REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. S1591 of 2004

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

AND IN THE MATTER OF AN APPLICATION FOR REDRESS BY THE APPLICANT PURSUANT TO SECTION 14 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO FOR THE CONTRAVENTION OF SECTIONS 4 AND 5 OF THE SAID CONSTITUTION IN RELATION TO THE APPLICANT

AND IN THE MATTER OF THE DECISION/S AND/OR ACTION/S AND/OR CONDUCT OF THE PORT AUTHORITY OF TRINIDAD AND TOBAGO IN NEGLECTING AND/OR REFUSING TO IMPLEMENT THE DECISION MADE BY THE PORT AUTHORITY TO REGARD THE APPLICANT AS A REGISTERED WORKER

BETWEEN

DUKARAN DHABAN

APPLICANT

AND

THE PORT AUTHORITY OF TRINIDAD AND TOBAGO

RESPONDENT

BEFORE THE HONOURABLE MADAME JUSTICE AMRIKA TIWARY-REDDY

Appearances

Mr. R. L. Maharaj SC leading Ms. Vijaya Maharaj for the Applicant

Mr. Vasheist V. Kokaram and Ms. Rhea Bholai for the Respondent

JUDGMENT

I. INTRODUCTION

1. This is a Motion filed on 26.8.04 for redress pursuant to section 14 of the Constitution of the Republic of Trinidad and Tobago for infringement of the Applicant's constitutional rights. The Applicant sought the following relief:

    1. A declaration that the Applicant was denied and is being denied the right to equality of treatment from the Respondent as guaranteed to him by section 4(d) of the Constitution of the Republic of Trinidad and Tobago (the Constitution) as a result of the neglect and/or failure and/or refusal of the Respondent to reinstate the Applicant to the position of a daily paid Permanent Worker and to regard him as commencing employment in 1960.

    2. A declaration that the Applicant was denied and is being denied the right to equality of treatment from the Respondent as guaranteed to him by Section 4(d) of the Constitution as a result of the neglect and/or failure and/or refusal of the Respondent to promote the Applicant from the position of Port Follower to the position of a Daily Paid Permanent Worker.

    3. An order that the Respondent pay to the Applicant such monetary compensation including aggravated and/or punitive damages for the infringement of the Applicant's fundamental rights guaranteed to him by the Constitution, to be assessed by a Judge in Chambers.

    4. Further and other relief.

    5. Costs.

2. The grounds upon which the Applicant sought to rely are that:

1. The Respondent failed to treat the Applicant like other similarly circumstanced persons by refusing to regard the Applicant's commencement year of employment as being the year in which he was first employed by the Respondent, that is, 1960.

2. The Respondent failed to promote the Applicant to the status of a daily-paid permanent employee even though he was entitled to be promoted based on his seniority.

3. The Respondent denied the Applicant his income and other financial benefits attached to the position of a Daily Paid Permanent Worker.

4. The Respondent acted with mala fides and its action was designed to hurt the Applicant.

5. The conduct of the Respondent constituted a deliberate and intentional exercise of its power to act contrary to law.

6. The action of the Respondent constituted irresponsible and reckless action with a total disregard of the rights and interests of the Applicant.

3. The Respondent is a body corporate established under the **Port Authority Act Chapter 51:01 (the Act)** of the laws of Trinidad and Tobago for the principal purpose of operating port services at the ports of Port of Spain and Scarborough. The functions of the Respondent as set out in **sections 8 and 9 of the Act** include but are not limited to the development of harbours and the operation of port services in Trinidad and Tobago. By **section 15 of the Act** the President gives to the Respondent special or general directions in the exercise of its powers under the Act.

4. By Notice of Motion filed on 28.10.05 the Respondent moved the Court for an Order that the Applicant's Motion be struck out as an abuse of process on the grounds that:

    a) The proceedings are in respect of the private contractual relationship between the Applicant and the Respondent and the Applicant's alleged rights and/or entitlements, if any, arise in private law and not in public law and/or that the challenged acts or matters complained of against the Respondent do not constitute "state action".

    b) The Applicant has an effective statutory remedy to obtain relief where disputes have arisen in relation to terms and conditions of employment, by invoking the trade disputes procedure under the **Industrial Relations Act Chap 88:01** and the jurisdiction of the Industrial Court.

