

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2021-01544

**IN THE MATTER OF THE CONSTITUTION OF TRINIDAD OF THE REPUBLIC
OF TRINIDAD AND TOBAGO**

AND

**THE APPLICATION FOR REDRESS BY THE APPLICANT PURSUANT TO SECTION
14 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO
FOR THE CONTRAVENTION OF SECTIONS 4 AND 5 OF THE SAID
CONSTITUTION IN RELATION TO THE APPLICATION**

BETWEEN

TIMOTHY MALONEY

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Madam Justice Margaret Y. Mohammed

Date of Delivery 29 April 2022

Appearances

Mr Farai Hove Masaisai and Ms Antonya Pierre instructed by Ms Desiree Tommy of Messrs Hove and Associates Attorneys at law for the Claimant.

Ms Sasha Sukhram instructed by Ms Tiffany Kissoon and Ms Janine Joseph Attorneys at law for the Defendant

JUDGMENT

INTRODUCTION

1. On 29 April 2017, the Claimant was discharged from the Trinidad and Tobago Defence Force (TTDF) on the ground of completion of service. He filed the instant action four years afterwards, seeking orders which concerned his failure to be promoted while he was an officer in the TTDF. The orders he has sought are :
 - (a) A declaration that the Claimant has been treated in an illegal and discriminatory manner contrary to the constitutional right to equality of treatment from a public authority in the exercise of its functions in breach of section 4(d) of the Constitution of Trinidad and Tobago¹ (“the Constitution”).
 - (b) A declaration that the Claimant’s right to due process of law was infringed upon in breach of section 4(a) of the Constitution.
 - (c) A declaration that the Claimant’s right to equality before the law and protection of the law was infringed upon in breach of section 4(b) of the Constitution.
 - (d) A declaration that the Defendant failed to act in a fair manner contrary to the constitutional right to a fair hearing and to the rules of natural justice.
 - (e) An order that the Claimant be reappointed to the promoted position of Staff Sergeant with retroactive effect from 2014.
 - (f) An order that the Defendant pay to the Claimant damages including pecuniary, aggravated, exemplary and punitive

¹ Chapter 1:01

damages for infringement of the Claimant's fundamental rights as guaranteed to him by the Constitution.

(g) Any further relief as the court may think just and reasonable in the circumstances.

(h) Costs.

BACKGROUND FACTS

2. The Claimant's case was set out in his affidavit filed on 28 April 2021 ("the Claimant's Affidavit") and his affidavit in reply filed on 30 September 2021 ("the Claimant's Reply Affidavit").
3. On 20 February 2014, the Claimant became aware that he had accumulated 120 days' privilege leave ("privilege leave") and if he did not proceed on resettlement training by September 2014 he would lose both his privilege leave and time for resettlement, which amounted to approximately two (2) years. He wrote to Lieutenant Colonel Patrick Gomez ("Lt Col Gomez") by a letter of even date regarding the accumulation of his privilege leave and requested immediate leave. He was later assured by Lt Col Gomez that he would be recommended for rapid promotion to Superintendent Clerk due to the pending retirement of Warrant Officer Lochan. He proceeded on leave for ninety (90) days, from February 2014 to May 2014.
4. On 30 June 2014, Lt Col Gomez prepared a letter of recommendation on behalf of the Claimant, which was to be forwarded to the Chief of the Defence Staff ("the CDS") and recommended him for immediate advancement to the rank of Staff Sergeant (Ag.). The said recommendation was reviewed by the Chief Staff Officer, Lieutenant Colonel PA Sealy ("Lt Col Sealy") and forwarded to the CDS on 9 July 2014. It stated that the recommendation of the Claimant for promotion was subject to (i) the advice of the Commander of the Trinidad and Tobago

Regiment (“COTTR”); (ii) the prerequisites for advancement being met; (iii) the Claimant’s position on the senior roster being identified; and (iv) the availability of a vacancy. Thereafter, Commandant Major Peter Ganesh and other stakeholders agreed with the recommended promotion and forwarded it to the COTTR for the final approval. There was a delay in forwarding the Claimant’s recommendation to the COTTR of about 4 months and upon its receipt the Claimant was advised that there were no vacancies and further justification for the promotion was required.

