

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2015-03886**

**Between**

**SHELDON DAVID**

**Claimant**

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**1<sup>st</sup> Defendant**

**THE COMMISSIONER OF POLICE**

**2<sup>nd</sup> Defendant**

**Before The Honourable Mr. Justice Seepersad**

Appearances:

1. Mr. I. Ali for the Claimant
2. Ms. C. Findley instructed by Ms. S. Maharaj for the Defendants

**Date of delivery: 14<sup>th</sup> March, 2016**

## DECISION

1. Before the Court for its determination is the Defendant's notice of application filed on the 14<sup>th</sup> January, 2016 by virtue of which the Defendant sought the following reliefs:
  - a. That the amended fixed date claim form filed in 23<sup>rd</sup> November, 2015 be struck out against the 2<sup>nd</sup> Defendant pursuant to Parts 26.2(1)(b) and 19.2(4) of the Civil Proceedings Rules 1998 as amended;
  - b. That the amended fixed date claim form filed on 23<sup>rd</sup> November, 2015 be struck out in its entirety pursuant to part 26.2(1)(b) of the Civil Proceedings Rules 1998 as amended as constituting an abuse of process;
  - c. That the Claimant's claim be dismissed pursuant to Part 26.2(1)(k) of the Civil Proceedings Rules 1998 as amended; and
  - d. That the Claimant do pay to the Defendants the costs of this application, to be assessed in default of agreement.
  
2. By his amended fixed date claim form filed 23<sup>rd</sup> November, 2015 the Claimant sought the following reliefs:
  - i. A declaration that the Defendants have contravened the Claimant's rights to the enjoyment of property and the right not be deprived thereof except by due process of law, the right of the individual to equality before the law and the protection of law and a right not to deprive a person of the right to a fair hearing in accordance with the principals of fundamental justice for the determination of his rights and obligations as guaranteed by Sections 4 (a), 4 (b) and 5(2) (e) and 5 (2) (h) respectively of the Constitution of Trinidad and Tobago, by failing to hold a fair hearing within reasonable time for incidents involving the Claimant that took place on or about 5<sup>th</sup> March, 2005.
  - ii. A declaration that the decision of the Defendants to prefer four disciplinary charges against the Claimant out of incidents that occurred on the 5<sup>th</sup> March, 2005, is in contravention of his constitutional right under Sections 4 (b) and 4 (d) to equality

- before the law and the protection of law and to be treated equally/fairly and/or not to be discriminated against and/or the decision is illegal, null and void and/or ultra vires and/or made in excess and/or without jurisdiction.
- iii. A declaration that the Defendants and/or refused and/or neglected to follow the procedures stipulated in the Police Service Commission Regulations prior to and subsequent to deciding to exercise disciplinary control over the Claimant and thereby acted unconstitutionally, illegally and/or ultra vires and/or in excess and/or without jurisdiction.
  - iv. A declaration that the purported hearing of the disciplinary charges against the Claimant by the Disciplinary Tribunal was unconstitutional, illegal, null and void.
  - v. A declaration that the decision of the Defendants to bypass and/or not consider the Claimant for acting appointments for the rank of Inspector whilst he had disciplinary proceedings on-going, is in contravention of his constitutional rights under Sections 4 (b) and (d) to equality before the law and the protection of the law and to be treated equally/fairly and/or not to be discriminated against and/or the decision was illegal, null and void and/or ultra vires and/or made in excess and/or without jurisdiction and/or in the alternative.
  - vi. A declaration that the decision to bypass and/or not consider the Claimant for acting appointments for the rank of Inspector whilst he had disciplinary proceedings on going is in contravention of his constitutional rights under Sections 5(2) (f) (1) to be presumed innocent until proven guilty according to law;
  - vii. A declaration that the failure of the Defendants upon the dismissal of the disciplinary charges against the Claimant, to retroactively give the Claimant the acting appointments to the rank of Inspector and/or the remuneration/entitlements of the acting appointments to the rank of Inspector and/or the remuneration/entitlements of the acting appointments is in contravention of his constitutional rights under Sections 4(a), 4 9b) and 4 (d) to the enjoyment of property and the right not to be deprived thereof except by due process of law, to equality before the law and the protection of

the law and to be treated equally/fairly and/or not to be discriminated against and/or the decision was illegal, null and void and/or ultra vires and/or made in excess and/or without jurisdiction and/or in the alternative;

- viii. An order requiring the Defendants their servants or agents to pay the claimant all sums representing salary, allowance, accumulated action leave, gratuity and pension to which he is entitled.
- ix. An order for monetary compensation to be assessed in favour of the Claimant for the loss and damage which he has suffered as a direct result of the contravention of his rights under the said Constitution.
- x. Damages including aggravated and/or exemplary damages.
- xi. Such further and/or other reliefs, order or directions as the Court may in the exercise of its jurisdiction under Section 14 of the Constitution and under its inherent jurisdiction consider appropriate for the purpose of enforcing and protecting or securing the enforcement and protection of the Claimant's said rights.
- xii. Costs.

