

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A NO. 461 OF 2003

**IN THE MATTER OF THE JUDICIAL REVIEW ACT,
NO. 60 OF 2000**

**IN THE MATTER OF AN APPLICATION BY
GLADYS GAFOOR FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW**

BETWEEN

GLADYS GAFOOR

Applicant

AND

**THE REGISTRAR
OF THE INDUSTRIAL COURT**

Respondent

Before the Honourable Madam Justice M. Dean-Armorer

Appearances:

Mr. Russell Martineau, S.C. and Mr. R. Harnanan for the Applicant

Mr. Neil Byam for the Respondent

JUDGMENT

Introduction

The instant case is an application for judicial review of the decision of the Registrar of the Industrial Court (“ the Registrar”) to withhold direct payment of her chauffeur allowance to the Applicant, who is at present a Vice President of the Industrial Court.

The Applicant also seeks the review of the decision of the Registrar to pay the Applicant’s chauffeur allowance to Mr. Herbert Bahador, on the ground that it is illegal, null and void and of no effect.

The two impugned decisions in fact arise out of the identical series of events which are set out in detail hereunder.

Facts

1. The dates and the respective offices to which the Applicant had been appointed are not in dispute. The Applicant had been appointed a Member of the Industrial Court under the hand of His Excellency the President in March, 1990. In September, 1994, she was re-appointed a Member of the Industrial Court as well as a Member of the Essential Services Division. In September, 1998, the Applicant was re-appointed as Member of the Industrial Court and Member of the Essential Services Division and in April, 2000, the Applicant was appointed to hold office as Vice President of the Industrial Court.
2. The facts which gave rise to the instant application began in November, 2001, when the Applicant notified the Accounting Unit of the Industrial Court that she had employed Mr. Herbert Bahador to be her chauffeur. Mr. Bahador continued to perform

the duties of chauffeur until the 12th May, 2002, when the Applicant hired Mr. Anthony Ramjohn in his place.

3. It was not until the 2nd July, 2002, that the Auditing Assistant I of the Industrial Court wrote to the Registrar to inform her that Mr. Herbert Bahador was hired as the Applicant's chauffeur. On the same day, the Registrar sent a memo to the Applicant seeking to clarify the identity of the Applicant's chauffeur, since no one knew Bahador and everyone seemed to be acquainted with a Mr. Anthony Ramjohn. It was possibly in response to this query that on the same day, the 2nd July, 2002, Mr. Anthony Ramjohn wrote to the Registrar of the Industrial Court, in order to supply information concerning his National Insurance, Board of Inland Revenue, and Identification numbers. There could therefore be no suggestion that the Registrar was not aware of the identity of the Applicant's chauffeur.
4. It has not been disputed that the Accounting Unit of the Industrial Court continued to prepare cheques in the name of Herbert Bahador, even for those months when another chauffeur had been employed by the Applicant.
5. It has also not been disputed that the Applicant has had to pay her chauffeur out of her own pocket. By the date of the hearing of this matter and despite repeated requests by the Applicant and her attorneys-at-law, seven cheques were awaiting collection by Mr. Bahador.
6. In his affidavit, Mr. Noel Inniss, whose affidavit was filed on behalf of the Respondent has not disputed the foregoing facts, but has referred to three (3) directives in the form of Minister of Finance Circulars, two of which have been annexed to the affidavit of the Applicant. Mr. Inniss has also alluded to the *Exchequer and Audit Act* and the *Financial Instructions 1965*.
7. Mr. Inniss referred extensively to the procedures by which chauffeur of members of the Industrial Court are paid, saying that the member of the Industrial Court informs

the accounting unit of the name, and the Board Of Inland Revenue and National Insurance numbers of their chauffeurs. He has deposed that the chauffeur's name is placed on a pay-sheet and the chauffeur is paid directly after the requisite amounts are deducted for National Insurance and income tax.

8. Mr. Inniss supplied further details as to the preparation of a cheque in the name of the chauffeur and the requirement, in accordance with the *Financial Instructions* 1965, that the chauffeur sign as having received it.
9. Mr. Inniss alluded to an addition to the procedure by his predecessor, that is to say, the opening of personnel files for the chauffeurs. He deposed further that it was his belief that the procedures were the requirement of the *Financial Instructions*, 1965, extracts of which are annexed to his affidavit.

