

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2018-03216

Between

ANTHONY NOEL EGBERT

Claimant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: July 9, 2019

Appearances:

Claimant: Mr. F. Masaisai instructed by Mr. I. Jones

Defendant: Ms. M. Smith and Ms. C. Alexander instructed by Ms. A. Mohan

JUDGMENT

1. This case concerns issues of the constitutionality of the decision of the Permanent Secretary of the Ministry of Works and Transport (“MOWT”) to withhold the claimant’s salary for the months of June, July and August 2018. The claimant, at the material time held the substantive post of Estate Constable with the MOWT. Prior to being posted at the MOWT, he was posted at the Ministry of the Attorney General and Legal Affairs (“MAGLA”). It is to be noted that prior to his posting at the MAGLA he was assigned as Estate Constable at the Ministry of Education. At that time the claimant’s name was Anthony Hosein. He subsequently changed his name. The brief details of the claimant’s Claim according to Fixed Date Claim Form filed September 10, 2018 are as follows;

- i. The claimant’s right to life, and the enjoyment of property and not to be deprived thereof except by due process of law under section 4(a) of the Constitution was infringed when the Permanent Secretary of the Ministry of Works and Transport acted unconstitutionally to deprive him of his statutory salary with the intention to force and/or cause him to commit suicide and/or his removal from office by the Public Service Commission;
- ii. The claimant was denied the right to equality before the law and the protection of the law as guaranteed to him by section 4(b) of the Constitution by the Permanent Secretary of the Ministry of Works and Transport directing him to make a false declaration by submitting a second assumption of duties in order to receive his statutory salary;
- iii. The claimant was denied the right to equality of treatment and fairness as guaranteed to him by section 4(d) and 5(e) of the Constitution when the Permanent Secretary of the Ministry of

Works and Transport stopped and/or authorized the unconstitutional withholding of his statutory salary;

2. Pursuant to the aforementioned, the claimant claims the following relief;
 - i. An order that the Defendants stopping and/or unlawful withholding of the Claimant's statutory salary from the period June 2018 to present was unconstitutional and an illegal;
 - ii. An order that the decision of the defendants to stop the claimant's salary was carried out to victimize him because of his race (it is to be noted that this relief was not pursued in submissions and neither was any evidence led in relation thereto. The court therefore considered that this relief was abandoned);
 - iii. An order that any public officers who wilfully breach any law of Trinidad and Tobago should not be shielded from personnel legal liability for any action or conduct;
 - iv. An Order that the Permanent Secretary of the Ministry of Works and Transport has acted unconstitutionally by instituting a security division with a shift system in breach of the Civil Service Act;
 - v. An order that the Defendant do pay to the claimant damages including aggravated, exemplary and punitive damages for infringement of the claimant's fundamental rights as guaranteed to him by the Constitution;
 - vi. An order that the claimant is entitled to damages for misfeasance in public office and breach of his constitutions rights;
 - vii. That damages be assessed by a Master or Judge in chambers;
 - viii. An injunction preventing the defendant from the continued operation of an unconstitutional security division within the Ministry of Works and Transport;
 - ix. Further and other reliefs; and

x. Costs

Summary of facts

3. The evidence in this case is contained in affidavits sworn to by the claimant and the affidavit of Judith Wilson-Campbell (“Wilson-Campbell”) the Human Resource Officer II (Ag.) of the Human Resource Technical Section, MOWT filed on behalf of the defendant. From the evidence, the following undisputed facts can be gleaned.
4. By letter dated March 21, 2018, the claimant was transferred by the Public Service Commission from the Ministry of the Attorney General and Legal Affairs (“MAGLA”) to the MOWT. According to the claimant, he was given letter dated March 21, 2018 on April 9, 2018.
5. The claimant was granted approval for vacation leave from April 10, 2018 to May 12, 2018 and he proceeded on vacation to the United Kingdom. Whilst on vacation leave, the claimant applied for and was granted extended sick leave from April 25 to July 23, 2018.
6. The claimant received his salary for the month of May, 2018 from the MOWT as was customary, the Finance and Accounts department of MAGLA having transferred his IHRIS computerized salary particulars to the MOWT on the basis that the Cabinet of Trinidad and Tobago agreed to the transfer of the post of Estate Constable to the MOWT and the transfer having been effected by the Public Service Commission.

7. By June 30, 2018 however, the claimant had not received salary from the MOWT for the month of June. Indeed the claimant also received no salary for the months of July and August 2018 (dealt with later on).
8. On July 24, 2018 the claimant resumed duties from extended sick leave at the MAGLA and was released from duty at 11.00 a.m. to permit him to assume duty at the MOWT. He reported to the Human Resource department of the MOWT at the head office of the MOWT and handed over his letter of release to Wilson-Campbell.
9. The claimant then filled out and submitted an assumption of duty form at the head office of the MOWT on July 24, 2018. He was then posted for duty at the Drainage Division, El Socorro. The claimant left the MOWT's head office to proceed to his place of posting but suffered an illness on his way to the Drainage Division and had to seek medical attention. He was examined by the District Medical Officer for Chaguanas, Dr. Indarjit Birjah at 3.15 p.m. and was placed on four days sick leave.
10. As such, the claimant continued on extended sick leave from the 24th July until August 9, 2018. The claimant was required to submit a Fitness Certificate and he did so on August 10, 2018. By letter dated August 21, 2018 the claimant was informed by Wilson-Campbell that he was required to submit another assumption of duty dated August 10, 2018 in order to be paid his salary. The claimant refused to submit another assumption of duty since he had already signed and submitted an assumption of duty form on July 24, 2018.
11. Nonetheless, the claimant submitted a second assumption of duty form dated August 27, 2018 in which he assumed duties as an Estate Constable

at the Drainage Division of the MOWT on August 10, 2018 after seventeen days extended sick leave from July 24, 2018.

12. The claimant sought an interim injunction against the Permanent Secretary of the MOWT on September 21, 2018. Immediately prior to the hearing of the application, the claimant was paid his outstanding salaries.

ISSUES

13. The issues for determination by this court are as follows;

- i. Whether the stoppage of the claimant's salary constituted an infringement of his right to the enjoyment of his property without due process of law;
- ii. Whether the claimant was denied the right to equality before the law and protection of the law when he was asked to submit a second assumption of duties;
- iii. Whether the claimant was denied the right to equality of treatment and fairness when the Permanent Secretary of the Ministry of Works and Transport stopped and/or authorized the withholding of his statutory salary; and
- iv. Whether the Claimant is entitled to damages including aggravated, exemplary and punitive damages if he establishes any of the above breaches.

ISSUE 1 - *Whether the stoppage of the claimant's salary constituted an infringement of his right to the enjoyment of his property without due process of law*

14. According to the claimant, his right to enjoyment of property and not to be deprived thereof except by due process of law under section 4(a) of the Constitution was infringed when his salary was stopped and he was removed from the MOWT's IHRIS Computerized system for payment of salaries.

15. **Section 4(a) of the Constitution of Trinidad and Tobago** provides as follows;

"4. 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..."

16. The parties have agreed that a person's salary and other emoluments could be considered property under section 4(a) of the Constitution.

17. In the Court of Appeal case of **Chandresh Sharma and others v Attorney General Of Trinidad And Tobago**¹, Sharma C.J. (as he then was) had the following to say at paragraph 18;

"In relation to section 4(a) that the non -payment amounted to a deprivation of property without due process of law, it was common ground between the parties that salary and benefits due to a person constituted "property" within the meaning of section 4(a) and if someone is denied

¹ C.A. No. 52 of 2005

payment without due process that amounts to a contravention of section 4(a). What is in issue however is whether the Appellants were entitled to be paid their salary and benefits.”

18. Consequently, the court has to determine whether the claimant has established that he was entitled to his salary and if so, whether the deprivation of his salary was done without due process.

Whether the claimant has established that he was entitled to his salary

EXTENDED SICK LEAVE

19. The claimant in his submissions has asserted a statutory right to receive his salary by the last day of every month under **regulation 39 of the Civil Service Regulations of the Civil Service Act Chapter 23:01** which provides as follows;

“39. (1) Salary shall be paid on the day previous to the last full business day of the month. When, however, the last business day falls on a Saturday or a Monday, payment of salary shall be made on the preceding Thursday or Friday respectively.

(2) The Permanent Secretary in the Ministry of Finance, may vary the date of payment of salary to an earlier date, whenever it appears to him expedient to do so.

(3) An officer who is proceeding on leave may receive his salary before the normal pay day for the whole month in which he proceeds on leave, provided the period of leave extends beyond the end of the particular month.”

