

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE EQUAL OPPORTUNITY TRIBUNAL**

(Referred pursuant to S. 39(2) of the Equal Opportunity Act 2000 as amended by Act No. 5 of 2001)

E.O.T. No. 0005 of 2012

**BETWEEN**

**DESMOND NOEL**

**Complainant**

**AND**

**THE AUDITOR GENERAL OF TRINIDAD AND TOBAGO**

**Respondent**

**CORAM:**

His Honour Mr. Rajmanlal Joseph - Judge/Chairman

Her Honour Ms. Leela Ramdeen - Lay Assessor

His Honour Mr. Harridath Maharaj - Lay Assessor

**APPEARANCES:**

**Mr. Delzin instructed by Ms. Sylvester** appeared on behalf of the **Complainant**

**Ms. Nabbie and Ms. Boxhill** appeared on behalf of the **Respondent**

**Date of Delivery of Judgment: September 15, 2017**

**JUDGMENT**

**BACKGROUND:**

1. This case is concerned primarily with the allegation by the Complainant that he was discriminated against by the Respondent contrary to Sections 5(a) and 9(b) of the Equal Opportunity Act, Chap. 22:03, in the way that, in circumstances that are the same or not materially different, the Respondent has treated the Complainant less favourably than persons of a different race, by the Respondent's refusal and/or deliberate omission to afford the Complainant access to the opportunity to act in the post of Audit Director during the periods as follows:
  - (i) 17<sup>th</sup> February 2010 to 8<sup>th</sup> April 2010
  - (ii) 10<sup>th</sup> May 2010 to 15<sup>th</sup> July 2010
  - (iii) 8<sup>th</sup> June 2010 to 19<sup>th</sup> July 2010; and
  - (iv) 16<sup>th</sup> August 2010 to 9<sup>th</sup> December 2011.
  
2. In addition, the Complainant is seeking a Declaration that the Respondent has victimised the Complainant contrary to Section 6(d) of the Equal Opportunity Tribunal Act, Chap. 22:03, in the way that, the Respondent has treated the Complainant less favourably than in those circumstances the Respondent treats or would treat other persons and has done so by reason that the Complainant has alleged that the Respondent has committed an act, which (whether or not the allegation so states) would amount to a contravention of the Act. And further the Complainant is also seeking damages including aggravated and/or exemplary and/or vindictory damages.
  
3. On the other hand, the Respondent by its amended Defence filed on September 30, 2013 indicated that the Respondent did not discriminate against the Complainant on the basis of his race in terms of not being recommended to act in the next higher position during the periods outlined in his Complaint and Particulars thereof. Moreover, it is the position of the Respondent that the Complainant was never victimised; and that he was not recommended to act in the next higher position was due to his poor performance record.

**THE EVIDENCE:**

4. With reference to their respective positions hereinabove the parties submitted the undermentioned Witness Statements:
  - (a) Witness Statement of the Complainant filed on September 30, 2013.
  - (b) Witness Statement of Sharman Ottley filed on September 30, 2013
  - (c) Witness Statement of Reahla Balroop filed on September 30, 2013
  - (d) Witness Statement of Shiva Sinanan filed on September 30, 2013
  - (e) Witness Statement of Elizabeth Ann Mofford Benjamin filed on September 30, 2013
  - (f) Witness Statement of Gaitrie Maharaj filed on September 30, 2013.
  
5. Essentially, it is the evidence of the Complainant that he began his employment at the Auditor General's Department at the entry level in the Technical Class and on October 10, 2000 he received a letter of even date from the Service Commissions Department appointing him Auditor Examiner Assistant I, Auditor General's Department with effect from 14<sup>th</sup> June, 1999.
  