5. On 25 September 2014, the Claimant and Corporal Aming were informed that Captain Byron (“Captain Byron”) had requested a meeting with them and based on this information they immediately proceeded to her office. Captain Byron was not in her office when they arrived and despite several checks being made, they were unable to locate her in any of the other offices in the vicinity. They were also unable to locate any other senior personnel from the TTDF on the premises. They waited for approximately two (2) hours before they left the premises and did so without meeting with Captain Byron. The following morning, the Claimant reported to Captain Byron and despite providing a legitimate explanation for his absence, he was charged for failure to attend the meeting on 25 September 2014 (“the 2014 charges”). He was subsequently placed on report, received a severe reprimand and fined seven (7) days’ pay by Lieutenant Colonel Collin Millington (“Lt Col Millington”). He sought redress of the 2014 charges and punishment, and they were rescinded by the CDS three (3) months later. However, the rescinded punishment was never published as required.
6. The Claimant asserted that he was subsequently charged again in March 2015 (“the 2015 charges”), after he attended a meeting with Captain Byron but the charges were later rescinded. He was then informed by Captain Byron that he was being sent on leave pending an investigation, at the end of which, a final determination would be made regarding his

status within the TTDF. He shared this information with Lt Richardson and it was agreed that he would proceed on privilege leave from 16 March 2015 to 31 May 2015 and begin his resettlement from 3 June 2015. Shortly thereafter, he requested a meeting with Lt Commander Serrette and met with him in September 2015 to enquire about his outstanding promotion from 2014. He was informed by Lt Commander Serrette that he had been recommended for promotion and the issue would be dealt with retroactively when he got promoted.

7. In or around October of 2015, the Claimant received a telephone call from RSM WO1 Dexter Lee ("RSM Lee") to report to camp for promotion at 1300hrs (1:00pm). He reported to camp, got suited in uniform and joined the line for promotional orders. He was then approached by RSM Lee with instructions from the Commandant, Lieutenant Colonel Ashook Singh ("Lt Col Singh") to see the Commandant separately. He complied by waiting in RSM Lee's office along with other persons.
8. The Claimant was consequently marched in and informed by Lt Col Singh that he would not be promoted pending an investigation. He enquired about the nature of the complaint made against him, the nature of the investigation, and when the issue was raised for investigation as he had spoken to the Commandant during the previous month of September and had been informed that there were no present issues concerning his recommendation for promotion.
9. The Claimant was then told by Lt Col Singh that he did not receive details of the said investigation and enquired whether he had any recently raised issues. He went on to brief Lt Col Singh that the only issue arising during his tenure of service was when he was remanded for Commandant Orders in 2014. He informed him that he had been charged but the punishment was rescinded and was of no consequence to the current prospect of promotion.

10. Lt Col Singh contacted Lt Col Millington concerning the 2014 charges and he asked RSM Lee, to ascertain if the rescinded punishment had been published. After RSM Lee indicated that the reprimand was not published, Lt Col Singh informed the Claimant of same and that he could not be promoted.
11. The Claimant sought assistance from CPO Jaikaransingh and Lt Commander Serrette for permission for an audience with the COTTR but was unsuccessful. He then contacted and sought the assistance of FSM W01 Michael Fough to raise the issue of his promotion with the CDS Major General Kendrick Maharaj.
12. On 17 December 2015, the Claimant went to see the CDS to ascertain the reasons for his non-promotion. He was subsequently told that he needed to be tried and charged by Lt Col Singh on the request of the CDS.
13. The Claimant was marched in for Commandant Orders from Lt Col Singh and W01 Dexter Voisin and the charges from the aforementioned investigation were read to him by the Commandant. After the charges were read, Lt Col Singh stated the charges needed to be redone. He was subsequently tried and told by Lt Col Singh that the charges would be addressed and dealt with shortly. He waited from 09:30hrs (9:30am) to 1400hrs (2:00pm), however, he did not receive any call or information. He was later instructed to leave, and advised that he would be contacted on a later date.
14. The Claimant received a call on 18 February 2016 informing him of Commandant Orders on 19 February 2016, concerning the additional charges against him and detachment Commandant Orders. He enquired about the additional charges through the RSM who responded that they were not yet known to him.

15. The Claimant endeavoured to meet with RSM Lee on 19 February 2016 when he encountered mechanical problems with his vehicle. He then proceeded to contact RSM Lee and informed him of his situation, who in turn told him that he would reschedule the orders and contact him. No contact was made until the Claimant requested to see the Commandant in order to request a meeting with the COTTR. Thereafter, on 29 February 2016 Lt Col Singh wrote a letter on the issue of his non-recommendation.
16. The Claimant met with Lieutenant Colonel Dexter Metivier (“Lt Col Metivier”) who informed him that the necessary documents and details of the interview had not been forwarded for the interview to be successful.
17. The Claimant then contacted W02 Gillian Nurse (“DSM Nurse”) to arrange to see Detachment Commander Lieutenant Andre Ferguson to query what issues were arising concerning himself and why he was not permitted the opportunity to deal with the issue of promotion. He was then informed by DSM Nurse that he had Detachment Commandant Orders and twenty-five (25) charges of allegations were read out to him. At no point in time during this discussion was a report read or any summary of evidence given.
18. The Claimant was then contacted by RSM Dexter Voisin on 27 June 2016 and informed to report for Commandant Orders on 29 June 2016 at 0930hours (9:30am). He complied and on that day the charges were read out to him again. He attempted to explain that the allegations made against him were untrue and requested from Lt Col Metivier, the identity of the individual who investigated the charges. Lt Col Metivier responded that the matter of who conducted the investigation was not relevant. As a result of these charges, the Claimant was given a severe reprimand and informed that he would be recommended to be reverted in rank. However, he was again contacted by RSM Dexter Voisin on 30 June 2016 and informed to report for Commandant Orders on 1 March 2016 at 0900hours (9:00am). He complied and on that day he was informed by Lt

Col Metivier that he was being recommended for discharge as opposed to a reversion in rank, on the ground that his service was no longer required.

