

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SAN FERNANDO**

Claim No. CV 2007 -01093

HARRIDATH MAHARAJ

Claimant

AND

PUBLIC SERVICE COMMISSION

Defendant

Before the Honourable Madame Justice Rajnauth-Lee

Appearances

Mr. Anand Ramlogan instructed by Mr. Sheldon Ramanan for the Claimant.

Mr. Russell Martineau S.C. leading Miss Anoushka Ramsaran and Miss Priya Jadoo instructed by Mr. Haran Ramkaransingh and Miss Reeti Maharajh for the Defendant.

Dated the 16th July, 2009

JUDGMENT

THE APPLICATION

1. Harridath Maharaj (“the Claimant”), Motor Vehicle Supervisor II, sought against the Public Service Commission (“the Commission”) and was granted leave by the Court to challenge inter alia the unfair denial of promotion to the office of Transport Commissioner and the failure to take disciplinary action against officer Reuben Cato pursuant to a recommendation made by the Claimant.

RELIEF SOUGHT

2. The Claimant claimed the following relief against the Defendant:
 - 1) An order of certiorari to quash the promotion of Mr. Rueben Cato to the office of Transport Commissioner.
 - 2) A declaration that the decision to bypass the Claimant for promotion to the office of Transport Commissioner is unreasonable, irrational, unfair and illegal.
 - 3) An order remitting the issue of the Claimant’s application for promotion to the office of Transport Commissioner to the Commission for it to reconsider in accordance with the findings of the Court.
 - 4) A declaration that the Claimant was and remains qualified and eligible to be considered for promotion to the office of Transport Commissioner.

- 5) A declaration that the Claimant has been treated unfairly contrary to the rules of natural justice as codified by section 21 of the Judicial Review Act.
- 6) An order of mandamus directing the Commission to appoint an investigator to investigate the complaints made against Mr. Reuben Cato as set out in the letter dated 25th day of April, 2006 addressed to the Permanent Secretary in the Ministry of Works with attachments thereto.
- 7) An order setting aside the promotion and/or appointment of Mr. Rueben Cato to the position of Transport Commissioner.
- 8) Damages.
- 9) Costs.
- 10) Pursuant to section 8 of the Act, such further orders, directions or writs as the Court considers just and as the circumstances warrant.

THE GROUNDS

3. The Claimant relied on the following grounds:
 - (a) The Claimant has enjoyed a long and distinguished career in the Transport Division in the Ministry of Works. He was appointed to act as Assistant Transport Commissioner and Transport Commissioner for the following periods from the 2nd day of January, 2002 to the 26th day of February, 2002 and from the 27th day of July, 2004 to the 16th day of November, 2005.

(b) On the 9th day of June, 2006, the Claimant submitted an application for promotion to the position of Transport Commissioner in response to a circular memorandum inviting applications from suitably qualified officers for the said office.

(c) The aforesaid circular memorandum detailed the minimum required experience and training requirements and read as follows:

“Minimum experience and training requirements:

Extensive (more than 8 years) experience in transport administration such as may have been gained in the lower classes and training as evidenced by a General Certificate of Education, Ordinary Level with passes in five subjects including English Language and Mathematics or any equivalent combination of experience and training.”

(d) The Claimant was unlawfully bypassed for promotion to the said office in favour of his junior, Mr. Rueben Cato. He was never notified of any deficiency in his application nor was he ever invited to attend any promotional interview.

(e) The Claimant possessed the minimum experience and training requirements and was eligible and qualified to be considered for promotion to the said office.

(f) The selection of Mr. Reuben Cato for appointment/promotion to the said office is arbitrary, unfair and irrational as no promotional interviews were held in keeping with the established practice, procedure and policy of the Commission regarding promotion to such high offices in the public service. Alternatively, if

promotional interviews were held, the Claimant was treated unfairly by not being invited to participate in same.

- (g) The Commission has failed and/or refused to respond to a pre-action letter issued on behalf of the Claimant seeking an explanation for the unsatisfactory and unfair treatment he received. The Claimant is therefore in the embarrassing and unenviable position of not knowing the reasons for the sudden termination of his long acting appointment in the office of Transport Commissioner and the consequent denial of promotion.
- (h) The Commission has failed to respond to the said letter despite the obvious urgency in this matter in light of the fact that Mr. Reuben Cato has assumed duty as Transport Commissioner and continues to exercise the functions of this office.
- (i) Regulation 13 of the Public Service Commission Regulations (“the Regulations”) deals with vacancies in the public service. The Permanent Secretary or Head of Department ought to have made an advance recommendation regarding the filling of the vacant office of Transport Commissioner to the Director of Personnel Administration. (“D.P.A.”).
- (j) By Regulation 13 (4) of the Regulations, the D.P.A. must advertise the vacancy and failure of eligible officers to apply shall not prejudice the consideration of their claims to promotion.
- (k) Regulation 14 states that appointments are to be made **by competition** within the particular service. In this case Mr. Reuben Cato was appointed from within the particular service.

