

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2009-00376

BETWEEN

SUZETTE MARTIN

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Ms. A Watkins for the Claimant.

Ms. Monica Smith instructed by Mr. Rene Singh and Ms. Kamala Mohammed Carter for the Defendant.

Judgment

Background

The claimant obtained 73 marks in her assessment for promotion to the rank of Police Corporal. She claims

- (i) That the qualifying mark was 74.
- (ii) That she was not afforded the opportunity to contest the mark and

- (iii) That commendations earned in the period under review were not taken into account. Had they been taken into account her points would have been increased and she would have been promoted.
- (iv) That other persons, who were similarly circumstanced to her, had the opportunity to have their points reviewed and increased, and thus qualified for promotion.
- (v) That because she was denied an equal opportunity to have her points reviewed and increased, her constitutional right to equality of treatment was infringed.

The respondent contends that recommendations in favour of the claimant, in accordance with a policy applicable to all, would not be treated as commendations, unless

- (a) approved by the Police Awards Board (the Board).
- (b) published in Departmental Order signed (and therefore approved) by the Commissioner of Police.

Issues

1. Whether the claimant's constitutional right to equality of treatment was infringed
 - (a) by the failure of the respondent to afford her the same opportunity to have her marks reviewed (under any heading) as was afforded to other persons similarly circumstanced to her.

- (b) by the failure to afford the claimant the same opportunity to have her mark under the heading "commendations" reviewed as was afforded to other persons similarly circumstanced.
2. Whether the claimant had to establish that the respondent was actuated by mala fides in failing to afford her such opportunity.
3. Whether this action was an abuse of process.

Findings and Disposition

I find as follows:

1. A claimant who alleges breach of the constitutional right to equality of treatment can do so by proving mala fides.
2. If he does so then the onus of proving mala fides lies on him.
3. If unequal treatment is proved, in some such situations mala fides may be inferred from the circumstances, subject to rebuttal evidence by the respondent - that is the onus then shifts to the respondent to rebut an inference of mala fides.
4. Failure to prove mala fides is not fatal to a claim under section 4 (d) of the Constitution. If a claimant fails to prove mala fides he may still succeed if he proves -
 - a) The deliberate and intentional exercise of a power (or discretion), by the defendant /respondent,

- b) The exercise of which was arbitrary and unreasonable in the circumstances,
- c) Which resulted in treatment in relation to him,
- d) That was less favourable to him than in relation to others similarly circumstanced.

5. There is evidence that marks were awarded, and the mark for commendations was increased, in respect of at least one other person who was similarly circumstanced to the claimant. His "recommendations" were taken into account, even though, like those of the Claimant, they had not been approved by the Board or published in a signed Departmental Order.

6. The policy that was being applied to the claimant and to others was therefore not applied equally. The exception made to the alleged policy was not explained or justified and on its face was arbitrary. The Constitution prohibits the deliberate and intentional unequal treatment, on an arbitrary basis, of persons, who are similarly circumstanced.

7. Accordingly, the claimant has proved that she was discriminated against and/or received less favourable treatment (as compared to others similarly circumstanced) in not having the opportunity to have her marks for commendations reviewed and increased, by the taking into account

of her recommendations for the period under review, even though these were not published in a Departmental Order signed by the Commissioner of Police

The Right to Equality of Treatment

S 4(d) of the Constitution is 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–

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

In Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago [2004] UKPC 21, Privy Council Appeal No. 45 of 2003 (Bhagwandeem) the Privy Council indicated what must be proved to constitute infringement of that right.

At paragraph 18 it was stated:

"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-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.***

In **Central Broadcasting Services Ltd. and Sanatan Dharma Maha Sabha of Trinidad and Tobago v. The Attorney General of Trinidad and Tobago Cv. A. No. 16 of 2004**, the Honourable Justice of Appeal Hamel Smith at the Court of Appeal stated 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 any one 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 Evidence

Some of the material facts in this regard are set out in the affidavit of the Claimant and relevant portions are set out hereunder: (emphasis added)

- xi. *The procedure regarding promotion at that time in the Police Service was published in Departmental Order No.188 dated 5th July 2004 which was made by a committee appointed by the Commissioner of Police which reviewed and made recommendations on the process to be undertaken for evaluating members of the Police Service to be promoted.*
- xiii. *The practice and procedure at the time was that the officers were first required to pass an examination. Officers were then assessed based on the same criteria mentioned above where they were given points for 'academic qualifications,' 'performance appraisal,' 'general fitness,' 'service,' 'commendation' and 'disciplinary record.' (emphasis added)*
- ii. *In November 2005 I received a letter of omission from the list of persons selected for promotion to the rank of Corporal. My evaluation scores were listed in the notification as 73. I received a score of zero (0) for commendations, with five (5) points being the maximum that was attainable. I however, received the maximum scores for my disciplinary record, fitness and performance appraisal.*
- iii. *I first wrote to the Police Service Commission in 2005 and again in early 2006 informing them of seven (7) commendations **which were approved by the Police Awards Board at its sitting on the 1st day of February 2006.***

*These commendations were later printed in **Departmental Order 49/06 dated 23rd day of February 2006**. All these commendations were for work done for the period 2002-2005. I therefore submitted a copy of my Commendation Certificate which was given to me by the then Commissioner of Police, Mr. Hilton Guy, which the awards board noted in its sitting on the 1st February 2006 as an attempt to correct an error of omission.*

- x. The Service Commission wrote to me by letter dated August 17th 2006 saying that that the commissioner commented and said that the commendations were recently acquired and were therefore not considered during the evaluation exercise.*

- xi. This I knew to be unfair and arbitrarily discriminatory, as points were changed for other officers who were awarded commendation points after the period but they were still promoted retroactively to the date of the promotion in question. Examples would include Johnnie Abraham, Don Lezama, John Daniel and Barbara Wills. Most recently there was a promotion of two officers, PC Dwight Hall and PC Teradatsingh who were promoted on the 23rd January 2009 with retroactive effect from May 2006.*

These named persons would be the comparators whose circumstances must be considered and compared in relation to the applicant's circumstances.