19. The Defendant's case was set out in the affidavits of Lt Col Metivier ("the Metivier Affidavit"), Lt Col Gomez ("the Gomez Affidavit"), Lt Col Singh ("the Singh Affidavit") and Captain Ginelle Pran (formerly Captain Byron) ("the Pran Affidavit") all filed on 26 August 2021.
20. The Defendant's position was that on 20 February 2014 the Claimant wrote to Lt Col Gomez to highlight issues regarding his professional advancement. By letter dated 30 June 2014, Lt Col Gomez wrote a letter of recommendation in favour of the Claimant for advancement to the rank of Staff Sergeant. There was no promise/ guarantee that the Claimant would be promoted². At that time the Claimant was in good standing as he did not have any investigations, charges or findings of guilt against him.
21. In September 2014, Captain Pran conducted an audit on the personnel working at the Pay Office³. During the audit, Captain Pran discovered that between 2008 and 2013 the Claimant altered his pay slips thirteen (13) times to enable him to obtain loans from various financial institutions⁴. The pay slip was altered to remove the deductions on the Claimant's salary to reflect a salary higher than it actually was. The altered pay slip was then used to obtain a job letter⁵. Captain Pran submitted an audit report to the Commandant who instructed that charges be proffered⁶.
22. The Claimant was then asked to see Captain Pran concerning the audit findings but he was not present. Shortly thereafter, Captain Pran conducted an interview with the Claimant to ascertain the reason for his non-attendance⁷. Captain Pran informed the Claimant that he did not have

² Paragraphs 9 and 10: Affidavit of Lt. Col. Gomez

³ Paragraph 5: Affidavit of Captain Pran

⁴ Paragraph 6: Affidavit of Captain Pran

⁵ Paragraph 7: Affidavit of Captain Pran

⁶ Paragraph 9: Affidavit of Captain Pran

⁷ Paragraph 13: Affidavit of Captain Pran

the authority to allow any officer to leave and had a further conversation with the Claimant concerning his insubordination where the Claimant was allowed to state his position⁸. The Claimant was placed on report by Captain Pran and seen by the Commandant on three (3) charges concerning the insubordination. The Claimant was found guilty of the third charge but these charges were later rescinded⁹.

23. The Claimant's administrative duties were revoked due to the charges relating to the altering of the pay slips and not the charges that were rescinded¹⁰. In September 2015 at a regiment promotional conference, the issue of the Claimant's promotion arose. It was noted that outstanding disciplinary issues concerning the Claimant were being investigated and the duties to continue the investigations were handed over to Lt. Col. Singh¹¹.

24. In October 2015, at a regiment promotional conference, Lt Col Singh reported that the Claimant had outstanding disciplinary issues that were still being investigated and as such was not recommended for promotion¹². On 13 October 2015, the Claimant was seen on Orders to Attend where he was informed of the pending investigation and his non recommendation for promotion as a consequence¹³. The Commandant at that time, Lt Col Singh investigated the complaints concerning the Claimant and provided a report to the Commanding Officer¹⁴. Investigations revealed that: there were job letters obtained by the Claimant that did not reflect his true salary; deductions to Clico Credit Union were stopped for the months in which the Claimant requested a job letter and started again the following month; and there was no evidence

⁸ Paragraphs 15 and 16: Affidavit of Captain Pran

⁹ Paragraphs 17 and 18: Affidavit of Captain Pran

¹⁰ Paragraph 11: Affidavit of Captain Pran

¹¹ Paragraph 11: Affidavit of Lt. Col. Singh

¹² Paragraph 11: Affidavit of Lt. Col. Singh

¹³ Paragraph 12: Affidavit of Lt. Col. Singh

¹⁴ Paragraph 5: Affidavit of Lt. Col. Singh

of the procedure for stoppage of deductions being followed.¹⁵ In December 2015, the Claimant was granted an audience with the CDS and orders were given to treat with his disciplinary issues immediately¹⁶. The Claimant was provided copies of the charges by Captain Pran¹⁷.