6. The Complainant indicated that throughout his working life at the Auditor General's Department he applied himself conscientiously to be a better auditor. In that regard he wrote and was successful in the final examinations of the Association of Chartered Certified Accountants (ACCA) in December, 1999. He maintained that he was the only person in the Department who passed those examinations in that sitting. And was subsequently recommended to act as Audit Senior with effect from May 15, 2000. After him the following officers passed the ACCA final examinations: Jennifer Lutchman, Nela Dwarika Ali, Anisha Baksh and Cheryl Ann Wright.
  
7. This witness stated that he took steps to further develop himself by attending a number of training courses, taken examinations and became a member of professional bodies; and at the time of doing his witness statement he was reading for the Henley Masters in Business Administration (2008-2013). He forcefully pointed out that he used his personal funds for all these examinations and training; and retained membership in the

ACCA, ISACA, Institute of Chartered Accountants of Trinidad and Tobago (ICATT) and Institute of Internal Auditors (IIA).

8. He further asserted that throughout his tenure at the Auditor General's Department he consistently received very good Annual Performance Appraisals. The exceptions being the Appraisal done by Mr. Gary Peters (a person of East Indian descent) for the period June 14, 2002 to June 14, 2003 which was subsequently overturned by the Assessment Appeal Committee. In addition to another Annual Performance Appraisal for the period June 2008 to 2<sup>nd</sup> June 2009 done by Mrs. Mofford Benjamin in which she indicated that *"the officer is not yet ready to perform duties of the higher level"*. The Complainant appealed his Appraisal and the Assessment Appeal Committee by its report dated January 31, 2011 set aside the box 3 performance rating of "good" to box 2 *"very good"*.
  
9. The Complainant exhibited some of his Annual Performance Appraisals in which he asserted that in one of his reports he received a very good assessment in which his strengths were:  
*"displayed excellent people management skills and conflict resolution solution. Good analytical ability and good supervisor"* And he was deemed fit to be promoted to the next higher level. These were all contained in his Annual Performance Appraisal for the period June 2011 to 2<sup>nd</sup> June, 2012. Further, in his 2006 Annual Performance Appraisal the then Assistant Auditor General Ms. Pujadas-Charles identified his major strength as follows:  
*"very good investigating techniques;*  
*Willingness to learn;*  
*Takes constructive advice, and his performance rating was rated as very good"*. Moreover, his career prospects/potential was that *"The Officer is now capable of performing duties/responsibilities of a higher level"*.
  
10. However, the Complainant also indicated that having met the requirements for the Audit Director position, he acted Audit Director each year from 2004 to 2009 as long as he was in line for the acting period and the acting was for more than three weeks.

11. The Complainant further stated that in 2006 Ms. Ottley was appointed Auditor General and in 2010 during a meeting with the Public Service Association (PSA) she indicated inter alia that the officers in San Fernando did not wish to work with him and preferred to do the work themselves. However, she did not give him an opportunity to know his accusers and defend himself against allegations made. He maintained that she was very vague and did not identify any of the persons by name or office. On account of his good relationship with staff at the South Branch, he had his misgivings about these allegations as not one officer was identified in support of her allegations.
12. Furthermore, on December 2, 2009 the Complainant stated that he was summoned by the Auditor General and was told that two Assistant Auditor Generals Mrs. Benjamin and Ms. Maharaj complained to her that they could not work with or supervise him. The Complainant indicated that he was disturbed because he told the Auditor General that Ms. Maharaj had given him good appraisals and that she had not reviewed a single file when he stopped reporting to her.
13. In addition, the Complainant indicated that the technical and professional class in the Auditor General Department (AGD) are unique to it; in that there is no external competition when vacancies arise in these offices. The vacancies can only be filled by officers within the Auditor General's Department. The exception being if the AGD goes through the process and takes in persons at the entry levels. However, in Staff Notice 05 of 2010 it was indicated that Mr. Shiva Sinanan was proceeding on vacation leave but it failed to mention that Ms. Dwarika Ali was to "hold on" for Mr. Sinanan. He maintained that if the Department had taken a legitimate management decision not to recommend anyone to act in the office of Audit Director, then he should be asked to "hold on" before Ms. Dwarika Ali as he was senior to her but it was their intent to treat him less favourably because of his race, being of African Descent while Ms. Dwarika Ali is of East Indian descent.
14. Furthermore, the Complainant indicated that he was treated less favourably than Ms. Balroop who is of East Indian descent; in that they have comparable staff appraisals at the level of Assistant Audit Director (AAD) yet she was recommended to act but he was not. In addition, after working with Ms. Maharaj in Division 2 over the period 9<sup>th</sup> October 2008 to 30<sup>th</sup> January, 2009 (77 working days) and again from 11<sup>th</sup> September,