20. According to the claimant, the powers delegated to the Permanent Secretary (“PS”) and the accounting officer at the MOWT is given by Part II of the First Schedule of the Public Service Commission (Delegation of Powers) Order (made or deemed to be made under section 127 of the Constitution). Part II of the First Schedule of the Public Service Commission (Delegation of Powers) Order provides as follows;

“1. The powers delegated to Permanent Secretaries and Heads of Departments are as follows:

(a) to appoint a public officer to act in the public office in the Civil Service up to and including Salary Range 68 for periods up to six months in exercise of which power, then Permanent Secretary shall apply the principles of selection prescribed in regulations 18 and 26 and the provisions of regulation 25 of the Regulations;

(b) to transfer a public officer from an office in a grade in the Ministry or Department to which such an officer is assigned to a similar office in that grade in the same Ministry with no alteration in remuneration up to and including Salary Range 68 and this power shall be exercised subject to the provisions of regulation 29 of the Regulations which requires notice to be given to such officer and to the right of such officer and to make representations to the Commission;

(c) to appoint persons temporarily to offices in the public service for periods not exceeding six months at a time where such persons have already been appointed temporarily by the Public Service Commission for a fixed period;

(d) to confirm the appointment of a public officer to a public office after consideration of all performance appraisal reports and medical reports on the officer, where applicable during the probationary period if satisfied that the service of the officer on probation has been satisfactory.

2. The powers delegated in this Part are in respect of public officers in the Ministry under his supervision who hold the public offices specified in Salary

Ranges Nos. 1 to 68 of the Classification of Offices set out in the First Schedule to the Civil Service Act, except that the power to confirm appointments to public offices applies to all offices within the Ministry or Department...”

21. As such, the claimant submitted that his right to enjoyment of property and not to be deprived thereof except by due process of law under section 4(a) of the Constitution was infringed when the PS of the MOWT acted unconstitutionally in depriving him of his statutory salary beyond the powers afforded to her under Section 127 of the Constitution. According to the claimant, the PS unilaterally stopped his salary from the month of June, 2018 preceding his release from the MAGLA and assumption of duty at the MOWT.
22. Under the IHRIS computerized system for payment of salaries in the public service, the claimant’s financial records were transferred at the end of the month of April, 2018 by the MAGLA to the MOWT whilst the claimant was on approved vacation in the United Kingdom and had not yet been released from the MAGLA to the MOWT. The claimant was paid his salary for the month of May, 2018 by the MOWT.
23. According to the claimant, when he did not receive his salary after June 30, 2018 upon being told that he was now being paid by the MOWT, he visited the MOWT Accounts department where he spoke to Avion Kowlessar (“Kowlessar”) who informed him that his salary was stopped as a result of his failure to assume duties. The claimant informed Kowlessar that he had not yet been released from the MAGLA and that he was on extended sick leave for the periods of April 25 to May 4, 2018, May 5 to May 17, 2018, and June 26 to July 23, 2018. Kowlessar then informed the claimant that

he had been over paid for the month of May, 2018 and that the MOWT would like to recuperate its money from him. The claimant informed Kowlessar that that was news to him as he had not been issued any letter of notice of overpayment from the MOWT and that was the process that had to be carried out in the event an officer is in overpayment.

24. The defendant at paragraph 6 of the affidavit of Wilson-Campbell stated that the claimant's salary from June, 2018 was not deliberately stopped or withheld by the MOWT. That there was a delay in the payment of the claimant's salary for the months of June, July and August, 2018 but that he was paid. The claimant was paid for the period of June 1 to June 25, 2018 by cheque dated September, 2018 and for the period of July 24 to August 9, 2018 by cheque dated October 24, 2018.

25. In this regard it is somewhat disingenuous of the defendant to make the assertion that the claimant's salary was not stopped as the evidence clearly demonstrates that the claimant was not being paid on schedule, namely at the end of each month and that his salary was belatedly paid after the injunctive proceedings were brought before the court.

26. At paragraph 7 of the affidavit of Wilson-Campbell it is stated that the MOWT was awaiting a proper assumption of duties from the claimant and that the MOWT's Accounts department must maintain transparent records for audit purposes. Further, that the Human Resources department could not classify any leave for the claimant as there was an inconsistency with respect to the claimant's date of assumption. The alleged inconsistency was that the claimant filled out an assumption form dated July 24, 2018 however he also submitted a medical certificate dated July 24, 2018 which asserted that he became ill on July 24, 2018 and so

based on the medical certificate, the claimant could not have both assumed duties and have obtained extended sick leave for the entire day.

27. Wilson-Campbell also stated at paragraph 10 of her affidavit that the claimant was informed on numerous occasions of the need to submit an assumption of duty since his assumption of duties submitted on July 24, 2018 was invalid. That the claimant only complied with their request by letter dated August 27, 2018 wherein he stated that he assumed duties on August 10, 2018. Letter dated August 27, 2018 was only received by Wilson-Campbell on September 19, 2018.

28. Further, in the affidavit of Wilson-Campbell she deposes at paragraph 9 that she read an e-mail from Dianne Shim, Director of Finance and Accounts of MOWT to Ethyln John, Deputy Permanent Secretary of MOWT which stated that the claimant's pay sheet was prepared for the period June 1, 2018 to June 25, 2018 but that the Accounts department of the MOWT was awaiting a valid assumption for duties from extended sick leave.

29. In the court's view, the above evidence provides further confirmation and the court finds that the claimant's salary was stopped pending his assumption of duties at the MOWT and that his name was taken off the automatic IHRIS computerized payroll at the MOWT.

30. The defendant did not dispute that civil servants, like the claimant, in normal circumstances, are entitled to payment of their salary by the last day of every month. However, the defendant submitted that the facts of the claimant's case do not fall squarely within the entitlement to receive a

timely salary in accordance with regulation 39 of the Civil Service Regulations.

31. The defendant submitted that it was agreed between the parties that the claimant had been on extended sick leave for approximately three months prior to being released to the MOWT. That when the claimant was released to the MOWT on July 24, 201, as an employee of the MOWT for the very first time, he applied to continue on extended sick leave until August 9, 2018.

32. The defendant relied on **Regulation 86(1) of the Civil Service Regulations** which provides as follows;

“Extensions of sick leave on full pay may be granted by the Chief Personnel Officer provided the leave is supported by a medical certificate from an approved registered medical practitioner.”

33. Further, the defendant relied on the Personnel Department Guidelines for the Administration of Devolved Functions (“the Guidelines”) wherein under the heading “Eligibility for Extension of Sick Leave”, Guideline B number 2 provides as follows;

“The Permanent Secretary or Head of Department/ Statutory Authority in his absolute discretion decides whether an extension of sick leave should be granted with full pay, partial pay or without pay as the circumstances of the individual case may warrant.”

34. Under the heading “Introduction”, Guideline A, Number 1 of the Guidelines provides as follows;

“An extension of sick leave may be granted in cases where an officer has exhausted his annual sick leave eligibility i.e. fourteen (14) working days in a particular year.

An officer does not have an entitlement to pay in respect of extensions of sick leave.”

35. As such, the defendant submitted that the discretion of the Chief Personnel Officer (“CPO”) to grant extensions of sick leave with pay was delegated to the PS, Head of Department or Statutory Authority in the Ministry by the Guidelines. That the said discretion is to be exercised according to the particular circumstance of each individual case. Further, the defendant submitted that it is apparent on the face of the Guidelines (Guideline A, 1), that there is no entitlement to pay whilst on extended sick leave.

36. Consequently, it was the submission of the defendant that regulation 39 of the Civil Service Regulations does not inform the claimant’s conclusion that his salary was unconstitutionally stopped in the month of June, 2018. According to the defendant, the claimant was on extended sick leave and so he could not be paid until the leave was classified as leave with pay. The defendant submitted that such classification, of necessity, may not be completed in time for payment of the salary for the respective month, namely by the 12th of the month. That indeed, in the claimant’s circumstances, the MAGLA did not classify his extended sick leave in time for payment of salaries in the month of June, 2018.

37. According to the defendant, it was only on July 3, that the MAGLA classified the claimant’s extended sick leave for the period of April 25, 2018 to July 23, 2018. Furthermore, the entire period was not classified as leave with

pay, for instance, the period June 26, 2018 to July 23, 2018 was classified as leave without pay.

