Easter Term
[2019] UKPC 22
Privy Council Appeal No 0056 of 2017

JUDGMENT

The Port Authority of Trinidad and Tobago (Respondent) *v* Daban (Appellant) (Trinidad and Tobago)

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

before

Lord Kerr
Lord Wilson
Lady Black
Lady Arden
Lord Sales

JUDGMENT GIVEN ON

20 May 2019

Heard on 3 April 2019

Appellant	*Respondent*
Tom Poole	Elton A Prescott SC Christopher Sieuchand
(Instructed by BDB Pitmans LLP)	(Instructed by Charles Russell Speechlys LLP)

LORD SALES:

1. This appeal concerns the application of section 4(d) of the Constitution of the Republic of Trinidad and Tobago in an employment context. It concerns a claim brought by Mr Dukaran Dhaban ("Mr Dhaban"), who is now deceased. The appeal is brought by his executor.

2. Section 4 of the Constitution provides in relevant part as follows:

> "there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely …
>
> (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions."

3. It is common ground that the respondent Port Authority is a public authority which is subject to the obligation of equality of treatment set out in section 4(d).

Factual background

4. The Port Authority has developed a system of employment involving different grades of worker. The principal distinction is between permanent workers and temporary workers. Permanent workers are guaranteed work for five days a week, are paid double time for weekend working and have an entitlement to a pension. Temporary workers are engaged on an ad hoc basis day by day depending on whether there is work available for them. They do not have an entitlement to a pension.

5. There are also sub-categories within the temporary workers class. For present purposes it is sufficient to mention two of these. Temporary workers employed on the Port Followers' Roll ("port followers") have priority over temporary workers employed on the Daily Paid Temporary Roll ("daily paid temporary workers") so far as concerns being given available work. Port followers are offered available work first, according to the order in which they appear on the Port Followers' Roll, and daily paid temporary workers are only offered work if there is any left after all the port followers have been offered the available work.

6. In 1960 Mr Dhaban commenced employment with the Port Authority as a temporary worker (longshoreman). He was then promoted to the position of registered worker, which has permanent worker status.

7. However, in 1964 Mr Dhaban was convicted of wounding with intent and was sentenced to a term of imprisonment of five years. As a result, he lost his job with the Port Authority.

8. Mr Dhaban completed his sentence and was released on 14 April 1969. The prison welfare officer wrote a letter to the Port Authority recommending that he be re-employed by the Port Authority. Mr Dhaban presented himself for work, but the Port Authority declined to employ him at this time. He found work elsewhere.

9. However, Mr Dhaban persevered in seeking employment with the Port Authority and on 20 April 1980 the Port Authority employed him again, this time as a daily paid temporary worker rather than restoring him as a permanent worker. In 2004 he retired from his employment with the Port Authority, having been declared medically unfit.

10. For the purposes of Mr Dhaban's equality claim under section 4(d) of the Constitution and this appeal, Mr Dhaban and his executor have relied on one Francis Hypolite as the relevant comparator. Mr Hypolite commenced employment with the Port Authority in 1976 as a temporary worker. In 1986 he was convicted of unlawful killing and sentenced to a term of imprisonment of seven years. He was released from prison on 12 October 1990. As with Mr Dhaban, the prison welfare officer wrote to the Port Authority requesting that Mr Hypolite be re-employed. The Port Authority acceded to this request and re-employed Mr Hypolite with effect from 7 November 1990 as a temporary worker (port follower).

11. In August 2004 Mr Dhaban commenced proceedings by a notice of motion issued pursuant to section 14 of the Constitution, alleging (so far as is relevant for the purposes of this appeal) that the treatment he had received from the Port Authority in failing to re-employ him as a permanent worker in 1980 had been in breach of his right to equal treatment under section 4(d) of the Constitution, when compared with the treatment accorded to Mr Hypolite in 1990. The particular allegation made by Mr Dhaban was that Mr Hypolite had been re-employed in 1990 with the same employment grade that he had had before he went to prison (ie as a temporary worker) and that he, Mr Dhaban, should therefore have been re-employed in 1980 with the same employment grade that he had had before he went to prison (ie as a permanent worker).

12. The Port Authority contended that the claim was an abuse of process, on the grounds that it related purely to its functions in private law, as an employer, and that there existed a suitable alternative remedy. The Port Authority also maintained that Mr

Dhaban and Mr Hypolite were not suitable comparators; that even if they were suitable comparators in some respect they had not been subjected to different treatment (in that both had been re-employed as temporary workers); and that such difference as there had been in their treatment had been justified.

