



JUDGMENT

Winston Gibson (Appellant) v Public Service Commission (Respondent)

**From the Court of Appeal of the Republic of Trinidad
and Tobago**

before

**Lord Phillips
Lord Brown
Lord Mance
Lord Kerr
Lord Dyson**

**JUDGMENT DELIVERED BY
LORD KERR
ON**

9 August 2011

Heard on 17-19 May 2011

Appellant

Sir Fenton Ramsahoye SC
Elton Prescott SC
Tom Richards
Anthony Bullock
Jodie Blackstock
Sanjeev Datadin
Cindy Bhagwandeem

(Instructed by Bankside
Commercial Solicitors)

Respondent

Peter Knox QC
Miss Carol Hernandez
Ms Nadine Nabie

(Instructed by Charles
Russell LLP)

LORD KERR

1. In 1972 Winston Gibson began his career in the Ministry of Agriculture in Trinidad and Tobago as an Agricultural Officer. After serving in a number of different posts, he was promoted to the office of Chief Technical Officer in that ministry on 5 July 1999. The only offices above Chief Technical Officer are deputy Permanent Secretary and Permanent Secretary. After his appointment as Chief Technical Officer and until 2003 Mr Gibson filled the post of Permanent Secretary in the Ministry of Agriculture in an acting capacity on several occasions.

2. In December 2002 Mr Gibson was given leave of absence with effect from 22 November 2002 until 31 August 2004. During this period he went to Guyana as a representative for the Inter-American Institute for Cooperation on Agriculture. On his return to Trinidad and Tobago, he discovered to his surprise and considerable dismay that two officers who had been junior to him before he left for Guyana had been appointed to act as Permanent Secretary and deputy Permanent Secretary in the Ministry of Agriculture. These were Trevor Murray and Dr John Pegus. What Mr Gibson did not then know, but what he subsequently found out, was that, while he was in Guyana, a substantial overhaul of the system of appointment to some civil service posts had been undertaken.

3. While Mr Gibson was on leave, the Director of Personnel Administration had sent a "Circular Memorandum" to the Permanent Secretaries and Heads of Departments in the public service inviting applications for the office of deputy Permanent Secretary in the Public Service from "suitably qualified officers". The memorandum stated that the selection of persons to be appointed would be made from candidates from a short list that would be prepared using the "Assessment Centre Exercise" (ACE).

4. One hundred and seventy three officers applied for these posts. Of these, 108 were chosen to participate in the ACE scheme. This was carried out by the Public Service Commission (PSC) in consultation with the Canadian Public Service Commission. The first part of the exercise was conducted on 15 July 2004. The second phase of the assessment took place after Mr Gibson had returned from his period of leave. In the meantime, on 2 September 2004 Mr Gibson had written to the Director of Personnel Administration of the PSC, complaining about the appointment of the officers who were junior to him to the positions of acting Permanent Secretary and deputy Permanent Secretary. Also at about this time, Mr Gibson spoke to Mr Murray and asked him to indicate to PSC that he was interested in acting as Permanent Secretary or deputy Permanent Secretary.

According to Mr Gibson, Mr Murray replied that he would not “cut off his nose to spite his face”. He also said that Michael Mahabir, who was then the Director of Personnel Administration, was his (Mr Murray’s) friend and that he had assured Mr Murray that he would be promoted to the office of Permanent Secretary before Mr Gibson.

5. The second phase of the appointments process, using the ACE scheme, began on 27 September 2004. The minimum score for admission to the second phase was fixed at 26 out of a possible 50. Forty five candidates obtained 26 marks or more and they were duly admitted.

6. On 6 December 2004, Mr Gibson wrote again to the Director of Personnel Administration. He renewed his application to be considered for any acting appointment to the offices of Permanent Secretary and Deputy Permanent Secretary after 31 December 2004 (the date on which Mr Murray’s and Dr Pegus’s acting appointments were due to expire). In his letter he also asked to be given reasons for not being appointed, in the event that he was “bypassed” for these positions. By letter of 14 January 2005, the Director of Personnel Administration replied that PSC had considered his representations and that it proposed “to fill the vacant offices of Permanent Secretary and deputy Permanent Secretary by the end of March 2005”. The letter also informed the appellant that Mr Murray and Dr Pegus would continue to hold those posts in an acting capacity until the appointments were made.