The affidavit of Dawn Harding was filed in response and material parts are set out hereunder:

5. *In answer to paragraph 5 (xi) of the Claimant's affidavit, P.C. Hall's points were changed based on representations that were made in relation to **academic certificates** which were previously not considered. He was therefore awarded additional points for academic qualifications and not commendations. **With respect to commendations, the Commissioner of Police did not approve these and so no additional points were awarded to him.***

6. *Police Corporal Singh's points were changed based on representations that were made in relation to academic certificates which were previously not considered. He was therefore awarded additional points for academic qualifications and not commendations as alleged. **With respect to commendations, the Commissioner of Police did not approve these and so no additional points were awarded to him.***

7. *Police Sergeant Daniel's points were changed as a consequence of commendations. However, these commendations had been granted during the period under review, but were not previously taken into consideration.*

In relation to Hall and Singh their situations were distinguishable. The review of their marks was under a different head, [not commendations] and in relation to academic qualifications already obtained. In relation to Daniel the commendations had been granted. [during the period under review] In all these cases it was a case of simply giving credit for matters which had not been taken into account.

Further in the case of Hall and Singh the same policy was applied to them as was applied to the Claimant.

The respondent also filed an affidavit by Larry Alexander who deposed (inter alia)

6. *The procedure for commendations is set out below and can be found in Departmental Order No.249 dated 7/9/2006 which is annexed to the Claimant's affidavit filed on the 4th day of February, 2009 and marked "S.M.2".*

i. An officer may be recommended for a commendation or award through his superior to the head of his division or Branch. An officer's performance may also be recognised by any outstanding member in the community in writing to the officer's supervisor. The officer's supervisor would then forward this letter with his recommendation as above;

ii the officer's Head of Division or Branch would forward such recommendation to the chairman of the Board;

- iii *the Board would then consider the facts before them and would make recommendation to the Commissioner of Police for approval. **The Commissioner of Police may or may not approve the Board's recommendation;***
- iv. *A commendation is valid upon publication in a **Departmental Order signed by the Commissioner of Police***

10. *It is true that marks of female officer Thalia-Megan Francis No. 12020 were changed. Mr. Glen Roach was the then Chairman of the Promotion Advisory Board. On the advice of Mr. Roach, Officer Francis was asked to produce documentation in support of her request for a change of scores. The Board met and changed Sgt Francis' marks for the following reasons:*

- a. *Officer Francis was involved in a vehicular accident in 2003 and upon the production of the accident report and medical certificate the Board awarded full points for fitness of 20 points as is provided for in Departmental Order 85 dated April 7, 2005;*
- b. *Officer Francis submitted an additional Advance Level Certificate and was awarded 1 additional point;*
- c. *Three (3) commendations were also submitted and were duly published in Departmental Order 142 dated May 22, 2005, Departmental Order 18 dated January 25, 2005, and Departmental Order 187 dated July 4, 2005. In this regard 3 additional points were awarded;*

- d. *Thalia Francis was then promoted to corporal on the 11th of May, 2006. True copies of the documents in support of the above changes are now produced, shown to me hereto annexed in a bundle and marked "L.A.1".*

This demonstrates that in relation to this officer, points were increased upon review but only in respect of qualifications and commendations already awarded and published in Departmental Order.

12. *With respect to paragraph 5 (xi) of the Claimant's affidavit, it is not true that the points of other officers were changed based on commendations received after the period. In relation to Don Lezama and Barbara Wills there were discrepancies with the performance appraisals of these officers. This was brought to the attention of the Promotions Advisory Board and their respective points were adjusted in order to correct the discrepancies. True copies of the documentation of the Board's decision to change the points of Mr. Lezama and Ms. Wills are hereto annexed in a bundle and marked "L.A.2".*

Their marks were reviewed not on the basis of commendations, but rather on the basis of their performance appraisals.

Up to this point the affidavits do not reveal any discrimination against the claimant. The review process applied to the other comparators was consistent with the policy stated by

Alexander. This policy was in fact applied to Hall and Singh namely non recognition of (favourable) recommendations, unless they were approved by the Board and then published in signed Departmental Order.