13. At first instance, Tiwary-Reddy J upheld Mr Dhaban's claim. She ruled that there was no abuse of process, because there was a sufficient constitutional dimension to the claim for Mr Dhaban to be entitled to rely upon his right to equal treatment under section 4(d) of the Constitution and there was no suitable alternative remedy available to him. The judge made a declaration that Mr Dhaban was denied the right to equality of treatment by the Port Authority as guaranteed to him by section 4(d) as a result of its failure to re-employ him as a permanent worker from 1980.

14. In the course of her judgment, Tiwary-Reddy J also made the observation (para 39) that the Port Authority treated Mr Dhaban unequally in delaying his re-employment (that is to say, from his release from prison in 1969 until 1980). It was implicit in this observation that this was as compared with the Port Authority's decision to re-employ Mr Hypolite very shortly after his release from prison in 1990. The Board refers to this as the delay issue. No doubt this observation by the judge reflected points made in argument before her. However, in his notice of motion Mr Dhaban had made no claim of unequal treatment by reason of the period of delay between his release from prison and his re-employment; nor was any such distinct complaint spelled out in Mr Dhaban's affidavit filed in support of his pleaded case. In the event, the declaration made by the judge did not refer to any breach of the equality right in section 4(d) by reason of the delay issue.

15. The Port Authority appealed to the Court of Appeal against the declaration made by the judge. Mr Dhaban did not cross-appeal and so again failed to raise the delay issue in the proceedings. Properly speaking it was not an issue before the Court of Appeal.

16. The Court of Appeal allowed the Port Authority's appeal. Like the judge, the Court of Appeal held that Mr Dhaban's claim involved no abuse of process. On the basis of the guidance given in *Boxhill v The Port Authority of Trinidad and Tobago* Civil Appeal No 11 of 2008 there was a sufficient constitutional dimension to Mr Dhaban's claim to justify his invocation of section 4(d) of the Constitution and there was no suitable alternative remedy available to him (the latter point is now common ground). At para 34 it held that Mr Dhaban and Mr Hypolite were relevant comparators:

> "Insofar as the judge below found that [Mr Dhaban] and Mr Hypolite were similarly circumstanced upon their release from prison and at the time of their applications to the [Port Authority] for re-employment we agree. The point of comparison arose when

> Mr Hypolite presented himself for re-employment and was taken on by the [Port Authority] as a temporary worker."

17. However, the court held that, viewed as comparators in that way, Mr Dhaban and Mr Hypolite had not received different treatment at the hands of the Port Authority since both had been re-employed as temporary workers: paras 41-42. Although there was in a certain sense a difference in the effect of the treatment they received - in that Mr Hypolite was, by virtue of his re-employment as a temporary worker, re-engaged in the same grade of employment as he had had before he went to prison, whereas in being re-employed as a temporary worker Mr Dhaban was re-engaged in a different grade than he had had before he went to prison - that was properly characterised as a difference in outcome rather than a difference in treatment. Accordingly, there had been no violation of Mr Dhaban's right under section 4(d) of the Constitution.

18. Even though the delay issue was not a matter to which the appeal was directed, the court did make some observations about that issue at paras 35 to 38. It indicated that, in agreement with the judge, it did not appear to them that this difference in the Port Authority's approach to Mr Dhaban and Mr Hypolite could be justified. But this part of the court's reasoning led nowhere. On the question raised on the appeal, the court allowed the Port Authority's appeal and set aside the declaration made by the judge at first instance.

19. The executor of Mr Dhaban's estate now appeals to the Board. In the grounds of appeal, in addition to repeating Mr Dhaban's argument that by virtue of his right under section 4(d) of the Constitution he should have been re-employed in 1980 as a permanent worker rather than as a temporary worker, the executor has sought to raise two new grounds of claim: (i) he now seeks to elevate the delay issue to a ground of claim, contending that in compliance with Mr Dhaban's right under section 4(d) he should have been re-employed in 1969 (whether as a temporary worker or as a permanent worker) upon his release from prison; and (ii) he also seeks to argue that even if the Court of Appeal was right to find that Mr Dhaban had no right to be re-employed in 1980 as a permanent worker, it should nonetheless have found that his re-employment as a daily paid temporary worker violated his right to equal treatment under section 4(d), because to be treated in the same way as Mr Hypolite he should have been re-employed as a higher grade of temporary worker, ie as a port follower.