25. On 29 June 2016 a trial was conducted. The Claimant was aware of the purpose of his appearance before the Commanding Officer as he was provided with copies of the charges. Lt Col Metivier indicated to the Claimant that they would proceed slowly and treat with each charge separately. There was a review of the evidence in relation to the twenty-six (26) charges against the Claimant. The Claimant was given an opportunity to answer each charge separately. When called upon to enter a defence, the Claimant did not offer any substantial defence. The Claimant was allowed to present evidence but nothing was offered. The Claimant did not attempt to explain the allegations made against him or that they were untrue. He did not request the identity of the individual who investigated the charges. The Claimant was informed of the findings on all charges and that he was found guilty. He was asked whether he would accept the award or alternatively, wished to be tried by a Court Marshall. The Claimant accepted the award. He was informed that he was severely reprimanded and would be recommended for reduction in rank.¹⁸

26. According to the Defendant, the result of the charges and the finding of guilt meant that the recommendation letter of Lt Col Gomez became a nullity, as the Claimant would have no longer been in 'good standing' as is required for promotion¹⁹. Subsequently, the Claimant met with the Commandant and requested that he be allowed to serve on the TTDF until

¹⁵ Paragraph 13: Affidavit of Lt. Col. Singh

¹⁶ Paragraph 15: Affidavit of Lt. Col. Singh

¹⁷ Paragraph 21: Affidavit of Captain Pran

¹⁸ Paragraphs 18 and 19: Affidavit of Lt. Col. Singh; Paragraphs 19 and 21: Affidavit of Captain Pran; Paragraphs 7 and 8: Affidavit of Lt. Col. Metivier

¹⁹ Paragraph 13: Affidavit of Lt. Col. Gomez; Paragraph 9: Affidavit of Lt. Col. Metivier

the completion of his service. By letter dated 1 July 2016, the Commandant wrote to the COTTR recommending the Claimant for discharge based on the findings and indicated that the Claimant had requested that consideration be extended to him, so that he may be allowed to serve on the TTDF until the completion date of his service.²⁰ The Claimant was discharged on 30 April 2017 on the ground of 'Completion of Service'. The Claimant has been paid all benefits owed to him, including gratuity and his monthly pension²¹.

THE ISSUES

27. In their closing submissions the parties addressed the Court on eight (8) issues which dealt with the substantive orders sought by the Claimant. I have chosen to refine the issues as:

- (a) Whether the claim is an abuse of process as the Claimant had alternative remedies.
- (b) Whether the Claimant's fundamental right to due process by the law as enshrined by section 4(a) of the Constitution was infringed by the Defendant's failure to comply with the appropriate disciplinary and discharge procedures.
- (c) Whether the Defendant failed to act with fairness to the Claimant and in breach of the rules of natural justice as guaranteed to him by section 5(e) of the Constitution when the Defendant denied him the opportunity for a promotion.
- (d) Whether the Claimant's right to equality before the law and protection of the law as guaranteed to him by section 4(b) of the

²⁰ Paragraphs 10 and 11: Affidavit of Lt. Col. Metivier

²¹ Paragraph 23: Affidavit of Lt. Col. Singh

Constitution was breached as a result of the Defendant's failure to offer the Claimant a promotion to a higher office.

- (e) Whether the Claimant's right to equality of treatment from any public authority in the exercise of any functions as guaranteed to him by section 4(d) of the Constitution was breached as a result of the Defendant's failure to offer the Claimant a promotion to a higher office.
- (f) Whether the Defendant deprived the Claimant of a legitimate expectation to be promoted in accordance with the settled practice of promotions of other persons in similar circumstances.
- (g) Whether the Claimant is entitled to damages for breach of his constitutional rights.

WHETHER THE CLAIM IS AN ABUSE OF PROCESS AS THE CLAIMANT HAD ALTERNATIVE REMEDIES

- 28. The Defendant contended that the claim is an abuse of process and should be dismissed as the Claimant had alternative remedies as a judicial review claim and under section 195 of the Defence Act²².
- 29. The Claimant's position was that the Defendant failed to respond to the Pre-Action Protocol Letters indicating that the Claimant had alternative remedies; failed to apply to strike out the claim; and failed to demonstrate how the alleged alternative remedies or avenue of redress were more convenient, expeditious and effective.
- 30. The Privy Council decision of **Jaroo v The Attorney General of Trinidad and Tobago**²³ established the principle that the right to apply to the High Court for redress under section 14(1) of the Constitution should be

²² Chapter 14:01

²³ PC Appeal No 54 of 2000

exercised only in exceptional circumstances where there is a parallel remedy. Another Privy Council judgment **Durity v. The Attorney General of Trinidad and Tobago**²⁴ addressed the issue of delay in applying for relief under section 14 (1) of the Constitution. At page 417:

“When a court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, 268. An application made under section 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process.

In the present case Sinanan J held this was the position regarding Mr Durity's application for constitutional relief in respect of the commission's decision to suspend him from office. The commission made this decision in August 1989. It was over five years later that Mr Durity first sought to challenge this decision. As already noted, the Court of Appeal refused an application by Mr Durity to amend his judicial review proceedings to introduce

²⁴ [2002] UKPC 20

such a challenge. Given the lapse of time and the absence of explanation, that decision by the Court of Appeal was plainly correct.”

