

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2018-02460

BISNATH MAHARAJ

Applicant/Proposed Claimant

AND

THE COMMISSIONER OF POLICE

Respondent/Proposed Defendant

Before the Honourable Madame Justice Margaret Y. Mohammed

Dated the 15th October, 2018

APPEARANCES:

Mr. Jared Jagroo, Mr. Pariagsingh instructed Ms. Dindial Attorneys at law for the Applicant/Proposed Claimant.

Ms. Antoinette Alleyne Attorney at law for the Respondent/Proposed Defendant.

JUDGMENT

1. The Applicant is a former Acting Assistant Superintendent of Police in the Trinidad and Tobago Police Service (“the TTPS”) with over thirty-four (34) years’ service and former Director of Strategic Services Agency (“SSA”), On the 11th July 2018, the Applicant applied for leave to apply for judicial review (“the application”) against the Commissioner of Police (“the Respondent”) to challenge the failure and/or refusal to make a decision on the Applicant’s request for information under the Freedom of Information Act¹ (“the FOIA”).
2. The main reliefs which the Applicant seeks in the application are:
 - i. A declaration that the Respondent breached its statutory duty under Section 15 of the FOIA to take reasonable steps to enable the Applicant to be notified of the approval or refusal as soon as practicable but in any other

¹ Chapter 22:02

case not later than thirty (30) days after the date on which the request was duly made;

- ii. A declaration that the Respondent has breached his statutory duty under section 23 of the FOIA by failing to issue a notice stating the reasons for the deferral of access to the requested information;
- iii. Alternatively, or additionally a declaration that the Claimant is entitled to access the requested information pursuant to his application under the FOIA; An order of mandamus to compel the Respondent to render a decision with respect to the Applicant's request within seven (7) days thereof and inform him whether his entire request for access to documents/information has been approved or refused in accordance with section 15.

3. The basis for the Applicant seeking the aforesaid reliefs was set out both in the grounds of the application and in his affidavit filed in support of the application. According to the Applicant, by letter dated 18th February 2013, he was seconded from his employment with the TTPS to the position of Director of the SSA pursuant to Regulation 27 of the Police Service Regulations. By letter dated 13th November 2015, he was advised by the Minister of National Security, Mr. Edmund Dillon, that his Instrument of Appointment as Director of the SSA had been revoked with effect from 13th November 2015.
4. He has challenged his removal from the Office of Director of the SSA by filing proceedings in the High Court intituled as CV2016-01460 Bisnath Maharaj v The Attorney General of Trinidad and Tobago ("the dismissal proceedings").
5. The Respondent in the dismissal proceedings filed three (3) affidavits in opposition to the Applicant's principal affidavit filed on 3rd May 2016, namely the affidavits of Oswald Clarke and Carl Francis both filed on the 27th March 2017 and of George Robinson filed on the 3rd April 2017.
6. According to the Applicant, the deponents in the aforementioned affidavits have raised new issues regarding his entitlement to gratuity payments as a former officer of the TTPS on

secondment. The Applicant deposed that he was advised by his Attorneys at law that he is required to reply to any new issues raised by the Defendant in the dismissal proceedings by filing an affidavit in reply to the Respondent's affidavits.

7. By Order dated 26th June 2018, the Court in the dismissal proceedings granted the Applicant permission to send a draft Reply to the Defendant on or before 10th July 2018 and if agreed he was also granted permission to file and serve the Reply on or before 31st July 2018. If the Reply is not agreed the Applicant is to file an application annexing the draft Reply seeking permission from the Court to file it.
8. The Applicant deposed that he instructed his Attorneys at Law to submit an official application under the FOIA dated 22nd March 2018 ("the FOIA request") and an accompanying covering letter to the Respondent seeking access to the following information:

"The policy and/or procedure which govern payment of benefits and remuneration of police officers who are on secondment, and in particular, whether their service will continue to be counted for the purpose of their gratuity."
9. By letter dated 28th March 2018 Inspector Lucien Ferguson Regimental No. 13286 of the Office of the Deputy Commissioner of Police "Administration" (Legal Unit) acknowledged receipt of the FOIA request and informed the Applicant's Attorneys at Law that *"your request is being addressed and a response will be forwarded to you within the stipulated statutory time limit."* The Respondent failed to disclose the requested information or render a decision on the FOIA request within the statutory time, which expired on 28th April 2018.
10. By letter dated 30th April 2018 and addressed to the Applicant's Attorneys at Law, the aforementioned Inspector Lucien Ferguson advised that *"your letter dated 22nd March was received on 26th April 2018...your request is being addressed and a response will be forwarded to you as soon as possible"*.
11. The deadline for providing a substantive response to the FOIA request expired on the 28th April 2018. In the absence of any response from the Respondent, the Applicant instructed his Attorneys at Law to issue a pre-action protocol letter to the Respondent for his failure to respond and/or render a decision on the FOIA request. The said letter was issued on the

9th May, 2018 wherein the Respondent was notified of the Applicant's intention to apply for Judicial Review pursuant to section 39 of the FOIA, if the information requested under the FOIA request was not provided within the next twenty-eight (28) days. The said pre-action letter was hand delivered and received by the Respondent on the 14th May 2018 and a copy was also hand delivered to the office of the Solicitor General 14th May 2018.

12. By letter dated 14th May 2018, Inspector Lucien Ferguson again wrote to the Applicant's Attorneys at Law and advised that "*all attempts are being made to provide the requested information on or around 12th June 2018.*" However, no decision was made as to whether the Respondent has approved or refused the FOIA request for information. The Applicant deposed that the requested information is critical to enable him to obtain full legal advice and/or documentary evidence necessary to successfully pursue his claim for wrongful dismissal and constitutional relief; to answer certain issues raised by the Defendant in the dismissal proceedings and to give proper instructions to his attorneys at law to file an affidavit in reply pursuant to the Orders of the Court dated 26th June 2018.
13. Upon receipt of the application the Court ordered, on the 12th July 2018 that the Applicant serve the application on the Respondent. The Court directed the Respondent to file a notice on or before the 14th August 2018 indicating:
 - i. Whether it consents or objects to the application for leave.
 - ii. Whether it consents or objects to the provision of the further information requested and if it consents setting out the time within which the said further information can be provided to the Applicant."
14. The Court also scheduled a hearing for the application.
15. The Respondent did not comply with the order of the 12th July 2018. At the hearing of the leave application, Counsel for the Respondent indicated that by letter dated the 26th July 2018 ("the July letter") the Respondent responded to the FOIA request. The July letter was only brought to the Court's attention at the hearing but it was not shown to the Court and it was not part of the Court's record. Subsequent to the hearing the Court gave the Respondent permission to file an affidavit to annex a copy of the July letter. The Respondent complied with the Court's order and filed an affidavit of Lucien Ferguson on the 12th October 2018 which annexed the July letter as exhibit "L.F.6" In the July letter the

Applicant was advised that *“the practice and procedure related to secondment can be found in the Police Service Regulations 2007, Regulation 27.”*

16. Counsel for the Respondent objected to leave being granted on the basis that the information being sought in the FOIA request is found in legislation. Counsel referred the Court to the Police Service Act², the Police Service Regulations 2007, the Pensions Act³ and the Regulations to the Pensions Act. Counsel argued that under section 12 of the FOIA there was no duty on the Respondent to provide information which is a matter of public record which the Applicant can obtain.
17. It was argued on behalf of the Applicant that the Court should grant leave since the July letter did not address the issue of gratuity to be paid to police officers on secondment. Further, Counsel agreed that if the information requested in the FOIA request was found in legislation then the Respondent ought to have responded to the FOIA request indicating the legislation where the information requested could be found.