- (l) Regulation 16 provides for the establishment of Selection Boards and the holding of promotional interviews. Regulation 18 contains the criteria or principles that must be applied by the Commission when considering the claims of eligible officers for promotion.
- (m) The Claimant was unlawfully bypassed for promotion despite the fact that he had performed the duties of Transport Commissioner in a commendable manner for over one year. He was relatively senior to Mr. Reuben Cato and had no pending disciplinary matters.
- (n) Mr. Reuben Cato has been given preferential protection and treatment during his career by the Ministry and/or the Commission. He was allowed to pursue and complete a degree in Economics as a full-time student at the University of the West Indies (“U.W.I.”) whilst maintaining his position as a full-time public officer in the Ministry of Works. Additionally no steps have been taken to investigate a complaint of serious misconduct sent via the chain of command, in accordance with the established protocol and/or procedure via the Permanent Secretary to the Commission.
- (o) Almost one year has elapsed with no action on this complaint despite a recommendation from the Claimant that the matter warranted further investigation.
- (p) The Claimant has been treated unfairly by being denied promotion to the office in which he was acting without blemish or complaint in circumstances where no reason or explanation has been provided as to how Mr. Reuben Cato could skip so many offices in the hierarchical structure of the Transport Division and gain

promotion to the said office without any promotional interviews being held.

- (q) The accelerated promotion of Mr. Reuben Cato whereby he skipped several offices and leapfrogged into the office of Transport Commissioner is entirely without precedent. The established practice, procedure and/or policy of the Commission have always been to promote officers to the next immediate higher office with one promotion at a time. In other words, an officer is not permitted to “skip ranks” and must progress through the ranks by virtue of promotion to the various offices along his vertical career path in keeping with the hierarchical organizational structure of the Transport Division. Indeed, there are several officers in the Transport Division with University degrees and none of them has ever been afforded the privilege of skipping ranks.

- (r) The grounds upon which this challenge is based under section 5 of the Judicial Review Act include:
 - (a) Failure to satisfy or observe conditions or procedures required by law;
 - (b) Breach of the principles of natural justice;
 - (c) Unreasonable, irregular or improper exercise of discretion;
 - (d) Abuse of power;
 - (e) Conflict with the policy of the Freedom of Information Act;

- (f) Failing to take relevant considerations into account, namely, the Claimant's seniority, performance of the duties as Acting Transport Commissioner and/or Assistant Transport Commissioner, the pending complaint against Mr. Reuben Cato and the experience and training of the Claimant;
- (g) Deprivation of a legitimate expectation;
- (h) An exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power;
- (i) Breach of or omission to perform a duty;
- (j) Unreasonable delay.

4. The Claimant also claimed damages for the loss of opportunity to gain promotion to the office of Transport Commissioner.

THE AFFIDAVITS

5. The following affidavits were filed on behalf of the Claimant:

- The affidavit of the Claimant sworn to and filed on the 4th April, 2007.
- The affidavit of the Claimant sworn to and filed on the 24th April, 2007.

- The affidavit of the Claimant in reply sworn to and filed on the 4th July, 2007.
- The affidavit of Hemawatie Boodhai sworn to and filed on the 4th July, 2007.
- The supplemental affidavit of the Claimant sworn to and filed on the 13th September, 2007.

6. The following affidavits were filed on behalf of the Commission:

- The affidavit of Reuben Cato sworn to and filed on the 8th June, 2007.
- The affidavit of Arlene McComie sworn to on the 6th June, 2007 and filed on the 8th June, 2007.
- The affidavit of Gloria Edwards Joseph sworn to on the 8th June, 2007 and filed on the 11th June, 2007.
- The affidavit of Ruby James Myers sworn to on the 21st June, 2007 and filed on the 22nd June, 2007.
- The supplemental affidavit of Gloria Edwards Joseph sworn to and filed on the 30th August, 2007.

UNDISPUTED FACTS

7. The Claimant entered the public service as an Estate Constable on the 4th October, 1972. He progressed through the ranks of the public service and now

holds the substantive post of Motor Vehicle Supervisor II having served in the Transport Division for over thirty-three (33) years.

8. The Claimant acted in the office of Assistant Transport Commissioner for the period the 2nd January, 2002 to the 26th February, 2002 and from the 27th July, 2004 to the 16th November, 2005.
9. On the 17th November, 2005, the Claimant was appointed to act in the office of Transport Commissioner which had become vacant upon the retirement of Mr. Nathaniel Douglas, the former Transport Commissioner.
10. On the 9th June, 2006, the Claimant submitted an application for promotion to the position of Transport Commissioner in response to a circular memorandum dated the 10th May, 2006 inviting applications from suitably qualified officers for the office of Transport Commissioner. The circular memorandum detailed the **minimum experience and training requirements** for the office of Transport Commissioner. The requirements are set out in full at paragraph 3 (c) of this judgment. The Claimant was never invited to any promotional interview. Five persons, including Mr. Reuben Cato, were interviewed.
11. The Claimant acted as Transport Commissioner continuously and without interruption until the 7th March, 2007 when he received a letter from the Permanent Secretary, Ministry of Works and Transport which read as follows:

“Dear Sir,

With effect from today March 07, 2007, you are to assume duties as acting Assistant Transport Commissioner, Licensing Division.

The Transport Commissioner is required to assign to you your duties.”

