

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 2013

BETWEEN

INDRA CHANKASINGH-BUDHAI

Complainant

AND

THE MINISTRY OF FOOD PRODUCTION

1st Respondent

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

2nd Respondent

CORAM:

His Honour Mr. Rajmanlal Joseph - Judge/Chairman

Her Honour Ms. Leela Ramdeen - Lay Assessor

His Honour Mr. Harridath Maharaj - Lay Assessor

APPEARANCES:

Ms. S. Singh and Mr. A. Mohammed for Complainant.

Mr. K. Ramkissoon for First Respondent.

Mr. N Byam and Ms. Thompson for Second Respondent.

Date of Delivery of Judgement: July 11, 2017

JUDGMENT

BACKGROUND:

1. The Complainant by her complaint and particulars thereof filed on February 26, 2014 wherein she contended that she was discriminated against by the agents/servants of the Respondents in refusing or deliberately omitting to afford the Complainant access to opportunities for promotion contrary to the Act due to her status of sex..
2. Further, that the Respondent, its servants/agents treated the Complainant less favourably than in those circumstances would treat other persons, and did so by reason that the complainant brought proceedings against the Ministry of Food Production; and/or had given evidence or information in connection with such proceedings, resulting in the Complainant being victimised contrary to the Act.
3. The First Respondent by its Defence filed on March 13, 2014 contended that it did not discriminate against the Complainant on the basis of her sex or by reason of victimisation. And maintained that promotion within the public service is the exclusive domain of the Public Service Commission pursuant to Section 121 (1) of the Constitution of the Republic of Trinidad and Tobago.
4. It is the further averment of the First Respondent that the Complainant acted continuously as Agricultural Assistant II in South Region from May 22, 1991 until May 22, 2001 and received her substantive appointment as an Agricultural Assistant II with effect from December 31, 1991. Moreover, by memorandum from the Director of Personnel Administration (DPA) dated March 14, 2011 the Complainant was promoted to Agricultural Assistant III (AA III) on April 7, 2011 at the Research Division, La Reunion Estate, consequent on the retirement of Mr. David Waldropt.

Furthermore, by letter dated February 23, 2012 to the DPA, the Complainant declined the promotion. The DPA by letter dated April 18, 2012 to the Complainant cancelled the promotion with effect from April 7, 2011.

THE EVIDENCE:

5. In support of their positions abovementioned, the parties submitted the following witness statement.
 - (a) Written Witness Statement of the Complainant dated July 28, 2014 and filed on August 29, 2014, in addition to a Supplemental Witness Statement dated March 18, 2015.
 - (b) Written Witness Statement of Ahid Ali (Retired AAIII) dated and filed on April 7, 2015.
 - (c) Written Witness Statement of Patrice Smith, Ag. Senior Human Resource Officer of the First Respondent, dated July 25, 2014 and filed on July 28, 2014.
 - (d) Written Witness Statement of Aldwyn Wellington, Agricultural Officer I of the First Respondent, dated July 24, 2014 and filed on July 28, 2014

6. In essence the evidence of the Complainant was that she first started to work in the Ministry of Food Production as an Agricultural Assistant on August 1, 1978; and worked as a District Officer in the Counties of Victoria and St. Patrick. On November 30, 1993 she was made an Acting Agricultural Assistant II (AA II). And in March 30, 1994 was promoted to AA II with effect from December 31, 1991, and according to the memorandum from the Public Service Commission the Complainant was promoted in a vacancy that occurred when Ragoobir Singh (AA II) was promoted to AA III with effect from December 31, 1991. It was the contention of the Complainant that at that time Mr. Singh was stationed at the Plant Quarantine Section of the Research Division.

7. The Complainant further asserted that she was only sent to the Plant Quarantine Section in 2001 due to the intervention of her union. Further, by letter dated March 14, 2011 from the Public Service Commission she was promoted to AA III with effect from April 7, 2011. However, by letter dated February 23, 2012 to the Service Commission Department the Complainant rejected the promotion on the basis that she preferred to remain as an AA II in the Plant Quarantine Section of the Research Division. The Service Commission Department by letter dated April 18, 2012 informed her that her promotion to AA III was cancelled with effect from April 7, 2011.

