

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 1885 of 1983

**In the Matter of the Constitution of the
Republic of Trinidad and Tobago**

And

**In the matter of the Application of Rawle Gift
(A person alleging that certain provisions
of the said Constitution have been and
are being and are likely to be contravened in
relation to him) for redress in accordance
with section 4 of the said Constitution**

APPLICANT

And

**1) Alfred Earle Jones
2) Lulworth Punch
3) Winston Fung
4) James A. Bain
(Chairman, Deputy Chairman and Members
of the Public Service Commission)**

And

**Wilfred Mc Kell
(Director of Personnel Administration)**

And

**Eutrice L. Hope
(Administrative Officer IV)**

And

The Attorney General of Trinidad and Tobago

RESPONDENTS

Before the Honourable Mr. Justice G. Smith

Appearances:

Mr. C. Gift for the Applicant

Ms. Nabbie for the Respondents

REASONS

INTRODUCTION

1. This action concerns a motion filed by the Applicant, an Administrative Officer II in the Ministry of Agriculture, Lands and Food Production, alleging breaches of his Constitutional rights. The Respondents to the motion are the superior officers and employers of the Applicant, namely, an Administrative Officer IV and the Permanent Secretary in the Applicant's Ministry, the Director of Personnel Administration, the members of the Public Services Commission, and the Attorney General (representing the State).

2. The Applicant's motion seeks some 14 declaratory orders, damages and some consequential reliefs but the basic claims are challenges to decisions to:

- (1) By-pass the Applicant for promotion;
- (2) Defer and/or withhold his promotion;
- (3) Issue new instructions and/or directives which would negatively affect his claims for traveling allowances;

(4) Withhold permission for the Applicant to initiate legal proceedings against his superiors;

(5) Initiate disciplinary proceedings against the Applicant.

These decisions were challenged on the grounds that such decisions and/or actions contravened or were likely to contravene his constitutional rights.

3. This matter has had a prolonged history of adjournments and on the 13th January 2004, pursuant to my directions at a cause list hearing, the Respondents gave notice of a preliminary objection to the motion, namely, that it was an abuse of process. The Respondents also filed skeleton submissions on the point pursuant to the order at the cause list hearing but the Applicant failed to file his skeleton submissions.

4. After hearing argument on the preliminary issue and for the reasons that follow, I held that the motion was indeed an abuse of the process of the court and I dismissed the Applicant's motion but I made no order as to costs.

REASONS

5. The law on this area of abuse of process has been stated in the much quoted dicta of Lord Diplock in Harrikissoon v The A.G. (1980) A.C. 265 at 268 B – F (P.C.), and because of its direct relevance to the present matter, I will set out the relevant quoted passage and an extra portion:-

“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 or fundamental freedom 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.

The instant case concerns and concerns only the right of a holder of a public office not to be transferred against his will from one place to another. In their Lordships’ view it is manifest that this is not included among the human rights and fundamental freedoms specified in Chapter I of the Constitution.”

(my emphasis)

In the more recent decision in Jaroo v The Attorney General of Trinidad and Tobago P.C. Appeal 54 of 2000, Lord Hope adopted the general test as stated above and restated the principles succinctly at paragraph 39, namely that before an applicant resorts to the procedures of the Constitutional motion he “must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure whether under the common law or pursuant to statute might 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 process to resort to it.” (my emphasis)

The nature of the rights allegedly contravened

6. Applying those observations to the present matter I considered firstly what was the true nature of the rights allegedly contravened.

7. The real grievance of this Applicant concerned the failure/refusal or neglect of the authorities to promote him to the post of Administrative Officer IV. In fact, 9 of the 14 declarations sought were based on this complaint. I even venture to suggest that if every other relief had been granted to the applicant save his promotion, he would still have felt aggrieved.

This grievance, however, was based on an assumption that the right to a promotion was or could be included among the fundamental rights and freedoms specified in Chapter 1 of the Constitution. This proposition need only be stated to be rejected.