31. In **Durity**, the appellant slept on his right to bring judicial review proceedings and when he decided to take action, the time for filing same had expired. He then brought a constitutional motion which was deemed an abuse of process.
32. Subsequently, the Privy Council in **The Attorney General of Trinidad and Tobago v Siewchand Ramanoop**²⁵ followed the position in **Jaroo** and noted at paragraph 33 that

“... it is in everyone’s interest that an applicant should be in a position to decide which procedure is appropriate, preferably before he starts his proceedings or, failing that, at the earliest opportunity thereafter. To this end observations made by Hamel-Smith JA in *George v Attorney-General of Trinidad and Tobago* (8 April 2003, unreported), para 19, are pertinent:

“The decision [in *Jaroo*] also serves to emphasise, in my view, that the State must at an early stage, ideally in response to any letter before action, make it known whether it will be challenging the allegations or not and on what basis. In that way, the aggrieved party would be in a position to make an informed choice of procedure. Failure to respond may lead to the State being condemned in costs, in the event that the party proceeds under s.14 of the Constitution only later to find that the facts were in issue and no constitutional principle of general significance to citizens is involved.” (Added emphasis)

²⁵ [2005] UKPC 15

33. Section 195 of the **Defence Act** provides the process by which an officer of other rank (non-commissioned officer) may make a complaint about any issue:

“195. (1) If an other rank thinks himself wronged in any matter by any officer other than his commanding officer or by any other rank, he may make a complaint with respect to that matter to his commanding officer.

(2) If an other rank thinks himself wronged in any matter by his commanding officer, either by reason of redress not being given to his satisfaction on a complaint under subsection (1) or for any other reason, he may make a complaint with respect thereto to the Council.

(3) The Council or the commanding officer shall investigate any complaint received by him under this section and shall take such steps as he may consider necessary for redressing the matters complained of.”

34. The Claimant’s Affidavit stated that the delay in filing the instant action was because he had originally instructed his Attorney at law to file a claim in private law, but was then advised of the decisions of **Hayden Ochoa v The Attorney General**²⁶ and **Aaron Samuel v The Attorney General**²⁷ that state such claims are to be brought in the public realm and that the judgments in **Hayden Ochoa** and **Aaron Samuel** have been appealed.

35. It appears that the Claimant had an alternative remedy under section 195 of the Defence Act. Notably, the Claimant did not provide any explanation to account for his failure to use the avenue under the said section for redress.

²⁶ CV2017-03607

²⁷ CV 2016-00258; CA P 402 of 2017

36. In any event, I accept that there was no good explanation by the Claimant for delaying in filing the instant claim as the decisions in **Aaron Samuel** (decided in 2017) and **Hayden Ochoa** (decided in 2019) set out the existing position in law until those decisions are set aside. Yet, the Claimant waited until 2021 to institute the instant claim.
37. However, I am not minded to strike out the action at this stage on the basis of abuse of process as the Defendant failed to raise these matters earlier. There was no evidence that the Defendant replied to the Claimant's Pre-action letter. There was also no application to strike out the Claimant's case during case management when the claim was first brought to the Defendant's attention. In my opinion, it would be a draconian step at this stage of the proceedings to strike out the claim on the ground of abuse of process based on the Defendant's conduct.

WHETHER THE CLAIMANT'S FUNDAMENTAL RIGHT TO DUE PROCESS BY THE LAW AS ENSHRINED BY SECTION 4(a) OF THE CONSTITUTION WAS INFRINGED BY THE DEFENDANT'S FAILURE TO COMPLY WITH THE APPROPRIATE DISCIPLINARY AND DISCHARGE PROCEDURES.

WHETHER THE DEFENDANT FAILED TO ACT WITH FAIRNESS TO THE CLAIMANT AND IN BREACH OF THE RULES OF NATURAL JUSTICE AS GUARANTEED TO HIM BY SECTION 5(e) OF THE CONSTITUTION WHEN THE DEFENDANT DENIED HIM THE OPPORTUNITY FOR A PROMOTION.

38. I have decided to treat with both issues together to avoid repetition as there is some degree of overlap.
39. The Claimant contended that he was deprived of the opportunity to be promoted and the consequential benefits in remuneration without due process as: (a) he was eligible for promotion but there was an inordinate delay in the sending of the recommendation—for his promotion to the COTTR; (b) his promotion was withheld on the basis of unfairly laid charges

which were later rescinded; and (c) charges and investigations against him were based on allegations not disclosed to him and on which he had no proper opportunity to comment.

40. The Defendant's position was that there was no breach of the Claimant's rights, as he was afforded due process at all times, both with regard to his non-promotion and discharge.

41. Section 4(a) of the Constitution provides as follows:

"It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law."

42. This provision guarantees the said basic human rights of an individual that he should not in any way be deprived of those rights without the due process of the law.

43. The principles of fairness are well settled. Lord Mustill in **R v Secretary of State for the Home Department, Ex Parte Doody**²⁸ at 560 described the minimum standards of fairness as follows:

"...what does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers

²⁸ [1994] 1 AC 531

an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.”