12. By circular memorandum dated the 14th March, 2007, the Permanent Secretary, Ministry of Works and Transport, informed all members of staff, Licensing Division, that with effect from the 7th March, 2007, Mr. Reuben Cato was promoted as Transport Commissioner, Ministry of Works and Transport.
13. On the 9th June, 2006, the Claimant submitted an application under the Freedom of Information Act, and requested the following information:
1. Copies of all documents on Claimant's personnel file including staff reports and any correspondence.
 2. Copies of any recommendations made by the Ministry of Works relative to the filling of the vacant office of Commissioner of Transport, whether for acting appointment or promotion.
 3. Copies of the minutes of the Commission when the issue of acting appointment or permanent promotion to fill the vacant office of Transport Commissioner was raised and discussed.
14. By letter dated the 26th June, 2006, the Commission provided some of the requested documents. As to the minutes of the Commission that had been requested, the Commission informed the Claimant that they were internal working documents and as such were exempt documents in accordance with section 27 of the Freedom of Information Act.
15. By letter dated the 15th March, 2007, Mr. Sheldon Ramanan, Attorney-at-Law, wrote to the D.P.A complaining inter alia that the Claimant had been by passed for promotion to the office of Transport Commissioner and that the Commission's decision to appoint Mr. Reuben Cato was unfair, irrational and arbitrary. Mr. Ramanan requested that the Commission provide some clarification or explanation as to why the Claimant's acting appointment was terminated and

why Mr. Reuben Cato had been elevated at the Claimant's expense. Mr. Ramanan also warned the Commission that he had been instructed to apply for judicial review unless "this matter is amicably resolved within 14 days".

16. By letter dated the 28th March, 2007, the D.P.A. replied to Mr. Ramanan as follows:

"Public Service Commission has considered the representations in your letter dated 15th March, 2007 on behalf of Mr. Harridath Maharaj, Motor Vehicle Supervisor II, Licensing Division, Ministry of Works and Transport and wishes to inform you that only those applicants who satisfied the experience and training requirements of the office of Transport Commissioner were interviewed to determine their suitability for promotion.

Mr. Maharaj was not invited to be interviewed since he does not satisfy the training requirement of the office. He had been informed in a letter dated 30th December, 2005 that his appointment to act as Transport Commissioner would have given him no claim to promotion to the office."

There was an initial dispute between the parties as to when the letter was dispatched and/or received, but that dispute appeared to dissipate after the commencement of the oral hearings. Mr. Ramlogan's position before the Court was that they had moved beyond that dispute.

THE REGULATORY FRAMEWORK

17. The procedure for promotion in the public service is regulated pursuant to the Constitution of the Republic of Trinidad and Tobago by the Public Service Commission Regulations Chapter 1:01 ("the Regulations").

18. Regulation 13 sets out the procedure for the filling of vacancies in the public service. Section 13, subsections (1) and (4), read as follows:

13. (1) As soon as it is known that a vacancy will occur the Permanent Secretary or Head of Department shall communicate to the Director in writing and shall make his recommendations regarding the filling of the vacancy.

(4) The Director shall, from time to time by circular memorandum or by publication in the Gazette, give notice of vacancies which exist in the particular service and any officer may make application for appointment to any such vacancy. Such application shall be forwarded through the appropriate Permanent Secretary or Head of Department to the Director, but the failure to apply shall not prejudice the consideration of the claims of all eligible public officers.

19. Regulations 14, 15, and 16 are relevant to the issues before the Court and are set out in full:

14. Whenever in the opinion of the Commission it is possible to do so and it is in the best interest of the particular service within the public service, appointments shall be made from within the particular service by competition, subject to any Regulations limiting the number of appointments that may be made to any specified office in the particular service.

15. Where the Commission considers either that there is no suitable candidate already in the particular service available for the filling of any vacancy or that having regard to qualifications, experience and merit, it would be advantageous and in the best interest of the particular service

that the services of a person not already in that service be secured, the Commission may authorize the advertisement of such vacancy.

16. (1) The Commission may from time to time appoint one or more Selection Boards to assist in the selection of candidates for appointment to the public service and the composition of any such Board and the form in which its reports are to be submitted shall be in the discretion of the Commission.

(2) On consideration of any report of a Selection Board, the Commission may, in its discretion, summon for interview any of the candidates recommended by such Board.

20. Regulation 18 sets out the principles or factors to be taken into account when the Commission is considering the eligibility of officers for promotion. Regulation 18 reads as follows:

18. (1) In considering the eligibility of officers for promotion, the Commission shall take into account the seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such officers, and in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy.

(2) The Commission, in considering the eligibility of officers under subregulation (1) for an appointment on promotion, shall attach greater weight to -

(a) seniority, where promotion is to an office that involves work of a routine nature, or

(b) merit and ability, where promotion is to an office that involves work of progressively greater and higher responsibility and initiative that is required for an office specified in paragraph (a).

(3) In the performance of its functions under subregulations (1) and (2), the Commission shall take into account as respects each officer -

- (a) his general fitness;
- (b) the position of his name on the seniority list;
- (c) any special qualifications;
- (d) any special courses of training that he may have undergone (whether at the expense of Government or otherwise);
- (e) the evaluation of his overall performance as reflected in annual staff reports by any Permanent Secretary, Head of Department or other senior officer under whom the officer worked during his service;
- (f) any letters of commendation or special reports in respect of any special work done by the officer;
- (g) the duties of which he has had knowledge;

- (h) the duties of the office for which he is a candidate;
- (i) any specific recommendation of the Permanent Secretary for filling the particular office;
- (j) any previous employment of his in the public service, or otherwise;
- (k) any special reports for which the Commission may call;
- (l) his devotion to duty.