8. Another one of the Applicant's satellite complaints was that the initiation of disciplinary charges against him by the Public Services Commission was ultra vires the provisions of the Public Services Regulations and null and void.

Once again the initiation of disciplinary charges, per se, does not violate any constitutional right.

9. Another of the Applicant's collateral complaints was that the refusal of the Public Services Commission to grant him permission to institute legal proceedings against the Permanent Secretary and an Administrative Officer IV in his Ministry was unconstitutional, null and void.

Even if such permission had been refused, the Applicant could still, as of right, have brought an application for judicial review and/or a motion to challenge any administrative decision made. So that the allegation that some right of his was being infringed as a result of the failure to give him permission to litigate, was frivolous and vexatious.

10. Another secondary complaint in this motion was that an alleged change in the requirements to validate travelling allowances which was introduced by the

Administrative Officer IV was an excess of authority, a contravention of certain regulations and a denial of the property rights of the Applicant.

This complaint assumed that there was a constitutional or property right to earn a travelling allowance and/or a right not to have any change to the conditions under which such allowances could be earned; these propositions need only to be stated to be rejected. The ability to earn a travelling allowance upon certain conditions does not seem to be a constitutional right or a right of property, but at best it may be unfair, unreasonable or an excess of jurisdiction to arbitrarily change the conditions upon which a person may earn such an allowance. This involved no constitutional law breach but rather, it was a complaint of maladministration which should have been challenged by way of judicial review or even by way of proceedings in labour law.

11. One of the declarations claimed by the Applicant in his amended motion filed 11th July 1983 was that he was treated less favourably than other similar and/or junior officers in his Ministry and by this, was denied equality before the law and the protection of the law (see Relief 4H).

Unfortunately, this issue was not fleshed out in the addresses before me. Further, even if this claim for a declaration did relate to a constitutional right, as was stated at paragraph 7 above, this relief was really collateral to the main complaint of the failure to promote the Applicant and perhaps also collateral to the claim for travel allowances (see paragraph 10 above); and if, for argument sake, the matter proceeded on this ground alone and a declaration in terms of

paragraph 4(h) of his reliefs were granted, it would be nothing to the cause, without the consequent request for, or the grant of a promotion and/or the confirmation of his entitlement to a travel allowance, neither of which reliefs could be granted, as they were not constitutional rights (see paragraphs 7 and 10 above). In other words, the declaration that the Applicant was treated less fairly than other similarly circumstanced persons, standing by itself, would not have advanced his case; in any event since he had already retired nothing could now be done about treating him equally to other officers employed in the Ministry. This relief had no real substance to it, so much so that no mention was made of this issue in addresses before me, and it seemed to be a relief that was “tacked on” to the issue of the Applicant’s promotion and/or his entitlement to travelling allowances. This “claim” was not considered relevant to the real or live issues before the court and I treated it as such.

12. In these circumstances, this was not truly a case where the constitutional rights of the Applicant were being infringed and it was an abuse of process to proceed by way of a constitutional motion.

An available parallel Remedy

13. Assuming I was wrong in this issue, I went on to consider whether there was an available parallel remedy to which the appellant ought to have resorted and which would have made the procedure by way of a constitutional motion an

abuse of process except in exceptional circumstances. As Lord Hope said in Jaroo's case at paragraph 29:

“it has been made clear more than once by their Lordship’s Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances when there is a parallel remedy.”

14. All of the complaints of the Applicant (referred to at paragraphs 2, 7, 8, 9, 10 and 11 above) dealt with administrative decisions which he alleged were arbitrary, unfair, illegal and excessive. He also alleged that he was not given a fair hearing before some of these decisions were made. Judicial review is most apt to obtain judicial control over administrative action and was the course which the Applicant should have followed to get the relief sought in this matter. In fact, judicial review has been held to be the available parallel remedy in these types of cases (see Mahabir v The A.G. Civ. App 128 of 1998 Jones J.A. pg 18, Joseph George & Anor v The A.G. Civ. App. 63 and 74 of 2002 at para 5, and Jaroo's case).