By consent of the parties it was agreed that the Respondent's preliminary application would be tried and determined at the trial of the substantive issues raised by the Applicant.

II. EVIDENCE

5. a) The Applicant's affidavit in support of the Notice of Motion filed on 28.8.04.
   b) The Affidavit of Elva Stewart-Toussaint on behalf of the Respondent filed on 28.10.05.
   c) The Applicant's affidavit filed on 13.1.06.
   d) The Affidavit of Carlyle Peters on behalf of the Respondent filed on 30.11.06.
   e) The Affidavit of the Applicant in response to that at d) above, filed on 26.2.07.

All evidence in this matter was taken *de bene esse* and there was no cross-examination of any of the deponents.

III. <u>UNDISPUTED FACTS</u>

6. The following facts were un-disputed:

    a) The Applicant commenced employment with the Respondent as a temporary worker in 1960. He was assigned the number 7458 as a Longshoreman.

    b) Between the years 1960 to 1964 the Applicant was registered as a Labourer in the Harbour Engineer Division and assigned the number 3276.

    c) A Registered Worker at the Respondent is a Permanent Worker.

    d) The Applicant was convicted of the offence of wounding with intent in 1964 and sentenced to imprisonment for five years. He was released from prison in 1967.

IV. <u>FACTUAL MATRIX</u>

7. The Applicant commenced his employment as a temporary worker (Longshoreman) with the Respondent in 1960. Between 1960 to 1964 in the course of his employment with the Respondent, he was transferred to the Harbour Engineer Division and promoted to the position of a Registered Worker. A Registered Worker with the Respondent is a Permanent Worker. As a result of his status as a Permanent Worker (Registered Worker) the Applicant was entitled to have guaranteed work for five (5) days a week and if he worked during the weekends he would have been paid double time. In addition, if the

Applicant contributed to the Respondent's pension plan for at least ten years he would be eligible for a monthly pension and a gratuity.

8. The Applicant served his sentence of imprisonment from 1964 to 1969. Upon his release from prison on 14.4.69 the Applicant reported for duty at the port of Port of Spain but was not permitted to resume his employment. The Applicant continued to make representations to be permitted to resume duties and eventually in 1980, some 11 years later, he got an audience with the then line Minister and was allowed to resume duties. This resumption was bitter sweet in that the Applicant was not re-instated as a Permanent Worker (Registered Worker) but instead was re-employed and treated as a Daily Paid Temporary Worker, with his commencement year of service being adjusted from 1960 to 1980.

9. The Applicant persevered with his objections to being treated as a Temporary Worker and in the process met with the Respondent's Divisional Manager of Human Resources, Mr. Yates and the Respondent's Deputy Manager, Mr. Lucas. Arising out of this meeting Yates wrote to Mr. Beharry, the Divisional Manager of the Respondent's Operations by letter dated 30.4.92 under the caption, "*Registration and Confirmation of Dookeran Dhaban #8974 as Lift Operator*" as follows:

> "*After reviewing the matter with the Deputy General Manager, you are hereby informed that Mr. D. Dhaban temporary lift Operator is now confirmed in his position from May 11, 1992.*"

However the above decision was never implemented even in the face of several oral requests and representations made by the Applicant.

10. At the Applicant's request Yates wrote to the Labour Officer by letter dated 18.3.94 inquiring why steps had not been taken to make the Applicant's employment permanent as had been decided. The Labour Officer responded by letter dated 22.11.96 in which he said *inter alia* the following:

> "*I am not in a position to say why Mr. Dhaban was not re-instated … what I would mention is that if Mr. Dhaban was re-instated according to Folio No. 77 he would have been sent home in 1993 due to the down sizing operations. May I point out that during the period 1969-1980 Mr. Dhaban was residing in England … To re-instate Mr. Dhaban at this point in time would automatically make him senior to all Port Followers who have been employed from as early as 1971 a position which would not be accepted by the Union.*"

11. In or about 1993 the Applicant was made a Port Follower, that is, a temporary worker who is entitled to first preference for employment after the list of workers in the Daily Paid Permanent Roll is exhausted. On 2.7.03, forty-six (46) Port Followers were approved and appointed as Permanent Workers by the Respondent. The Applicant who by this time had ten effective years of service in this position, was not named in the list of promoted workers. On 7.10.04, the Applicant, having been declared medically unfit, retired from work at the Respondent.