8. The Complainant maintained that the Ministry "*Juggled the appointments to enable Loutan to get the job over me*". And further declared that she was discriminated against because she is a woman. Moreover, she asserted that seniority was the only thing to be considered in the promotion process and this was not done in that the proper order was not followed. It was her expectation to be promoted to the AA III position that was held by Mr. Ali at the Plant Quarantine Section; while Mr. Loutan should have been promoted to the AA III slot occupied by Mr. Waldropt in Research Section.
9. It is the further contention of the Complainant that she rejected the notion that promotions can only be done for employees whose performance appraisals are up to date, whether by the Public Service Commission or any other department.
10. The Complainant also asserted that she was being discriminated against because of being a woman for the following reasons:-
 - (a) "*My male counterpart, Mr. Loutan who was immediately senior to me as an AA II got the promotion that was supposed to be for me as an AA III.*"
 - (b) *I was now placed to work under him as an AA II.*
 - (c) *Mr. Loutan ensured that I did not leave the office to do the travelling jobs or the overtime work, even though the post of AA II is a travelling one.*
 - (d) *Mr. Loutan gave preference to the male AA II's under him in that he allowed them to come into the office at whatever time and to leave before 4p.m, to go do their overtime jobs.*
 - (e) *I had to remain until 4p.m, at the office and then leave to do the overtime work*".
11. Furthermore, the Complainant stated that Mr. Rudolph Jack who was promoted to AA II in 2009 was transferred to Point Lisas ahead of her and was made to stay in Port of Spain before the Complainant went ^{on} to pre-retirement leave. And that she considered that discrimination since he was less senior and not as experienced or as performance oriented as herself; and yet he was sent to the most lucrative of the stations ahead of her.

12. In her Supplemental Witness Statement dated and filed on March 18, 2015 the Complainant reiterated that whilst working at the Ministry promotions are done according to the seniority list. And that persons are matched to a person in a higher position and when he retires the person so matched would be promoted to that vacancy. The Complainant maintained that she was "*matched*" against Mr. Ahid Ali AA III. And further asserted that she was discriminated in the rotation schedule.
13. Mr. Ahid Ali, retired AA III gave a Witness Statement on behalf of the Complainant and contended that from his experience and observation over the years "*the most senior employee in one category is appointed according to a seniority list*". And that "*promotion within the Ministry are done strictly according to the seniority lists. Not on merit. The Public Service Commission even has these seniority lists*".
14. Moreover, Mr. Ali stated that due to the "*matching*" approach to promotions and that he was aware that the Complainant was the AA II to be promoted when he retired.
15. On behalf of the First Respondent two Witness Statements were filed, both on July 28, 2014. In that regard Patrice Smith then Acting Senior Human Resource Officer of the First Respondent contended that "*neither the First Respondent nor the Human Resource Division has the authority or power to promote and make appointments to vacant offices within the Ministry...such responsibility belongs to the Public Service Commission which is guided by the Public Service Commission Regulations*". She further asserted that "*promotions within the Ministry are based on seniority*". And that the composition of the said seniority listing is solely the Public Service Commission's (PSC) responsibility.
16. Moreover, Ms. Smith asserted that annual performance appraisal reports are vital to the promotion of an employee, and it is only when an employee's performance appraisal is up-to-date that he/she can be promoted. Further, she is aware that the PSC may not fill a vacancy immediately and that the Permanent Secretary has power delegated to him by the PSC to appoint the most senior officer to act in the vacancy, until the PSC appoints an officer permanently.

