THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

H.C.A: 203/2004

BETWEEN

SAM MAHARAJ

Applicant

AND

PATRICK AUGUSTUS MERVYN MANNING
Prime Minister and Head of Cabinet
(For an on behalf of himself and all other members of Cabinet)

Respondent

Before the Honourable Mr. Justice Frank Seepersad

Date of Delivery: February 4, 2019

Appearances:

1. Mr. Ramesh Lawrence Maharaj, Ms. V. Maharaj instructed by Ms Badal for the Applicant.

2. Mr. Martin Daly SC, Ms. T. Toolsie instructed by Ms. Ramsook for the Respondent.

DECISION

1. Pursuant to the order of this Court dated February 20, 2018, the issues to be determined are as follows:

    a. Whether on a balance of probabilities, the Applicant/Claimant would have been re-appointed as a Judge of the Industrial Court after his term expired on 17 November 2003;

    Alternatively, whether the Applicant/Claimant is entitled to advance a claim for loss of a chance on the basis that his application was not determined fairly;

    b. Whether the Applicant/Claimant should be awarded damages as constitutional redress under section 14 of the Constitution, Chap 1:01;

    c. If there is an entitlement to damages, what is the quantum of damages to which the Applicant/Claimant is entitled and whether the Applicant/Claimant is entitled to an award of vindicatory damages in the circumstances of the claim.

2. The parties complied with the Court's directions in relation to the filing of written submissions and the Court having considered same did not require oral submissions.

3. The position adopted by the Applicant/Claimant was as follows:

    1) On a balance of probabilities, the Applicant/Claimant would have been re-appointed, given that the only reason given for not re-appointing him was the mistaken suggestion of one member of Cabinet that he was illiterate.

2) That redress pursuant to the constitution should be considered under three heads:

   i. Compensation for the <u>pecuniary loss</u> arising from the failure to treat him fairly, in breach of his constitutional right, to include:

      a. compensatory damages to reflect his loss of earnings in the sum of **$2,558,645.67** for the period February 17 2004 to November 16, 2008;

      b. Alternatively, it was submitted, that because the Applicant/Claimant is "entitled to redress for the obvious wrong to him, he is entitled to compensation for loss of a chance" which should be assessed at **95%** of $2,558,645.67.

      c. the sum of $**1,440,330.00** (**60%** of $2,400,500.00) representing the Applicant's loss of a chance to be re-appointed for a further period from 17 November 2008 to 17 November 2013;

   ii. Damages for distress and inconvenience in the range of **$150,000.00** to **$200,000.00;**

   iii. Vindicatory damages to reflect the Court's sense of outrage at the treatment of the Applicant and to vindicate the constitutional right breached, in the range of **$950,000.00** to **$1,150,000.00.**

4. In its submissions, the Respondent did not dispute that an award of damages is appropriate pursuant to section 14 of the Constitution.

5. The Respondent directed the Court to the dicta of Lord Toulson in **<u>Alleyne and Ors v The Attorney General [2015] UKPC 3</u>** and to the principle that where an injured party has suffered damage, the quantification in question should begin

with consideration of the common law measure of damages. It was submitted that in a wrongful dismissal claim, the normal measure of damages should be that which would have been earned under the contract, less any sums reasonably earned via alternative employment with deductions for the estimated income and tax liability on account of wages received.

6. The Respondent, to its credit, frontally conceded that the evidence before the Court, established that it was more probable than not that the Applicant would have been re-appointed a Judge of the Industrial Court following the expiry of his term on November 17, 2003. It was submitted that the total sum which would have been earned by the Applicant, taking into account statutory deductions and taxation, was the sum of **$2,548,645.67** less the sum of $10,000.00 which the Applicant earned by virtue of a one off consultancy with the National Agricultural Marketing and Development Company.

7. Given that the Applicant's tenure at the Court was extended for a 3-month period post the expiry of his term, until 16 February 2004 and he was paid his salary and allowances for this period, the relevant period under consideration is from **February 2004 to 16 November 2008,** a total of 56 months and 28 days.

8. **The Applicant outlined an entitlement to the sum of $2,558,645.67 for this aforesaid period but from this sum the further sum of $10,000.00 has to be deducted. Accordingly, the sum of $2,548,645.67 should be awarded to the Claimant/Applicant on account of his loss of earnings for the period February 17, 2004 to November 16, 2008.**

9. In the circumstances, given that the Claimant/Applicant is to be awarded damages on account of his loss of earnings, the issue of loss of a chance in relation to his non-appointment for the period February 17, 2004 to November 16, 2008 does not arise.