7. In a letter of 2 February 2005, Mr Gibson applied to be considered for appointment to the position of Permanent Secretary. He again asked to be informed of the reasons for not being appointed in the event that he was unsuccessful. The PSC’s chairman replied on 10 February saying that the matter would be submitted to the PSC for consideration. On 28 February 2005, the Director of Personnel Administration wrote to Mr Gibson saying that there would be a “further communication in due course”. That “further communication” did not materialise, however.

8. The second phase for the appointment of the deputy Permanent Secretary under the ACE scheme resumed on 14 March 2005 and ended later that month. The final phase, which consisted of checking references submitted by the candidates for the position, took place between June 2005 and 17 August of the same year. As we shall see, two appointments were made to the post of deputy Permanent Secretary with effect from 21 October 2005.

9. Although Mr Gibson had been sanguine about the extension to the end of March 2005 of the period during which Mr Murray and Dr Pegus would continue

to act as Permanent Secretary and deputy Permanent Secretary, he became concerned when that date passed and there was no sign of an end to their time in those posts. On 21 April 2005, therefore, he applied for judicial review of the decision to extend the two acting appointments beyond 31 March 2005. He also applied for an order that the PSC had been guilty of unreasonable delay in filling the permanent vacancies. This application has been referred to in these proceedings as the first judicial review application.

The first judicial review application

10. In this application Mr Gibson complained, among other things, that he had not been invited to any promotion interview for the offices of Permanent Secretary and deputy Permanent Secretary, despite the deadline of 31 March 2005 having passed. Leave to bring the judicial review application was granted on 25 April 2005 and on 2 May 2005 directions were given for the filing of affidavits by the PSC. At a further directions hearing, however, senior counsel for the PSC asked for an adjournment in order to give his client certain advices and this was granted and, in the event, no replying affidavits were filed for the respondent to the application.

11. During the resumed hearing of the case on 9 and 10 June 2005, counsel for PSC informed the judge (Dean-Armorer J) that his client would submit to a declaration that in April 2005 Mr Gibson was eligible to be considered by PSC for appointment either as acting Permanent Secretary or alternatively as deputy Permanent Secretary. The judge duly made a declaration in the course of an oral judgment which she delivered on 29 July 2005. It was in the following terms:

“(1) The [appellant] is eligible to be considered by the Public Service Commission either for appointment or appointment to act in the post of Permanent Secretary in the Ministry of Agriculture in April 2005.”

(2) The Public Service Commission ought to reconsider the [appellant’s] claim to act as the Permanent Secretary in the Ministry of Agriculture at the end of the present period of acting.

(3) The [appellant] has been treated unfairly in that he had conceived a legitimate expectation by virtue of the undertaking by the Director of Personnel Administration in a letter dated 14th January 2005, which undertaking was never honoured.”

12. Although the judge based her finding of legitimate expectation on the letter of 14 January 2005, in fact that letter had merely said that the Ministry proposed to fill the posts by the end of March 2005. It said nothing, for instance, about the appellant's eligibility to be appointed to either position. Nor could it have done so because eligibility depended on participation in the ACE scheme and Mr Gibson had not taken part in that scheme. In retrospect, therefore, one can see that there is a certain unreality about the judge's order but she is not to be faulted for that. Unaccountably, counsel for PSC had not told her about the Circular Memorandum, about the need to have participated in the ACE scheme as a prerequisite of eligibility for appointment or, indeed, about the appointments exercise that was taking place at the very time that the judicial review application was heard. In fact counsel had conceded that the appellant was eligible to be considered by PSC for appointment as acting Permanent Secretary or as deputy Permanent Secretary in April 2005. Be all that as it may, Mr Gibson ended up (at this stage) with a declaration that he was eligible to be considered for appointment to or to act in the post of Permanent Secretary (which went significantly further than counsel's concession). In her written judgment (delivered on 14 December 2005) the judge expanded the declaration that had been made in her oral judgment by specifying that Mr Gibson was eligible also for appointment to or to act in the post of deputy Permanent Secretary. In the final result therefore Mr Gibson had a declaration in his favour that he was entitled to be considered for appointment to or to act in either position. No appeal from the judge's decision or application to have the declaration set aside has ever been made.