2009 to 2<sup>nd</sup> October, 2009 (15 working days) she was able to determine that he was not only not suitable to act Audit Director but to perform in his substantive office as Assistant Audit Director. Ms. Maharaj made this profound determination although she had given him very good assessment over the related periods. Not only that, she did all of that without first reviewing a single audit report of his submitted during the period 11<sup>th</sup> September to 2<sup>nd</sup> October, 2009. The Complainant averred that the ten prior years working in the Department and year after year getting positive staff appraisals, undergoing training and gaining qualifications to develop himself; he was the only person in her division not fit to be promoted. The Complainant maintained that any East Indian with his qualification, experience and performance appraisals would have been recommended by Ms. Maharaj who is of East Indian ancestry to act as Audit Director. Consequently, based on the report by Ms. Maharaj to the Auditor General he was not put to act as Audit Director for periods complained of.

15. The Complainant further indicated that he complained about the less favourable treatment against him by the Auditor General to the Chief Personnel Officer (CPO), the Director of Personnel Administration (DPA) and the Public Service Association (PSA). However, the PSA did intervene on his behalf on many occasions and at each time provided advice to the Auditor General's Department.
16. Additionally, he stated that at a meeting with the Auditor General she provided him with Auditor General she provided him with a note dated 1<sup>st</sup> February, 2010 signed by Ms Maharaj in which she stated for the first time that she and Unit 2 heads did not want to work with him. Following this note, the Complainant approached Ms. Balroop to find out if she had any difficulty working with him and she responded no. He asked her if she was told of his weaknesses that she needed to address and she said that she was not told of any area to address.
17. Further, on May 31, 2011 the Complainant met with Ms. Balroop to do his quarterly and annual appraisal. At that meeting she assessed his performance as poor, stating that he refused to comply with her lawful instructions and that he was unable to perform at the level he was at, she cannot work with him, and that he needed development with basic accounting and basic auditing. He simply told her that he would appeal her decision; and did so on July 22, 2011. And by letter dated October 5, 2011 the

Assessment Appeal Committee communicated its decision to the Complainant in which it overturned Ms. Balroop's decision.

18. However, the Complainant asserted that at a meeting of the Joint Consultative Committee held on December 8, 2011 in which the President of the PSA and members of his executive attended, he was recommended to act Audit Director. In addition, a decision was also taken at that meeting to discontinue Ms. Balroop's appeal of the decision of the Assessment Appeal Committee. Further, by letter dated December 12, 2011 he was recommended to act Audit Director, San Fernando Branch office from December 12, 2011 to January 6, 2012. And on April 18, 2012 his Annual Performance Appraisal for the period June 3, 2009 to June 2, 2010 was finally completed by the Auditor General, in which she assessed his performance as being "*very good*" and that he was fit to be promoted.
19. This witness was comprehensively cross-examined by counsel for the Respondent. And the Tribunal found him to be generally truthful in his responses to questions asked by counsel; even accepting that he made certain errors when he was supervised by Ms Balroop. Nonetheless, the Tribunal found him to be a credible witness.
20. The next witness to be called was Ms. Sharman Ottley who indicated that at the material time she was the Auditor General and held this position since March 14, 2006 and had worked at the Auditor General's Department since April 16, 1973. And is the Head of the Department and required to make all acting appointments as delegated by the Public Service Commission.
21. This witness averred that every month there is an "*Acting Meeting*" which is held to determine which officers are going to be appointed to act, and in doing so she use the seniority list for the Auditor General's Department and in conformity with Regulation 26 of the Public Service Commission Regulations (PSCR). However, where officers are recommended to act at a location where they are not normally based, that person would be written to by Human Resource Services to see if that person is interested in the acting appointment. If that officer is not interested, the next senior eligible officer is written to, until the acting appointment is accepted.