3. **The first issue to be considered is whether or not the 2<sup>nd</sup> named Defendant is a proper party to the action.**

4. The 1<sup>st</sup> Defendant directed the Court's attention to Section 19(2) of the State Liability and Proceedings Act Chp. 8:02 which provides as follows:

*“Subject to this Act and to any other written law proceedings against the State shall be instituted against the Attorney General.”*

5. The Claimant directed the Court to Sections 123 A and Section 6 of the Constitution of the Republic of Trinidad and Tobago and of the Constitution Amendment Act 2006 respectively. Section 123 A provides as follows:

“123A. (1) Subject to section 123(1), the Commissioner of Police Shall have the complete power to manage the Police Service and is required to ensure that the

human, financial and material resources available to the Service are used in an efficient and effective manner.

(2) The Commissioner of Police shall have the power to:-

(a) appoint person to hold or act in an office in the Police Service, other than an officer referred to in section 123(1)(a), including the power to make appointments on promotion and to confirm appointments;

(b) transfer any police officer; and

(c) remove from office and exercise disciplinary control over police officers, other than an officer referred to in section 123(1)(a).....

(4) In the performance of his functions under this section the Commissioner of Police shall act in accordance with the Police Service Act and the Regulations made thereunder.”

6. Although the allegations levied by the Claimant directly relate to the manner in which the 2<sup>nd</sup> Defendant exercised his constitutional powers, the proper party to this action is the 1<sup>st</sup> named Defendant pursuant to Section 19(2) of the State Liability and Proceedings Act. No useful purpose can be served by joining the 2<sup>nd</sup> Defendant as a party and the inclusion of the 2<sup>nd</sup> Defendant results in a circumstance whereby the 2<sup>nd</sup> Defendant has to incur unnecessary legal costs to defend the Claimant’s claim. In the circumstances the Court declares that the 2<sup>nd</sup> Defendant is not a proper party to this instant claim and the Court orders that the action as instituted against the 2<sup>nd</sup> Defendant is hereby struck out.

**7. The Court next considered the issue as to whether any other parallel remedy is/was available to the Claimant.**

8. The law is settled in this area and where parallel or alternative remedies are available, constitutional relief should only be sought if there is the existence of exceptional circumstances. In the case of Antonio Webster v. The Attorney General (2011)UKPC 22, the Board of the Privy Council examined the issue as to what amounts to an exceptional circumstance and found that the conduct of the police in that case was ‘quite

appalling' and amounted to a shameful misuse of the coercive powers that were vested in a police officer.

9. No standard test can be outlined so as to determine what circumstances may be viewed as being exceptional and the determination is inherently case and fact specific. A good indicator may however be the existence of circumstances that suggest that the abuse of power was extreme or excessive, or outrageous, or contumelious and/or appalling.
10. After the Appeal Tribunal dismissed the charges against the Claimant, the instant action was instituted. The reliefs sought at items ii, iii and iv of the claim form were in fact dealt with by the said tribunal and it is therefore not necessary for the Court to revisit the issues determined by the tribunal. Accordingly the declaratory reliefs prayed for at items ii, iii and iv of the claim form are struck out.
11. In its decision, The Appeal Tribunal found that the Commissioner of Police failed to substantially comply with the time limits as prescribed under the regulations and accordingly found that the charges levied against the Claimant had to be dismissed. Under the Constitution, the Commissioner is vested with substantial power and any failure by the office holder to lawfully exercise the discretion vested in him or any failure to comply with all the relevant regulations in the course of his decision making is of national importance, since the organization which he heads is a vital part of this nation's national security structure and is vested with the responsibility for the maintenance of peace and the rule of law. As a result, the improper and/or unlawful exercise of the constitutionally vested power, by the Commissioner of Police, can have a direct impact on the public's confidence in the police service.
12. Given the nature of the rights allegedly contravened, this Court is of the view that in the circumstances the issues raised are serious and significant enough to be categorized as being 'exceptional'.
13. The Claimant alleges that as a result of the unauthorized actions of the Commissioner his rights to the enjoyment of property, the right to equality before the law and the right to a fair trial were all contravened, these alleged contraventions are serious and can impact on

the operation and functions of the Police Service as a body. The Court is therefore of the view that the issues raised on the affidavit evidence before the Court are so fundamental that no other avenue of legal address may adequately deal with the issues raised.