44. In my opinion, there was no inordinate delay in the sending of the recommendation for the Claimant’s promotion to the COTTR. Based on the Claimant’s evidence the period between his recommendation for promotion and the time when it was forwarded to the COTTR was four months.
45. However, the said recommendation of the Claimant’s promotion was subject to several prerequisites being satisfied, one of which was that there was a vacancy and the Claimant was aware of these prerequisites as he referred to them in the Claimant’s Affidavit. Lt Col Gomez set out the process for promotion at paragraphs 10 and 11 of the Gomez Affidavit as:

“10. ...The process is that when a letter of recommendation is forwarded to the Chief of Defence Staff, it is then forwarded to the Commandant, which is then forwarded to the Commanding Officer of the Trinidad and Tobago Regiment (“COTTR”) for considerations taking into account all considerations, including seniority and vacancy.

11. It is important to note that a recommendation is only one part of the process that goes towards a promotion. To be recommended for promotion, service person has to be in good standing and seniority, as well as the existence of a vacancy, would also be considered. At the time of my letter of recommendation, the Claimant was in good standing as there were no reports made against him nor had he received any reprimands or disciplinary awards, and therefore there was nothing precluding me from making a recommendation. However, this recommendation did not guarantee promotion to the next higher rank.

46. Lt Col Singh also stated at paragraph 8 of the Singh Affidavit that:

“The Chief of Defence Staff is responsible for promoting all personnel in the Regiment. The person who advises the Chief of Defence Staff is the Commanding Office of the Regiment (“COTTR”). This is why the letter of recommendation was sent to the COTTR for review. The COTTR will then discuss the recommendations at COTTR conferences on recommendations.”

47. The report of Lt Col Singh²⁹ demonstrated that although there was no objection to the Claimant’s recommendation for promotion, the CDS required advice on the availability of a vacancy³⁰. This position was

²⁹ Attached as “A.S.1” to the Singh Affidavit

³⁰ See page 2 of the report of Lt. Col. Singh

supported by exhibits “T.M.3” and “T.M.4” of the Claimant’s Affidavit, which showed that in addition to a vacancy being available, the CDS had to consider whether the other prerequisites for promotion had been met and the position on the seniority roster. Although the Claimant’s evidence was that Lt Col Gomez stated that he would recommend him for the position of Superintendent Clerk, the Gomez Affidavit deposed that he could only recommended the Claimant for promotion to the position of Staff Sergeant. However, there was no evidence from the Claimant that there was a vacancy for the position he was recommended for by Lt Col Gomez.

48. With respect to the charges which were laid against the Claimant, the evidence of the Metivier Affidavit did not support the Claimant’s assertion that the Defendant failed to follow due process with respect to the charges. Lt Col Metivier explained in the Metivier Affidavit that during the period February 2016 to July 2016, he held the rank of Major and the position of Commandant at the TTDF Headquarters. He asserted that he first became aware of charges relative to the Claimant in February 2016, when they were still ongoing and pending investigations. Based on the reports received from Captain Byron (Captain Pran) and Petty Officer Alleyne, it had been alleged that the Claimant had been altering his pay slips without the requisite authorization, in order to obtain job letters that would cause him to gain favourable consideration from financial institutions.

49. Lt Col Metivier denied the Claimant’s version of events and asserted that the Claimant was instructed to report for Commandant Orders on 29 June 2016, in respect of the twenty- six (26) charges that were being laid against him. On the said date, he read out the charges and his corresponding findings of “guilty” to the Claimant, who was given an opportunity to answer each charge separately. However, the Claimant offered no evidence in his defence; he did not attempt to explain that the allegations

made against him held no evidential basis and were untrue; and he did not request the identity of the individual who investigated the charges. The Claimant was then asked whether he would accept the award or wished to be tried before a Court Marshall and he indicated his acceptance of the award. He was then severely reprimanded with six months' probation and informed that he would be recommended for a reduction in rank.

50. Although the Metivier Affidavit gave a different version of what transpired at the Commandant hearing on 29 June 2016, the Claimant did not seek permission to cross-examine him to discredit his version of the hearing. I, therefore, accept the version as set out in the Metivier Affidavit and in accepting it I am satisfied that the process was fair, as the Claimant was informed of the charges and he was given the opportunity to present his response.

51. The Defendant's evidence on the Claimant's treatment after he was reprimanded was set out in the Metivier Affidavit. It stated that Lt Col Metivier wrote to the COTTR by letter dated 1 July 2016 recommending the Claimant for discharge and informing the COTTR that the Claimant had requested that consideration be extended to him, so that he may be allowed to serve on the TDF until the completion date of his service. He also had an informal conversation with Lt Col Sealy in respect of same, where it was discussed that due to the Claimant's age and the short amount of time that he had left to serve, he may be allowed to serve out his natural time and be discharged on the ground of completed service. In my opinion, Lt Col Metivier's position appears to be accurate, as the Claimant did not dispute that he was allowed to serve out his natural time and that he was discharged on the ground of completed service.