Legal principles- Application for leave for Judicial Review

18. Section 9 of the JRA provides:

“The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances.”
19. The **Civil Proceedings Rules Part 56.3(1)** states:

“(1) No application for judicial review may be made unless the court gives leave.”
20. The test for granting leave for judicial review was stated in the judgment of **Sharma v Browne-Antoine**⁴ at paragraph 14 (4) as follows:

*“(4) The ordinary rule now is that the court will refuse leave to claim judicial review **unless** satisfied that there is an arguable **ground** for judicial review **having** a*

² Chapter 15:01

³ Chapter 23:52

⁴ (2006) 1 UKPC 57

realistic prospect of success **and not subject to a discretionary bar such as delay or an alternative remedy**: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, Para 62, in a passage applicable mutatis mutandis to arguability:

" . . . the more serious the allegation or the more serious the **consequences** if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies **not in** any adjustment to the degree of **probability** required for an allegation to be proved (such that a more serious allegation has to be **proved** to a higher degree of **probability**), **but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.**" (Emphasis Added)

21. In **Ferguson & Another v The Attorney General of Trinidad and Tobago**⁵ Kangaloo JA advocated that the Court ought not to use a stringent application of the aforesaid test. He stated that:

“4. It would be a travesty if the words of their Lordships were taken to mean that the test of arguability lends itself to stringent application. To adopt such an approach would be to erode the very protection that is offered by the remedy of judicial review. The purpose of judicial review is to keep the executive in check and to prevent the citizen from arbitrary, unwarranted and unlawful executive action. Such protections are part of the wider concept of the rule of law which lies at the foundation of any democratic society. In this regard, the observations of Lord Phillips of Worth Matravers are worthy of note:

“The rule of law is the bedrock of a democratic society. It is the only basis upon which individuals, private corporation, public bodies and the

⁵ Civ. App No 207 of 2010

executive can order their lives and activities The rule of law will not fully prevail unless the domestic law of a country permits judges to review the legitimacy of executive action. This is increasingly becoming the single most important function of the judge in the field of civil law, at least in jurisdiction.

5. The main purpose of the permission stage in judicial review proceedings is still to eliminate unmeritorious application brought by an applicant who is “no more than a meddlesome busybody”; an aim which is particularly beneficial in current times given the explosion of civil litigation which our justice system has witnessed. However in fulfilling its mandate as the guardians of democracy and the rule of law; concepts which can easily be seen as two sides of the same coin, the court must not lightly refuse a litigant permission to apply for judicial review. It must only be in wholly unmeritorious cases which are patently unarguable (barring issues of delay and alternative remedies) that the courts should exercise its discretion in refusing to grant leave.”

22. Section 3 of the FOIA sets out the object of the legislation which is a right of access to information in the possession of public authorities by members of the public. It states:

“3. (1) The object of this Act is to extend the right of members of the public to access to information in the possession of public authorities by—

- (a) making available to the public information about the operations of public authorities and, in particular, ensuring that the authorisations, policies, rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those authorisations, policies, rules and practices; and
- (b) creating a general right of access to information in documentary form in the possession of public authorities limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities.

(2) The provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and any discretion conferred by this Act shall be

exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.”

23. Under Section 4 the Respondent is a public authority. Section 11 establishes a right of general access to documents and information. Section 12 sets out the documents which the access procedure under the FOIA is not applicable. It provides:

“12. A person is not entitled to obtain, in accordance with the procedure provided for in this Part, access to ---

(a) a document which contains information that is open to public access, as part of a public register or otherwise, in accordance with another written law, where that access is subject to a fee or other charge;

(b) a document which contains information that is available for purchase by the public in accordance with arrangements made by a public authority;

(c) a document that is available for public inspection in a registry maintained by the Registrar General or other public authority;

(d) a document which is stored for preservation or safe custody, being a document which is a duplicate of a document of a public authority.”