17. Further, she is also aware that on the voluntary retirement of David Waldropt with effect from February 2, 2009 as AA III, the PSC promoted the Complainant to that position as she was the next most senior employee. While Mr. Loutan the actual most senior person could not be promoted due to the fact that his performance appraisal reports were not up to date. But he was so promoted on November 8, 2011 upon the retirement of Ahid Ali.
18. The other witness for the First Respondent was Mr. Aldwyn Wellington, Agricultural Officer I who indicated that he had worked with the Ministry for 31 years and served as Agricultural Officer I since May 2004; and is responsible for the supervision of all Plant Quarantine officers at three official ports of entry into the Island of Trinidad, namely, the Piarco international Airport, the Port of Spain Port and the Pt. Lisas Port.
19. Mr. Wellington stated that there is a rotation system in place as regards AA II's in plant quarantine. He maintained that the Port of Spain port was the busiest port and requires 3 AA II's (out of 5) the other two being posted at Pt. Lisas and Piarco ports. Consequently, over the past 4 years, only one AA II out of a pool of three AA II's attached to the Port of Spain port is rotated every year.
20. This witness asserted that he is aware that the Complainant was an AA II in Plant Quarantine in 2001 and that she effectively retired on April 22, 2014. He stated that during the years 2001 to 2014 the Complainant was rotated within the three ports a minimum of eight times.
21. Further, it came to his attention during the latter part of 2012 that the Complainant requested to be rotated to the Pt. Lisas Station. Upon investigating this request he found out that based on planned recommendations, one Mr. Rudolph Jack was in line to head the operations at the Pt. Lisas Station.
22. He further indicated that in keeping with the practice and procedure of the Ministry, he could not make the rotations; but wrote a memorandum to the Director of Research on December 17, 2012 recommending Mr. Jack to be rotated to Pr. Lisas station, instead of the Complainant. And the reasons he advanced for this recommendations are as follows:

- (i) Mr. Jack never served at Pt. Lisas despite holding the office of AA II in the Research Division Corp Protection Sub Division since 2009.
 - (ii) The Complainant served as AA II at the Pt. Lisas Station three years prior, during the period May 2009 to May 2010.
 - (iii) The Complainant was rotated a minimum of eight times since being employed as AA II in the Plant Quarantine Division in 2001.
 - (iv) The rotation was scheduled for June 2013, however, the complainant was set to enter pre-retirement in December, 2013. Therefore, if the Complainant was recommended for rotation at Pt. Lisas, she would have served for only 6 months before entering into pre-retirement.
23. The Complainant was extensively cross-examined by counsel for the First and Second Respondents. From the said cross-examination she indicated that her complaint was that she was supposed to be promoted to the AA III position in place of Mr. Ahid Ali at the Plant Quarantine Unit; but was instead promoted by the Public Service Commission by letter dated March 14, 2011, and was placed by the PS in the AA III slot made vacant by the early departure of Mr. David Waldropt.
24. The Complainant steadfastly maintained that the Public Service Commission promoted her but that the Permanent Secretary posted her out against Mr. Waldropt at research. She indicated that she refused the promotion to AA III as that posting had no lucrative overtime earnings attached to it.

Later in cross-examination she stated emphatically that *“when the Public Service Commission promotes you, the names go to the PS and the PS then in his or her jurisdiction with consultation with the Director of Human Resources place you out on your post”*.

25. Furthermore, when the Complainant was asked whether there were persons of your rank who never got to go to the Plant Quarantine Department, she indicated *“the other 325... comprising men and ladies now, plenty ladies”*

Mr. Ahid Ali when cross-examined indicated that Agricultural Assistants are placed all over Trinidad and Tobago at various stations and that he is aware that completed performance appraisal reports are necessary for promotions. In addition, he stated that there is from time to time, time lags in the preparation and submission of such reports, sometimes as much as two to three years.