15. At one stage Counsel for the Applicant sought to allege that the application for judicial review was not a viable alternative because of the former ouster clause contained in section 129 (3) of the Constitution which would have applied to the Applicant. Section 129 (3) provided that the question whether a Service Commission had (inter alia) validly performed any function vested in it by the Constitution may not be enquired into in any Court.

However, as Counsel conceded, the case law showed that the “ouster clause” would not have protected administrative decisions that had been made in excess of jurisdiction or contrary to the rules of natural justice (see Jones v Solomon (1998) 41 WIR 299, Thomas v The A.G. (1983) 32 W.I.R. 375). Since the complaints of the Applicant were based on these two premises, section 129(3) would not have prevented the Applicant from pursuing his present claims by way of an application for judicial review.

16. Another reason why judicial review would have been the better parallel remedy is because of the serious disputes of fact which had arisen in the present motion. As Lord Hope said in the Jaroo case at paragraph 36, “the originating motion procedure under section 14(1) (of the Constitution) is appropriate where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes of fact.”

17. Counsel for the Applicant alleged that there were no real disputes of fact here and that all that was necessary was an interpretation of various documents such as the letter of promotion dated 20th April 1982 (see exhibit “R.G. 6” in the affidavit of the Applicant filed 11th July 1983) and the memorandum concerning the new arrangements for travel allowances (exhibit “R.G.7” of the same affidavit).

This statement by Counsel was not only an oversimplification of the facts but threw a blind eye on the majority of the matters raised in the affidavits.

18. In the present matter, the greater part of the 1st Affidavit filed by the Applicant on the 11th July 1983 raised matters of fact which purportedly showed that he had been by-passed for promotion in an arbitrary and irrational manner and that the charges that were brought against him were unfounded. In response, the Permanent Secretary and the Director of Personnel Administration filed affidavits which, for the most part, stated the reasons why he had been by-passed and why he had been charged for misconduct and affirming that they were acting bona fide. In reply, the Applicant filed an affidavit which mostly alleged facts which he felt would indicate that both the Permanent Secretary and the Director of Personnel Administration were not acting bona fide. The issue of the bona fides or lack thereof in relation to the decisions to by-pass the Applicant for promotion was a substantial dispute of fact.

Also the Permanent Secretary alleged that he had held discussions with the Applicant and kept him informed as to why he had been by-passed and the Applicant denied this. This was another substantial dispute of fact.

The Applicant even insisted that if the matter were to proceed, there was to be cross-examination on the affidavits and the Applicant had also made an application for discovery which was stoutly resisted and which was the subject of argument and decision.

This matter was wholly unsuitable to be proceeded with by way of an originating motion for constitutional law relief. An application for judicial review where all these interlocutory applications and cross-examination were more frequently entertained, would have been the better alternative method of advancing the case.

Exceptional Circumstances

19. The Applicant also argued that even if there were an available parallel remedy in this matter, there were exceptional circumstances which made it appropriate for the current motion to proceed; they were:-

- (a) This matter, when started in 1983, was quite a proper application since it was believed that it was not improper to pursue either a constitutional motion or a parallel remedy. However, it was only after the year 2000, with the Privy Council decision in Jaroo's case that it was finally decided that the existence of a parallel remedy made resort to the constitutional motion improper;
- (b) There were some matters raised in the present matter which were purely constitutional law points;
- (c) The Applicant was now barred by the doctrine of Limitation from pursuing any other application for relief, especially so, an application for judicial review.

20. With respect to point (a), it is to be noted that when this matter was commenced on 24th May, 1983, the decision in Harrikissoon had been made some three years earlier. The principles of ascertaining the nature of the relief sought and whether there was an alternative remedy that was being avoided, had already been stated (see paragraph 5 above). The decision in Jaroo's case merely re-stated the law and repeated the warning against the abuse of the constitutional motion; this was alluded to in Jaroo's case where, after citing the oft quoted decision of Lord Diplock in Harrikissoon's case which was referred to, at paragraph 5 above, Lord Hope stated at paragraph 30.