(4) In addition to the requirements prescribed in subregulations (1), (2) and (3), the Commission shall consider any specifications that may be required from time to time for appointment to the particular office.

THE ISSUES

21. The following issues fall to be determined by the Court:

- (1) whether the decision of the Commission to bypass the Claimant for promotion to the office of Transport Commissioner and/or not to interview the Claimant for such office was unreasonable, irrational, unfair and/or illegal. If so, what relief should the Court grant to the Claimant in all the circumstances of the case.
- (2) whether the Court ought to direct the Commission to investigate the complaints made by the Claimant against Mr. Reuben Cato.

ISSUE (1) THE DECISION TO BYPASS AND/OR NOT TO INTERVIEW

A. The minimum experience and training requirements

22. It is not disputed on the evidence that the Claimant had the minimum eight (8) years experience in transport administration. In fact, the Claimant has served for over thirty-three (33) years in the Transport Division, having acted as Transport Commissioner for a period of some fifteen (15) months. It is also not disputed that the Claimant did not possess the training requirement of a General Certificate of Education, Ordinary Level, with passes in five (5) subjects.

23. The Court has examined Exhibit H.M.7 to the Claimant's affidavit filed on the 4th April, 2007 and the minimum experience and training requirements set out for the posts of Driver Licensing Examiner, Traffic Safety Officer, Motor Vehicle Supervisor I, Automotive Licensing Officer I, Motor Vehicle Supervisor II, Automotive Licensing Officer II and Assistant Transport Commissioner. The Claimant has held several of these posts up to the post of Motor Vehicle Supervisor II as he advanced up the ranks of the Transport Division.

24. The Court has noted that the minimum training requirement for the above-mentioned posts has not changed; it has remained training as evidenced by a GCE 'O' Level with passes in five (5) subjects. The minimum experience requirement, however, has varied with each post. For example, in the case of the post of Motor Vehicle Supervisor II (the Claimant's substantive post), the minimum experience and training requirement was "considerable experience in Transport Administration as may have been gained in the next lower class and training as evidenced by a General Certificate of Education, Ordinary Level with passes in five subjects, including English Language and Mathematics; or any equivalent combination of experience and training".

25. Mr. Martineau S.C. has argued with conviction on behalf of the Commission that it is a matter for the Commission to determine what equivalent combination of training and experience meets their requirements. According to Mr. Martineau, the issue of the weight given to the various factors is for the Commission alone, the decision-maker. The Court does not interfere unless the decision-maker has acted unreasonably in the *Wednesbury* sense [**City of Edinburg Council v Secretary of State for Scotland** [1997] 1 W.L.R. 1447, Lord Clyde at page 1458; and **Tesco Stores Ltd v Secretary of State for the Environment** [1995] 1 W.L.R. 759, Lord Keith at page 764].
26. The Court accepts Mr. Martineau's submissions. However, Mr. Ramlogan has argued that by letter of the 28th March, 2007 from the Commission to Mr. Sheldon Ramanan, Attorney-at-Law, the Commission had made it clear that the Claimant "was not invited to be interviewed since he does not satisfy the training requirement of the office". At paragraph 10 of the affidavit of Mrs. Gloria Edwards Joseph filed on the 11th June, 2007, Mrs. Edward Joseph had deposed that the Claimant was not interviewed for the position of Transport Commissioner "because he did not satisfy the minimum training requirements for the office. He also did not possess the necessary equivalent combination of experience and training".
27. Mr. Ramlogan has therefore argued further that the Commission should not be allowed to supplement their reasons for decision by affidavit evidence. Mr. Ramlogan placed reliance on the case of **R v Westminster City Council, ex parte Ermakov** [1996] 2 All E.R. 302.
28. On the other hand, Mr. Martineau has contended that **Ermakov** did not apply to the facts of this case. According to Mr. Martineau, **Ermakov** was a case where the public authority was bound to give reasons at the same time as the decision was communicated. In the instant case, argued Mr. Martineau, there was no statutory or any other obligation to give reasons as to why the Claimant was

not promoted to the post of Transport Commissioner. Mr. Martineau therefore submitted: (i) there was in any case no difference in substance between the Commission's letter of the 28th March, 2007 and paragraph 10 of Mrs. Edwards Joseph's affidavit; and (ii) assuming but not accepting that there was a difference, the Commission was entitled by affidavit in these judicial review proceedings to elucidate on the reasons for their decision.

29. The Court finds useful guidance in the case of **R v Lancashire County Council ex parte Huddleston** [1986] 2 All E.R. 941 which concerned the refusal of a local authority to award a discretionary grant for university education to the applicant. The council stated as its reasons for its refusal that 'Having considered the circumstances of [the] case' and because local education authorities only received reimbursement from central government of 10% of their expenditure on discretionary grants the council felt that there were no special circumstances to justify making an award. The Court of Appeal held inter alia that in the special circumstances of this case, the bare statement that all the circumstances were taken into account was an adequate answer.