26. Moreover, he indorsed the position of the Complainant that an Agricultural Assistant in Plant Quarantine can earn a significant amount of extra earnings. He also indicated that there is a seniority list and it is produced by the Service Commission. Mr. Ali further accepted that the Complainant worked at Plant Quarantine for twelve years. He specifically recalled that she worked with him at Plant Quarantine in Port of Spain, Pt. Lisas and Piarco.
27. The next witness to be cross-examined was Ms. Patrice Smith then Acting Senior Human Resource Officer of the First Respondent and she indicated that the Ministry does not have the power to make appointments to vacant offices, but the Permanent Secretary does have delegated powers to make acting appointments; and in so doing is guided by the seniority list from the Public Service Commission.
28. Further, this witness admitted that the Complainant had a history of challenging the Ministry on her appointments and on one of those occasions a settlement in the Complainant's favour was reached. Moreover, this witness indicated that the PSC requested updated performance appraisal reports for Mr. Loutan for the purpose of promoting him.
29. The final witness to be cross examined was Mr. Aldwyn Wellington, Agricultural Officer I who indicated that he was responsible for recommending rotations between the three ports within the Plant Quarantine Department. His recommendations go to the Director of Research and then to the Permanent Secretary who had the ultimate authority to approve the recommended rotations. He also stated that his recommendations are generally approved. He also indicated in his evidence that rotations within the Plant Quarantine Department takes place within a pattern and that pattern is interfered with when there is

retirement, resignation or death of an officer. He also indicated that he had no first hand knowledge on how Agricultural Assistants move from grade I to III but suspected that it was on the basis of seniority.

30. This witness also stated that he did not interfere with the existing pattern of rotations in order to prevent the Complainant going to the Pt. Lisas port – presumably the most lucrative of the three ports in Trinidad.

FINDINGS OF FACT:

31. Based on the evidence presented in this case the Tribunal on a balance of probabilities find the following facts:

- (a) The Complainant was employed with the First Respondent from 1978 until her retirement in 2014 and moved up the rank of Agricultural Assistants I and II; and was subsequently promoted to the position of Agricultural Assistant III by the Public Service Commission by letter dated March 14, 2011 and the said promotion was effective from April 7, 2011.
- (b) By memorandum dated March 14, 2011 from the Director of Personnel Administration to the Permanent Secretary, Ministry of Food Production, Land and Marine Resources, indicated that the Complainant was promoted AA III with effect from April 7, 2011 on the retirement of David Waldropt from the Public Service with effect from January 5, 2010.
- (c) By letter dated January 9, 2012 addressed to the Complainant, the Permanent Secretary informed her that she was promoted Agricultural Assistant III with effect from April 7, 2011 in the Research Division consequently on the retirement of Mr. David Waldropt, Agricultural Assistant III with effect from January 5, 2010; and that she was required to report to the Director of Research Division who will assign her duties with effect from February 10, 2012.
- (d) On February 23, 2012 the Complainant wrote a memorandum to the Director of Personnel Administration u.f.s., the Permanent Secretary and Director Human Resources of the First Respondent in which she requested that her promotion to Agricultural Assistant III be rescinded. And by letter dated April 18, 2012 the Service

Commissions Department informed the Complainant that her promotion was cancelled with effect from April 7, 2011.

- (e) My memorandum date March 16, 2011 the Director of Personnel Administration wrote the Permanent Secretary of the First Respondent indicating that no Performance Appraisal Reports were submitted on the job performance and conduct of Mr. Himrajh Loutan, AA II from January 1, 2000 to present and five other named officers, and that the Commission was giving the PS seven days of the date hereof to furnish the Performance Appraisal Reports on the officers. And on the said date the Public Service Commission wrote to Mr. Loutan u.f.s., Permanent Secretary of the First Respondent that it was considering his promotion to AA III but was awaiting the submission of his Performance Appraisal Reports.
- (f) By letter dated November 8, 2011 the Director of Personnel Administration informed Mr. Loutan that the Public Service Commission had promoted him as AA III with effect from April 3, 2011. And by memorandum of said date informed the PS of the First Respondent that Mr Loutan was promoted as AA III with effect from April 3, 2011 consequent on the retirement of Mr. Ahid Ali from the Public Service with effect from September 13, 2009.
- (g) The Complainant rejected her promotion to the position of AA III consequent on the retirement of Mr. Waldropt on the basis that such a promotion would put her outside the Plant Quarantine Department; and the very lucrative overtime payments. In addition, there was no credible evidence presented to support the contention of the complainant that there was some type of "Juggling" to ensure that Mr. Loutan would be promoted consequent on the retirement of Mr. Ali who was in plant quarantine; in order to keep the first female AA III in plant quarantine from happening.
- (h) The Complainant was of the erroneous view that seniority was the only determining factor to be taken into account in promotions. And that somehow her name was placed on a list against that of Mr. Ali, hence, when Mr. Ali retired she would be promoted to his post. However, that list was never produced as evidence to the Tribunal. Under cross-examination the Complainant indicated that "*there is a seniority listing that the Public Service Commission makes available to the officers via the PS*". The only lists presented as evidence of seniority, is a seniority listing 2002 dealing with AA II's signed by someone for the PS. The list contained the names of 61 AA II's of which the