But he continue -

13. *With respect to Johnnie Abraham, said officer was promoted after his commendation score was revisited and he attained one additional mark which made him eligible for promotion. A true copy of the correspondence from the Commissioner of Police to the Director of Personnel Administration in this regard is now produced, shown to me, hereto annexed and marked "L.A.3".*

This statement was disingenuous as was demonstrated upon examination of exhibit LA.3.
(considered infra)

14. *At no time during the promotion process was the claimant treated unfairly or in an arbitrary manner. Further the claimant was not similarly circumstanced to the officers whose points were changed or updated because, as stated at paragraph 8 above, with respect to the claimant's alleging that commendations in her favour were printed in Departmental Order 49/06, said Department Order was prepared in draft in 2006, however it was never approved signed and/or published, therefore it did not exist at the time the evaluation exercise was conducted.*

By that I understand him to mean that it did not officially exist, and therefore could not be used as the basis for awarding points under the heading "commendations". Clearly however it had come into existence but was not finalised. The suggestion appears to be that the Commissioner of Police had to approve the Board's recommendations and that if he did not do so he would not sign a Departmental order publishing them, denying them any legal effect.

It was not disputed however that the claimant's recommendations were approved by the Board in 2006. Rather it was contended that that they did not come into effect unless published.

In the affidavit of Suzette Martin in reply she contended as follows:

3. *Departmental Order No.249 dated 7/09/06 clearly states at 10.1 that*
"The Award Board shall sit on a monthly basis and address all recommendations made to it. The chairman shall ensure that the decisions of the Board are submitted to the Commissioner of Police who shall have the results published within two (2) days of its receipt in the Departmental Orders for immediate circulation."

6. *Therefore paragraph 7 of the said Affidavit is incorrect because the commendations were only required to be signed by the Commissioner who was obligated to publish it in a Departmental order. My commendations should have been taken into account. In any case once it was brought to the attention of the*

Awards Board, and the Police Service Commission that the recommendations were not signed and circulated, it should have been immediately brought to attention of the Commissioner of Police who should have then duly appended his signature.

9. *The commendations that I received were approved by the Awards Board and were recorded in Departmental order 49 of 2006. The simple fact that the decision of Awards Board at that particular sitting was given a Departmental Order number rebuts any suggestion that it was only done in draft. All that needed to be done was for it to be signed by the Commissioner of Police and circulated. The commendations in my favour were shown to me by the Departmental Order clerk at the Police Administration Building where I saw and recorded the Departmental Order No.49/06 dated 23rd February, 2006. All those commendations were for work done for the period 2002-2005.*

I accept the claimant's evidence in this regard as it has not been denied by the respondent.

15. *With respect to Johnnie Abraham the exhibit marked "LA3" annexed to the affidavit of Larry Alexander states that although he did not acquire the commendation, his points were nevertheless revisited and he was given an additional point. There was no mention of this commendation going to be approved by the Awards Board and he was promoted before these points were even published in a Departmental Order.*

17. *The system was operated arbitrarily and thus unfairly. Further I was not awarded the points rightly due to me, through no fault of my own but as a result of the breach of their own regulations by all the parties involved. The Commissioner of Police was mandated to sign and circulate the recommended commendations. This breach was further intensified by the fact that even after I brought it to their attention that that the commendations being claimed were for the assessment period of 2002-2005 they were blatantly disregarded, which resulted in a flagrant breach of my constitutional rights.*
18. *Other officers requested that their points be changed, whether it was for commendations or otherwise. The Service Commission ensured that all the points that these officers acquired and deserved were reflected in their elevated scores. Officers Lezama and Wills points were changed because of discrepancies with their performance appraisals. Similarly, the relevant parties should have ensured that my commendations were duly signed and circulated in accordance with the written procedure.*
19. *I was therefore treated unfairly and in an arbitrary manner. I was similarly circumstanced, since the issue was not under which column the points were changed but the arbitrary procedure that was employed in changing said points.*

30. *The Defendant at various points throughout the Affidavits mentioned that commendations, or fitness or academic certificates, or performance appraisals that were not considered or tabulated correctly were subsequently changed. Similarly I informed the Police Service Commission that an error existed in my scores for commendations which were clearly given based on my performance for the assessment period 2002-2005. Nevertheless, my points were still not verified although all that was needed was a signature.*

Memorandum exhibited as LA3 to the affidavit of Larry Alexander

Exhibit LA3 was a memorandum to the Director of Personnel Administration from the Commissioner of Police. The relevant portion is as follows:

No.10046 Sergeant Abraham

This officer contends that during the period of evaluation he received a letter of commendation from the Ministry of Community Development and as such he should be awarded an additional point, however, commendations are only acknowledged when they are endorsed by the Police Awards Board and published in Departmental Orders.

His commendation score was however revisited and he has attained one (1) additional mark in this area. His score now stands at 77 points, which makes him eligible for promotion.

In relation to this under cross examination Larry Alexander stated as follows

Para 13 - LA 3

Q: Abraham score was revisited and increased?

A: Commendation score was revisited and increased.

Shown LA3

Q: You will agree it says score with regard to commendation was revisited and increased?

A: Yes.

Q: And you will agree that nowhere in the paragraphs does it state letter from Ministry was endorsed by Police Awards Board or published in Departmental Order?

A: That is correct.

I have seen sitting of awards board for 1st February 2006.

Q: And you accept there are 10 items that refer to Claimant?

A: I would take your word.

Q: Would you agree with respect to these 10 items relative to claimant it is stated as a fact that commendations were awarded to among other persons WPC Martin?

A: Yes.

Q: Board has power to approve as well as not approve?

A: Yes.

Q: With regard to sitting of awards boards there would be serial numbers?

A: Yes.

Q: And for some of those items awards made and others not?

