griffith was promoted to Colonel without attending such a course. In any event according to the Claimant the Minister appeared to be favourable in the dispute between the Claimant and the Chief of Defence Staff with respect to the latter's failure to nominate him for certain overseas training. Paragraph 18 of the Claimant's affidavit filed on the 6<sup>th</sup> May 2009 states:

“ I am personally aware in this regard, the Minister raised the issue with regard to the precedent and criteria for professional development training overseas for Lieutenant Colonels in correspondence addressed to the Chief of Defence Staff (CDS) dated 18 May 2006, as to the rationale why the CDS would nominate Lt Col Mitchell, a junior officer to me, since I am next in line to attend this particular overseas training . Again on 28 September 2006, the Minister raised the issue of the said officer being considered, when he was junior to three officers, including

---

<sup>12</sup> 6<sup>th</sup> ed 50.2 to 50.4 pages 518 to 525

<sup>13</sup> [1998] AC 407,496 G – 497 C

myself and requested from the CDS the reasons why I was not being considered for training overseas; since the others and myself were appropriately qualified and I was next in line.”

23. Based on the Claimant’s evidence even if such a policy existed, the approach adopted was not rigid and there was nothing stopping the Minister from departing from the policy and recommending the Claimant’s promotion to the President after consultation with the Prime Minister, if he was of the opinion that the Claimant’s case was one where he could have properly done so.

24. Was there a substantive breach of legitimate expectation? The first port of call in answering this question is the terms of the Rajkumar J order which did not make any declaration that there was a breach of substantive legitimate expectation. In my opinion the issue is whether the Claimant can get damages for the First Defendant failures for which the Court made such declarations in the Rajkumar J order. Therefore while the Claimant has made extensive submissions basing its claim for damages on the breach of a substantive legitimate expectation the Court did not make such a finding and therefore no claim for substantive legitimate expectation has survived. In the Privy Council decision of **Permanent Secretary, Ministry of Foreign Affairs & Prime Minister v Ramjohn**<sup>14</sup> the Court set out the position as:

“As for Mr Kissoon’s appeals against the Court of Appeal’s refusal of further relief respectively against the Prime Minister and the PSC, these too must be dismissed. These arguments can be disposed of very briefly indeed. The claim for damages against the Prime Minister failed below on the ground that “there is no claim for damages as is required by section 8(4) of the Judicial Review Act” (para 56 of Mendonca JA’s judgment). Section 8(4) of the 2000 Act does indeed provide that: ‘On an application for judicial review, the Court may award damages to the applicant if (a) the applicant has included in the application a claim for damages arising from any matter to which the application relates; and (b) the Court is

---

<sup>14</sup> PC Appeal No 38 and 57 of 2010

satisfied that, if the claim had been made in an action begun by the applicant at the time of making the application, the applicant could have been awarded damages.” Mr Kissoon’s insurmountable difficulty in this regard is that his claim for damages was (and could only have been) based solely on his allegation that he was unequally treated – a claim pursuant to sections 4(d) and 14 of the Constitution. This allegation, however, was struck out by the unappealed order of the trial judge on 9 May 2005 (see para 23 above). No damages claim thereafter survived.”

25. In any event, the Claimant’s claim against the First Defendant was that it acted irrationally by failing to consider the two complaints which he had lodged with it. He did not make any claim against the First Defendant that it had promised him anything. In the closing submissions on the issue of damages it appeared to me that the Claimant’s claim for substantive breach of legitimate expectation is against the Minister but while the Minister is a chair of the First Defendant he is not the Defence Council.
26. Further, with respect to the Claimant’s submissions that he is entitled to bring a constitutional motion alleging breach of section 4 (b) of the Constitution I agree with Defendants submissions that the Claimant did not make his claim in the instant action for a breach of section 4 (b) of the Constitution and even if there was such a breach, in the Rajkumar J order there was no such finding.
27. Can the Claimant get damages due to the First Defendant’s failure to investigate the Claimant’s two complaints on the basis of breach of protection of the law? In support of this contention the Claimant relied on the high court judgment of Jamadar J ( as he then was) of **Ronnie Samaroo v The Principal of Point Fortin Junior Secondary School and the Minister of Education**<sup>15</sup>. In my opinion **Ronnie Samaroo** can be distinguished from the instant case since in that case there was evidence of distress, embarrassment and humiliation which was corroborated which is unlike this case.

---

<sup>15</sup> HCA S 536 of 1998

28. Further, the Rajkumar J order which dealt with the substantive issues made no declaration that the First Defendant's failure to initially investigate and make a decision was a breach of the Claimant's right to protection of the law under the Constitution. In my opinion I have no basis for exercising the Court's discretion to make any award of damages under this heading.
29. In light of the aforesaid reasons I have concluded that the Claimant is not entitled to any damages.

**Margaret Y. Mohammed**  
**High Court Judge**