30. At pages 945-946, Sir John Donaldson MR set out certain relevant principles.

Counsel for the council also contended that it may be an undesirable practice to give full, or perhaps any, reasons to every applicant who is refused a discretionary grant, if only because this would be likely to lead to endless further arguments without giving the applicant either satisfaction or a grant. So be it. But in my judgment the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure.

Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post war development. This development has created a new relationship between the court and those who derive their authority from the public law, one of partnership based on common aim, namely the maintenance of the highest standards of public administration.

Second, counsel for the council submits that it is often impossible to list seriatim all the factors of which account is taken in reaching a discretionary administrative decision and, if only some are listed, it will be assumed that these were the only factors taken into account. The applicant will then advert to some other factor and claim relief on the mistaken basis that this was never considered. I accept that this may well be widely believed by some, and perhaps many, authorities, but they are mistaken. The judges who man the public law court are, or very soon become, specialists with a very real appreciation of the realities of public administration. They know that the decision-making process can be complex. They know that it may often depend on the expertise of the decision-makers. The legal, as contrasted with the evidential, burden being on the applicant to establish his entitlement to relief, they are entitled and are very willing to assume that the authority has acted in accordance with law, until the contrary is shown. But authorities assist neither themselves nor the courts if their response is a blanket assertion of having acted in accordance with law or one which begs the question. If the issue is whether an authority took a particular factor into account, it will be a sufficient response to show that it did. But if the allegation is that a decision is prima facie irrational and that there are grounds for inquiring whether something immaterial may have been considered or something material omitted from consideration, it really does not help to assert

baldly that all relevant matters and no irrelevant matters were taken into consideration without condescending to mention some at least of the principal factors on which the decision was based.

31. At page 947, Parker L.J. made it clear that the public authority's extent of disclosure depended on the *basis of the attack*. He concluded as follows:

In the vast majority of cases authorities whose decisions are challenged will no doubt put before the court all that is necessary to enable justice to be done, for I agree that they have, or should have, a common interest with the courts in ensuring that the highest standards of administration are maintained and that, if error has occurred, it should be corrected. I agree, therefore that when challenged they should set out fully what they did and why, so far as is necessary, fully and fairly to meet the challenge.

In so doing they will, in my view, be making full and fair disclosure and putting the cards face upwards on the table as referred to by Sir John Donaldson MR. I express my views in a rather more restricted way, for I would not wish it to be thought that once an applicant has obtained leave he is entitled to demand from the authority a detailed account of every step in the process of reaching the challenged decision in the hope that something will be revealed which will enable him to advance some argument which has not previously occurred to him.

32. Sir George Waller made the important point that the facts of each case and of each decision varied. According to him, (page 947), "the important matter in every case where judicial review is granted is to make clear that all relevant facts have been considered, but this may not always require them all to be specified."

33. **Huddleston** provides a commonsense approach to the Court's determination of the issue (raised by Mr. Ramlogan) whether the Commission has

fulfilled its duty of full and fair disclosure. I adopt the reasoning of the Court of Appeal in that case that the extent of disclosure depends on the decision itself, the facts of each case and the basis of the applicant's attack.

34. In the instant case, on the 15th March, 2007, Mr. Ramanan, Attorney for the Claimant, had written a letter before action to the Commission. Mr. Ramanan had complained inter alia that the Claimant had been bypassed for promotion to the office of Transport Commissioner and also that the Commission's decision to appoint Mr. Reuben Cato was unfair, irrational and arbitrary. Mr. Ramanan had also requested that the Commission provide some clarification or explanation as to why Mr. Reuben Cato was promoted to the post of Transport Commissioner at the Claimants' expense. The letter also warned that Mr. Ramanan had instructions to apply for judicial review unless the matter was amicably resolved within fourteen (14) days.

35. In essence, the Attorney's letter was a *pre-action protocol letter*, although not all the elements of the Pre-Action Protocol for Administrative Orders had been fully satisfied. [Appendix D Practice Directions Civil Proceedings Rules, 1998]. According to the relevant Protocol, the letter in response where the defendant does not concede the claim should:

- (b) provide a more detailed explanation for the decision, if considered appropriate to do so;
- (c) address any points of dispute, or explain why they cannot be addressed.

36. Accordingly, there was a legal obligation placed on the Commission to comply with the pre-action protocol and to give a more detailed explanation for its decision not to interview the Claimant. It is obvious to the Court that the Commission sought to comply with the Pre-Action Protocol and provided the

explanation that the Claimant was not invited to be interviewed because he did not satisfy the training requirement of that office. In the Court's view, the Commission cannot rely on the submission made on its behalf that "such a letter is not normally written by lawyers." The Court does not agree with Mr. Martineau's contention that the reason advanced by the Commission in its letter of the 28th March, 2007, was not different in substance from the reasons contained in paragraph 10 of the affidavit of Mrs. Edwards Joseph. It is one thing to say that the Claimant did not satisfy the minimum training requirement and a different thing altogether to say that he did not possess the equivalent combination of experience and training. The equivalent combination requirement assumes that a candidate may not have met the training requirement but that can be compensated for with more than adequate experience. This is a wholly different consideration.