22. This witness further indicated that from December 2, 2009 she had placed him on Special Assignment reporting directly to her. This action was taken in light of verbal representations made by Ms. Maharaj then Assistant Auditor General, Division II where the Complainant was assigned prior to this date. She indicated that officers in her Division did not wish to work with the Complainant, neither did they wish to be supervised by him. This action was a temporary measure until the matter of persons not wishing to work with the Complainant could have been resolved.
  
23. With reference to the period 17<sup>th</sup> February 2010 to 8<sup>th</sup> April 2010 there was a vacancy for an Audit Director in an acting capacity at the San Fernando Branch Office as a result of Mr. Shiva Sinanan proceeding on vacation leave. The Complainant was next in line to act in the position. However, based on the wrong advise given in a management letter to a client when the Complainant previously acted for Mr. Sinanan. Ms. Dwarika Ali Assistant Audit Director, the next most senior officer at the San Fernando Branch was asked to "hold on" as she was based in San Fernando and not because she is of East Indian descent.
  
24. With respect to the vacancy of Audit Director from 10<sup>th</sup> May 2010 to 15<sup>th</sup> July 2010 which arose due to the acting appointment of Mr. Gary Peters as Assistant Auditor General, this vacancy was in Division II headed by Ms. Maharaj. She did not appoint the Complainant to act because she was of the view that his work was not of the level expected of an Audit Director. This was based on verbal reports she received from Ms. Maharaj.
  
25. With respect to the period 2<sup>nd</sup> August 2010 to 9<sup>th</sup> December 2011 as raised by the Complainant in his Particulars, she averred that Ms. Maharaj an Assistant Auditor General proceeded on vacation leave to be followed by a scholarship, and Mr. Gary Peters, Audit Director was appointed to act for her. However, sometime in August 2010 Ms. Maharaj assigned Ms. Baroop, Acting Audit Director to supervise the Complainant with a view to improving his performance by providing guidance and advising on any weakness in his work performance and to provide written instructions with regard to any task to which he was assigned. In the circumstances, based on the Complainant's performance and the fact that he would have been at the same level as

Ms. Balroop who was mentoring him, she decided not to appoint him to act as Audit Director for that period.

26. This witness further maintained that she never made any decisions regarding acting appointments for the Complainant or any other officer based on race. And that the Complainant has not been discriminated against in any regard. However, he received an adverse performance appraisal for the period 3<sup>rd</sup> June 2008 to 2<sup>nd</sup> June 2009. He appealed and the appeal was up held on the grounds that certain procedures required under the performance management system for the Public Service were not followed. In addition, he received an adverse performance appraisal report for the period 3<sup>rd</sup> June, 2010 to 2<sup>nd</sup> June, 2011; he appealed and his appeal was up held on the grounds that procedure as required under the performance appraisal system was not followed.
27. This witness was extensively cross-examined by counsel for the Complainant. And agreed that there is nothing in the public service that demands that one of the factors for promotion is that people must want to work with you. In addition, she also agreed that it would not be a factor to be taken into account in making an acting appointment.
28. This witness also accepted that when Mr. Sinanan was critical in a management letter sent out by the Complainant when he acted Audit Director at the San Fernando office he did not bring these errors to his attention so he may give an explanation.
29. Moreover, this witness accepted that the Complainant was the most eligible to act, he was the most senior, and that she was required to take into account his general performance in deciding whether he should be appointed to act; and that she has decided that the willingness of officers in his division to work for him was a factor that militated against him acting.
30. Even though this witness accepted that she took into account a factor for promotion or acting appointments in the public service that ought not to be taken into account; and did not give the Complainant an opportunity to respond to Mr. Sinanan's criticism of his management letter. The Tribunal found that this witness tended to be a credible witness.