A: Can't answer that.

Q: 10 items listed [for claimant] - you would accept they were within the assessment period?

A: Yes.

Q: You have no explanation for non publication for Departmental Order?

A: I cannot give you an answer.

Put: Claimant did in fact have 10 commendations granted to her for relevant period of assessment from Constable to Corporal.

A: Not correct.

Q: In fact 10 recommendations became commendations when Board sat when it approved them on 1st February 2006?

A: That is correct - once they were published.

Put: Sitting of Board and their approval is what makes it a commendation and not its subsequent publication

A: No.

Q: And you can produce no official document that states it is only upon publication that makes recommendations commendations?

A: No.

The Alleged Procedure

The respondent alleges that recommendations were not valid until they were considered by the Police Awards Board (the Board) and recommended to the Commissioner of Police for approval. The Board forwarded their findings\ recommendations to the Commissioner of Police. .They then had to be published in a departmental order signed by him. Only then were they submitted for publication and became eligible for consideration for the award of points under the heading "commendations". The Commissioner of Police therefore effectively had the power to veto their findings.

The Departmental order giving rise to this procedure is Departmental Order No.249 dated 7/09/06 which provides as follows:

"The Award Board shall sit on a monthly basis and address all recommendations made to it. The chairman shall ensure that the decisions of the board are submitted to the Commissioner of Police who shall have the results published within two (2) days of its receipt in the departmental Orders for immediate circulation"

It makes no mention of a power of veto by the Commissioner of Police.

Neither does it make mention of only becoming officially recognised upon such publication. In fact it makes clear that the decision of the Board was to be submitted to the Commissioner of Police who shall have the results published within 2 days of its receipt.

The claimant contends that the Board was to have met monthly and should have considered her recommendations on a timely basis so that they could have been officially recognised as commendations for the period under review when the time came for points to be awarded based thereon. If they had done so she would not have been in the unfair position of having zero marks awarded for commendations when she had acquired 10 recommendations from diverse sources attesting to excellence in the performance of her duties.

But she further contends that the Board did meet in February 2006, did approve her recommendations, and that a draft departmental order 49 of 2016 had been produced which was shown to her, but which was never finalised, and never published. The failure/

refusal to publish that departmental order⁴⁹ of 2006 for reasons unknown , placed her in a position where her several recommendations went unrecognised officially , and resulted in zero points being awarded to her.

The effect of this is that a settled practice is alleged by the respondent in relation to commendations – if not considered by the Board AND published in departmental order signed by the Commissioner of Police then recommendations do not become commendations and cannot be taken into account for the award of points under that heading. That practice if applied equally would be an answer (and the respondent contended that it was the answer) to the claimant's claim. That practice was in fact applied to Hall and Singh and although they were awarded increased marks on review under the category “academic qualifications”, they were was not awarded further marks under "commendations" for this reason. Conversely WPC Francis was awarded further marks under this head because commendations, recognised as such within the period under review, had not been taken into account.

As Abraham's case demonstrates however, that was not essential. He was awarded an extra mark despite the apparent non publication in departmental order (and possibly without even endorsement by the Police Awards Board) of his recommendations.

On the other hand the claimant’s recommendations, which were apparently considered and approved by the Board and which resulted in a draft departmental order, which was never published, were not taken into consideration.

Findings of Fact

1. The assessment process for promotion involved the awards of points under various headings including "commendations".
2. The claimant attained 73 points out of 85 at her promotional assessment.
3. Other persons also initially attained less points than those required for promotion. Some such persons requested reviews of their points under various headings.
4. The claimant requested a review of her points under the head of commendations.
5. Other officers that the claimant claims were similarly circumstanced to her were the following: Abraham, Wills, Lezama, Singh, Daniel and Hall. Of these -
 - (a) some obtained increased points based upon a reconsideration of their performance appraisals,
 - (b) some obtained increased points based upon the failure to consider academic qualifications,
 - (c) one obtained increased points based upon reconsideration of fitness for duty,
 - (d) one obtained a review based upon a reconsideration of commendations awarded during the review period.

The respondent contended that the claimant was not similarly circumstanced to such persons in that:

- (a) Most obtained reviews under headings other than commendations and therefore were not appropriate comparators to the claimant.
- (b) Those who obtained reviews under the heading "commendations" were successful because the commendations were awarded during the period of review and prior to consideration for promotion.

This does not explain the situation with Abraham however.

It appears that Abraham had a recommendation which had not yet been endorsed by the Board .Yet his commendation score was revisited and a further point was awarded based on that recommendation, though it had not yet been transformed into a commendation by its publication in signed departmental order.

On the other hand the claimant had received 10 recommendations. They were all within the period of review. Yet it was contended that those recommendations had not been transformed into commendations by their consideration and approval by the Board, and publication in departmental orders.

In those circumstances I find that the claimant was similarly circumstanced to Abraham, who received a review of his mark for commendations, based upon recommendations which were not published as commendations in signed departmental orders.

I find as a fact therefore that Sergeant Abraham was similarly circumstanced and an appropriate comparator, I find that he was treated in a more favourable manner than the claimant without any justification. There is no explanation or justification for this exception to the policy which it is contended is applicable to all. If the policy admits of exceptions based on the exercise of discretion there is no explanation as to why that discretion could not have been similarly applied to the claimant.