38. The court agrees with the submission of the claimant that the defendant's assertion that the claimant was on sick leave from April 25, 2018 to August 9, 2018 is inaccurate. The evidence of the claimant was that he was on statutory vacation leave from April 10, 2018 which was stopped when he submitted his sick leave while on vacation beginning on April 25, 2018 ending on July 23, 2018. Therefore, when the claimant was released to the MOWT on July 24, 2018 he was not on sick leave.
39. The claimant testified that whilst he was on duty at MOWT after officially assuming duties by signing the prescribed form on July 24, 2018 he was posted to continue duties at the Drainage section, of the said ministry in El Socorro. As a matter of common sense therefore, the claimant became ill having assumed his official duty while proceeding to the Drainage Section, El Socorro and the court so finds. To this end, the court does not accept the evidence of the defence that an assumption of duty would have to be submitted at the Drainage Division to be valid in the context of the circumstances of this case. Clearly the claimant had submitted his assumption of duty form at the head office and same had been accepted and was in the possession of the HR department.
40. Subsequently the claimant sought medical attention and was examined by the government District Medical Officer in Chaguanas and given sick leave for four days. He thereafter received further sick leave up to August 9, 2018.

41. To explain how the process works in conjunction with the Guidelines, the claimant made reference to two of his previous matters of classification while at the Ministry of Education. In both cases he applied for sick leave and the Ministry having classified it he appealed.

42. The first matter of classification occurred in the following manner;

- i. By notices dated May 16, May 31 and August 18, 2011 the Ministry of Education informed the claimant that the periods of December 7, 2010 to December 20, 2010, March 22, 2011, March 23, 2011 to March 31, 2011, April 13, 2011 to April 14, 2011, April 21, 2011, May 24, 2011 to May 25, 2011, June 10, 2011 and July 25, 2011 were approved for extended sick leave without pay.
- ii. By letter dated September 2, 2011 the claimant appealed the decision to classify the periods of December 7, 2010 to December 20, 2010, March 23, 2011 to March 31, 2011 and April 21, 2011 as extended sick leave without pay.
- iii. By letter dated December 23, 2011 the PS responded to the appeal and noted the claimant's representations, but stated that in accordance with the guidelines for classification the claimant did not satisfy the requirements for extended sick leave with full pay. As such, the decision could not have been overturned.
- iv. By letter dated October 16, 2012 the claimant was informed that he was indebted to the Government in the sum of \$ 7,182.00 and that the reason for the indebtedness was that the leave taken for the period December 12, 2010 to December 31, 2010 was classified as absence from duty without pay but his entire salary was paid

which resulted in the overpaid amount. By this letter it was demanded that the claimant deposit the overpaid amount at the Treasury or submit a reasonable proposal in writing to have the debt liquidated.

- v. By letter dated November 22, 2012 the claimant submitted another appeal for re-classification to the PS of the Ministry of Education against the re-classification of the periods of extended sick leave as leave without pay.
- vi. By letter dated April 25, 2013 the PS of the Ministry of Education responded to the appeal and stated why the extended sick leave could not be re-classified.
- vii. By Letter dated July 10, 2013, the claimant submitted another request to Jennifer Daniel the Ag. PS of the Ministry of Education to review the classification of extended sick leave without pay, due to delay in the classification by the Ministry of Education.
- viii. By letter dated July 25, 2013 the PS of the Ministry of Education responded and stated that the decision had been maintained.
- ix. By letter dated August 29, 2013 the claimant responded to the PS and stated that the delay in classification of his extended sick leave has estopped him from making a claim for sickness benefit under the National Insurance Board Act and that he would only make payments towards his over payment if the Ministry of Education accept responsibility for the late classification of his extended sick leave and communicate same to the NIB and/or compensate him for his sickness benefit claims. The PS was given twenty-one (21) days to give her decision.

- x. By letter dated September 3, 2013 the claimant lodged a grievance against the Ministry of Education with the PSA. The General Secretary later advised the claimant to file his complaint with the Ombudsman.
- xi. By letter dated March 7, 2014 the claimant filed a complaint to Lynette Stephenson Senior Counsel, the Ombudsman of Trinidad and Tobago against the decision of the Ministry of Education to classify his extended sick leave as leave with no pay.
- xii. By letter dated July 8, 2015 the Office of the Ombudsman responded to another complaint of the claimant and stated that the Ombudsman does not have the jurisdiction to pursue the matter. This letter further informed the claimant that the Ombudsman wrote to the PS of the Ministry of Education with respect to the Ministry's failure in dealing with the classification of his leave in a timely manner which caused him to suffer financial loss and recommended that the Ministry implement a system to ensure that matters such as his are handled within a given timeframe to allow compliance with the deadlines stipulated in legislation.

43. The second matter of classification occurred as follows;

- i. The claimant suffered injury whilst on duty at the Ministry of Education on December 8, 2011 and was on extended sick leave from December 9, 2011 to February 24, 2012. The claimant submitted a claim for injury leave on December 8, 2011.

- ii. By letter dated February 24, 2014 the Ministry of Education informed the claimant that his application for injury leave for the period of December 9, 2011 to February 24, 2012 was not approved and that the period of absence was referred for classification as an extension of sick leave.
- iii. By letter dated June 9, 2014 the claimant appealed the decision to classify the period of extended sick leave without pay to the PS of the Ministry of Education.
- iv. By letter dated August 14, 2014 the PS of the Ministry of Education responded and stated that the decision to not classify the period of December 9, 2014 to February 24, 2014 as injury leave had been maintained.
- v. By letter dated September 12, 2014 the claimant made a complaint to Lynette Stephenson, Senior Counsel, Ombudsman of Trinidad and Tobago against the decision of the PS of the Ministry of Education to classify the period of injury leave as extended sick leave without pay.
- vi. By letter dated October 3, 2014 the office of the Ombudsman acknowledged the complaint against the Ministry of Education.
- vii. By letter dated October 6, 2014 the Ministry of Education gave notice to the claimant that the following periods of extended sick leave was approved and classified as follows;
 - a) December 9, 2012 to January 1, 2012 0- with full pay;
 - b) January 20, 2012 to February 16, 2012 – half pay;
 - c) February 22, 2012 to February 24, 2012 – without pay

- viii. By letter dated January 16, 2019 the Office of the Ombudsman responded to the claimant complaint to query the decision of the Ministry of Education to not classify the period December 9, 2011 to February 24, 2014 as Injury leave and stated that the Ministry of Education reclassified the period and approved as it as Injury leave.
- ix. By letter dated January 4, 2019 the Ministry of Education confirmed that the claimant's appeal against the extended sick leave was approved and that the period of December 9, 2011 to February 24, 2012 was re-classified as injury leave.

44. Consequently, the claimant submitted that a classification of sick leave is only a notice that the period has been classified and so there was no power in law to stop and/or to withhold his salary. That if a period of extended of sick leave is classified as being leave with no pay and an officer does not appeal the classification, the officer has to be given notice of the classification of extended leave with no pay and the option to offset any such period against with casual leave or any vacation leave eligibility.² As such, the claimant submitted that the PS or any officer cannot deduct or withhold any amount of an officer's salary unless the following process is followed;

- i. A letter of classification is issued outlining to the officer the option to offset the period of extended sick leave without pay with casual leave and/ or vacation leave; and if the offer is declined;

² See Guideline C of the Personnel Department Guidelines for the Administration of Devolved Functions

- ii. A letter of over payment is issued to the officer in accordance with sections 83 to 85 of the Exchequer and Audit Act Chapter 69:01 which would require the affected officer to submit a proposal to the Comptroller of Accounts, which is usually an offer to make monthly deductions that can be from \$100.00 to up to \$1,000.00. It does not give any power to the PS to stop or withhold a public officer's salary.

45. According to the claimant, whilst that process is in progress, the notice of over payment of indebtedness is suspended until the outcome of the entire process and the officer will continue to receive his full salary in accordance with regulation 39 of the Civil Service Regulations. The officer therefore suffers no loss of earnings by having to make payments by either giving his approval for salary deductions or making direct payment to the Board of Inland Revenue to the Comptroller of Accounts.

46. Regulation 86 of the Civil Service Regulations, sets out the discretion vested in the CPO to classify sick leave in excess of the statutory sick leave period of 14 days as being extended leave with salary. It follows therefore that once an officer takes in excess of the permitted number of days on sick leave, those excess days are to be reconciled by the CPO (in this case by the PS, to whom the discretion has been delegated) in accordance with the Guidelines. The PS then classifies the leave as being either leave with pay or without pay or with part pay only. As such, the court finds that regulation 86 has no correlation to the payment of a public officer's salary under section 39 of the Civil Service Regulations.