13. . Just to add to the incongruity of events, by a memorandum of 18 July 2005 Mr Gibson was appointed to act as Permanent Secretary - even before the judge delivered her oral judgment. That appointment was subsequently extended to 30 September 2005.

Events following the first set of proceedings

14. On 25 October 2005 Mr Gibson had a meeting with the chairman and deputy chairman of the PSC, the head of the Public Service and the acting director of Personnel Administration, Gloria Edwards Joseph. According to the appellant, PSC's Chairman told him that he could not be considered for promotion to Permanent Secretary or deputy Permanent Secretary as he had not participated in the new assessment exercise. The appellant claims that, on hearing this he complained that since resuming duties in 2004, this point had not been raised with him and no arrangements had been put in place by the PSC to allow for his participation in the ACE scheme despite his seniority and eligibility for these positions. He said that, if he had been told of the ACE scheme, he asked to take part in it and that he was still willing to submit himself to any form of evaluation exercise. This account was disputed by Gloria Edwards Joseph. She claimed that at the meeting the chairman had told Mr Gibson that the results of the ACE

exercise had been received, and that it had made appointments to the office of deputy Permanent Secretary and Permanent Secretary; and that his acting appointment would come to an end on 31 October 2005. Ms Edwards stated that the chairman had not informed Mr Gibson that his claim for promotion to the offices of Permanent Secretary and deputy Permanent Secretary could not be considered.

15. The dispute as to what transpired at the meeting is immaterial. It was the fact that Mr Gibson, despite Dean-Armorer J's order of 29 July 2005, had not been considered for promotion to either post. And it was also the fact that the reason that he was considered ineligible was that he had not participated in a scheme that he did not know existed.

16. The appointments to the posts were presented to the appellant as a fait accompli. Ms Phillipa Forde was appointed to act as Permanent Secretary from 2 November 2005 until 31 May 2006 "as a prelude to substantive appointment". Mr Knox QC who appeared on behalf of the respondent on this appeal accepted that this put her "in pole position" for final appointment to the post. As it happens, Ms Forde went on leave on 1 June 2006 and did not take up appointment as Permanent Secretary until 1 September 2007. Two appointments to the position of deputy Permanent Secretary were made with effect from 21 October 2005. Each appointment was made with a year's probationary period as a condition of appointment.

The second set of proceedings

17. On 26 October 2005, the appellant made a second application for judicial review. He sought (a) an order of certiorari to quash PSC's decision to bypass him for promotion to the offices of Permanent Secretary and deputy Permanent Secretary; (b) an order remitting to PSC the issue of his suitability for promotion to these posts; (c) a declaration that he had been treated unfairly; and (d) an order restraining PSC from implementing its decision to promote any other person to the posts. Bereaux J granted leave to apply for judicial review on 2 November 2005 and on the same date made an interim injunction restraining the implementation of the PSC's promotions pending the hearing of the appellant's claim. This interim injunction was subsequently discharged on an inter partes hearing on 10 November 2005.

18. On 28 April 2006, Bereaux J delivered an oral judgment dismissing the application. He held that PSC was not obliged to inform Mr Gibson personally of the ACE scheme while he was on leave of absence. It was sufficient that it had been advertised at large to members of the public service. The judge found that at

the time of the correspondence in 2005 PSC had not been fully briefed on the facts of the appellant's case. The chairman's letter of 10 February 2005 had simply informed Mr Gibson that the Director had been instructed to submit the matter "for consideration". The correspondence did not give rise to a legitimate expectation, because "an exchange of correspondence between the Commission and the [appellant] cannot give rise to an expectation enforceable in a court of law" and any promise of consideration of his application could only have been within the bounds of PSC's promotion policy, which had to be applied to all uniformly.