37. The Court has examined **Ermakov** and shares Mr. Martineau's view that it is not applicable to the instant case. Nevertheless, the Court finds that this is not a case where the public authority has sought by affidavit after the grant of leave to elucidate its reasons or to set out its reasons in full. In my view, the Commission has changed its reasons for not interviewing the Claimant without any explanation to the Court. They have not sought to say that the letter of the 28th March 2007 was erroneous or that they were seeking to correct some error that had inadvertently been made.

38. In my judgment, the Commission should not be permitted to change its reasons as it has sought to do. In the circumstances of the case, the Court agrees with Mr. Ramlogan's submissions and finds that the equivalent combination of experience and training was not considered by the Commission. Accordingly, the Court finds that the Commission did not apply its mind to the relevant consideration whether the Claimant satisfied the equivalent combination.

39. In response to the Claimant's complaint that he had been promoted up the ranks of the Transport Division and was acting in the office of Transport Commissioner without ever being informed that he was not eligible for such appointments, the Commission has raised two (2) issues:

- (i) that the Claimant had been granted a waiver of qualifications to enable him to be promoted to the office of Motor Vehicle Supervisor II; and
- (ii) that the Claimant's appointment to act as Transport Commissioner was an exception to the general rule set out in Regulation 26 of the Regulations.

B. Waiver of Qualifications

40. By memorandum dated the 7th October, 1993, the Chief Personnel Officer agreed to the waiver of the minimum training requirements in respect of several officers in the Transport Division, including the Claimant, who was then promoted to the post of Motor Vehicle Supervisor II. By memorandum dated the 11th March, 1997 stated to be further to the memorandum of the 7th October, 1993, the Chief Personnel Officer advised the D.P.A of the proviso put forward by the Public Services Association in respect of the grant of waivers of the minimum training requirement in favour of the relevant officers. The proviso read as follows:

“...if further promotion beyond the positions mentioned is envisaged the officers should obtain the required qualification for these positions to which they are to be promoted ...

The memorandum concluded with the words:

“Please be guided accordingly.”

41. The Court understands the proviso to mean that the concerned officers were to be informed of the waivers so that they could obtain the required qualifications if they wished to be promoted beyond their present positions.

42. The Court accepts the Commission's evidence contained in paragraph 6 of the supplemental affidavit of Ms. Edwards Joseph filed on the 30th August, 2007, that it is not the practice to inform officers of a grant of waiver by the Chief Personnel Officer. The Court agrees with Mr. Ramlogan that the principles of fairness dictate that the concerned officer should be informed of the waiver. As a matter of general guidance, the Court wishes to say that in the interests of good public administration and fair play, where a waiver is granted so as to allow the promotion of an officer, that officer should be informed in a timely manner that he is the recipient of a waiver.

C. Regulation 26

43. Regulation 26(1) of the Regulations read as follows:

(1) Where an acting appointment falls to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall -

(a) as a general rule be the senior officer in the Ministry or Department eligible for such acting appointment;

(b) assume and discharge the duties and responsibilities of the office to which he is appointed to act.

44. According to the evidence of Mrs. Edwards Joseph, [paragraph 12 of her affidavit of the 11th June, 2007] the Claimant's appointment to act as Transport

Commissioner was an exception to the general rule in that while he had the seniority he was not eligible. She referred to Exhibit H.M. 1 to the Claimant's first affidavit which showed that when the Claimant was appointed to act, he was informed that his acting appointment gave him no claim to promotion to the office of Transport Commissioner. Regulation 26 contemplates a situation where an officer may be appointed to act, but may not be appointed to the substantive office. There is no breach of the Regulations or of the principles of fairness in that case.

45. Mr. Ramlogan has argued that the Commission has given no evidence that the Claimant was appointed to act in the office of Assistant Transport Commissioner as an exception to the general rule contained in Regulation 26. Accordingly, he has asked the Court to hold that it is irrational for the Commission to maintain that the Claimant did not satisfy the minimum requirements for promotion to the office of Transport Commissioner.

46. Although it is an attractive argument, the Court has observed that the Commission was responding to the Claimant's contention that he had been appointed to act in the position of Transport Commissioner and therefore his acting appointment must have been made on the basis that he was *eligible* to be promoted to the substantive office [paragraph 11 of the Claimant's first affidavit]. In fairness to the Commission, there was no issue raised by the Claimant by affidavit as to whether he was eligible to be appointed to act as Assistant Transport Commissioner.

47. In all the circumstances, therefore, the Court does not agree with Mr. Ramlogan that the Claimant was indeed *eligible* to be considered for the office of Transport Commissioner. The Court finds however, that in the spirit of fairness, the Claimant ought to have been informed that the Commission had departed from the general rule and that he was not eligible for the acting appointment to the post

of Transport Commissioner. The Commission should regard the Court's view as a matter of general guidance.

D. Conclusion

48. In the judgment of the Court, the Commission has failed to consider the equivalent combination of experience and training of the Claimant. Accordingly, its decision not to interview the Claimant without having considered his equivalent combination of experience and training was unfair, irrational and made without regard to a relevant consideration contrary to Judicial Review Act Chapter 7:08.

E. Reliefs

49. The Claimant has sought inter alia an order of certiorari to quash the promotion of Mr. Reuben Cato to the office of Transport Commissioner and an order remitting the issue of the Claimant's application for promotion to the office of Transport Commissioner to the Commission for its reconsideration in accordance with the findings of the Court.