10. **The Court next addressed the issue as to whether the Applicant is entitled to damages based on pecuniary losses for the period November 17, 2008 to November 17, 2013.**

11. In his submissions, the Applicant argued that he lost the chance to be re-appointed for a further term of five years (i.e. 60 months) from the 17th November 2008 and contended that he would have been entitled to a further sum of **$2,400,500.00** in earnings for this period.

12. It was submitted that he lost a reasonably good chance in relation to such re-appointment as an Industrial Court Judge for the aforesaid period and the Court was asked to assess same at 60%. The Applicant further contended that the evidence demonstrated that having regard to his qualifications, experience and performance as an Industrial Court Judge that his chance of being recommended for the re-appointment for a further period of 5 years was significant.

13. The Respondent, as previously outlined, conceded that as a matter of probability, the Applicant would have been re-appointed for the period February 17, 2004 to November 16, 2008, however in relation to the issue of a further re-appointment, the Respondent argued that the Applicant failed to establish that he had a real or substantial chance of being appointed a Judge of the Industrial Court for the period 17 November 2008 to 16 November 2013 (**"the second 5-year period"**).

14. The Respondent argued that the evidence before the Court demonstrated that the practice with respect to the re-appointment of sitting members of the Industrial Court at the time of the Applicant's tenure was as follows:

a. Members indicated their desire to continue to the President of the Court;

b. It was in the discretion of the President of the Court, after evaluating the performance of the Member concerned, to recommend his/her re-appointment to the Attorney General;

c. It was then in the discretion of the Attorney General to recommend the individual's reappointment to Cabinet;

d. Once recommended by the Attorney General, Cabinet deliberated upon the said recommendation and rendered its decision.

15. The doctrine of loss of chance has a direct link to the issue of causation and the Applicant has to demonstrate that the alleged damage can be attributed to the Respondent's act. Where the Applicant's alleged loss depends on the hypothetical actions of a third party or parties, he is entitled to succeed only, if he is able to show that there was a real or substantial, rather than a speculative chance that the third party would have acted so as to confer the benefit upon him.

16. The assessment as to what may be treated as negligible or speculative is dependent upon the factual matrix of each case. In **Harding Homes (East Street) Ltd & Ors. V Bircham Dyson Bell (a firm) [2015] EWHC 3329 Ch** guidance was provided as to what is negligible as Proudman J applied the test advanced in **Allied Maples v Simmons & Simmons [1995] 1 WLR 1602 CA** so as to determine whether a claim for loss of chance would succeed. The Court also noted the dicta of Morgan J in **Thomas v Albutt [2015] EWHC 2187 Ch at 461** that prospects of 10% or less are regarded as negligible.

17. The Applicant suggested that if the Court was unable to find as a fact that he would have been appointed for a second contract term that he had a very

good chance of being so re-appointed ,as there existed a substantive, as opposed to a negligible or speculative chance of reappointment.

18. The Applicant urged the Court to award a high percentage on account of loss of chance and referred to the case of **Oswald Alleyne and 152 others v The Attorney General of Trinidad and Tobago CV 2018-00447** where at page 52, the learned Judge cited authorities in which loss of chance was assessed at a range of 20% to 60%.

19. In Oswald Alleyne (supra) the Court also considered that the case of **Phillip & Co v Stephen John Whatley [2007] UKPC 28** was useful in calculating the appropriate loss of chance percentage. At page 53 of the judgment, the Court referred to the observations of the Privy Council at paragraphs 2 and 3 in **Phillip & Co v Stephen John Whatley (Supra)** as follows:

> "*The conventional approach to a claim such as the present is not to seek to try the original claim, but to measure its prospects of success and assess damages on a broad percentage basis. The assessment which Dudley J had to undertake was complicated. He had to assess not merely the prospects in law of successful claim against W&F, but also the prospects of W&F satisfying such a claim*."