47. On the evidence provided by the claimant it can be gleaned that the process used by at least one Ministry is that when a public officer takes in excess of his eligibility of fourteen days sick leave, he can proceed to take additional sick leave with the provision of a medical certificate. That additional sick leave is subsequently classified as extended sick leave in accordance with the conditions outlined in the Guidelines as extended leave with full pay, half pay or no pay. Classification of extended sick leave is done by the Human Resource department of the government ministry.
48. The public officer is then issued a notice of approval of classification of the grant of extended sick leave as being either with full pay, half pay or leave without pay. That notice to the officer however does not generally result in automatic stoppage of the officer's monthly salary or any withholding thereof.
49. If an officer's extension of sick leave is classified as leave without pay, the Officer is afforded an administrative remedy to appeal the classification to the Office of Permanent Secretary for Re-classification of the period of extension of sick leave with full pay by providing additional evidence to support the request.
50. If the PS decides to affirm the decision to classify the extension of sick leave as leave with no pay, the matter does not end there, as the officer is permitted to challenge the decision of the PS either as a grievance with the Public Service Association ("PSA") or to the Office of the Ombudsman as an appeal against the re-classification of the extension of sick leave as leave with no pay. The final recourse when all alternative remedies are exhausted may be that of judicial review.

51. Any grievance against classification of extended sick leave as leave with no pay that is unsuccessful can then be referred by the PSA to the Ministry of Finance for settlement. If there is no settlement at the Ministry of Finance, the matter is then referred as a trade dispute under section 51 of the Industrial Relations Act by the PSA to the Industrial Court of Trinidad and Tobago. Alternatively, the officer can lodge a complaint with the Office of the Ombudsman or make an application for judicial review.

52. However, there is no evidence before this court that would lead it to find that this practice is a universal one founded on statute or regulations. There is therefore no reasonable basis to argue that the MOWT does not have the power in the appropriate case to withhold salary in the event it is found that an officer is not entitled to same because of the classification of extended sick leave without pay. In that regard a distinction must be made between the case where there is an overpayment which must be repaid and a nonpayment in circumstances where salary has not yet been paid, the latter bring a deduction for monies owed and not a stoppage of salary, despite the effect potentially being the same, that is the non-receipt of salary. The issue is whether this case was an appropriate one for such withholding.

IS THIS CASE AN APPROPRIATE CASE IN THE CIRCUMSTANCES

53. The said Guidelines under the rubric “Extension of sick leave” at Part C (a) provides as follows;

“Where it is necessary to have an officer’s absence from duty, due to illness, classified as an extension of sick leave, the officer may be given the option of having the period provisionally offset against his earned annual leave

eligibility while his application is being determined. Should the officer neglect to exercise such option or where the officer has no annual leave to his credit, the period of his absence from duty, due to illness, shall be treated as a period of absence without pay pending classification by the Permanent Secretary or Head of Department/Statutory Authority.”

54. It follows that the general rule appears to be that while the classification is pending the officer can exercise the option to have the extra days offset provisionally against his annual leave until classification is completed. Should the officer fail so to do or should he have no annual leave the extended leave is to be considered as leave without pay, unless otherwise classified. So that the general rule is that extended sick leave carries no pay unless otherwise classified.

55. As such, the claimant would not have been entitled to pay for the days on which he was absent because of illness unless the discretion was exercised in his favour. The claimant’s leave was initially classified as follows;

- i. Extension of sick leave without pay;
 - a) April 25, 2018 to May 4, 2018;
 - b) May 5, 2018 to May 16, 2018;
 - c) June 26, 2018 to July 23, 2018;
- ii. Extension of sick leave with full pay;
 - a) May 17, 2018 to May 28, 2018;
 - b) May 29, 2018 to June 11, 2018;
 - c) June 12, 2018 to June 25, 2018.³

³ See Memorandum dated July 3, 2018

56. By letter dated July 23, 2018 the claimant submitted an appeal for the re-classification of the following periods of sick leave which had been classified as extension of sick leave without pay;

- i. April 25, 2018 to May 4, 2018;
- ii. May 5, 2018 to May 16, 2018;
- iii. June 26, 2018 to July 23, 2018.

57. By letter dated August 8, 2018 the claimant was notified that the PS of the MAGLA reclassified the period of May 5, 2018 to May 16, 2018 as extended leave with full pay.

58. By process of calculation it means that the periods which were eventually classified as extended sick leave without pay were April 25 to May 4 and June 26 to July 23. This amounts to five days in April, four days in May, four days in June and twenty-three days in July.⁴

59. It follows therefore in the court's view that this was not an appropriate case to withhold the full salary of the claimant for the months of June, July and August pending classification or otherwise. The periods of leave without pay having been set as five days in April, four days in May, four days in June and twenty-three days in July, it was unlawful to deprive the claimant of salary for thirty one days in May, thirty days in June and thirty one days in July.

THE ASSUMPTION OF DUTY

⁴ See letter dated August 8, 2018 from the PS of the MAGLA to the claimant.

60. The defendant submitted that in addition to the fact that the claimant was on extended sick leave, there were other circumstances unique to the claimant's case, which contributed to a delay in the payment of his salary for the months of June to August, 2018 namely the fact that his assumption of duty on July 24 was inconsistent with sick leave for the same day and therefore he could not have been treated as an officer who had assumed duty from an accounting perspective.
61. It was agreed between the parties that on August 10, 2018, the claimant submitted a fit for duty form to Wilson-Campbell as well as a copy of the written assumption of duties dated July 24, 2018 which he had submitted to head office of MOWT on July 24, 2018.
62. According to the defendant, in the Guidelines, under the heading "Eligibility for Extension of Sick Leave", Guideline B number 5(a) provides that, *"Sick Leave/extensions of sick leave shall commence from the date specified on the medical certificate and continue to the end of the period recommended by the doctor."* Under the heading "General", Guideline F, Number 1(a) provides that, *"Extension of sick leave are not granted in working days."*
63. As such, the defendant submitted that the Guidelines stipulate that extended sick leave is to run from the date specified on the medical certificate until the end date as recommended by the doctor. That it is further stipulated that extensions of sick leave are not granted in working days. Accordingly, the defendant submitted that in the unique circumstances of the claimant's case, the servants of the defendant, acting in an accounting capacity, could not prudently accept the claimant's assumption of duties dated July 24, 2018. That in essence, the claimant

had applied to extend his sick leave from July 24, 2018 onward and such extended sick leave was continuing from as far back as April 25, 2018. The defendant further submitted that it was not rational, for accounting purposes to continue on extended sick leave and have a proper assumption on the same date.

64. The defendant submitted that assuming, but not accepting that the claimant had submitted a valid assumption of duties on July 24, 2018, the claimant did not submit a resumption of duties on August 10, 2019 but instead, to the defendant's confusion, resubmitted his assumption of duties dated July 24, 2018.

65. According to the defendant, the claimant was on extended sick leave and was not entitled to be paid until such leave was classified and the claimant had not assumed duties at the Ministry from which he was entitled to be paid. As such, the defendant submitted that the claimant could not be paid at the end of the respective months.

66. Consequently, the defendant submitted that the authorities support its submission that the claimant has not established an entitlement to be paid in accordance with Regulation 39 of the Civil Service Regulation for the months of June, July and August, 2018.

67. The claimant denied that he applied for extended sick leave from July 24, 2018 as there is no such application for extended sick leave.

68. The court finds that the claimant resumed duties at MAGLA by his official resumption of duties form dated July 24, 2018 and therefore his period of

extended sick leave from June 26, 2018 to July 23, 2018 at the MAGLA had come to an end on July 24 when he reported for duty at that place.

69. It was the evidence of the claimant that after working up to 11.00 am at the MAGLA, he was released to the MOWT. He submitted his release letter dated July 24, 2018 to the Human Resource department and he was sent to the security division where he assumed duties by signing the official assumption of duties form. The claimant was then detailed to continue duties by being posted to the Drainage section, El Socorro. Therefore, the court finds that when the claimant left the Head Office of MOWT at 1:00 pm, he had lawfully assumed duty at the MOWT.

70. The court does not agree with the submissions of the defendant that it was constrained by the Guidelines to classify July 24 as a sick day and therefore consider the period of July 24 to August 9 as a continuation of the original period of extended sick leave. It is clear that the claimant resumed duty at the MOWT and fell ill whilst on duty. In that case the sick leave could not have covered the entire day but roughly half the day. Such a finding is not inconsistent with B 5(a) of the Guidelines which provides for the sick leave period to commence on the day specified in the medical. In other words the leave began on July 24, 2018 but during the latter half of the day.