12. A Port Follower (Temporary Worker) is entitled to:

- Second preference for overtime to the registered worker;
- No pension;
- No guarantee for work for five (5) days a week; and
- Gratuity based on effective years of service.

A Daily Paid Permanent Worker is entitled to:

- First preference for overtime;
- A monthly pension;
- Guaranteed work for five (5) days a week; and
- Gratuity based on continuous years service

13. A Temporary Worker earns approximately $1,500.00 a week less than a Permanent Worker. If the Applicant had been regarded as a Permanent Worker he would also be entitled to an increased pension upon his retirement. By Notice of Motion filed on 26.8.04, the Applicant initiated this action to resolve the disputes over the effective date of his employment and his entitlement to certain sums of money on retirement.

V. <u>ISSUES</u>

14. 1. Whether the proceedings herein should be struck out as an abuse of process on the grounds that the proceedings are in respect of a private contractual relationship and/or the Applicant's rights and entitlements arise in private and not public law?

    2. Whether the Applicant's constitutional right to equality of treatment as guaranteed by section 4(d) of the Constitution of the Republic of Trinidad and Tobago was violated by the Respondent when it:

        a. Neglected to re-instate and re-employ him as a Daily Paid Permanent Worker and to regard him as beginning employment in 1960?

        b. Failed to promote the Applicant to the position of a Daily Paid Worker.

VI. <u>ANALYSIS</u>

15. The Applicant's motion is grounded in **Section 14 of the Constitution** which provides:

> "*14(1) For the removal of doubt it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available,*

> *that person may apply to the High Court for redress by way of originating motion.*
>
> *(2) The High Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1)*"

And **Section 4(d) of the Constitution** enshrines the following fundamental right:

> "*(d) The right of the individual to equality of treatment from any public authority in the exercise of any functions.*"

16. For the Applicant it was submitted that a breach of the right enshrined in section 4(d) and the resultant remedy provided therefor in section 14 arise in public law. In **Maharaj v AG (No. 2) (1979) AC 385** Lord Diplock stated at page 396G:

> "*… the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. This chapter is concerned with public law, not private law...*"

17. Counsel for the Respondent contended that the Respondent is not a part of the Executive arm of the State as it performs "other or non-governmental functions" and so the appropriate remedies would lie outside **Section 14**. Counsel submitted further, that the Respondent was not a "*public authority*" and in any event, the acts and functions under challenge are not public law functions. It follows therefore this Court must first determine whether the Respondent is a public authority within the meaning of the Constitution and whether the actions taken on the part of the Respondent are in fact public acts or functions.

18. In HCA No. 4789 of 1982 **Rambachan v Trinidad and Tobago Television and the AG** Deyalsingh J considered existing contextual definitions of public authority and sought to confirm the expansion of the concept. This was the learned Judge's reasoning:

> "*It is clear that [Lord Diplock in Maharaj (No. 2) 1977 1 ALLER 411] was now including entities not caught within the obvious and traditional state departments. He no doubt had in mind the fact that within the last thirty or so years there has been a complete transformation in the functions of the sovereign state. They are going beyond the traditional functions – to maintain law and order; to conduct foreign affairs; to see to the defence of the country and have extended their activities to the commercial and other fields. And Lord Diplock, it seems to me, considered that the state should not escape the fundamental rights not by virtue only of the fact that one of the traditional departments of state was not involved.*"

In this regard, in **Thornhill v Attorney General of Trinidad and Tobago (1981) AC 61** the Privy Council clarified what Lord Diplock meant in ***Maharaj (No. 2 above)*** and stated that the expression public authority embraced:

> "*local as well as central authorities and included any individual officer who exercised executive functions of a public nature*."

19. The Respondent is part of the executive arm of the state and exercises coercive powers. A person who commits any offence under the provisions of the **Act** may be arrested without warrant by any "*authorised employee or by a constable*". The Respondent Authority was established by statute and its powers and functions are circumscribed by statute. The Respondent has powers to impose dues, charges, and fees, which it fixes by Regulations. The Courts have however shown an increasingly flexible approach in resolving the question of whether a body is a public authority within the meaning of **section 4(d) of the Constitution**. It seems therefore that the Respondent is imbued with

the powers of a public authority and is accordingly indelibly marked as a public authority in accordance with the criteria set out by Lord Diplock and elucidated subsequently by the Board of the Privy Council.