31. The next witness was Ms. Reahla Balroop who indicated that at the time of making her Witness Statement she held the position of Acting Audit Director in the Port of Spain branch of the Auditor General Department; and had been so acting in this position for approximately eight years. And on August 12, 2010 Ms. Maharaj and Ms. Balroop met, and she was asked by Ms. Maharaj to supervise and to provide written instructions and guidance to the Complainant with regard to any task to which he was assigned. And from 12<sup>th</sup> August 2010 to 2<sup>nd</sup> June 2011 she supervised the Complainant and provided him with written instructions upon completion of the several assignments conducted during that period.
32. Moreover, after the Complainant completed his assignments during this period she wrote him advising him of any weakness noted in his work and provided guidance for improvement of the assignments given by means of a Report Review Form. An Internal Memorandum re: Performance Assessment was issued for each assignment given and included analyses of the deficiencies found in the Complainant's work during that period. These documents were filed on 12<sup>th</sup> July, 2013 and are as follows:

**TAB 6** (Review of Accountants Working Papers of the Airport Authority of Trinidad and Tobago (AATT) for year ended 31<sup>st</sup> December, 2003)

**TAB 12** ((Review of Accountants Working Papers of (AATT) 2004 for year ended 31<sup>st</sup> December, 2004)

**TAB 13** (Review of Accountants Working Papers of the Airport Authority of (AATT) for year ended 31<sup>st</sup> December, 2005)

**TAB 14** (Review of Accountants Working Papers of the Airport Authority of (AATT) for year ended 31<sup>st</sup> December, 2006)

**TAB 16** (Review of Management Letter re: Audit of Financial Statement of Chaguaramas Development Authority for the year ended 30<sup>th</sup> September, 2002).

**TAB 17** (Review of Accountants Working Papers of Environmental Management Authority for year ended 31<sup>st</sup> December, 2009): and

46. Based on the evidence presented in this case the Tribunal on a balance of probabilities find the following facts:  
(a) That the Complainant at the material time held the substantive position of

**FINDINGS OF FACT:**

45. This witness was extensively cross-examined by counsel for the Complainant and what significantly emerged was that in her discussions with Ms. Otley then Auditor General the only issue raised by her according to Ms. Otley was the allegation that officers in Division 2 did not want to work with the Complainant, and not any issue of his alleged poor work performance. In addition, she admitted that she gave him a good performance appraisal following his work on the NLCB audits; but when asked by the Complainant why he was not allowed to act Audit Director, she quite remarkably indicated that the review was a cursory review. And that she did not want to "stain" his performance record. Due to these contradictions the Tribunal found this witness to be combative and reluctant to answer searching questions; and therefore the Tribunal found this witness to be less than credible.

44. It is the further assertion of this witness that the Complainant requested a meeting with her to find out why he was not allowed to act for the next available period. She stated that she reiterated his weakness, and he pointed out that his performance appraisals did not reflect his weakness. She maintained however that he NLCB audits were based on a cursory review and did bear some areas for improvement. And it is in this context that she did not want his performance record to carry the stain of "poor performance".

43. However, his subsequent work on the Central Bank Audit and letters he issued to clients as being unsatisfactory and below the standard required of an officer of his rank. In addition, Ms. Maharaj was critical of the Complainant's work on NLCB Audits. And was of the opinion that he lacked the technical soundness for the next higher post of Audit Director. It is in this context she asserted that arrangements were made with Reahla Balroop who was asked to supervise and coach him to improve his performance, and to assist him in remedying his technical weakness, so that he would be ready to perform at the higher level. He was therefore not recommended for further acting as Audit Director until such assessment can be made.