71. In any event, even if the extended sick leave is to be classified as having begun on the full day of July 24, 2018, that classification is for the purpose of the payment of the day's salary only and cannot affect the issue of whether the claimant reported and assumed for duty which is the case here. In other words, while the MOWT may have been entitled to withhold pay for that day, this does not derogate from the fact that the claimant assumed duties and so would have broken former period of sick leave.

72. Consequently, the court finds that the claimant has established that he was entitled to receive his salary by the last day of every month pursuant to regulation 39 of the Civil Service Regulations of the Civil Service Act Chapter 23:01 subject to the withholding of the appropriate amount for days of no pay extended sick leave.

Whether the claimant was deprived of salary without due process

73. The right to property is circumscribed by the principle of due process of law. That is, the individual is entitled to his property, except where a deprivation of such property is done with reference to those fundamental principles which are necessary for a fair system of justice.⁵ The due process clause therefore gives constitutional protection to the concept of procedural fairness.⁶

74. In the case of Steve Ferguson v AG⁷, Smith JA had the following to say at paragraph 78;

“The ‘due process of law’ has been aptly described as a ‘compendious expression’. It has been stated and restated in different ways by different courts...

I recognize that there is some seeming divergence of view of the scope and extent of this ‘due process’ concept.

Some judges have defined it in broad terms such as embracing ‘the concept of ordered liberty’; ‘the concept of the rule of law itself and the universally

⁵ See The State v Boyce (Brad) (2006) 68 WIR 437.

⁶ See Hillare v Baptiste Privy Council Appeal No. 60 of 1998, 119.

⁷ Civil Appeal No. P-098 of 2013

accepted standards of justice observed by civilised nations which observe the rule of law'; and the protection against the arbitrary infringement of the right to personal liberty. Other courts have limited its scope in a constitutional law context to the 'fundamental principles which are necessary for a fair system of justice'.

There has also been a discussion as to whether the concept of due process of law should only extend to protect procedural fairness or substantive fairness.

Whatever the conceptual differences may be, there is one common thread in the cases and it is that when one is considering the applicability of the due process protections in the Constitution, one needs to perform 'a realistic assessment of the proceedings considered as a whole'.

In fact, the more full quote in my view captures the essence of the due process protection and its interrelation with other similar concepts, namely:

In the context of the Constitution of Trinidad and Tobago there is a close link between the three guarantees of due process, protection of the law and fair hearing since the fundamental concept of a fair trial is common to them all (...) There is therefore no reason to doubt that the issue whether there has been a breach under any of these guarantees must be judged on a realistic assessment of the proceedings considered as a whole."

75. The court finds that on a realistic assessment of these proceedings considered as a whole, there has been a breach of the due process protections of the Constitution as the claimant has established that he was entitled to receive his salary by the last day of every month pursuant to

regulation 39 of the Civil Service Regulations of the Civil Service Act Chapter 23:01 subject to the withholding of the appropriate amount for days of no pay extended sick leave.

76. By Memorandum dated July 3, 2018 the MOWT was informed that the claimant's sick leave was classified as follows;

- iii. Extension of sick leave without pay;
 - d) April 25, 2018 to May 4, 2018;
 - e) May 5, 2018 to May 16, 2018;
 - f) June 26, 2018 to July 23, 2018;
- iv. Extension of sick leave with full pay;
 - d) May 17, 2018 to May 28, 2018;
 - e) May 29, 2018 to June 11, 2018;
 - f) June 12, 2018 to June 25, 2018.

77. As such, by July the MOWT would have had knowledge of the classification of the claimant's sick leave but continued to withhold the claimant's entire salary for the months of June, July and August. The process to which he was entitled would have certainly included but was not limited to fundamental elements of notification to him of the stoppage or intended stoppage of his salary and the opportunity to make representation to the PS.

78. Additionally, the evidence shows that a particular process which encompassed the elements of notice and representation was employed by the MAGLA and the same process ought to have been afforded to the

claimant by the MOWT. Unfortunately, the MOWT took a very different approach to the claimant's sick leave issues to his detriment.

79. The defendant relied on the case of *Harry v Thom*⁸ wherein Crane J had the following to say;

"In the matter in hand, the affidavit of Lucille Harry discloses prima facie, the existence of a legal right in her to receive sick leave on full pay by virtue of reg 60 (3) (c) of the Education Code, Cap 91 [G], for a period not exceeding one calendar month in any school year if certain conditions are fulfilled.

*In her affidavit there is a statement to the effect that she is in possession of a letter from the Chief Education Officer that he is standing by his previous decision to grant sick leave with no pay. If, indeed, the Chief Education Officer did make a priori such decision, a question of construction of the relevant regulation under which he granted the period of eighteen days sick leave necessarily arises. This must be so in order to ascertain whether he is peremptorily given power to grant sick leave with no pay, or whether it gives him a discretion to allow such leave with or without pay, and if so, whether he has judicially exercised that discretion. It is submitted that what has been said in *Re Man Power Citizens Assocn* ((1964), 8 WIR 52) is equally applicable to the case of a ministerial discretion which Thom exercised, namely ((1964), 8 WIR at p 63):*

It is well known that a discretion is not to be exercised in a capricious and arbitrary manner, but in a disciplined and responsible way. A quasi-judicial discretion requires that the matter shall not be a chose jugee, but shall be approached with an open mind.'

⁸ (1967) 10 WIR 348 at 355 and 356

The Chief Education Officer has approved of the eighteen days' sick leave for which the appellant applied. On the face of it, therefore, she is entitled to sick leave with full pay unless with good reason he exercised his discretion to the contrary."

80. According to the defendant, in the case of Harry v Thom supra, the question was whether the CEO of the Ministry of Education had the discretion to withhold the claimant's salary for a period during which she was granted sick leave. On the basis of the facts and law in that case, the CEO had no such discretion. In the CEO's Affidavit he did not seek to justify why he had granted the claimant leave but at the same time refused her pay. At page 351 of the judgement, the respondent's evidence was as follows:

"In his reply to Harry's affidavit, Thom declares he is the Chief Education Officer attached to the Ministry of Education and Race Relations. But while his reply substantially admits the facts in Harry's affidavit, including the fact that eighteen days' sick leave had been granted her, somehow illogically and inconsistently, it would appear, goes on to allege that he had been informed and verily believes that the plaintiff absented herself from school from 29 June 1964, ie, the day after her sick leave commenced, without authority or without assigning any reason, though he believes she attended the In-Service Teacher Training Programme at the Skelton Centre."

81. The defendant submitted that it was in the context of those facts in Harry v Thom supra that the court held that there was a deprivation of the claimant's right to property which was not in accordance with due process. That based on the facts it appeared that the respondent acted arbitrarily and capriciously in depriving the Claimant of eighteen days' pay for which

he had approved sick leave. According to the defendant, on the facts of the present case, in the affidavit of one of its accounting officers, Wilson-Campbell it indicated the reasons why the MOWT delayed in paying the claimant his salary for the respective periods. That on the facts, the accounting officer did not exercise her discretion arbitrarily or capriciously.

82. According to the evidence submitted by the defendant from the affidavit of Wilson-Campbell, the delay in the claimant's salary was caused as a result of his own refusal to submit a proper assumption of duties to the HR department of the MOWT. In light of the court's findings that 1) the claimant assumed duties at the MOWT on July 24, 2018 and 2) the claimant established that he was entitled to receive his salary by the last day of every month pursuant to regulation 39 of the Civil Service Regulations of the Civil Service Act Chapter 23:01 subject to the withholding of the appropriate amount for days of no pay extended sick leave, it is clear to this court that the withholding and/or stoppage of the claimant's entire salary was committed without due process of law.