I find that the failure to treat the claimant in an equivalent manner to at least one other person similarly circumstanced placed her at a significant disadvantage. Though on a non arbitrary application of the alleged policy, (or possibly discretion) she was equally entitled to be considered for the award of additional points, she was denied the opportunity for promotion to the rank of corporal, and eligibility for consideration for promotion to the rank of sergeant thereafter at the next promotional assessment.

Whether mala fides must be proved

The issue remains however whether the claimant must establish that the respondent acted with mala fides towards her in order to establish a breach of her constitutional right to equality of treatment. This issue has been the subject of discussion in recent cases, and the subject of dicta in the Privy Council in the cases of **Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago [2004] UKPC 21, Privy Council Appeal No. 45 of 2003** (Bhagwandeem) and **Central Broadcasting Services Ltd. and Sanatan Dharma Maha Sabha of Trinidad and Tobago v. The Attorney General of Trinidad**

and Tobago Privy Council Appeal No. 49 of 2005 (the Maha Sabha case) and is considered further infra.

Evidence re Mala Fides

There is evidence that the policy applied to the claimant was in fact applied to other applicants for promotion. In the case of Hall and Singh while they obtained a review of marks under the heading "academic qualifications" they were denied an increase of marks under the heading "commendations" on the basis of their non approval by the Commissioner of Police.

There are allegations that marks of other applicants e.g. WPC Francis were changed in the claimant's presence on an arbitrary basis, but the evidence is that those points were changed in accordance with the procedure in place and such changes were justifiable. The changes in the marks of Francis, Wills, Singh, Daniel, and Hall, and Lezama were all on a rational basis. Any breach of the right to equality of treatment therefore must involve consideration of the actions of the respondent in failing to permit a review of the points of the claimant while permitting a review of the marks of officer Abraham in respect of commendations which had not been endorsed by the Police Awards Board or approved by the Commissioner of Police or published in Departmental order.

The claimant's peculiar situation is that the Board apparently did approve her recommendations but their approval was not confirmed by the Commissioner of Police

and their publication in a departmental order signed by the Commissioner of Police did not occur despite the wording of the Departmental order No.249.

There is the contradicted evidence of the claimant that representations were made to her that the matter would be resolved in her favour, but I find that there is no basis for a finding of mala fides against the respondent or anyone on his behalf on the facts alleged in this regard.

Were mala fides a requirement I consider the claimant would be hard pressed to establish a breach of the constitutional right to equality of treatment, (though on an application of the tests for proof of mala fides enunciated by the Honourable Justice of Appeal Mendonca in the **Maha Sabha** case at paragraph 42, it is conceivable that the arbitrary application of exceptions to the policy could constitute sufficient proof of mala fides).

The policy, whether it had a proper legal foundation or not, was applied to others and the changes of points for other comparators were based on rational, justifiable, and non arbitrary reasons.

Only in relation to Abraham was there a deviation, from which he benefited, but the claimant was not maliciously singled out for unfavourable treatment. Rather, she did not equally benefit from an exception to the general policy for which exceptions could have been, and were in fact made on a discretionary basis. The unequal application of this discretion was on its face arbitrary, though not ostensibly malicious. (Save in the sense referred to by the Honourable Mendonca J.A.)

Deliberate and intentional action

I do find that the actions of the respondent in failing to permit a review of the claimant's marks under the heading "commendations", (pursuant to an application of a policy not to consider recommendations to attain the status of commendations, in circumstances already described) was a deliberate intentional and purposeful act of unequal treatment.. It was an intentional exercise of power not justified, and not in accordance with law, being inconsistent with the stated requirements of the respondent's internal procedures. Were such a policy to have been consistently applied, then the claimant would not have been able to establish unequal treatment in relation to her as compared to persons similarly circumstanced. But an unexplained, unjustified, and on the face it arbitrary, exception to this policy was apparently applied and documented in relation to Officer Abraham.

The presumption of regularity

The presumption of regularity cannot of course apply in this situation where there is evidence- in fact evidence emanating from the respondent himself.

See Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago [2004] UKPC 21, Privy Council Appeal No. 45 of 2003 Paragraphs 22-23

*"The presumption of regularity comes into play in this context **when there is no evidence either way** whether a public authority or official has taken into account the correct considerations in reaching an administrative decision. In such case*

the decider is entitled to the benefit of the presumption of regularity and is not obliged to adduce evidence to establish that he took only the correct factors into account. In consequence, in the absence of contrary evidence the application for judicial review will fail. "

Mala Fides

In **Bhagwandeem** [supra] it was stated

"The need for proof of deliberate intention to discriminate is quite a different question. The Court of Appeal of Trinidad and Tobago accepted in Attorney General v KC Confectionery Ltd that a party complaining of discrimination must prove, in the same terms as it was formulated in the US authorities, "intentional and purposeful" acts of unequal treatment. Persaud JA said at page 403 that the complainant must show a clear and intentional discrimination, "which in turn connotes mala fides". That this is not required in discrimination cases in the United Kingdom was established by the House of Lords in James v Eastleigh Borough Council [1990] 2 AC 751, when the majority preferred what Lord Lowry termed the causative to the subjective construction and held that discrimination could be established even though the respondent council had not intended to discriminate between men and women. Accordingly the law of Trinidad and Tobago relating to discrimination by public officials may require further consideration in the light of these observations."