20. The affidavit of Addison Khan filed on February 27, 2004 provided the Court with an insight into the number of variables which operated at the material time with respect to the appointment process of the Industrial Court and noted the following:

a. Advertisements inviting applications for positions as members of the Court were published in 1996 or 1997 and the year 2000[i] (the Applicant at paragraph 57 of his affidavit filed on April 16, 2018 stated that he applied for membership of the Court pursuant to an advertisement published in 1999), but as at February 2004, there had been no further advertisements for persons to serve as Members of the Court;
b. Of those candidates who applied pursuant to advertisements, interviews and assessments were conducted by a panel appointed by the then Attorney General. However, some appointments to the Court were made without persons being subjected to an interview by the designated panel and the Applicant was appointed as a member of the Court in November 2000 without such an interview;
c. At least 3 former Members of the Court were appointed to the Court without vacancies having been advertised or without consultation between the Attorney General and the President of the Court.

21. It appears that an expression of interest by a sitting member was not the only means which rendered an individual eligible for appointment to the Court, nor was there a limited pool of persons from which candidates were chosen. It remained open to the Applicant, despite the break in his service to the Court, to apply for re-appointment in the year 2008 or at any time thereafter.

22. At paragraph 6 of the affidavit of Noel Inniss filed on July 23, 2018, it was outlined that re-appointments to the Court were effected by decisions of the Cabinet and the President would be advised to make appointments. Any such decision by Cabinet would have been heavily dependent upon a number of precedent factors and upon the exercise of discretion by a number of third parties.

23. **In the absence of statutory provisions governing appointments and re-appointments, it is open to consider relevant factors having regard the prevailing circumstances, in order to arrive at a decision. Neither the Attorney General nor the Cabinet is statutorily obliged to accept a recommendation of the President of the Court. Conversely, the failure of the President of the Court to recommend an individual for re-appointment does not fetter the discretion of the Attorney General or the Cabinet.**

24. **The situation as it exists is untenable and should be reviewed as a matter of urgency. The existing appointment system can engender a perception of bias in relation to appointments to the Court and such a perception can have a fundamental impact upon the Court's independence. Appointments should never be tainted by the perception of partisan affiliations or leanings.**

25. The Supreme Court in this Republic both at the High Court and Appellate Court levels have issued statements concerning appointments and re-appointments to the Industrial Court, some of these are as follows:

    a. A change in the Presidency of the Industrial Court may reflect a change in strategic and management style of the Court, with a consequence that it was important for persons appointed to the Court to be able to contribute to any change in objectives and/or focus by the new President: As per the judgment of Pemberton J (as she then was) in Ruby Thompson-Brodie and Lenore Harris (above) at paragraph [11];

    b. An individual's qualifications and area of expertise is a relevant factor in determining the complement of the Court and the range of skill sets represented at any particular time: As per Moosai JA in Paul Lai v The Attorney General of

Trinidad and Tobago, Civ. App. No. P 129 of 2012 at paragraph [108].

c. A further factor for consideration in determining re-appointment may be the age of the individual: As per Lloyd Elcock v The Attorney General of Trinidad and Tobago, HCA No. 3308 of 2004 at paragraph [17].

26. In his written submissions, the Applicant/Claimant asserted that the Respondent took no steps to reconsider its decision after it became clear in the course of these proceedings that former Minister Achong was mistaken. The Respondent objected to the inclusion of this allegation and pointed out that same was not contained in the affidavit evidence so that the Respondent was not afforded an opportunity to respond to same.

27. It is evident that the composition of the Court may vary from time to time and Section 4(3) (c) of the Industrial Relations Act does not provide for a fixed number of members. Any re-consideration of the decision to reappoint the Claimant after it was clarified during the course of the litigation that the position adopted by Achong was mistaken, would have been dependent upon the Court's composition at the material time and no such information was placed before the Court and the Respondent was not afforded an opportunity to engage the issue.

28. The Claimant/Applicant also invited the Court to consider the impact that unquantified losses such as the loss of the option to purchase a new vehicle with exemptions as well as his loss of subsistence and medical allowances. The Court noted that no evidence was adduced to establish that the Applicant did acquire a new vehicle during the period 2004-2008 and no medical receipts were produced to show that he incurred medical expenses.