83. The defendant further relied on the case of **Bernadette Hood-Caesar v AG**⁹ wherein Justice Ibrahim had the following to say at pages 24 to 28;

“The final question is whether that deprivation was effected by due process of law or not. The Minister said that he acted under the provisions of section 5(2) of the Exchequer Act. That Act gives him the power to suspend and expenditure charged under any Appropriation Act if the exigencies of the financial situation render such suspension necessary. This power seems to be of such a nature that it may only be invoked in a financial crisis

⁹ HCA 3015 OF 1987

situation. Further, it is to be of a temporary duration only as it is a temporary measure. It gives the Minister the power to act summarily whilst at the same time to put proper measures into place to take care of the crisis situation. He must be aware that as he defers payment, not only will he have to pay a substantial lump sum for the arrears at some point in time in the future. But also the persons to whom payments are due are being denied the right to and the enjoyment of their property so long as their entitlement remains suspended. (Which I am told for the C.O.L.A. alone is in the region of almost five hundred million dollars annually). Care ought to be taken to avoid that situation occurring or being prolonged unduly. It is some fifteen months since that Circular was issued. The payment of C.O.L.A. and merit increases have been suspended during that period of time. That is a very long period of time indeed to have a measure of a temporary duration enforced with no response from the Respondent as to when that suspension will be lifted. That power was intended to be exercised concerning any expenditure charged under any Appropriation Act. By Section 42 of the Exchequer Act every appropriation act shall have effect for the financial year and every appropriation by parliament of public monies for the service of any financial year shall lapse and cease to have effect at the close of that period. This power invoked has been extended beyond the close of the financial year in which it has been involved and it has gone well into another financial year under another Appropriation Act. I do not think that it was intended so to be. No issue was raised as to whether a circular issued under one appropriation act suspending expenditure thereunder would be valid to suspend expenditure under a subsequent Appropriation Act...

This case does not concern the taking of the money from the Applicant and using it for any particular purpose as in the Lilleyman case or the Trinidad Island-wide Cane Farmers case, but it is an act of the Minister in simply not

making payments to show a substantial reduction in recurrent expenditure to bring the recurrent account into balance...

The concept of legitimate expectation does not involve the question whether a particular decision or policy is fair or not, or reasonable or not, but it is only concerned with the manner in which those decisions have been taken. It is a review of the manner in which the decision was made. The question is whether the decision was arrived at by a process which is unfair? In the Civil Service case the Applicants sought a declaration that the instructions were invalid because there was a procedural obligation on the Respondent to act fairly by consulting the persons concerned before exercising her power under the Order in Council."

84. According to the defendant, in the case of Hood-Caesar supra, in deciding that the claimant's right was deprived without due process of the law, the court considered the duration of the deprivation, extent of the infringement and the legal basis or justification for the infringement. The property deprived of in the Hood-Caesar case was in the region of five million dollars and the deprivation was carried on for over fifteen months for which there was no legal basis. Further, there was no rational justification for the deprivation in that the monies were not taken from the applicant for a particular purpose, but simply to bring the State's accounts into balance.

85. The defendant submitted that the facts of the instant case clearly differ from those of Harry v Thom and Hood-Caesar v AG (supra). That the claimant's salary was not deprived, there was a delay in payment and a reason was proffered by the defendant for the delay which was not indefinite. According to the defendant, the claimant was informed of the

reason and he had an opportunity to remedy the situation but he opted not to but instead to institute costly legal proceedings.

86. The court agrees with the submission of the defendant that the facts of the instant case differ from those of *Harry v Thom* and *Hood-Caesar v Ag supra*. That the property of which the claimant was deprived was not as substantial as that in the case of *Hood-Caesar* and that the claimant was not deprived of his property for a similar a lengthy period. Nonetheless, it was clear to this court that the reasons proffered by the defendant for what it has referred to as delay in the payment of the claimant's salary for the months of June, July and August did not provide a lawful basis to the MOWT with to withhold and/or stop the claimant's entire salary for three months.

87. Moreover, the defendant relied on the case of ***Paponette and others v the Attorney General of Trinidad and Tobago***¹⁰ wherein Sir John Dyson SCJ had the following to say at paragraph 23;

"23. ... In order to prove an infringement of the right to enjoyment of property, it is not necessary to show in a business context that the infringement makes the operation of the business impossible. That was not the effect of the Traktörer decision. The infringement must, however, reach a certain level of significance. The regulation cases such as Traktörer should be applied with some care. In many of the cases relied on by the Court of Appeal, the principle that was being applied was not that a regulatory restriction could not of itself involve the taking of property. Rather it was

¹⁰ [2010] All ER (D) 275

that, as Lord Hoffmann put it in *Grape Bay Ltd v Attorney General (1999)* 57 WIR 62, at p72:

“It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid.””

88. The above authority was cited with approval by this court in the case of **Myron Rudder and Barbara Kanhai v The AG**¹¹, an authority which was relied on by the claimant.

89. The court finds that the infringement in this case did reach a certain level of significance as it was the claimant’s evidence that he had no other income. He testified that the failure to pay him his salary caused him considerable hardship since he was unable to 1) purchase medicine for his illness of depression and anxiety, 2) buy food, 3) pay his utility bills, 4) purchase his mother’s medicine for her diabetes, and 5) travel to work. The claimant further testified that he had to resort to begging in the streets in his neighbourhood and that he was ridiculed by his peers for being reduced to a beggar. The defendant in an attempt to disparage the claimant’s evidence that he resorted to begging in the streets made reference to the fact that the claimant was able to afford to file this constitutional matter. However, the claimant submitted that his attorneys took this matter on a pro bono basis as he suffered great injustice.

90. Consequently, for the several reasons articulated above, the court finds that the claimant was deprived of his right to the enjoyment of his salary without due process of law.

¹¹ CV2012-05129

ISSUE 2 - *whether the claimant was denied the right to equality before the law and protection of the law, when he was asked to submit a second assumption of duties*

The right to equality before the law

91. **Section 4(b) of the Constitution** provides the right of the individual to equality before the law and protection of the law. Equality before the law means the equal subjection of all classes to the law of the land. According to the case of **Annissa Webster and Ors. v The Attorney General of Trinidad and Tobago**,¹² in order to prove that there was inequality of treatment an applicant for constitutional relief must show that he was similarly circumstanced to other persons but was treated differently. Similarity of circumstances does not mean that there should be no differences between relevant comparators. It will be sufficient that there are no material differences.

92. Once the claimant makes out a case of differential treatment, it is for the defendant to justify the difference in treatment. By letter dated August 21, 2018 the claimant was advised that he had to submit a written assumption of duties with effect from August 10, 2018 in order for his salary to be processed.

93. The claimant submitted that the requirement of a second letter of assumption of duty was to discriminate against him and to treat him differently to the other estate constables namely, WEC Roslyn Browne-Carr, No. 3351 WEC Wendy Joseph-John and WEC Alana Morris. The requirement for WEC Roslyn Browne-Carr, WEC Wendy Joseph-John and WEC Alana Morris, when they assumed duty at the MOWT was that they

¹² C.A.CIV.86/2008

presented their release letter to the Human Resource department and then reported to the Security division, where they signed their assumption of duty on the prescribed form. They were then posted for duties, WEC Browne-Carr at the Licensing Office, Port of Spain and WEC Joseph-John and WEC Morris to the Drainage Division.

94. In the case of WEC Rosalyn Browne-Carr, upon submitting her release letter to the Human Resource department at MOWT on April 10, 2018, she assumed duties at the Security Division and was posted for duties at the Licensing office, Wrightson Road, Port of Spain. When she reported to the Licensing office she was not required to submit a second assumption of duties at this division by the MOWT.

95. The defendant submitted that the claimant has failed to show that he was similarly circumstanced to WEC Rosalyn Browne-Carr or any other person as there were differences in circumstances between himself and WEC Rosalyn Browne-Carr as WEC Rosalyn Browne-Carr assumed her duties, whilst the claimant proceeded on extended sick leave after his vacation and did not assume duties.

96. The defendant submitted that for transparency and accountability purposes the claimant's assumption of duties dated July 24, 2018 was unacceptable. The defendant further submitted that as an assumption of duties is a material record of any officer's employment with a public body and it is the document which brings the officer under the remit of the particular public body, the defendant was justified in requesting a proper assumption of duties, especially in light of the heavy responsibility of accountability placed on the shoulders of the State's accounting officers.

97. The court has already found that the claimant assumed duties at the MOWT by the assumption of duty form dated July 24, 2018. Further, the fact that Wilson-Campbell has admitted in her affidavit, that the claimant's sick leave for the period July 24, 2018 to August 9, 2018 was classified as extended sick leave with full pay establishes as a fact that his assumption of duty was not invalid because the MOWT could not have classified his sick leave if he was not an employee in the Ministry.

98. Consequently, the court finds that WEC Roslyn Browne-Carr, WEC Wendy Joseph-John and WEC Alana Morris are comparators and the point of comparison occurred when they presented their release letter to the Human Resource department and then reported to the Security division, where they signed their assumption of duty on the prescribed form. As such, the court finds that the claimant was treated materially differently from his comparators when he was made to submit a second assumption of duty at the Drainage division since that requirement was only directed at him in order for him to be paid his salary. The aforementioned special condition placed on the claimant was not a requirement on the female estate constables Rosyln Browne-Carr, Wendy Joseph-John and Alana Morris. Therefore, by causing the claimant to submit a second assumption of duty, the defendant infringed the claimant's right to equality before the law under section 4 (b) of the Constitution and the court so finds.