52. I accept that the learning in **Myron Rudder and anor v The Attorney General of Trinidad and Tobago**³¹ established that money owing to an

³¹ CV2012-05129

individual is an example of such property under section 4(a) of the Constitution. However, the Claimant did not establish that money was owing to him and that he was deprived of it without due process.

53. Having found that there was no delay in the forwarding of the recommendation for the Claimant's promotion, the recommendation was not the only criteria which was material in determining promotion and that the Claimant was treated fairly with respect to the charges against him, I am of the opinion that the Claimant was not denied the opportunity to be promoted and that there was no breach of section 4(a) of the Constitution. In this regard, the Claimant was not deprived of his right to enjoyment of property without due process of law.

WHETHER THE CLAIMANT'S RIGHT TO EQUALITY BEFORE THE LAW AND PROTECTION OF THE LAW AS GUARANTEED TO HIM BY SECTION 4(b) OF THE CONSTITUTION WAS BREACHED AS A RESULT OF THE DEFENDANT'S FAILURE TO OFFER THE CLAIMANT A PROMOTION TO A HIGHER OFFICE.

54. The Claimant contended that his right under section 4(b) of the Constitution was breached as there was an inordinate delay in the recommendation reaching the desk of the COTTR; the decision to withhold his promotion was based on unfairly laid charges that had been rescinded; and the decision to withhold his promotion was based on charges that were not disclosed to the Claimant and on which he had no proper opportunity to comment.

55. Section 5(2) (e) of the Constitution states:

“5 (2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not —

(d) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.”

56. It is settled law that section 5 (2) (e) does not give an individual separate constitutional rights as they are particulars of the section 4(b) right to protection of the law³². Mendonca JA in **The Attorney General of Trinidad and Tobago v Dion Samuel**³³ explained this position at paragraph 24 where he stated:

“However, as Mr. Martineau correctly acknowledged, Section 5(2)(e) is not entirely without relevance as it serves to inform the content of the right to protection of the law (see *Thornhill v Attorney General of Trinidad and Tobago* [1981] AC 61, 70). It is now well settled that the right to protection of the law includes a right to a fair hearing by courts and other judicial bodies. As was noted by Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 670 para G:

“...a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to “law” in such contexts as “in accordance with law”, “equality before the law”, “protection of the law” and the like, in their Lordships’ view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.”

That applies equally to the Constitution of Trinidad and Tobago ...”

³² Lord Diplock in *Thornhill v Attorney General of Trinidad and Tobago* [1981] AC 61, 70

³³ Civil Appeal No: P-181 of 2013

57. Jamadar J (as he then was) in **Sanatan Dharma Maha Sabha of Trinidad and Tobago and others v The Attorney General of Trinidad and Tobago**,³⁴ described the protections afforded under section 4 (b) of the Constitution at pages 57-58 as:

“... “equality before the law” and “the protection of the law” [4(b)] encompass both the negative concept that “no person is above the law” and the positive concept that all persons have an inalienable right to enjoy their constitutional rights and freedoms, unrestrained except by equal and impartial laws and provided the same are reasonably justifiable in a democratic society [section 13(1) of the Constitution].

V.G. Ramachandran in his text ‘Fundamental Rights and Constitutional Remedies’ (discussing the scope of Article 14 of the Indian Constitution – at page 212) states the position as follows:

No individual or groups of individuals should have differential or preferential treatment over other individuals or groups of individuals similarly circumstanced and with equal qualifications.

Thus, a complainant must show that he/she has suffered some form of differential treatment or disadvantage, by reason say of one of the personal characteristics in the general non-discrimination prohibition. This differential treatment or disadvantage may be direct or indirect. For example, a law which results in preferential treatment of a group by reason of religion, in comparison to others similarly circumstanced, with the effect that those others experience some disadvantage, could amount to discrimination by reason of religion and a breach of the protection of the law aspect of the 4(b) equality provision [which

³⁴ H.C.A. No. CV. S. 2065/2004

is accentuated given the constitutional right to enjoy freedom of religious belief and observance – section 4(h)].”

58. In my opinion, there was no breach of the Claimant’s right under section 4 (b) of the Constitution as there was no evidence from the Claimant that he was treated differently from other persons or that the Defendant had applied laws and regulations differently to him so as to prevent his promotion.

WHETHER THE CLAIMANT’S RIGHT TO EQUALITY OF TREATMENT FROM ANY PUBLIC AUTHORITY IN THE EXERCISE OF ANY FUNCTIONS AS GUARANTEED TO HIM BY SECTION 4(d) OF THE CONSTITUTION WAS BREACHED AS A RESULT OF THE DEFENDANT’S FAILURE TO OFFER THE CLAIMANT A PROMOTION TO A HIGHER OFFICE.