50. Judicial review is a purely discretionary jurisdiction. In the unreported case of **Walkerwell Ltd v Water and Sewerage Authority** HCA CV No. 342 of 2000, Jamadar J. at page 12 of his judgment, referred to the several considerations to be taken into account on the exercise of the court's discretion as to whether to grant certain relief. These included:

- (i) regard for the wider public interest;
- (ii) whether the relief sought would be of any practical value;
- (iii) the impact on third parties; and

(iv) the impact on administration.

51. It is not for the Court to determine whether Mr. Reuben Cato was better qualified or more suitable for promotion to the office. That is clearly the purview of the Commission. Having regard to the above considerations, it is for the Court in its discretion to determine the relief to be granted.

52. In the Privy Council appeal of **Dattatreya Panday v The Judicial and Legal Service Commission** P.C.A. No. 33 of 2007 [from the Court of Appeal of Mauritius], their Lordships considered the appeal of Mr. Panday from the refusal of the Supreme Court of Mauritius to grant him leave to review the decision of the Commission to terminate his appointment as a temporary District Magistrate. At paragraph 19 of the judgment, their Lordships made the following points:

Turning to the facts, some form of report by the Chief Justice presumably preceded the Commission's decision of 2 March 2006. But its contents are unknown, the substance of the relevant matters and issues was never communicated to Mr Panday and he had no opportunity to respond upon it before the decision. The evidence now filed before the Board, which it is unnecessary for the Board to detail here, demonstrates beyond question that there was much that Mr Panday could and would no doubt have said in response, had he been given any opportunity. It is impossible to suggest that, had the matter been fairly conducted, whether under Regulation 9 or in accordance with general common law principles of fairness, the outcome before the Commission would have been inevitable and that Mr Panday's temporary appointment would have been bound to be terminated, and no such suggestion was made by Mr. Boolell.

53. Mr. Ramlogan placed reliance on the above dicta. He also relied on the judgment of Brooke J. in the case of **Regina v Secretary of State for Education ex parte Prior** [1994] I.C.R. 877 and in particular pages 17-18:

It is of course a matter for my discretion whether I should grant relief. I take into account the fact that the governors have, in all probability, corrected for the future the mistakes they made over the appointment of the staff committee and that it is open to the applicant to obtain the redress he seeks by private law action. However, I have not been told in terms what action the governors have now taken, and it seems to me that it would be inappropriate and unfair if I did not quash the Secretary of State's decision of 16 April 1993 and give him the opportunity to reconsider it in the light of this judgment. Of course it is quite likely that he will reach the same decision again, albeit by a different route, but nothing is certain and in my judgment the applicant is entitled to a decision on his complaint which is not seriously flawed as a matter of law.

54. Mr. Ramlogan also referred to the exchange between Counsel for the parties and the Court of Appeal at the hearing of the Motion filed by the appellant heard on the 4th April, 2005, in the matter of **Ganga-Persad Kissoon and the Honourable Prime Minister Patrick Manning and another** [No.42 of 2005] and the question posed to Senior Counsel for the respondents by Hamel-Smith J.A.:

“Do you accept that the court has the jurisdiction to set aside an appointment at the end of the day in its discretion ...?”

[See Transcript of Court of Appeal]

55. There can be no doubt that such a discretion exists. Having considered the approach of the courts above and having regard to the considerations set out by Jamadar J. in **Walkerwell**, however, the Court is not minded to grant an order of certiorari to quash the promotion of Mr. Reuben Cato. The Court has regard to the obvious negative impact that such an order will have on the administration of the Transport Division, the negative impact on Mr. Reuben Cato himself and the

office of Transport Commissioner, and the wider public interest. In my view, such an order will not serve the interest of justice.

56. It has been argued on behalf of the Claimant that the Court should order an enquiry as to damages. Section 8(4) of the Judicial Review Act Chap. 7:08 provides as follows:

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

57. Section 8(4) (supra) essentially codified the law which had been set out by the Court of Appeal in the unreported case of **Josephine Millette v Sherman Mc Nicolls** Civ. Appeal No. 155 of 1995. At pages 7 to 8 of the judgment of the Court delivered by de la Bastide C.J., the Court said:

If one analyses Order 53 rule 7, one notes that it imposes three conditions for the award of damages in judicial review proceedings viz:

- (1) *there must be a claim for damages included in the statement – this is a pleading requirement which was*

satisfied in the instant case as a result of the amendment of the statement.

(2) the claim for damages must arise from the same matter that forms the basis for the application for judicial review. In this case the application was for certiorari to quash the decisions of the magistrate to convict the appellant and impose two fines on her, and to order her imprisonment if she did not pay those fines. Though this is not expressly pleaded, the appellant's claim to damages arose from the imprisonment which she suffered as a result of the decisions to which her application for judicial review related.

(3) If the applicant had brought an action for damages at the time when he made his application for judicial review, he could have been awarded damages. This is the only condition which was not obviously satisfied in this case. There is no doubt that damages can be recovered at common law for wrongful imprisonment or, as it is called in the law of tort, false imprisonment. Such imprisonment may also constitute a breach of a person's constitutional rights under our Constitution and give rise to a right to claim damages in a constitutional motion.