Protection of the law

99. Protection of the law includes the right to natural justice.¹³

¹³ See *Rees v Crane* [1994] 2 AC 173, page 188 and *Nizam Mohammed v the Attorney General of Trinidad and Tobago* CV2011-04918

100. According to the case of **Boodhoo (Jerome) and Khemkaran Jagram v Attorney General**,¹⁴ per Lord Carswell, protection of the law means “...that persons are entitled to have recourse to the appropriate court or tribunal prescribed by law for the purpose of enforcing or defending their rights against others or resolving disputes of one kind or another. It is axiomatic that such a right is meaningless without a decision by the court or tribunal to which the claim or dispute is referred for adjudication...”

101. In **Jason Bissessar v the Attorney General**,¹⁵ Justice of Appeal Beraux stated that a far more expansive interpretation of protection of the law has been adopted by our courts. At paragraphs 40 & 41, His Lordship stated as follows;

“...“Protection of the law” under section 4(b) is not confined to a citizen’s access to the courts. A far more expansive interpretation has been adopted by our courts. The dictum of the Caribbean Court of Justice in *Attorney General of Barbados v Joseph and Boyce* [2006] CCJ 3 (AJ) per de la Bastide P and Saunders J is relevant. At para 60 of their joint judgment they say: “... the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed.” Further, in *The Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 at para 47 the CCJ stated: “The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or

¹⁴ (2004) 64 WIR 370 at 374

¹⁵ C.A. P136 of 2010

property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.' The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."

102. The defendant submitted that this is not a case which is properly concerned with the right to protection of law under Section 4(b). In so submitting, the defendant relied on the case of **Chandresh Sharma et al v The AG**¹⁶ wherein the claimants were deprived of their salaries and similarly claimed breaches of their rights to property and protection of the law. At paragraph 35, 41 & 42 Sharma C.J. (as he then was) stated as follows;

"35. This is not an appropriate case to attempt to define what is meant by "protection of the law", however, in my judgment this is not a protection of the law case. In the context of this case, the protection of the law if it

¹⁶ C.A. No. 52 of 2005

has any relevance, is as the Judge opined the ability of the Appellants to access the Courts and contend that that they have been wrongfully deprived of their salary. They have not been denied of their ability to do so...

41. Before concluding I would like to say that if the Appellants had any chance of success in this case it seems to me that this case is one that had to be made out under section 4 (a). Yet the Appellants pleaded that other rights were infringed. In Cr 102 of 1999 Boodhoo v the AG de la Bastide C.J. Cr p. 10-11) stated:

“In my view the right to a decision by the court or tribunal to which a claim has properly been referred, is one of the manifestations of the right to the protection of the law which is not expressly mentioned in section 5 of the Constitution. Since this right sits so comfortably within the ambit of the right to the protection of the law, it is unnecessary, I suggest, to strive to force it artificially into one of the other rights by straining the language in which they are expressed.”

42. Where an alleged breach of a right sits “comfortably within the ambit of one right” the practice to attempt to artificially place it under one or more of the other rights is one which should not be encouraged. Not only does this lead to unnecessary expenditure of precious judicial time, but unnecessary costs are also incurred. A litigant who succeeds in respect of only one of his claims for constitutional redress in respect of alleged breaches of his fundamental rights and freedoms may find himself not recovering full costs in the matter or having to pay at least a portion of the other side’s costs. If he fails the costs for which he is liable are multiplied.”

103. In light of the aforementioned, the defendant submitted that there was no breach to the claimant’s right to protection of the law when he was asked to submit a second assumption of duties. According to the

defendant, the request was fair and reasonable. The defendant further submitted that the claimant is presently before the court questioning the process which the MOWT adopted in delaying his salary, which in these circumstances, is the only relevance, if any, of the protection of law right.

104. Notwithstanding the aforementioned, the defendant maintained that this was an inappropriate case for the claimant to make allegations of a breach of his right to protection of the law, especially since the circumstances sat comfortably within the Section 4(a) property right.

105. As can be gleaned from the case of Jason Bissesar supra, the right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. It prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. The concept of protection of law goes beyond such questions of access and includes the right of the citizen to be afforded adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. This was the case here. It was incumbent on the MOWT to employ the processes that would ensure that the claimant was not deprived of his salary by their exercise of a power by the PS in the arbitrary manner in which it was exercised in this case. The result was that a public servant was denied his entitlement to property of which he met his daily expenses and cost associated with the basic needs to live.

106. The court therefore finds that the MOWT acted arbitrarily and unfairly by withholding the claimant's entire salary for the months of June, July and August. It is also manifestly unfair and arbitrary that the MOWT would impose a requirement that the processing of his salary be conditioned upon his submission of a second assumption of duties when in fact they were in possession of his valid assumption of duties form. As such, the court finds that the actions of the defendant deprived the claimant of his right to the protection of the law.

ISSUE 3 - *whether the claimant was denied the right to equality of treatment and fairness when the Permanent Secretary of the Ministry of Works and Transport stopped and/or authorized the withholding of his statutory salary*

Equality of treatment

Law

107. Section 4(1)(d) of the Constitution enshrines the right of the individual to equality of treatment by public authorities. In ***Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago***¹⁷, Lord Carswell stated as follows 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 phrase which is common to the anti-

¹⁷ [2004] UKPC 21, Privy Council Appeal No. 45 of 2003

discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other...”

108. In **Central Broadcasting Services Ltd. and Sanatan Dharma Maha Sabha of Trinidad and Tobago v The Attorney General of Trinidad and Tobago**,¹⁸

the Honourable Justice of Appeal Hamel Smith had the following to say at paragraph 20;

“[20] The constitutional right under s. 4(d) is a right to equality of treatment from a public authority in the exercise of its functions. The purpose of the right is to protect citizens from the arbitrary use of power by a public official. Lord Carswell in Bhagwandeem, stated that anyone who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would have been treated differently from some other similarly circumstanced person or persons. The treatment, it seems, will occur when a person who is entitled to a particular benefit or service from a public authority is deprived of it while others, similarly circumstanced, receive it without any reasonable or justifiable explanation being given for the denial.”

The submissions of the claimant

109. According to the claimant, both Browne-Carr and he had their permanent posts of estate constable transferred from the staff establishment of the MAGLA by the Cabinet of Trinidad and Tobago by Cabinet minute No. 2062 of November 16, 2017. They were given notice of that decision on April 9, 2018 by the Public Service Commission and they both appealed the decision by letter dated April 10, 2018.

¹⁸ Cv. A. No. 16 of 2004

110. Whilst their appeal was pending, Browne-Carr was released to the MOWT on April 10, 2018. However, the claimant was given approval for vacation leave on April 10, 2018. The claimant submitted that although their appeal was pending, the MAGLA transferred both their computerized IHRIS financial payment records to the MOWT at the end of the month of April, 2018 which meant their posts were now under establishment in the MOWT, so the payment of their salaries was the responsibility of that Ministry. The claimant further submitted that all that was required therefore was that they continue to receive their salaries, in accordance with section 39 of the Civil Service Act.

111. According to the claimant, although WEC Browne-Carr assumed duties at the MOWT, her assumption of duty in her established post was not confirmed because of her pending appeal against it which was in the same vein as the claimant. As such, the claimant submitted that until there was the completion of the legal process, the MOWT's sole duty was to continue to make payments towards the salaries of both Browne-Carr and him on the basis that their posts were in the establishment, not the officers.

112. According to the claimant, although the substantive assumption of duty was delayed until the completion of the appeal process, WEC Browne-Carr assumed her duties, whilst he proceeded on extended sick leave after his vacation and did not assume his duties. The claimant submitted that it was for that reason his salary was stopped and he was discriminated and treated less favourably than WEC Browne-Carr.

113. The claimant relied on the case of *Annisar Webster and Others v The Attorney General of Trinidad and Tobago*¹⁹ at wherein Baroness Hale noted the following at paragraph 14;

“the “problem” in formulating legal principles with respect to section 4(d) was that “the law necessarily has to treat different groups of people differently. The question is whether such distinctions are justified”.