19. The judge also held that there was nothing unfair about the introduction of the new ACE assessment process. It did not contravene the rules for appointments set out in the Public Service Commission Regulations (regulation 14 of which provides for appointments to be made "by competition"). Nor was there anything unreasonable in the decision to introduce it. On the contrary, it was introduced to assess merit and ability, and these were among the criteria which PSC was obliged to take into account under regulation 18 of those regulations.

20. Bereaux J also held that PSC had not disregarded the order of Dean-Armorer J in the first proceedings. He concluded that, by the time the order was made, part of it had already been satisfied by the appointment of the appellant as acting Permanent Secretary. The judge considered that Dean-Armorer J's order was premised on the assumption that Mr Gibson was eligible for promotion on the criteria used by the Commission at the time. The introduction of ACE was, the judge said, "not an issue" before Dean-Armorer J, and her order could not have the effect of requiring that the appellant be considered for promotion to the permanent posts without submitting to ACE when all other applicants had already been assessed by use of that scheme. That would be unfair to other candidates.

21. Mr Gibson appealed the dismissal of his judicial review application. The Court of Appeal (Archie CJ, Warner JA and Kangaloo JA) dismissed the appeal. In his judgment, with which the other members of the court agreed, the Chief Justice held that advertising vacancies by circular complied with the relevant requirement of regulation 13 (4) of the Public Service Regulations. He also found that there was nothing contrary to regulation 18 or "Wednesbury unreasonable" in requiring all applicants to attain a minimum standard in the ACE assessment. He rejected the argument that the introduction of ACE required an amendment to the regulations and the claim that the use of ACE as an overriding criterion was unfair to the appellant. The Chief Justice observed that the appellant's case had failed to focus on the legality of using ACE as an overriding criterion. Instead it had concentrated on whether he had a legitimate expectation to be considered for appointment. This, the Chief Justice considered, was not viable because PSC in the correspondence in early 2005 had made no relevant promise or representation to him that was clear, unambiguous and devoid of relevant qualification. It had merely stated that it would consider his representations and get back to him. It

was held that the appellant had not been treated unfairly, because the duty of fairness owed by PSC did not extend to reopening its application process even for a meritorious candidate if that person had missed the application deadline.

22. On the effect of Dean-Armorer J's order in the previous proceedings, Archie CJ held that this could not be construed as an order requiring PSC to consider the appellant's eligibility in spite of the selection procedure that had already begun. Again he based this conclusion on the circumstance that the legitimacy of ACE as a necessary criterion was not an issue in those proceedings. The Chief Justice considered, therefore, that Dean-Armorer J's order could only be construed as a direction to PSC to consider the appellant's eligibility in accordance with the relevant criteria that applied from time to time. Finally, it was held that, in any event, the judge's order could not have been intended to have retroactive effect in respect of a selection procedure that was already under way.

The duty to inform potential candidates

23. Regulation 13 of the Public Service Commission Regulations deals with the filling of vacancies for public service posts. Paragraph 4 of that regulation provides:

“The Director [of Personnel Administration] shall, from time to time by circular memorandum or by publication in the *Gazette*, give notice of vacancies which exist in the particular service and any officer may make application for appointment to any such vacancy. Such application shall be forwarded through the appropriate Permanent Secretary or Head of Department to the Director, but the failure to apply shall not prejudice the consideration of the claims of all eligible public officers.”

24. The appellant argues that Regulation 13(4) must be intended to ensure that all suitable public servants are notified of a circular issued under its aegis, since, otherwise, a more targeted method of notification would have been provided. It would have been open to PSC to circulate the memorandum notifying all potentially eligible candidates by email and no explanation has been offered why this now normal means of communication was not used. The prosaic – but effective – riposte to the complaint that no explanation was given as to why email was not used was provided by Mr Knox. This argument had not been advanced before Bereaux J or the Court of Appeal. Had that suggestion been made, said Mr Knox, significant evidence might well have been available to show that it was not feasible.