Circulars and Directives

10. The first of these is the Circular, which was issued by the Chief Personnel Officer on the 30th November, 1981. This Circular communicates the decision of Cabinet in respect of travelling allowances for office holders within the purview of the Salaries Review Commission. It reflects Cabinet's decision to restrict the Chauffeur allowance to office holders who have actually employed a chauffeur.
11. The 1981 Circular also reflects, beyond doubt, that the Chauffeur is the employee of the office holder and not of the Government:

“(i) the chauffeur of the holder of a public office within the purview of the Salaries Review Commission is not an employee of the Government; such employee is the personal choice of the particular officer but is however, paid by the Government; and

(ii) on the certification of the particular officer, the chauffeur designated by that person would for so long as he continues to be so

employed by him, be paid from the appropriate vote of the Ministry/Department/Authority concerned which would also handle the appropriate deductions (income tax, national insurance, etc.)

12. The second Circular of significance is ***Minister of Finance Circular No.5 of 1995***. It is significant that this Circular emanates from the Minister of Finance and bears the following caption:

“ Revised Remuneration Arrangements for Holders of Public Offices within the purview of the Salaries Review Commission ”

The group which is relevant for the purpose of this case is treated at paragraph (v), which contains the following directive:

(v) Persons who are now eligible for a Chauffeur Allowance but in respect of whom neither a personal Chauffeur nor a Service Allowance has been granted are to retain the facility of a Chauffeur Allowance as personal to them during their tenure in the respective office. Appendix V, which contains a list of these officers, includes reference to Member and Vice President of the Industrial Court.

13. The third Circular, like the second emanates from the Minister of Finance and is numbered ***Minister of finance Circular No. 7 of 1998***. This Circular contains revision of salaries and cost of living allowances payable to chauffeurs. The relevant portion of this Circular appears at paragraph B (b):

....“B. *Chauffeur Allowance*

The Chauffeur Allowance payable to the undermentioned group of office holders:

(b) office holders as at 31st December, 1994, who exercised the option given under the terms of Minister of Finance Circular No. 5 of 1995 dated 15th

*February, 1995, to retain the Chauffeur Allowance as personal to themselves.
(The list of offices the holders of which had this option is at Appendix III).”*

Issues:

14. The issue which arises in this case is whether the Applicant, as office-holder is entitled to have the chauffeur allowance paid to her or whether the allowance is payable only to the chauffeur.

15. At all material times the Applicant had a chauffeur in her employment. The question as to whether an office holder is entitled to the chauffeur allowance without having employed a chauffeur does not arise in this case.

Law : Relevant Sections of the Industrial Relations Act, Ch. 88:01 (“the Act”)

16. By s. 5(1) of the Act members of the Industrial Court are entitled to be paid salaries as prescribed by the President. They are entitled to hold office for a period of not less than 3 years and not more than 5 years. The section also provides that they shall be eligible for re-appointment.

17. Section 5(2) prescribes

“(2) The President of the Court and other members of the Court shall receive such allowances as may be prescribed by Regulations made by the President of Trinidad and Tobago”.

18. Section 5(3) of the *Act*, prohibits any alteration to their detriment of the terms and conditions of the office-holders of Member and Vice President of the Industrial Court. These offices fall within the purview of the Salaries Review Commission, by virtue of the *Constitution of Trinidad and Tobago (Prescribed Offices) Act, 1980*.

Application:

19. The facts of this case are largely undisputed and the Court is required principally to grapple with the true meaning of the three circulars and to ascertain what they imply of the terms and conditions of service of the Applicant, having regard at all times to the fact that she was an officer whose terms and conditions may not be altered to her detriment.

20. Before considering the terms which were implied in the Applicant's contract of employment with the State, it is first necessary to address the submission of Learned Counsel for the Respondent, who has argued that any allowances paid to the Applicant were illegal, as they were in contravention of the terms of s. 5(2) of the *Act*.