114. Baroness Hale also noted at paragraph 18, (in considering Article 14 of the European Convention on Human Rights) the Common law that *“a test of sameness is inadequate to secure real equality of treatment. It is almost always possible to find some difference between people who have been treated differently.”*

115. Consequently, the claimant submitted that he was treated differently than Browne-Carr after the post they both held was transferred to the MOWT pursuant to the Cabinet decision which made the payment of their salaries a mandatory requirement because of section 39 of the Civil Service Act. According to the claimant, he was discriminated against and treated less favorably because he did not assume duty at the MOWT when his vacation leave ended, all because the Permanent Secretary wanted to punish him for continuing on extended sick leave.

The submission of the defendant

116. The defendant submitted that the claimant has failed to show that he was similarly circumstanced to Browne-Carr or any other person. That there were differences in circumstances between the claimant and

¹⁹ [2015] UKPC 10

Browne-Carr as Browne-Carr assumed her duties, whilst the claimant proceeded on extended sick leave after his vacation and did not assume duties.

Findings

117. The court finds that although there are some differences in circumstances between the claimant and Browne-Carr, Browne-Carr is a nonetheless a comparator. Browne-Carr and the claimant both appealed the decisions to transfer their permanent posts of estate constable from the MAGLA to the MOWT. Whilst their appeals were pending, Browne-Carr was released to the MOWT on April 10, 2018 and she assumed duties. The claimant on the other hand was given approval for vacation leave on April 10, 2018. He then proceeded on sick leave. Nevertheless, the MAGLA transferred his computerized IHRIS financial payment records to the MOWT at the end of the month of April, 2018. Consequently, the point of comparison between Browne-Carr and the claimant occurred when both of their computerized IHRIS financial payment records were transferred to the MOWT at the end of the month of April, 2018.

118. As found above, the claimant was entitled to receive his salary by the last day of every month pursuant to regulation 39 of the Civil Service Regulations of the Civil Service Act Chapter 23:01 subject to the withholding of the appropriate amount for days of no pay extended sick leave. Therefore, the court finds that the claimant was treated materially differently from Browne-Carr when the PS of the MOWT stopped and/or authorized the withholding of his entire statutory salary.

Fairness

119. **Section 5(2) (e) of the Constitution** provides as follows;

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

(e) 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”

120. In **R v Secretary of State for the Home Department, Ex Parte [Doody]**,²⁰

(a case relied on by the claimant) Lord Mustill stated what were the minimum standards of fairness as follows;

“...what does fairness require in the present case? My Lords, I think it unnecessary to refer to by name or to quote from, any of the often cited authorities in which the courts have explained what is in essentially a judgement. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised as 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

²⁰ [1994] 1 A C 531 at 560

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 was informed of the case which he has to answer.”

121. The powers of a Permanent Secretary is obtained under section 127 of the Constitution by delegated powers from the Public Service Commission. None of those delegated powers given to an accounting officer from the subsidiary legislation allows for the stopping of a public servant’s salary.

122. The claimant by email dated July 10, 2018 brought to the attention of the Permanent Secretary that his salary was stopped for the month of June 2018. The aforementioned email did not materialize any response from Permanent Secretary, neither cause her to make payment of the claimant’s unpaid wages in accordance with the Civil Service Act and the Exchequer and Audit Act. The court agrees with the submission of the claimant that fairness at this juncture, demanded that the permanent secretary make restitution of the claimant’s salary or if there was any reason for the infringement on his right to his salary, he was entitled to be made aware by notice of the reason that action was instituted. As such, the court finds that the failure to act fairly to the claimant with regards to his fundamental rights to fairness under the Civil Service Act and the Exchequer and Audit Act constituted a breach of his rights under section 5 (2) (e) of the Constitution.

123. The claimant claimed damages including aggravated, exemplary and punitive damages. The claimant did not address the issue of damages in his submissions but simply stated that once the court is minded to accept that his constitutional rights have been breached, then he is entitled to damages for those said breaches. That damages may be assessed by a Master of the High Court, at which point he reserves his right to be heard.

124. In the case of **Attorney General v Ravi Doodnath Jaipaul**²¹ (a case relied upon by the defendant), Moosai J.A had the following to say at paragraphs 74 to 76;

“[74] Sections 14(1) and (2) of the Constitution are concerned with remedies. Section 14(2) confers on the High Court jurisdiction to hear and determine any application made by any person in pursuance of subsection (1), and to make such orders, issue such writs and give such declarations as it may consider necessary for the enforcement of the entrenched rights and freedoms. The Privy Council in Attorney General v Ramanoop²² interpreted section 14 as follows:

“...Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and

²¹ Civ App No. 35 of 2011

²² (2005) UKPC 15 [17] to [19]

additional to (“without prejudice to”) all other remedial jurisdiction of the court.

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under s 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. “Redress” in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions “punitive damages” or “exemplary damages” are better avoided as descriptions of this type of additional award.”

[75] Where a vindictory award is appropriate, its purpose is not punitive. In Merson v Cartwright²³ the Privy Council stated:

“The purpose of a vindictory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.”

[76] Additionally, the Privy Council has made it clear that damages may also be awarded in appropriate cases where a claimant has suffered distress, anxiety and depression as a result of a constitutional breach. Lord Kerr in James v Attorney General²⁴ stated:

“[27] In any event, the very fact of discrimination having occurred can inflict damage on those who have been discriminated against. The sense of having been wronged, the uncertainty over one’s status as a consequence of the discriminatory conduct and the distress associated with having to resort to litigation in order to have the discrimination exposed and corrected can all be recognised as damage, perhaps not in the conventional personal injury sense, but damage nonetheless. [28] An injury suffered as a result of discrimination is no less real because it does not possess tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognising its compensatable potential. This concept was well

²³ (2005) 67 WIR 17 [18].

²⁴ (2011) 2 LRC 217 [27] to [28]

expressed by Mummery LJ in Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 at [50]–[51]...

125. The defendant submitted that the claimant has not put any evidence or legal submissions before the court to support any claim to monetary loss for which he needs to be compensated by an award of damages. As such, the defendant submitted that the claimant is not entitled to damages to compensate for any monetary loss.

126. The defendant further submitted that the circumstances of this case are not suitable for an award of vindictory damages having regard to the nature of the infringement, being that the claimant was already paid and that any delay in the payment involved no element of bad faith on the part of the accounting officers of the MOWT.

127. According to the defendant, having regard to the circumstances of the claimant's case, he was in no sense uncertain as to the reason for the delay in his salary. The defendant submitted that there was no need for the claimant to resort to litigation as the officials of the MOWT made it clear that all that was required from him was another assumption of duties. That notwithstanding, the distress and pain which he claims to have suffered due to the lack of his salary, the claimant wilfully refused to submit a second assumption. Rather, in the face of alleged impecuniosity, the claimant opted to initiate costly litigation.

128. The defendant submitted that though it is of the view that none of the claimant's constitutional rights was breached, it acknowledges that a person's salary is important and to deprive one of it is a course which the State must be slow to adopt. However, the defendant submitted that this

long and costly process of litigation served no real use to the claimant as he was always aware of the defendant's position.

129. Nevertheless, the defendant submitted that if the court is minded to grant the Claimant any of the relief sought, an award of damages is not appropriate in light of the facts and the law as it relates to damages awardable in constitutional motions.

Findings

130. Having found that the claimant suffered a contravention of his fundamental rights, this court is of the view that he would be vindicated by an award of damages. The court finds that a declaration by it will articulate the fact of the violation but that an award of damages is needed to emphasize the importance of the constitutional rights of the claimant and to deter further breaches.

DISPOSITION

131. The order of the court is as follows;

- i. It is declared that the rights of the claimant guaranteed under section 4(a) of the Constitution were breached when the Permanent Secretary of the Ministry of Works and Transport acted unconstitutionally to deprive him of his statutory salary;
- ii. It is declared that the rights of the claimant guaranteed under section 4(b) of the Constitution were breached when it was mandated that he submit a second assumption of duties form in order for him to receive his monthly salary to which he is statutorily entitled;

- iii. It is declared that the rights of the claimant guaranteed under sections 4(d) and 5(2)(e) were breached when the Permanent Secretary of the Ministry of Works and Transport stopped and/or authorized the unconstitutional withholding of his statutory salary for the months of June, July and August 2018;
- iv. The defendant shall pay to the claimant damages including vindictory damages for breach of his constitutional rights to be assessed by a Master of the High Court on a date to be fixed by the court office; and
- v. The defendant shall pay to the claimant the costs of the claim to be assessed by an Assistant Registrar in default of agreement.

Ricky Rahim
Judge