24. Section 14 imposes a duty on public authorities to take reasonable steps to assist any person who exercises his right under the FOIA. Section 15 mandates the public authority to notify the Applicant of the approval or refusal as soon as practicable but in any case not later than 30 days after the date on which the FOIA request was made. Section 23 mandates the public authority to issue a written notice specifying the grounds upon which any deferment or denial of access is based.

25. The main issue which falls to be determined is whether the information requested by the Claimant from the Respondent fall within section 12 of the FOIA. The information requested from the Proposed Respondent concerns the calculation of a police officer’s pension and gratuity including where he was on secondment during his service. The Police

Service Act deals with the appointment and structure of the Police Service, the appointment of trainees, appointment and promotion of police officers and other related matter. Regulation 27 sets out how a period of secondment is to be treated with respect to a police officer's service. It provides:

“SECONDMENT

27. (1) An officer who is seconded to an office in the Public Service shall be paid the salary applicable to that office and is eligible for any increments payable to the holder of that office.

(2) The remuneration of an officer on secondment to an office out of the Service shall be paid by the receiving Ministry public body or authority.

(3) During the period of secondment of an officer out of the Service, the officer shall continue to hold his substantive office in the Service and, notwithstanding his absence from the Service, is eligible for promotion.

(4) The period of service of an officer while on secondment shall be taken into account when calculating his pension where the secondment is to an office in another service of the Government or where the receiving public body or authority makes the appropriate arrangement for the preservation of the officer's pensionable service.

(5) An officer on secondment to an office in the Service is eligible for the leave applicable to that office and while on such leave he is entitled to be paid the salary payable to the holder of that office.

(6) An officer who has completed a period of secondment outside of the Service and who returns to the Service shall revert to the point in the salary scale in respect of his substantive office which he would have reached if he had not been seconded.

(7) A period of secondment shall not exceed two years.”

26. Part XV of the Police Service Regulations of the Police Service Act deals with gratuity and pension and the Pension Act deals with the regulation of pensions, gratuities and other

allowances in respect of officers in the public service in Trinidad and Tobago which includes police officers. In particular, regulation 2 of the Pension Act Regulations guarantee a pension to be paid to public officers including police officers who has been in service for more than 10 years. The Regulations also set out in detail the mechanism which is used to calculate the said pension.

27. In my opinion, the information which the Claimant seeks can be found in legislation which can be accessed either by purchase from the government printery or from the website of the Ministry of Legal Affairs and therefore falls within section 12 of the FOIA. There is therefore no obligation on the Respondent to provide the information requested and there is no need to grant leave to apply for judicial review. The application is therefore dismissed.
28. However, on the question on costs, the Court is entitled to consider the conduct of the Respondent in the face of the FOIA request. The combined effect of sections 14, 15 and 23 of the FOIA placed a duty on the Respondent within 30 days from receipt of the FOIA request, in the instant case by the 28th April 2018, to inform the Applicant that the information requested was in legislation which was a matter of public record and which the Respondent had no duty under the FOIA to provide. This was not done by the Respondent. Instead the Respondent replied to the Applicant on three occasions in March 2018, April 2018 and May 2018 but he still did not see it fit to inform the Applicant that the information which was requested was in legislation. The Respondent's pre-action conduct precipitated the filing of the application. Indeed if the application was not filed, it is reasonable to conclude that the Respondent's position would have remained unknown. In my opinion, the approach taken by the Respondent is not consistent with his duty under the FOIA.
29. In the circumstances, it was the failure by the Respondent to comply with his duty under the FOIA resulted in the Applicant filing the application. The duty was to provide the response indicating the source of the information and to indicate that the Respondent had no duty to provide the legislation. The Respondent failed to do so. For this reason, although I would dismiss the application I would order the Respondent to pay the costs of the application since if the Respondent had responded appropriately to the FOIA request since the 28th April 2018 in my view the application would have been unnecessary.

Order

30. The application filed on the 11th July 2018 for leave to apply for judicial review is dismissed.

31. The Respondent to pay the Applicant's costs to be assessed by the Registrar in default of agreement.

**Margaret Y Mohammed
Judge**