Whether mala fides must be established

A party alleging discriminatory treatment under s. 4 of the Constitution may allege mala fides but does not necessarily have to do in order to establish a breach of this right.

See **Central Broadcasting Services Ltd. and Sanatan Dharma Maha Sabha of Trinidad and Tobago v. The Attorney General of Trinidad and Tobago Cv. A. No. 16 of 2004** per Hamel Smith J.A

Paragraphs 13-15

[13] Persaud JA, however, propounded another state of affairs, one in which the allegation was that the official had contravened the law in the discharge of his functions. In such a situation, Persaud JA stated, mala fides might not necessarily form part of the complainant's case, in which event the question of its proof would not arise. All that was required, he stated, to displace the presumption was proof of the deliberate and intentional exercise of the power, not in accordance with law, which resulted in the erosion of the particular constitutional right.

*[14] It was in this context that Persaud JA explained that there was no need to shift the evidential burden as Bernard J had suggested. He then concluded that if the trial Judge (Deyalsingh J) in **KC Confectionery** meant (when he said) that on a true construction of section 4(d) of the Constitution where 'an applicant makes out a prima facie case upon proof of unequal treatment ...the onus shifts to the State to show that such differential treatment was reasonably and justifiably made' was subsumed the presumption of regularity, he could find no fault.*

[15] *At the end of the day, while Persaud JA was satisfied that there could exist circumstances where mala fides was not alleged he nonetheless maintained the existence of the presumption of regularity in favour of the official. That presumption however could be displaced by proof of a deliberate and intentional exercise of a power not in accordance with law resulting in unequal treatment. It would seem that in such a case it would be the effect of the deliberate action on the applicant, not the intent of the official, which is paramount.*

[25] *The requirement that an applicant prove mala fides as a prerequisite may be to place a fetter on the right itself. Discrimination can be practised, and usually is, by stealth. That feature makes it difficult to discern particularly when the applicant is on the outside depending, so to speak, on the good faith and integrity of the decider on the inside. I agree with Persaud JA that if there is an allegation of mala fides then the applicant must prove it in order to succeed. But there will be cases where it is not alleged and need not be proved. In either instance the presumption is of little use and to insist that it be displaced with proof of mala fides may be lifting the bar to an extraordinary and unnecessary height.*

[16] *Bernard JA, in **KC Confectionery**, appears to have agreed with the observation made by Persaud JA about the evidential burden not shifting, as he (Bernard J) would have preferred. He acknowledged that having given fuller*

consideration to what Mukherjea J had said he would agree that the onus had been rightly placed. Persaud JA had made his comments about the onus not shifting in relation to a case where mala fides was not alleged. There are dicta therefore coming from the Court of Appeal to support the view that proof of mala fides is not always necessary to displace the presumption.

*[17] That this is so is quite understandable because the deliberate and intentional exercise of a power generally has nothing to do with motive or mala fides. It is the actual exercise of the power which results in unequal treatment and that causes the onus to shift to the official to show that his action is reasonable and justified. I think that the issue is easily resolved by reference to the following case referred to by Bernard J in **LJ Williams**.*

*[19] It is not in dispute that this Court is bound by its previous decisions but I am in agreement with Persaud JA that proof of mala fides is not always necessary in all claims under s. 4(d). Those cases in which proof of mala fides is not required seem to me to be consistent with **James v Eastleigh Borough Council** [1990] 2AC 751 cited by the Privy Council where the majority preferred what Lord Lowry termed the causative to the subjective construction and held that discrimination could be established even though the respondent council had not intended to discriminate.*

In Central Broadcasting Services Ltd. and Sanatan Dharma Maha Sabha of Trinidad and Tobago v. The Attorney General of Trinidad and Tobago Privy Council Appeal No. 49 of 2005 on appeal at the Privy Council it was stated at paragraphs 18-20 as follows:

" Before the Court of Appeal a central issue was whether proof of mala fides was a pre-requisite to establishing a case of infringement of the right to equal treatment. Hamel-Smith JA and Warner JA held that it was not. While disagreeing with the Judge's conclusion that the Ministry's inaction in the case of the appellants (compared to its action in the case of Citadel) amounted to a constructive refusal of a licence, they upheld his conclusion that the Ministry's conduct amounted to a breach of CBSL's constitutional right to equal treatment.

Mendonca JA in contrast considered that mala fides was necessary, but held on the facts that there was sufficient evidence of intentional and irresponsible conduct which was, in the absence of any justification, sufficient to rebut the presumption of regularity and give rise to an inference of mala fides. Warner JA did not consider that mala fides had been shown. But Hamel-Smith JA, while considering in common with Warner JA that proof of mala fides was not required, also said that for the reasons which Mendonca JA gave, he did not depart from Mendonca JA's decision and findings. So there was a majority in favour of the appellants on the issue of inequality of treatment, both on the basis that mala fides was not a pre-requisite and, it seems (though this is not perhaps entirely

clear), on the basis that it was. No cross-appeal was filed by the Attorney General against these conclusions.

The Board was invited to consider further whether mala fides is a pre-requisite to a finding of unequal treatment under the Constitution, having regard to the authorities in Trinidad and Tobago and the Board's own reservations expressed obiter in **Bhagwandeem v. Attorney General of Trinidad and Tobago Privy Council Appeal No. 45 of 2003, [2004] UKPC 21**. But the Board declined to do so as the established breach of section 4(d), (against which the Attorney General had lodged no appeal,) was by itself a sufficient finding of discrimination for the appellants' purposes.