21. In my view, this proposition is untenable, having regard to the plain and unambiguous meaning of the sub-section. I will begin by identifying what the sub-section does not say. Section 5(2), by when given its plain and ordinary meaning, does not prohibit either the Applicant from receiving allowances or the Government from granting same in the absence of regulations.

22. In my view the unambiguous meaning of Section 5(2) is to require the State, in mandatory terms, to pay to President and Members of the Industrial Court the allowances which are prescribed by Regulations. Where such regulations exist, the State may not seek, even by skilful negotiation, to exclude an allowance, which is prescribed by Regulations from the terms and conditions of a Members contract of employment.

23. In the absence of Regulations, and therefore in the circumstances which obtain at present, there is nothing to prevent Government, from entering into contracts of employment with persons who are appointed as either Member or Vice-President of the Industrial Court.

24. In such circumstances, allowances which are payable to the Member are those which arise from the office-holders' contract of employment. Where no written agreement exists, the judgment of Lord Diplock in *Endell Thomas v. A.G.* W.I.R.376

provides clear authority that the terms and conditions of the office holder's contract of employment with the State may be implied. Where the office-holder has been in active service for more than a decade, as in this case, her terms and conditions may be implied from her course of dealing with the State.

25. In these circumstances the Court is asked to decide whether the Applicant, by virtue of her terms and conditions as a Member and Vice President of the Industrial Court, is entitled to have the chauffeur allowance paid to her directly or whether such allowance can legally be paid only to the hired chauffeur. If the Applicant is so entitled, the necessary inference is that the Registrar had been acting illegally in withholding the Applicant's entitlement.

26. It is my view that the entitlement of the Applicant, in this case are to be considered at two levels, that is to say:

- The specific entitlement of the office-holder in this case, where she has been forced to disburse her chauffeur's salary from her own funds between the months of November, 2002 and the present;
- The general entitlement of an office-holder, whose right to a chauffeur allowance is to be gleaned from the Circulars identified supra;

27. At the first level, there has been in my view, a clear breach of the terms of the Applicant's contract of employment. There could be no doubt that the Applicant is entitled to have her chauffeur paid by the State and for this reason cheques were prepared for payment to Mr. Bahador.

28. According to the evidence, Mr. Anthony Ramjohn who replaced Mr. Bahador notified the Registrar of his appointment on the 2nd of July, 2002. There could therefore be no doubt that the Registrar was fully aware that Mr. Bahador had been replaced. Moreover, this was drawn to their attention by both the Applicant and her attorneys-at –

law, who made repeated requests for her to be paid her allowance for the months, in respect of which she had advanced payment to her chauffeur. In my view, the decision of the Registrar to withhold payment for these months and their obstinate refusal to make cheques to any one but Mr. Bahador escapes my understanding and could only be described as *Wednesbury* unreasonable, such that no reasonable decision-maker could make.

29. At the other level, the Court must resolve an issue which is not as clear. The terms and conditions of the Applicant are to be implied from her course of dealings with the State and from the several directives, by way of Circulars. It is clear from the 1981 Circular, that the chauffeur of the Member and the Vice President of the Industrial Court is the employee of the office-holder and not that of the Government. This was recognized by Justice Stollmeyer in the case of *Harris and Bodie –Thompson v. A.G.* HCA Cv. #3214/2000 and #3215/2000.

30. I have not been persuaded by the argument of Learned Counsel for the Respondent that the Chauffeur only bears the label of the employee of the office-holder and is in fact the employee of the State. In my view there is no evidence that the State controls the terms and conditions of service of the Chauffeur.

31. On the contrary, there is every indication that the selection of the chauffeur and the other terms such as those relating to discipline, sick and vacation leave and hours of duty are left to the office-holder. Indeed the salary payable to the chauffeur is controlled by the office-holder. The State, in the *Minister of Finance Circulars* of 1995 and 1998, has specified the quantum of the allowance. There is however nothing to prevent the office-holder, as employer from varying the basic salary by increasing it when circumstances require. It is to be observed by contrast that such an increase would be wholly inappropriate, and may even be regarded as a form of corruption, where the Chauffeur or other support staff is appointed by the Public or other Service Commission.