14. The Court is also of the view that it would have been premature for the Claimant to have initiated judicial review proceedings to prevent the disciplinary tribunal hearings. Section 9 of the Judicial Review Act Chapter 7:08 provides as follows:

*“The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances.”*

15. Section 132, (1) of the Constitution of the Republic of Trinidad and Tobago and notwithstanding the provisions of the Constitution Amendment Act 2006 with respect to the powers of the Commissioner of Police, gave the Claimant the right to Appeal as follows:

*“An appeal shall lie to the Appeal Board from any decision of a Service Commission, or of any person to whom the powers of the Commission have been delegated, as a result of disciplinary proceedings brought against a public officer.”*

16. In light of the provisions of the Judicial Review Act and Section 132 of the Constitution of the Republic of Trinidad and Tobago the Claimant acted reasonably and within the ambit of the statutory provisions that related to the manner in which he could review any deficiencies, failures to follow stipulated procedures and/or other failures that may have been committed with respect to the disciplinary process.
17. The appeal to the Police Service Commission Appeal Tribunal was effectively the first line of attack that was open to the Claimant to review the decision of the Commissioner.
18. When the Claimant exercised his right to Appeal the decision of the Commissioner, the determination of the appeal established and identified that the Commissioner had acted

in a manner that was deficient in that he failed to follow stipulated procedures. As a result of these failures there may have been a potential breach of Claimant's constitutional rights. In the circumstances the only course of action that could have been instituted thereafter with respect to the Commissioner's actions was to institute a claim for constitutional redress.

19. The relief obtained by the Claimant through his appeal to the Police Service Commission Appeal Tribunal was to quash the ruling given in his disciplinary matter and no other relief was given and/or was capable of being given, that would have afforded the Claimant the remedies that are available by virtue of the instant claim.
20. In **CV 2010-04494 P.C. Curtis Applewhite v. The Police Service Commission, Basdeo Mulchan, Lloyd Crosby**, the Court had to deal with a case that involved an application for judicial review in disciplinary proceedings and the Court ruled on the issue as to whether or not an alternative remedy existed by way of appeal and also considered the issue as to whether or not the Applicant's action was premature.
21. The Honourable Madame Justice Dean Armorner at pages 10 to 11 of her judgment stated as follows:

*“Before considering the issue of prematurity, it is necessary in my view to address the possibility of an adequate alternative remedy by way of appeal to the Public Service Appeal Board. In my view, the possibility of an appeal to the Public Services Appeal Board does not arise on these facts. Prior to 2006, an aggrieved police officer was entitled to appeal to the Public Service Appeal Board from a decision of the Police Service Commission. There was no corresponding right of appeal from a finding of a disciplinary tribunal. It was therefore never possible for an aggrieved officer to appeal to the Public Service Appeal Board from a decision of a disciplinary Tribunal. Since the year 2006 however, with the enactment of the Constitution Amendment Act 2006 it is no longer possible to lodge an appeal even in respect of a decision of the Police Service Commission. See the decision of the Honourable Justice Boodoosingh in **CV 2008/04646***



*Mohammed v. Police Service Commission 15.* Accordingly it is my view that there is no possibility of appeal to the Public Service Appeal Board.

22. At paragraph 13 the learned Judge stated that:

*“Moreover, even if there were a finding by the disciplinary tribunal as to the guilt of the Claimant, the issue of punishment is determined not by the tribunal but by the Police Service Commission. It would still open to the Police Service Commission to decide against the imposition of punishment. Should proceedings be determined against the Applicant he may at that stage probably seek judicial review. In my view, there are no exceptional circumstances in this case. In my view the application for judicial review is premature and ought to be and is hereby dismissed.”*

23. Given the particular of facts in this case, the claimant would have acted prematurely to bring judicial review proceedings prior to a determination having been made against him and upon a determination being made against him he did as he ought to have done and he filed an Appeal to the Police Service Commission Appeal Tribunal.
24. The Claimant’s claims relative to his promotion within the Police Service and him having been bypassed for promotion whilst the disciplinary proceedings were ongoing is directly linked to the legitimacy of the disciplinary proceedings and as a consequence of the Police Service Commission Appeal Tribunal’s decision it became open to him to advance a claim that he should be entitled to retroactive appointment which was not afforded to him in breach of his constitutional rights.
25. In the circumstances and having considered the matters stated by the Claimant, this claim cannot be viewed as a device to circumvent more appropriate proceedings.
26. **The final issue that the Court had to consider was whether or not the Court should permit this claim to be proceeded with having regard to the Claimant’s delay in instituting this action.**