Complainant was number 50 and Mr. Loutan number 47 with corresponding but indecipherable handwritings. There is also an undated and unsigned document purporting to be a seniority list for the office of AA II. That list contained 84 names, the Complainant being number 7 and Mr. Loutan number 4; with no corresponding name indicating that the Complainant is to be promoted to that office on the retirement of a particular AA III.

ISSUES:

32. There are two issues to be dealt with in this matter, they are as follows:
- (a) Whether the Complainant was discriminated against by the agents/servants of the Respondents in refusing or deliberately omitting to afford the Complainant access to opportunities for promotion contrary to the Act due to her status of sex.
 - (b) Whether the Complainant was victimised contrary to the Act by reason that she brought proceedings against the First Respondent; and/or had given evidence or information in connection with such proceedings.

ANALYSIS:

33. Issue (a)
- Discrimination in employment is dealt with in section 9 of the Equal Opportunity Act, Chap. 22:03, which states "*An employer shall not discriminate against a person employed by him –*
- (a) *In terms or conditions of employment that the employer affords the person;*
 - (b) *In the way the employer affords the person access to opportunities for promotion, transfer or training or to any other benefit, facility or service associated with employment, or by refusing or deliberately omitting to afford the person access to them; or*
 - (c) *By dismissing the person or subjecting the person to any other detriment".*
34. The Complainant in her evidence indicated that as an AA II her name was "*matched*" against Mr. Ahid Ali AA III and that when he retired she would be promoted to his post in the Plant Quarantine Department. However, no documentary evidence of this matching process was placed before the Tribunal. And the two "*seniority*" lists

presented, none had any discernible matching names. To be sure, those lists contradict her evidence under cross-examination wherein she stated *“there is a seniority listing that the Public service Commission makes available to the officers via the PS”* However, none of those lists carried the caption of the Public Service Commission and/or the Director of Personnel Administration.

35. Moreover, by memorandum dated March 14, 2011 the Director of Personnel Administration to the Permanent Secretary of the First Respondent indicated that the Complainant was promoted AA III with effect from April 7, 2011 on the retirement of David Waldropt from the Public Service with effect from January 5, 2010. It is clear from this document that the PSC acted on the basis of its own knowledge of vacant posts in the Ministry; and since Mr. Waldropt’s post of AA III was vacant, the Complainant was thus promoted.
36. However, she refused the promotion on the basis that she was matched against Mr. Ali and should have been promoted to that AA III post when he retired. That posting was at Plant Quarantine where there was substantial overtime benefits available. The plain fact is that had the Complainant accepted the promotion to AA III in the place of Mr. Waldropt she would have lost those benefits. Hence she voluntarily opted to remain an AA II at Plant Quarantine. In cross-examination she attempted to be creative by suggesting that the Public Service Commission promoted her and the Permanent Secretary posted her out. Her exact statement on cross-examination reads as follows:-
“when the Public Service Commission promotes you, the names go to the PS and the PS then in his or her jurisdiction with consultation with the Director of Human Resources place you into a post”