Intention of discriminator

The misconception that the presumption of regularity of the acts of public officials could only be rebutted by proof of mala fides has been clarified by the Privy Council in **Bhagwandeem**, and by the Honourable Hamel Smith J.A. in **Central Broadcasting Services Ltd. and Sanatan Dharma Maha Sabha of Trinidad and Tobago v. The Attorney General of Trinidad and Tobago Cv. A. No. 16 of 2004**.

As a matter of principle this must necessarily be so - to require proof of mala fides would be to eviscerate the right to protection from discriminatory treatment even if such proof can in some cases be satisfied from an inference from the nature of the discriminatory acts themselves. Mala Fides may be a matter that goes toward the remedy but it should not in principle affect the objective fact as to whether a citizen has been

treated in breach of a constitutional guarantee of equal treatment in respect of persons similarly circumstanced.

It would contribute to unfairness and lack of transparency if claims of unequal treatment can be defeated by failure to establish mala fides. The fact of unequal treatment in respect of persons similarly circumstanced would go unremedied simply due to inability to establish a state of mind of the discriminator- mala fides. In some cases that state of mind can be inferred by the nature of the action - but that may not always be the case. There will be situations where there is incompetence, misunderstanding of the effect of a statutory power or test, or a failure to consider properly all the circumstances.

Actions can be illegal, irrational, or procedurally improper without mala fides entering into the equation.

An applicant cannot be stuck and made to live with the consequences of unequal treatment if he cannot establish the existence of mala fides. On the current state of authority and in view of the dicta of the Court of Appeal the unsatisfactory state of affairs that would result from an insistence upon proof of mala fides with the onus of proof being upon the party alleging discrimination is not one that needs to be inflicted upon the Constitution especially on a purposive construction of the Constitution. That such a construction is required has been established beyond doubt.

In any event the debate in many cases would be of academic value only, as a broad interpretation of what constitutes "mala fides" results in the eliding of any distinction between the legal tests which require proof of mala fides and those which do not. See for example the Honourable Justice of Appeal Mendonca at paragraph 42 of his judgment in the Maha Sabha case that *'further if someone is singled out for different treatment, albeit favourable treatment, that is evidence from which Mala Fides may be inferred. It is on the face of it arbitrary which may provide evidence of mala fides'*. This is clearly demonstrated by the reasoning of the Honourable Justice of Appeal Mendonca in relation to mala fides and his conclusion, and the overall result in the Maha Sabha case.

Analysis and reasoning

Principles of Constitutional interpretation

It is well established that the Constitution should be afforded a generous, liberal and purposive construction and, conversely, a court should not derogate from rights conferred by the Constitution by an unduly restrictive construction.

Some rights now taken for granted were not at the time they were the subject of applications for constitutional redress, generally accepted as constitutional rights. Some examples of this are:

- (a) The right to instruct and retain a legal adviser. **Thornhill v AG [1981] A.C. 61**. This was only confirmed as a constitutional right on appeal to Privy Council, upholding the court of first instance.
- (b) **Whiteman v AG [1991] 2 A.C. 240**. The right to be informed of the right to retain and instruct a legal adviser – Though rejected by the court of first instance it was confirmed as a constitutional right by the Court of Appeal and the Privy Council.

In the case of **Bernard Coard & Ors v The Attorney General Privy Council Appeal No. 10 of 2006** Lord Hoffman stated at paragraph 33

In Hinds v Attorney-General of Barbados [2002] 1 AC 854, 870 Lord Bingham qualified the principle stated by Lord Diplock in Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 WLR 106 with this observation:

“It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument.”

Further in **Charles Matthew v The State Privy Council No. 12 of 2004** at paragraph 42 of the dissenting judgment of Lord Bingham of Cornhill it was stated that:

“The correct approach to interpretation of a constitution such as that of Trinidad and Tobago is well-established by authority of high standing. In Edwards v Attorney-General for Canada [1930] AC 124, 136, Lord Sankey LC, giving the judgment of the Board, classically described the constitution established by the British North America Act 1867 as “a living tree capable of growth and expansion within its natural limits”.

The provisions of the Act were not to be cut down “by a narrow and technical construction”, but called for “a large and liberal interpretation”. Lord Wilberforce spoke in similar vein in Minister of Home Affairs v Fisher [1980] AC 319, 328-329, when he pointed to the need for a “generous interpretation”, “suitable to give to individuals the full measure of the fundamental rights and freedoms referred to” in the constitution and “guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences”. The same approach was commended by Dickson J, giving the judgment of the Supreme Court of Canada in Hunter v Southam Inc [1984] 2 SCR 145, 155:

“The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its

provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'.”

In Attorney-General of Trinidad and Tobago v Whiteman [1991] 2 AC 240, 247, Lord Keith of Kinkel, giving the judgment of the Board, said: " The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights."”

In his dissenting opinion Lord Nicholls of Birkenhead in **Charles Matthew** at

Paragraphs 70 and 71 stated as follows:

A constitution should be interpreted as an evolving statement of a country's supreme law.