25. The argument must fail at a more fundamental level, however. The terms of the regulation require no more of PSC than that the circular memorandum give notice of vacancies. It does not stipulate any particular method of circulation. Nor does it list those to whose personal attention the memorandum should be drawn. It cannot be said to be unreasonable for the memorandum to be sent to heads of department and for PSC to rely on them to inform potentially eligible candidates of it.

26. A somewhat more plausible claim can be made that fairness required that PSC should have informed Mr Gibson of the ACE scheme after he returned from Guyana and began to correspond with PSC about his possible appointment to the post of Permanent Secretary. But, by that time the ACE scheme was well under way. On one view, informing Mr Gibson of its existence would have been pointless. The letter of 2 September 2004 had merely expressed an interest on Mr Gibson's part in being appointed to act in the posts of Permanent Secretary or deputy Permanent Secretary. His application for appointment to the post of Permanent Secretary was not made until 2 February 2005. The second phase of the appointments process was then about to resume. Mr Gibson had not participated in the first phase. He could only have been included in the second phase by a substantial modification of the existing process. While it was open to PSC to undertake such a modification, it is quite impossible to say that it was obliged *at that stage* to do so. Markedly different considerations arise after PSC had submitted to the declaration made by Dean-Armorer J. Of that we shall have more to say later but the Board has concluded that it is not possible to state that the failure to inform Mr Gibson of the ACE scheme in the period between his return from Guyana and July 2005 was unreasonable or in breach of PSC's duty to act fairly.

The effect of Dean-Armorer J's judgment

27. In light of the true facts, it is difficult to justify Dean-Armorer J's conclusion that Mr Gibson had a legitimate expectation that he would be considered eligible for appointment to both posts or to act in either post. He had not participated in the ACE scheme and this was the only gateway to appointment. As Archie CJ said, the correspondence that had passed between Mr Gibson and PSC did not contain an unequivocal undertaking that he would be considered for appointment. If counsel for PSC had not conceded that Mr Gibson was eligible for appointment, it is difficult to see how any case could have been made that he had a legal entitlement to be considered for selection.

28. The plain and unavoidable fact is, however, that the judge made a declaration in Mr Gibson's favour that he was eligible to be considered for appointment to both posts. One can understand the attraction of the solution

suggested by the Court of Appeal to the conundrum presented by the making of a declaration which did not reflect the true situation. Archie CJ's suggestion that Dean-Armorer J's order could only be construed as a direction to PSC to consider the appellant's eligibility in accordance with the relevant criteria that applied from time to time might be regarded as an ingenious attempt to reconcile the terms of declaration with a factual scenario of which the judge was not fully aware. But the Board has concluded that this reconciliation is simply not legally possible. The judge's order decreed that the appellant *was* eligible to be appointed, not that his eligibility was to be determined according to the standards as to eligibility that prevailed from time to time.

29. The declaration that Mr Gibson was eligible for appointment imposed a legal obligation on PSC to treat him as such. It did not do so. Instead it proceeded to make appointments to both posts without considering the appellant. That was a course that simply was not open to PSC. Mr Gibson is therefore entitled to a declaration that he was entitled to be considered for appointment to both posts, not because he had any legitimate expectation of being considered eligible but because he had an order of a competent court which pronounced that he was eligible.

30. The Board will allow the appeal and order that a declaration should be made in the appellant's favour that he ought to have been treated as eligible for appointment to Permanent Secretary or deputy Permanent Secretary in the Ministry of Agriculture in the appointments process that culminated in the appointments to those posts in October 2005. In light of the actual circumstances as they have been earlier outlined, it would not be appropriate to accede to the other forms of relief that the appellant sought such as an order of certiorari quashing the appointments made.