That statement is amply contradicted by the memorandum dated March 14, 2011 from the Director of Public Administration to the Permanent Secretary of the First Respondent, whereby the Complainant was promoted AAIII with effect from April 7, 2011 on the retirement of David Waldropt from the Public Service. Thereafter, by letter dated January 9, 2012 the Permanent Secretary informed the Complainant that she was promoted AA III and that she was required to report to the Director of the Research Division who will assign her duties with effect from

February 10, 2012. This letter by the Permanent Secretary came over nine (9) months after the aforesaid memorandum of the Director of Personal Administration.

37. The obvious question that arises, is whether she was discriminated against by the Frist Respondent on the basis of her sex. Her comparator who is Mr. Loutan (male) was promoted after her and she refused her promotion to AA III over a year after it was made; due no doubt to Mr. Loutan's promotion on November 8, 2011 consequent on the retirement of Mr. Ali.
38. Moreover, the notion that the only criterion for promotion in the public service is seniority, is explicitly contradicted by Regulation 18 of the Public Service Commission Regulations, Chap. 1:01 wherein the Public Service Commission is mandated to take into account the seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such officers, and in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy. This part of Regulation 18, clearly dispels the notion that seniority can be the only determining factor in promotions.
39. Based on the preceding analysis and findings of facts on a balance of probabilities the Tribunal is of the view that there was no discriminatory practice by the Respondents against the Complainant on the basis of her sex or at all.

ISSUES: (b)

40. The Equal Opportunity Act, Chap: 22:30 ('the Act') deals with victimisation in Section 6, which states as follows:

"6. (1) A person ("the discriminator") discriminates by victimisation against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has -

(a) brought proceedings against the discriminator or any other person under this Act, or any relevant law;

(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act, or any relevant law;

(c) otherwise done anything under or by reference to this Act, or any relevant law, in relation to the discriminator or any other person; or

(d) alleged that the discriminator or any other person has committed an act, which (whether or not the allegation so states) would amount to a contravention of this Act, or any relevant law,

or by reason that the discriminator knows the person victimised intends to do any of those things referred to in paragraphs (a) to (d), or suspects the person victimised has done, or intends to do, any of them.

(2) Subsection (1) does not apply to treatment of a person by reason of any allegation made by him, if the allegation was false and not made in good faith.”

41. The Complainant lodged her complaint with the Equal Opportunity Commission (EOC) on February 22, 2012. By this time she had already been promoted to AA III by the Public Service Commission and requested that the Public Service Commission “rescind” her promotion which the Public Service Commission did. Moreover, nowhere in her pleadings or evidence did she on a balance or probabilities demonstrate that she was somehow victimised for having lodged a complaint with the EOC against the First Respondent. In short, there is not a scintilla of credible evidence to suggest in any way that she was victimised by the First Respondent.

CONCLUSION:

42. Based on the foregoing analysis the Tribunal finds that the Complainant has failed on a balance of probabilities to prove her complaint as pleaded. And as a consequence her complaint is hereby dismissed.

ORDER

43. The Complainant’s Complaint is hereby dismissed and the Complainant shall pay the First and Second Respondents their costs on the prescribed scale outlined in Rule 20.4 (e) of the Equal Opportunity Tribunal Rules of Practice and Procedure 2016.

44. The foregoing decision is made and delivered by the Judge/Chairman of the Tribunal in accordance with Section 44 (7) of the Act, which states:

“The decision of the tribunal in any proceedings shall be made by the Chairman and shall be delivered by him”.

**HIS HONOUR MR. RAJMANLAL JOSEPH
JUDGE / CHAIRMAN
EQUAL OPPORTUNITY TRIBUNAL**

The following provisions shall be observed by the judges, the members of the judicial staff and the clerical staff of the courts in the exercise of their functions:

HONORABLE MR. RAJANATHAN JOSEPH
JUDGE / CHAIRMAN
EQUAL OPPORTUNITY TRIBUNAL