This is not to substitute the personal predilections of individual judges for the chosen language of the constitution. Rather, it is a recognition that the values underlying a constitution should be given due weight when the constitution falls to be interpreted in changed conditions. A supreme court which fails to do this is not fulfilling its

proper role as guardian of the constitution. It is abdicating its responsibility to ensure that the people of a country, including those least able to protect themselves, have the full measure of protection against the executive which a constitution exists to provide.

Whether the instant action is an abuse of process

It was contended that the action should have been brought by judicial review and as this was an alternative remedy the instant action under the constitution was an abuse of process.

It is clear that the substance of the procedure for constitutional remedies and remedies under judicial review are not dissimilar. In terms of relief constitutional relief can encompass those available on judicial review although the procedural basis of delay may be more strictly applied in the latter. In any event the essence of the claimant's claim was that she had been treated less favourably than others similarly circumstanced. This was a direct invocation of the court's constitutional jurisdiction, and constitutes "a *valid ground of distinction from the decision in Jaroo v Attorney General of Trinidad and Tobago [2002] 1 AC 87*"¹, and "*a bona fide resort to rights under the Constitution*"

See The Attorney General v Mohanlal Bhagwandeem Civil App. No. 23 of 2001 pages 7-8, Paragraph 17.

The issue of the appellant's entitlement to a constitutional remedy was not argued in or adverted to by the courts below, and their Lordships would be reluctant to

decide it at this stage. They would confine themselves to observing that there may be substance in the appellant's second argument. If the appellant is not entitled to claim damages on an application for judicial review which involves a claim that a public authority has deprived him of a constitutional right, then there is a viable argument that he was justified in bringing a constitutional motion in order to advance that claim, which should not be regarded as frivolous, vexatious or an abuse of the process of the court. This would constitute a valid ground of distinction from the decision in Jaroo v Attorney General of Trinidad and Tobago [2002] 1 AC 871, in which the appellant had a sufficient claim in detainee. It could be said to constitute a bona fide resort to rights under the Constitution, which, as Lord Steyn said in Ahnee v Director of Public Prosecutions [1999] 2 AC 294 at 307, ought not to be discouraged. Their Lordships are accordingly willing, without deciding the point finally, to proceed on the assumption that the appellant is entitled to advance his claim for damages by way of the constitutional motion the subject of the appeal.

Conclusion

Findings and Disposition

I find as follows:

1. A claimant who alleges breach of the constitutional right to equality of treatment can do so by proving mala fides.
2. If he does so then the onus of proving this lies on him.

3. Mala fides can include proof of "some element of deliberateness in the selection of a person for different treatment." (See judgment of Justice of Appeal Mendonca in the Maha Sabha case at paragraph 34) .Further" if someone is singled out for different treatment, albeit favourable treatment, that is evidence from which Mala Fides may be inferred. It is on the face of it arbitrary which may provide evidence of mala fides" per the Honourable Justice of Appeal Mendonca at paragraph 42 of his judgment in the Maha Sabha case.
4. If unequal treatment is proved, in some such situations mala fides may be inferred from overt acts and circumstances, subject to rebuttal evidence by the respondent - the onus then shifts to the respondent to rebut such inference of mala fides.
5. Failure to prove mala fides is not fatal to a claim under section 4 (d) of the constitution. If a claimant fails to prove mala fides he may still succeed if he proves the deliberate and intentional exercise of a power (or discretion), by the defendant /respondent the exercise of which was arbitrary and unreasonable in the circumstances which resulted in treatment in relation to him that was less favourable to him than in relation to others similarly circumstanced.
6. The claimant would be hard pressed to prove that the respondent's actions were actuated by mala fides. [Though I note statement of the Honourable Justice of Appeal Mendonca at paragraph 42 of his judgment in the Maha Sabha supra]

7. There is evidence that points were awarded, and the points for commendations were increased, in respect of at least one other person whose "recommendations" were taken into account, even though they had not been approved by the Board or published in a signed Departmental Order. The policy that was being applied to the claimant and to others similarly circumstanced was not applied equally. The exception made to this supposed policy was not explained or justified. The Constitution prohibits the deliberate and intentional unequal treatment of persons who are similarly circumstanced.

8. Accordingly, the claimant has proved that she was discriminated against or received less favourable treatment (as compared to others similarly circumstanced) in not having the opportunity to have her marks for commendations reviewed and increased by taking into account her recommendations for the period under review though unpublished in signed Departmental Order.

Orders

I consider that the orders set out hereunder would sufficiently vindicate the Claimant's rights and in the circumstances the following orders are granted:

1. A declaration is granted that the Defendant had been guilty of unequal and discriminatory treatment of the Claimant in contravention of her right enshrined in

section 4 (d) of the Constitution of Trinidad and Tobago to equality of treatment from any public authority in exercise of its functions.

2. It is ordered that the promotional assessment of the claimant be remitted for reconsideration of the points awardable to her in respect of her recommendations under the heading "commendations" in accordance with the findings above as though the promotion procedure in effect as at May 11 2006 still applies in relation to the claimant.
3. It is ordered that the promotional assessment exercise be reconducted in relation to the claimant and that her seniority, emoluments and terms and conditions of employment be based on the results and outcome of the assessment conducted as set out above.
4. It is ordered that costs be paid to the Claimant on the basis prescribed by the Civil Procedure Rules.
5. It is further ordered that there be liberty to apply in the working out of this order.

Dated this 1st day of February 2010

Peter A. Rajkumar
Judge