29. **It is evident to this Court that there is no settled and/or established practice with respect to the re-appointment and/or appointment of members of the Industrial Court and the Applicant cannot establish otherwise. If the Applicant had served the first 5-year period ending November 2008, he would have been entitled to express his interest in serving a further term as a Member of the Court but the matters outlined in the affidavits of Addison Khan and Noel Innis, as well as the aforementioned judgments, demonstrate that any re-appointment would have been subject to several intervening acts, and there existed no guarantee of re-appointment or even consideration by the Cabinet for re-appointment.**

30. **Having considered the issue, this Court is resolute in its view that the Applicant has failed to establish that he had a real or substantial chance of re-appointment post November 2008 or that he was deprived of anything of value. Accordingly, the Court makes no award to the Applicant on account of pecuniary losses for the period November 17, 2008 to November 17, 2013.**

31. **The next issue which the Court considered was whether damages for distress and inconvenience should be awarded.**

32. It is pellucid that any award of damages made by the Court pursuant to section 14 of the Constitution extends not only to pecuniary loss but also to distress and inconvenience suffered by the Applicant. Any award of damages for non-pecuniary loss however must be fair and reasonable, and the Court must engage in a "sensible assessment". The Court should also approach this task fully cognisant of the fact that such matters are incapable of objective proof or monetary measurement and the Court should consider that the distress or inconvenience sustained has to be considered in the round and not on an itemized basis as was outlined in **Crane v Rees and Ors. (2000) 60 WIR 409 at 417j**.

33. The Applicant's evidence in relation to this head of loss was referenced at paragraphs 85 to 93 of his affidavit filed 16 April 2018. The Court noted that it was claimed that there was an alleged change in the Applicant's relationship with his friends, relatives and members of the public. However, this is not a circumstance which can give rise to damages under the head.

34. In Crane v Rees (supra) the Court increased the award under this head of distress and inconvenience from $75,000.00 to $125,000.00.

35. **The instant case bears some degree of similarity with the factual matrix which operated in the Crane case (supra). The Applicant must have suffered from the uncertainty as to his status when the cabinet refused to respond to his request to be re-appointed and he would have felt an acute sense of embarrassment given that some of his colleagues were re-appointed whilst an air of uncertainty hung over him.**

36. **Having considered all the relevant factors in the round, the Court hereby awards the sum of $125,000.00 for the distress and inconvenience experienced by the Applicant/Claimant.**

37. **Finally, the Court considered the issue as to whether the vindicatory damages should be awarded and if so, in what quantum.**

38. Where the Court identifies an appropriate compensatory award it must ask itself, whether an additional award should be made so as to vindicate the person's constitutional right. The purpose of this additional award is to reflect the sense of public outrage, emphasize the importance of the constitutional right, the gravity of the breach and to deter further breaches.

39. In **Alphie Subiah v The Attorney General of Trinidad and Tobago Privy Council Appeal No. 39 of 2007**, Lord Bingham at paragraph 11 stated as follows:

> "*…Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasized in Merson, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression*."

40. The Court is of the view that the Applicant in this case is entitled to an additional award by way of vindicatory damages and is fortified in its view when regard is had to the following matters:

    a) The allegations of Mr. Achong were extreme and entirely unsubstantiated, particularly in light of a recommendation from the President of the Industrial Court that the Applicant be re-appointed.
    b) The Cabinet took no steps to investigate the claims of Mr. Achong nor was the Applicant given an opportunity to refute the allegations before a decision was made. In addition, there was a failure to inform the Applicant of the decision.

41. In most of the decided cases in this jurisdiction awards under this head have been made in quantum of $80,000.00 or less however, a significantly larger

award of $500,000.00 was approved by Court of Appeal in **Central Broadcasting Services Ltd v The Attorney General of Trinidad and Tobago (Civil Appeal No. 216 of 2009)**. In that case it was determined that the Appellant's right to equality of treatment and to freedom of expression had been infringed by the failure of the government to issue a license to it to establish a Hindu radio station. The Court of Appeal considered that this sum of $500,000.00 was appropriate as an additional award given that the constitutional right infringed had substantial consequences for individual rights as a large segment of the public was deprived of their right to the religious, cultural and political material which could have been disseminated by the Appellant.

42. The purpose of the vindicatory award is not to punish the executive but rather to vindicate the right which has been breached. The quantum of the award is at the discretion of the trial judge and should be contingent upon all of the circumstances of the case. At paragraph 48 of the judgment in Central Broadcasting Services Ltd v The Attorney General of Trinidad and Tobago (supra), Narine JA stated:

> "*Subsequent pronouncements of the Privy Council have emphasized that the purpose of an award of vindicatory damages is not to punish the executive but to vindicate the right. However, a legitimate purpose of such an award is to deter further breaches by the executive. The size of the award is at the discretion of the trial judge. It will depend on the nature of the particular infringement and the circumstance of the case. See Tamara Merson v Drexel Cartwright and the Attorney General of the Bahamas (2005) UKPC 38 at paragraph 18, and Angela Inniss v Attorney General of Saint Christopher and Nevis (2008) UKPC 42 at paragraph 27.*"