42. The final witness called was Ms. Giatric Maharaj who indicated at the time of making her Witness Statement she held the post of Assistant Auditor General in the Auditor General's Department since 1994. And it was when she was assigned to Division II from September 2004 to August 2010 that she worked with the Complainant. This witness further indicated that the Complainant was assigned to her Division from 10<sup>th</sup> October, 2008 until 30<sup>th</sup> January 2009 as Acting Audit Director. And During this period she assigned him 3 audits to do, and she stated that his work was well done and she indicated that on his staff performance worksheet.

41. This witness was cross-examined by counsel for the Complainant and it came out that she supervised the Complainant for the first time during the period February 5, 2009 to April 30, 2009. And she did the Complainant's Annual Performance Appraisal for the period June 2008 to June 2009 and it was based on her supervision of him for 3 months. She gave him a box 3 performance rating "good" and indicated that he had poor people skills and was not ready to perform the duties at the next level. This was appealed and the Appeal Committee overturned her negative markings and upgraded the Complainant's performance rating from "good" to "very good". The Tribunal was of the view that this witness was annoyed by the exchange of correspondence flowing between the Complainant and herself concerning the VMCOTT Report; and allowed her unsettled feelings to affect her appraisal of the Complainant's overall performance. Consequently, we found her a bit unreliable.

40. The Complainant further appealed the Equity Assessor's Report and a Tribunal was set up. The Tribunal overturned the Equity Assessor's Report and the Complainant's performance rating was upgraded from "3" to "2".

39. On 25<sup>th</sup> January, 2010 Ms. Benjamin completed an annual performance appraisal report for the Complainant in which she recommended some remedial training for him and stated that he was not ready to perform the duties at the higher level. The Complainant objected to her assessment and filed an appeal with the Equity Assessor, the Auditor General. The Equity Assessor subsequently deleted her recommendation for training.

**TAB 19** (First Level Review of Audited Financial Statements of the Port of Spain City Corporation for year ended 31<sup>st</sup> December, 2001).

33. This witness was thoroughly cross-examined by counsel for the Complainant and it came out that during the period June 3, 2010 to June 2, 2011 was the first time that she ever supervised the Complainant. However, on August 12, 2010 she was instructed by Ms. Maharaj then Assistant Auditor General to provide detailed guidance to the Complainant. The purpose of the assignment was to provide written assessments of the Complainant's performance; which were outlined in a number of memoranda all dated May 31, 2011. And the detailed guidance instruction manifested itself in Report Review Forms at the back of the aforesaid memoranda. In addition, none of these documents contained the signature of the Complainant indicating that he was aware of their existence. In that regard, the Tribunal found that all of these documents carrying the same date was calculated to escape the attention of the Complainant and be part of the written record against him. In that regard we found this witness to be less than reliable.
34. The next witness called was Ms. Shiva Sinanan, Audit Director attached to the San Fernando Branch of the Auditor General's Department, who indicated that he has been an employee of the Department for the past 20 years. And further, sometime in early 2009 he proceeded on vacation leave and the Complainant was appointed to act in his place. He subsequently returned from vacation leave just after Easter of 2008 whereupon the Complainant reverted to his substantive position in Port of Spain.
35. This witness further indicated that he reviewed a file that the Complainant had worked on in his absence, it was the 2001 audit of the Siparia Regional Corporation. He noticed a few errors on the management letter. He underlined the errors in the file and did a second level review report, a draft Auditor General's Report and the forwarding letters. Thereafter, he minuted the file to be sent to Mr. Majeed Ali, Assistant Auditor General, at head office, Port of Spain, who then sent the report to Ms. Sharman Ottley, the Auditor general. Two weeks later the Auditor General called him and she mentioned the issues she saw in the letter. He told her that he would deal with the matter when he made a courtesy call to the clients.