20. It is to be noted that not every harmful act by a public authority will infringe the Constitution. There still remains a realm of activities on the part of the Respondent that remains essentially private. It is within this realm that Counsel for the Respondent sought to locate the dispute between the Applicant and the Respondent. Counsel submitted that the proceedings were in respect of a private contractual relationship between the Applicant and the Respondent. The Applicant's claim of unequal treatment indeed arises out of his contract of employment. In **Civ. App. No.95 of 2005 NH International Caribbean Ltd. v Urban Development Corporation of Trinidad and Tobago Ltd.**, Kangaloo JA stressed the necessity of having a public law flavour or element in judicial review proceedings meant to challenge the actions of a public authority or state enterprise. Constitutional rights are essentially substantive statutory rights. In determining whether the failure to re-employ and to promote are public functions on the facts extant here, it must first be decided whether they are acts with a public law element or flavour. This Court notes **HCA No. 1234 of 2004 Michael Boxhill et al v Port Authority** where Aboud J said at paragraph 35:

> "*…the right not to be treated unequally cannot be said to be grounded in commercial or contractual obligations, even though the breach is said to originate out of a contract. It is a right that originates (or, to put it more correctly, which is declared as a pre-existing right) in the body of the Constitution.*"

21. In any event this Court holds that the questions asked of the Respondent, that of unequal or discriminatory treatment relating to re-employing an employee and the failure to implement its own decision to promote the Applicant, contain a sufficient public law element or flavour and therefore raise an important question of public law.

22. The Respondent's counsel also submitted that the Applicant abused the process of this Court by bringing a matter that could have been resolved by alternative means, namely, an application in the Industrial Court. It is useful at this juncture to be reminded of the sage caution by Lord Diplock in **Khemraj Harrikissoon v AG of Trinidad and Tobago [1980] AC 265** at 268 paragraphs B – D:

> "*The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.*"

23. In **Thakur Persad Jaroo v AG of Trinidad and Tobago 2002 UKPC 5** the Privy Council gave some guidance on how such a matter should be approached. Lord Hope of Craighead stated at paragraph 39:

"… *He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it ...*"

Here the Privy Council confirmed that the right to apply to the High Court, pursuant to **Section 14(1) of the Constitution**, should be exercised only in exceptional circumstances where there is a parallel remedy. This Court must now consider whether the alternative remedy raised by Counsel for the Respondent was indeed a viable option available to the Applicant.

24. The Applicant said that he had made several complaints to the Recognized Majority Union (The Seamen and Waterfront Workers Trade Union) of the Respondent's employees and had also appealed to the Respondent to be heard in respect of his grievances. In addition he promised to make himself available to the Union in pursuit of "*whatever legal action necessary against the Respondent*." However, the Union failed or refused to take action on his behalf.

25. **Section 51(1) of the Industrial Relations Act (IRA) Chap 88:01** states:

"*Subject to this section, any trade dispute, not otherwise determined or resolved may be reported to the Minister only by –*

(a) The employer;
(b) The recognized majority union
(c) Where there is no recognized union any trade union, of which the worker or workers who are parties to the dispute are members in good standing."

And **Section 7 of the IRA** provides that the Industrial Court, in addition to its powers as a superior court of record:

> "*shall have jurisdiction –*
>
> *(a) To hear and determine trade disputes;*
> *(b) To register collective agreements and to hear and determine matters relating to the registration of such agreements;*
> *(c) To enjoin a trade union or other organization or workers or other persons or an employer from taking or continuing industrial action;*
> *(d) To hear and determine proceedings for industrial relations offences under this Act;*
> *(e) To hear and determine any other matter brought before it, pursuant to the provisions of this Act.*"

Section 2 of the IRA defines a trade dispute as:

> "*… any dispute between an employer and workers of that employer or a trade union on behalf of such workers connected with the dismissal, employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of such workers, including a dispute connected with the terms and conditions of the employment or labour of any such workers, and the expression also includes a dispute between workers and workers or trade unions on their behalf as to the representation of a worker (not being a question or difference as to certification or recognition under Part 3)*".