43. At Paragraph 49 of the said judgment Narine JA went on to say as follows:

> "*The discretion of the court to award damages or to fashion an appropriate remedy to suit the circumstances of the case is not fettered. The importance of the discretion was emphasized by Sharma JA (as he then was) in the case of Ramnarine Jorsingh v Attorney General (1997) 52 WIR 501 at 512, where he was construing the language of section 14 (2) of the Constitution.*
>
> > *"The breath of language of subsection (2) is clear. The court is mandated to do whatever it thinks appropriate for the purpose of enforcing or securing the enforcement of any of the provisions dealing with the fundamental rights. There is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well, if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender and guarantor of the constitutional rights, would be guilty of the most serious betrayal*."

44. The learned Justice of Appeal at paragraph 58 of the judgment described the task of the trial Judge in determining the quantum of vindicatory damages and stated as follows:

> "*The first task of the trial judge is to consider the importance of the right in question. The trial judge is first required to make a value judgment. He must by his award vindicate the importance of the constitutional right. He must also consider the gravity of the breach, and the need to deter further breaches of the right. He must consider the particular circumstances of the case, including the conduct of the executive, bearing in mind that the purpose of the award is not to punish the executive by its award, but to deter it from committing similar breaches.*"

45. **This Court is of the view that the infringement of the Applicant's right was significant and was of undeniable importance. The issues which arose in this matter directly impacted upon the method of appointment to the Court as well as the integrity and independence of the Industrial Court. These issues have implications for all citizens. The Board of the Privy Council honed in upon the gravity and seriousness of the breach and at paragraph 44 of its judgment said as follows:**

> **"*Where a serving member of the judiciary is not afforded the chance to defend his reputation against such allegations, the integrity and independence of the judiciary are obviously implicated.*"**

46. **This Court is of the view that the instant matter involved much more than the infringement of an individual's right and had fundamental implications for all members of the Industrial Court, the public and members of all tribunals and courts of superior record.**

47. **At the present time, the Executive Arm of State is vested with the responsibility to advise the President as to the persons who should be**

appointed as members of the Industrial Court. Until there is a change in the method of appointment to the said Court, a strong, stern and singular message has to be sounded so as to deter further breaches and to signal to the Cabinet that there exists the heighted need for the adoption of a careful and considered approach in relation to such appointments. Decisions in relation to the appointments to the Court must be effected in circumstances which are devoid of bias and/or arbitrary, irrational and/or partisan considerations and all decisions should reflect the principles of procedural propriety, fairness and objectivity.

48. This Court is mindful that there is the need for consistency and proportionality but rejected the Respondent's position that a judge of the Industrial Court ought to be equated with a Prison Officer and that it should adopt the approach which was taken in **Khimrajh Bissessar v The Attorney General of Trinidad and Tobago (HCA) No. 490 of 1988.**

49. **The Court is of the view that the role and importance of the Industrial Court is paramount, especially given the current economic challenges and the recent developments and reviews which have been effected in relation to State enterprises. There is the need to emphasize and reinforce that issues which touch and concern the Court have to be treated with care and it has to be understood that appointments to Court should engender in the public a feeling that the Court is properly insulated against political bias or any other irrelevant considerations.**

50. **The Court considered the violation which occurred in this case and the resulting impact upon the independence of the Industrial Court and viewed same as a circumstance of greater significance than that which occurred in the Central Broadcasting Services Ltd (supra) matter. In that matter, the**

violation impacted upon only a sector of the public, whereas in this case the need for caution in relation to appointments and the protection of the Court's independence, are matters which affect all citizens of this Republic. Consequently, the award which must be made in this case should exceed the quantum of the award made in Central Broadcasting (Supra).

51. **Accordingly, and with the objective intent of deterring any future breaches in relation to appointments and re-appointments to the Industrial Court, this Court hereby awards the sum of $600,000.00 as vindicatory damages.**

52. **For the reasons which have been outlined the order of this Court is as follows:**

    I. The sum of $2,548,645.47 on account of loss of earnings for the period November 17, 2004 to November 16, 2008.

    II. The sum of $125,000.00 for the distress and inconvenience suffered by the Applicant.

    III. The sum of $600,000.00 as vindicatory damages being an additional award to deter the committing of similar breaches as that which occurred in this case.

53. The parties shall be heard on the issue of costs.

FRANK SEEPERSAD
JUDGE