These factors incline the Court's mind in favour of a finding that the allowance is payable directly to the office-holder.

32. The argument that has been advanced by the Respondent essentially point to the terms of the 1981 Circular and to an elaborate accounting practice which has been developed over the years, including the preparation of a pay-sheets, deductions for the purpose of income tax and national insurance, and more recently the compiling of a personnel file, in respect of the chauffeur.

33. It has been argued that these procedures ensure that the office-holder in fact has a Chauffeur in his or her employment. It has not been urged on behalf of the Applicant that the Chauffeur allowance is payable regardless of whether a Chauffeur has been employed. In my view, the elaborate accounting procedures are not necessary for ensuring that a chauffeur has been hired. This can be achieved by the certification by the office-holder as contemplated in the 1981 Circular. The accounting procedures cannot be intended to detract from the entitlement of the office-holder. If this were so the State, by instituting such a procedure would be altering the terms and conditions of the office-holder by depriving him or her of control of the allowance and ultimately of her employee. I am of this view because it is clear that one of the powers of an employer relates to the remuneration paid to the employee, not only in terms of the basic salary but also overtime allowances or deductions for absences or misconduct. An alteration of this nature, if so intended would, in my view, be contrary to s. 5(3) of the *Industrial Court Act*.

34. I find the analysis of Senior Counsel for the Applicant to be more persuasive, that is that the intricate procedures had been instituted to assist the office-holder, who may find it unnecessarily bothersome to address matters such as the remittance of income tax and national insurance payments. The allowance is a perquisite of the office-holder and in my view she is entitled to have it paid to her directly if she so wishes.

35. I find therefore that there is nothing to prevent office-holder from receiving the chauffeur allowance directly. Of course, for the purposes of good administration, it would be necessary for the office holder to make her preferences clear to the Registrar, so

that the accounting procedures could be dismantled in respect of the office-holder who prefers to have the allowance paid to her directly.

In this application I therefore find for the Applicant and grant the following relief sought at paragraphs (a) (b) (c) (d) (e) (f) (g) and (i) of the Notice of Motion filed herein on 26th February 2003:

- (a) a declaration that the decision of and the Registrar of the Industrial Court to withhold the direct payment of and to refuse to pay to the applicant directly the chauffeur allowances due to the applicant is unlawful, irrational, an abuse of power and is accordingly illegal, null and void and of no effect;
- (b) an order of certiorari to remove into this Honourable Court and to quash the decision and referred to in paragraph (a) above;
- (c) a declaration that the decision of the Registrar of the Industrial Court to continue to withhold and the continuing withholding by the Registrar of the Industrial Court of the payment of chauffeur allowances due to be paid directly to the applicant and the decision of the Registrar of the Industrial Court to refuse and the continuing refusal by the Registrar of the Industrial Court to pay to the applicant directly chauffeur allowances due to the applicant for the months of October 2002, November 2002, December 2002 and January 2003 are unlawful, irrational, and abuse of power, and are accordingly illegal, null and void and of no effect;
- (d) an order of certiorari to remove into this Honourable Court and quash the decisions and referred to in paragraph (c) above;
- (e) a declaration that the decision of the Registrar of the Industrial Court made on or about the 25th day of November, 2002 to pay the applicant's chauffeur allowance for the month of October 2002 to one Herbert Bahador is unlawful,

irrational, an abuse of power and is accordingly illegal, null and void and of no effect;

- (f) an order of certiorari to remove into this Honourable Court and quash the decision referred to in paragraph (e) above;
- (g) a declaration that the applicant is by virtue of her holding office as Vice-President and Member of the Industrial Court entitled to the payment directly to her of a chauffeur allowance in respect of a chauffeur employed by her;
- (h) an order that the Registrar of the Industrial Court as accounting officer in the Industrial Court pay or cause to be paid immediately to the applicant the chauffeur allowance due and owing to her for the months of October 2002, November 2002, December 2002 and January, 2003

Dated the 29th day of May, 2003.

M. Dean-Armorer
Judge.