26. Existing disputes must be reported to the Minister of Labour within six months or such extended time as may be granted by application. If the Ministerial conciliation intervention does not bear fruit, the Minister will report it as an unresolved dispute to the Industrial Court which has the power to hear the dispute and make orders to resolve it. It

follows that the Applicant could not apply to the Industrial Court on his own. He could only have done so through his Union. And the Union did not take action on his behalf. Therefore no such alternative remedy was available to the Applicant. This Court has not been provided with any authority for the proposition that an employee can approach the Industrial Court on his own, nor was any record of Industrial Court proceedings to this effect presented by the Respondent's Attorney-at-Law.

27. In the Privy Council case of **Ahnee v Director of Public Prosecutions [1992] 2AC 294**, Lord Steyn stated:

> "*bona fide resort to rights under the Constitution ought not to be discouraged*".

This Court holds that this case is a fit case for constitutional redress and accordingly finds that the Applicant's Motion does not constitute an abuse of process.

VI. IN-EQUALITY OF TREATMENT

28. In **Attorney General v KC Confectionery Ltd. [1985] 34 WIR 387 (KC Confectionery)** it was held that in order to establish inequality of treatment, the Applicant must prove the following:

    1. That he was in a similar position to persons of comparable circumstances (the comparator test);
    2. That he was treated differently from those other person(s); and
    3. The different treatment meted out was actuated by malice.

29. In **Mohanlal Bhagwagdeen v The Attorney General of Trinidad and Tobago (2004) 64 WIR 402**, the Privy Council set out the test for inequality of treatment under **section 4(d) of the Constitution** thus:

"*A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in* ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL11*** *as actual or hypothetical comparators. … the comparators must be such that the relevant circumstances in the one case are the same, or not materially different in the other.*"

30. It follows that in order to successfully establish a breach of the Applicant's right to equality before the law and equal treatment the Applicant must establish unequal treatment when compared with a party similarly circumstanced. In addition, he must show *mala fides* in the administrator's conduct. Mala fides is established by fulfilling the necessary requirement, at least proof of an intentional and purposeful or irresponsible act, or "*some element of deliberateness in the selection of a person for different treatment*" per de la Bastide CJ in **Civ. Appeal No. 102 of 1999 Boodhoo and Jagram v The Attorney General** at page 11.

31. Paragraph 8 of the affidavit of Carlyle Peters, the Respondent's Clerical Officer states:

"*8. F. Hypolite referred to in paragraph 3 of the Applicant's principal affidavit was committed to prison on the 11th of February, 1986 to serve a seven (7) year sentence for the criminal offence of unlawful killing. He was subsequently released on the 12th of October 1990. Unlike the Applicant he made himself immediately available for work and representations were made on his behalf by the recognized majority union of the Respondent. He was therefore re-employed by the Respondent with effect from 7th of November 1990.*"

It is significant that less than one month after his release from prison, Hypolite was re-employed by the Respondent. The reasons proffered were his prompt availability for work and the positive representations made by his Union.

32. In his affidavit filed on 24.8.04 the Applicant alleged that as soon as he was released from prison he reported for duty at the Respondent and was not permitted to resume work. He further stated that he continuously and vigorously knocked on this door seeking re-employment but it remained solidly shut until some 11 years later when he met with the Minister responsible for the Respondent. By letter dated 22.11.96 the Respondent's Labour Officer contended that the Applicant had been out of the jurisdiction and residing in England during the period 1969 to 1980, that is, the period from the date of his release from jail to his re-employment with the Respondent.

33. It is to be noted that according to the documents filed in these proceedings Hypolite was sentenced to 7 years in prison and served 4 ½ calendar years while the Applicant was sentenced to 5 years and served 5 calendar years. This Court is aware that a prison year is two thirds of a calendar year.

34. The Labour Officer's explanation of events was not supported by the documentary evidence tendered by the Applicant. The letter of Retired Public Servant Moonilal Seemongal confirmed that the Applicant was employed as a Casual Worker with the St. Patrick County Council during the impugned period. This Court therefore concludes that the Applicant was in fact in this jurisdiction during the years 1969 to 1980. Further, that he persevered in his quest to be re-employed with the Respondent by meeting the line Minister some ten years later and pursuing his claim.