27. In **Felix Durity v. The Attorney General of Trinidad and Tobago (2003) 1 A.C. 405** at paragraph 35 on page 417, Lord Nicholls of Birkenhead asserted:

*“When a court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or disentitle the Claimant to relief, it would usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the Court under its ordinary, non-constitutional jurisdiction. If it was and if such an application was not made and would not be out of time, then, failing a cogent explanation the Court may readily conclude that the Claimant’s constitutional motion is a misuse of the Court’s constitutional jurisdiction.”*

28. In **Farouke Warris v. The Comptroller of Customs and Excise and The Attorney General of Trinidad and Tobago HCA No. 2354 of 1990**, Sealy J at page 11 stated:

*“An applicant who has slept on his rights should not come to the court to allege a breach of constitutional rights...section 14 of the Constitution exists and demands urgent application, by an aggrieved person.”*

29. In this matter the decision of the Tribunal was delivered on the 14<sup>th</sup> November, 2011 and the instant claim was instituted on the 23<sup>rd</sup> November, 2015. Upon the successful determination of his appeal the Claimant was empowered to mount a claim that his constitutional rights had been infringed, the Claimant, however, neglected to advance his claim for a significant time period. While there is no statutorily defined limitation period in relation to claims under Sec. 14 of the Constitution, assertion of rights with expedition must be the mantra of any litigant who wishes to invoke the Court’s jurisdiction in relation to prayers for constitutional relief.

30. In **Tilokchand Motichand & Ors. V. H.B. Munshi and Anor (1969) 2 SCR** Hidayatulla CJ of India, Supreme Court at pages 831 letter D and page 832 letter B said as follows:

*“The question is whether this Court will inquire into belated and stale claims or take not of evidence of neglect of one’s own rights for a long time? I am of the opinion that it not only would but also that it should. The party claiming Fundamental Rights must move the Court before other rights come into existence.”*

*“If a short period of limitation is prescribed the Fundamental Right might well be frustrated. Prescribing too long a period might enable stale claims to be made to the detriment of other rights which might emerge.*

*If then there is no period prescribed what is the standard for this Court to follow? I should say that utmost expedition is the sine qua non for such claims. The party aggrieved must move the Court at the earliest possible time and explain satisfactorily all semblance of delay. I am not indicating any period which may be regarded as the ultimate limit of action for that would be taking upon myself legislative functions...I will only say that each case will have to be considered on its own facts. Where there is appearance of avoidable delay and this delay affects the merits of the claim, this Court will invoke the extraordinary jurisdiction.”*

31. In the instant case the Claimant stated that it was only after the Appeal Tribunal’s decision, he became aware of the possible Constitutional breaches and that he attempted to seek redress by writing to the Second Defendant. He also stated that he sought legal advice and verily believed that he had four years within which to bring his constitutional motion. He further stated that he was not in a financial position, prior to November, 2015, to retain attorneys to institute his claim.
32. In the supplemental affidavit filed on the 25<sup>th</sup> November, 2015, the Claimant further stated that he was not given notice during the disciplinary hearing that he had any other legal recourse and he explained that his wife was unemployed; that he has 3 children of school age and that he is subjected to several financial commitments that curtailed his ability to afford the legal costs that had to be met so as to institute a claim for constitutional relief.

33. The Claimant's assertion that he was unaware of the legal time constraints that applied cannot be viewed as a proper explanation for his delay and although the Claimant outlined the financial constraints under which he operates, there is no evidence that he sought any assistance from Leal Aid and Advisory Authority. Further the information contained in the affidavit does not appear to be so unusual or so exceptional so as to entitle him to benefit from an indulgence by the Court. The circumstances outlined by the Claimant appear to accord with the reality that faces many citizens in this Republic. The Court also noted that notwithstanding the Claimant's assertions as to financial constraints he adduced no evidence as to the quantum of his remuneration and the Court noted that the Claimant did in fact have legal representation before the Appeal Tribunal.

34. The Court finds that the delay that was occasioned prior to the institution of this claim cannot be condoned and the Court is of the view that it cannot be said that the Claimant acted with expedition and due dispatch. The grant or refusal of prayers for constitutional relief is a matter which must be addressed by the Court with a sense of urgency and those who invoke the Court's jurisdiction must do so with vigilance and speed. In this case the Claimant has not discharged the obligation that rested upon his shoulders to effectively and adequately explain why there was over a four year period of delay. In the circumstances this Court finds that the unexplained delay in this case is so significant that it renders the instant proceedings as an abuse of the Court's process and disentitles the Claimant to the reliefs sought.

35. Accordingly this claim cannot be proceeded with and the Claimant's fixed date claim form is hereby struck out. The parties shall be heard on the issue of costs.

.....

**FRANK SEEPERSAD**

**JUDGE**