59. A Claimant who alleges unequal treatment must provide cogent evidence that he has been or would be treated differently from similarly circumstanced persons described as actual or hypothetical comparators³⁵. One of the leading authorities on section 4(d) of the Constitution is the Privy Council judgment of **Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago**³⁶ where Lord Carswell stated at paragraph 18:

“A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators...the comparison must be such that the relevant

³⁵ Boodoosingh J (as he then was) in CV 2011-02619 Dr Trevor Anatol v North Central Regional Health Authority

³⁶ [2004] UKPC 21

circumstances in the one case are the same, or not materially different, in the other.”

60. At paragraph 24 of the Privy Council judgment in **Annissa Webster and ors v the Attorney General of Trinidad and Tobago**,³⁷ Lady Hale summarized the current approach to section 4(d) of the Constitution as:

“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).

61. In my opinion, the Claimant failed to establish his claim for inequality of treatment as there was no evidence from him of any comparators who

³⁷ [2015] UKPC 10

were similarly circumstanced and treated differently; there was no evidence of discrimination; and he failed to illustrate that a hypothetical comparator in these circumstances would have been treated differently and given a promotion, namely, that an officer with charges and a finding of guilt would still be held in good standing to be promoted.

WHETHER THE DEFENDANT DEPRIVED THE CLAIMANT OF A LEGITIMATE EXPECTATION TO BE PROMOTED IN ACCORDANCE WITH THE SETTLED PRACTICE OF PROMOTIONS OF OTHER PERSONS IN SIMILAR CIRCUMSTANCES.

62. It was contended on behalf of the Claimant that his legitimate expectation to be promoted cannot be divested from the procedurally unfair practices of the Defendant; the Defendant caused him to attend a promotion ceremony along with others and at that point indicated that he was being charged and not promoted; and the Defendant's inability to clearly articulate and proffer justifiable charges against the Claimant has not removed the right that the Claimant should have been promoted.
63. The Defendant submitted that the claim for a declaration for deprivation of legitimate expectation should not be entertained, as the issue of legitimate expectation is only considered in claims that involve a judicial review action and the Claimant is attempting to sneak in a judicial review ground when he failed to do so within the statutory timeframe. In any event, the Claimant cannot succeed in a claim for deprivation of legitimate expectation in the circumstances of this case as he has produced no evidence of any promise that he would be promoted.
64. Lord Neuberger in the Privy Council decision of **United Policyholders Group v The Attorney General of Trinidad and Tobago**³⁸ repeated the principles of legitimate expectation. He stated at paragraphs 37 and 38:

³⁸ [2016] UKPC 17

“In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, para 60 ...

Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body’s statutory duty — see e.g. *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 636, per Lord Fraser of Tullybelton. Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. This third point can often be elided with the second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or a fortiori should, reasonably decide not to comply with the statement.”

65. The burden of proving the legitimacy of the expectation initially rests on the Claimant. Once the Claimant has proven the elements, the onus is shifted to the Defendant to justify the frustration of the legitimate

expectation. The Privy Council judgment in **Francis Paponette v The Attorney General**³⁹ described the position at paragraph 37 as:

“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.”

66. The Claimant’s evidence was that he was assured by Lt Col Gomez that he would be recommended for rapid promotion to Superintendent Clerk due to the pending retirement of Warrant Officer WO1 Lochan and he proceeded on leave for 90 days, from February 2014 to May 2014. However, Lt Col Gomez disputed that he made any such promise to the Claimant. He deposed at paragraph 9 of the Gomez Affidavit that:

“I did have a discussion with the Claimant about making a recommendation for his promotion, however I was not in any position to promise or assure him that he would be recommended for rapid promotion to the post of Superintendent Clerk. I could not guarantee any service person that he would be promoted to the Superintendent Clerk position. It is important to note that this is the highest Non Commissioned Officer (NCO) appointment in the Logistics and Finance Department and carries

³⁹ (2010) UKPC 32

the rank of Warrant Officer Class 1 or equivalent. The Claimant at the time held the position of Sergeant and therefore, I could not have recommended him for appointment to this position. I could have recommended him for promotion to the rank of Staff Sergeant, which was one rank above his substantive rank at the material time. I further say that I could not guarantee any promotion in general as the final decision was not within my authority.”

67. For the Claimant to prove that he had a legitimate expectation he had to demonstrate that there was a clear unambiguous promise by a person who was empowered to make such a promise that he would be promoted. Based on the evidence there was no such clear promise or assurance. At best Lt Col Gomez had a discussion with the Claimant. Even if there was a promise by Lt Col Gomez as asserted by the Claimant, this was of no value as Lt Col Gomez was not the person who had the final word on whether the Claimant would be promoted. The undisputed evidence was that only the COTTR made the decision for promotion.
68. Having found that the Claimant has not succeeded in proving any breach of his rights, the issue of damages does not arise to be addressed.

ORDER

69. The Claimant’s action is dismissed.
70. The Claimant is to pay the Defendant’s costs of the claim to be assessed by a Registrar in default of agreement.

/S/Margaret Y Mohammed

Judge