“Lord Diplock repeated his warning against abuse of the constitutional motion in the context of criminal cases where there was a parallel remedy in Chokolingo v the Attorney General of Trinidad and Tobago 1981 1 W.L.R. 106, 111-112, see also his observations in Maharaj v Attorney General of Trinidad and Tobago (No.2) 1979 A.C. 385, 399-400 and Attorney General of Trinidad and Tobago v McLeod (1984) 1 W.L.R. 530.”

(It should be noted that the latter two cases were not criminal law cases and that the first two cases pre-dated the present matter).

Therefore the Applicant could not argue that there had been a change in the law since he filed his motion.

As an off shoot to this point, the Applicant sought to argue that another factor to consider was that the argument of abuse of process was taken at a very late stage and there had been no objection on this issue before. However, in Jaroo's case the abuse of process point only arose for the first time in the decision of the Court of Appeal (see paragraph 14) and was only fully ventilated

at the hearing in the Privy Council, yet the issue of abuse of process was upheld in the Privy Council. Therefore, the lateness of the Respondents' objections was not necessarily an exceptional circumstance. This position was affirmed by the Court of Appeal in George and Anor. v The A.G. (cited above at paragraph 14) where at paragraph 15 Hamel-Smith J. A. stated:

“What is quite evident is that their Lordships in Jaroo had no hesitation in dismissing the appeal as an abuse of process in spite of the fact that the issue had been fully ventilated in the High Court and in the Court of Appeal. The question of abuse arose for the first time in and by the Court of Appeal itself. In those circumstances, one would have thought that the Privy Council, in order to do broad justice to the case, might have considered it appropriate to allow the matter to proceed as if commenced by writ in spite of the abuse. The abuse, it seems however, was so ingrained and indefensible that the only acceptable course to adopt was to dismiss the action altogether.”

21. With respect to point (b), that there were some matters raised which involved only pure issues of constitutional law, Counsel for the Applicant rightly abandoned this argument as it was clear that all the reliefs sought could have been obtained in an application for judicial review. Further, having regard to my findings at paragraphs 14 and 15 above, this point could not be successfully advanced.

22. With respect to the issue of Limitation and the Applicant now being left without a remedy, I noted that this issue arose because the litigation herein has been exceptionally protracted; but the fact remains that from the outset, if the Applicant had properly considered his case, it would have been apparent that

there were serious difficulties in the way of proceeding by constitutional motion, namely, the nature of the relief sought, the existence of parallel remedies and, upon the filing of affidavits by the Respondents, serious disputes of fact. From the outset, or, at the latest, upon the filing of affidavits by the Respondents, the abuse was so ingrained as to be indefensible.

In De Lon Haynes v The A.G. H.C.A. 612 of 1999, Mohammed J. stated:

“If a constitutional motion is dismissed, consequences to an Applicant may occasionally be harsh. This is because in some cases, the relevant limitation periods for common law actions would have expired.

As unfortunate as that consequence may be, an abuse of the process of the court by the plainly inappropriate pursuit of a constitutional motion cannot be countenanced, for to do so would be to whittle away at the important value of constitutional relief.”

I accepted these observations and found that it applied to the present matter.

Another factor to note is that on checking the record of the proceedings in this matter, the majority of the numerous adjournments in this action were granted at the request of Counsel for the Applicant. A great part of the reason for this litigation being protracted was because of these adjournments which were granted so as to facilitate the Applicant; therefore, it behoves him little to now complain of the problem of limitation caused by such delay.

23. In the circumstances, I concluded that there were no exceptional circumstances in the present matter to allow this motion to proceed in the light of the availability of a parallel remedy.

CONCLUSION:

24. In all the circumstances, having decided that this matter was an indefensible abuse of process the only acceptable course was to dismiss the motion and I ordered accordingly.

25. However, bearing in mind that some of the adjournments of this matter were at the request of the Respondent, and also, the fact that the objection of abuse of process was raised late in the day I felt that it would not be fair to saddle the Applicant with the Respondents' costs of this matter and I made no order as to the costs of this motion.

Dated this 30th day of June 2004

**Mr. Justice Smith
JUDGE**