35. Whether the recognized union failed to raise the Applicant's grievance with management is no excuse for the Respondent's failure to treat one employee in the same manner as it treated another. There is no evidence before this Court that this failure on the part of the union was as a result of it taking a position of no confidence in the competence of the Applicant as an employee. It should be noted that after the Applicant's employment in

1980 and until his retirement in 2004, the Applicant served the Respondent without any complaints as to his competence or commitment to his work.

36. The Applicant and Hypolite both spent some time in prison and each was released with a written recommendation by the Prison Welfare Authority, on account of good conduct, for re-employment by the Respondent. However, in the case of Hypolite he was re-employed by the Respondent as a Port Follower which is a temporary position a mere twenty-four (24) days after his release. Conversely, the Applicant armed with a similar letter of recommendation from the Prison Welfare Authority was unable to get an audience with the relevant persons in the Respondent far less being re-employed or given the much valued status of Permanent Employee. From the internal correspondence entitled "*Particulars RE: Francis Hypolite incarceration and employment of*" and dated the 13.5.05 between the Labour Officer and the Deputy General Manager it was noted that:

> "*Mr. Hypolite was re-employed with effect from the 7th of November 1990 and placed at the end of the Port Followers Roll. Had he been re-instated his position on the roll would have been 112 as a Port Follower and his effective years preserved. His re-employment does not give effect to his effective years of service (7 years) from 1978 to 1984.*"

37. Prior to his incarceration Hypolite was engaged as a Port Follower and after serving his debt to society he was returned to his said position as a Port Follower, being a temporary position. Hypolite's seven years of service were however forfeited and he was placed at the end of the Port Followers' Roll. On the other hand, the Applicant who was a bona fide permanent employee was refused employment and when re-employed was reduced to the status of a temporary employee. This meant that he was not returned to his original position before incarceration as was done in the case of Hypolite.

38. In **KC Confectionery** Persaud JA cleared the air on Mala Fides:

"*The question canvassed before this Court is whether the complainant must prove mala fides when he complains of a breach of his constitutional rights? It seems to me that we must start off with the presumption that public officials will discharge their duties honestly and in accordance with the law. If this is correct then two situations will arise. If the complaint is made that the official has been dishonest in the discharge of his duties, or that he has acted out of spite towards the complainant, clearly mala fides is alleged, in which event is must be proved, and perhaps it is unnecessary to observe that the onus of proof rests on the complainant. If on the other hand the allegation is that the official has merely contravened the law in the discharge of his functions, mala fides may not necessarily form part of the complainant's case in which event the question of proof does not arise. All that needs to be proved in such a case is the deliberate and intentional exercise of power, not in accordance with law, which results in the erosion of the complainant's right or entitlement which may become vested in him either from the Constitution itself or from an Act of Parliament.*"

In **Civil Appeal No. 16 of 2004 Central Broadcasting Services Limited and Or v Attorney General of Trinidad and Tobago** Hamel-Smith JA stated:

"… I agree with Persaud JA that proof of Mala Fides is not always necessary in all claims under section 4(d). Those cases in which mala fides is not required seem to me to be consistent with James v Eastliegh Borough Council (1990) 2 AC 75 cited by the Privy Council [in Bhagwandeen] *where the majority preferred what Lord Lowry termed the causative to the subjective construction and held that discrimination could be established even though the Respondent council had no intention to discriminate*."

39. From a review of the foregoing authorities, it seems that the Applicant is not constrained to establish malice on the part of the Respondent. Further, the only consistent action with respect to the Applicant and Hypolite was the forfeiture of the effective years of service. This Court therefore holds that the Respondent treated the Applicant unequally in delaying his re-employment and also in not re-employing him at the position that he formerly held. The Applicant has therefore successfully established inequality of treatment by the Respondent.

DECISION/ORDERS

This Court grants the following declaration and orders:

(a) A declaration that the Applicant was denied the right to equality of treatment from the Respondent as guaranteed to him by **section 4(d) of the Constitution** as a result of the Respondent's failure to re-employ the Applicant to his position of Daily Paid Permanent Worker with effect from 1980.

(b) An Order that the Respondent do pay to the Applicant such monetary compensation to be assessed by the Master on a date to be fixed by the Registrar.

(c) An Order that the Respondent do pay the Applicant's costs of this Motion to be taxed in default of agreement, certified fit for one Senior and one Junior Advocate Attorney-at-Law.

Dated this 10th day of May, 2011

Amrika Tiwary-Reddy
Judge