58. The condition set out at section 8(4)(a) has no doubt been satisfied. The Claimant has sought damages for the loss of opportunity to gain promotion to the office of Transport Commissioner in his Amended Application filed on the 19th April, 2007. As to the condition set out at section 8(4)(b), however, I find that there is no basis upon which an award of damages can be made in this case, loss of opportunity to gain promotion not being actionable.

ISSUE (2) DISCIPLINARY COMPLAINT AGAINST MR. REUBEN CATO

59. By memorandum dated the 25th April, 2006, the Claimant as Acting Transport Commissioner wrote to the Permanent Secretary, Ministry of Works and Transport alleging that Mr. Reuben Cato, then Motor Vehicle Inspector I had been involved in activities outside the Civil Service. The activities complained of had been set out in a letter dated the 25th January, 2006, forwarded to Mr. Reuben Cato by the Claimant (Exhibit H.M. 9 to the first affidavit of the Claimant filed on the 4th April, 2007). They included the importation of foreign used motor vehicles into Trinidad and Tobago and the sale and registration of these vehicles. Mr. Cato denied these allegations in his letter in response dated the 4th February, 2006.

60. By this claim, the Claimant seeks inter alia an order of mandamus directing the Commission to appoint an investigator to investigate the above complaints. It was contended on behalf of the Commission that the complaints were properly investigated and that the Director, Human Resource, Ministry of Works and Transport, had “recommended that no disciplinary action was required as there was no evidence that Mr. Cato’s alleged involvement, either directly or indirectly, in the activity of selling foreign used motor vehicles contravened section 137(1) of the Civil Service (Amendment) Regulations, 1996 [paragraph 6 of the affidavit of Arlene McComie filed on the 8th June, 2007].

61. Mr. Martineau has relied on the decision of the Judicial Committee of the Privy Council in the case of **Public Disclosure Commission v Kendal G.L. Isaacs** [1988] 1 W.L.R. 1043 and has argued that there was no duty on the Commission to inform the Claimant of the outcome of his complaint against Mr. Cato. He has also argued that the Claimant has complained not of the inaction of the Commission, but the inaction of the Ministry of Works and Transport. In the

case of **Isaacs**, Lord Bridge delivering the judgment of the Board said at page 1050:

“In any other case the complainant is not liable to be subjected to any pains or penalties or exposed to prosecution. He is not seeking to enforce any private right, so there is no question of depriving him of any remedies or redress to which he may be entitled. He is acting as a public spirited citizen in giving information to the commission to assist them in the performance of their public duty. Any personal or political interest he may have in the outcome is irrelevant. He cannot be ‘told the case made against him and be afforded a fair opportunity of answering it’ because no case is made against him; it is he who makes a case against the declarant. It was submitted for the complaint that he was adversely affected by the publication in the Gazette of the commission’s conclusion that his complaint was not substantiated. Their Lordships cannot accept that this is a matter of sufficient weight to prevail against the countervailing considerations to which attention has already been directed. The language used in the statute distinguishing between complaint which are frivolous, vexatious or groundless on the one hand and complaints which are not substantiated on the other may be open to misunderstanding by uninformed members of the public. But on the true construction of the statute a finding that a complaint has not been substantiated connotes no more than that, when investigated and considered in the light of all available evidence, the complaint was not made out. Such a finding casts no adverse reflection on the complainant.”

62. The Court adopts the reasoning of the Board and agrees with Mr. Martineau’s submissions. I wish to add, that in my view, it would be contrary to good public administration for an officer in the position of the Claimant to be permitted by judicial review to scrutinize the investigation into a disciplinary

complaint lodged by him. Such a course could lead to victimization on the job. The Claimant therefore fails on this issue.

63. The Court wishes to consider briefly two issues raised by the Claimant. Firstly, the Claimant has contended that Mr. Reuben Cato was given preferential protection and treatment during his career by the Ministry of Works and Transport and/or the Commission, in being allowed to pursue and complete a degree in Economics as a full-time student at U.W.I., whilst maintaining his position as a full-time public officer. In my view, the Claimant has failed to show that he was in any way treated unfairly or discriminated against, even if such preference was afforded to Mr. Cato. It would have been a different thing altogether if the Claimant had applied for permission to pursue some form of advanced studies or training and had been refused. At this stage, the Claimant's contention amounts to nothing more than pure speculation.

64. Secondly, the Claimant has alleged by a supplemental affidavit filed on the 13th September, 2007, that since the filing of this claim he has been targeted for victimization. This allegation is irrelevant to the issues for determination before the Court.

COSTS

65. On the 31st October, 2007, the Court fixed a costs budget in the sum of \$140,000.00. Although the Claimant has failed on the second issue and even though the Court will not in its discretion quash the decision of the Commission to appoint Mr. Reuben Cato to the office of Transport Commissioner, the Claimant has succeeded in the very important issue that the equivalent combination of experience and training was not considered by the Commission. In my view, therefore an award of costs in the sum of \$100,000.00 would be fair and appropriate.

ORDER

(a) The Court declares that the Commission's decision not to interview the Claimant without having considered his equivalent combination of experience and training was unfair, irrational and made without due regard to a relevant consideration contrary to the Judicial Review Act Chap. 7:08.

(b) The Commission shall pay to the Claimant costs in the sum of \$100,000.00.

MAUREEN RAJNAUTH-LEE

JUDGE