20. The Port Authority seeks to resist the appeal by relying on the reasoning of the Court of Appeal. In addition, the Port Authority again maintains that the proceedings are an abuse of process because there is no sufficient public law aspect of Mr Dhaban's claim to warrant the application of section 4(d). It also says that the Court of Appeal should have concluded that Mr Hypolite was not an appropriate comparator. The Port Authority objects to the new grounds of claim advanced by Mr Dhaban's executor for the first time on this appeal.

Discussion

21. The Board dismisses the Port Authority's contention that these proceedings are an abuse of process because there is no scope for the application of section 4(d) of the Constitution. It is common ground that the Port Authority is a public authority for the purposes of application of section 4(d). The Court of Appeal decided as much in the *Boxhill* case. Both the courts below considered that there was a sufficient constitutional aspect to Mr Dhaban's claim. The Board sees no reason to come to a different view.

22. The parties are in agreement that the relevant guidance on this issue is that given by Bereaux JA in the *Boxhill* case at para 51, as follows:

> "Not all wrongful acts of a public authority will necessarily attract constitutional relief. That said, it does not always follow that to attract constitutional relief the act must be a public act in the purest sense. For the purpose of establishing a constitutional breach by a public authority, it will not always be necessary to establish that the acts complained of were of a *public nature* in the sense that that term is used in judicial review. Conversely, the fact that the act complained of may have been committed in the course of a contract will not defeat a constitutional claim by that fact only. The fact that it may be in breach of contract does not necessarily pre-empt a constitutional challenge. For example, the failure by a public authority to pay for goods and services provided under a contract will found no constitutional claim if the complaint is strictly about non-payment. But if the contractor alleges non-payment is part of a pattern of discrimination in which other contractors with outstanding invoices are favoured with payments while he is not, such an allegation may found an additional claim under the Constitution. Similarly a decision by a public authority not to advertise in a particular newspaper or on a specific radio station, while on its face a question of freedom of contract, may well found a basis of complaint under section 4(d) … if it is alleged and proven that the decision may be motivated by considerations which are political, racial, gender related or religious or some other colourable basis. Equally, allegations that the workers were promoted ahead of the appellants because of political or familial concerns can also found a successful basis of complaint under section … 4(d). These examples are not exhaustive. Any act of discrimination will attract the sanction of the Constitution. No pattern of discrimination is required. A single act will suffice. The provisions of sections 4 and 5 themselves provide the basis of the complaint. They found the claim itself. That is a sufficient basis upon which a claimant may proceed. The fact that the act for which

there is complaint arises out of a contract will be of no relevance to the viability of the constitutional claim in those circumstances."

23. Mr Elton Prescott SC, for the Port Authority, submits that Mr Dhaban's legal challenge to the conduct of the Port Authority was made in respect of its performance of purely private functions, in deciding which individuals it should employ. However, section 4(d) refers to the exercise by a public authority of "any functions". As Bereaux JA makes clear, a constitutional challenge may be brought in relation to the performance of functions which can be characterised as private functions rather than public functions, provided there is a relevant constitutional dimension in relation to what has been done. In the present case, Mr Dhaban maintained that there had been discrimination against him contrary to the constitutional standard set out in section 4(d) and the courts below were entitled to proceed to examine that claim.

24. Before proceeding to examine the merits of the appeal, the Board wishes to call attention to an issue which causes it concern. Mr Dhaban's complaint relates to how he was treated by the Port Authority in 1980 (or, if his executor is permitted to pursue the delay issue, in 1969). But that was long before Mr Dhaban could point to Mr Hypolite as a relevant comparator. Mr Hypolite only became a candidate comparator in 1990. Mr Poole for Mr Dhaban's executor accepts that when the Port Authority acted in 1980 to re-employ Mr Dhaban as a temporary worker rather than as a permanent worker (and when it acted in 1969 when it declined to re-employ him in any capacity), it could not have been said that it acted unlawfully or in breach of Mr Dhaban's right under section 4(d), because at those times Mr Dhaban had no relevant individual with whom to compare himself for the purposes of a claim under section 4(d). It is an open question, not addressed by the courts below, whether Mr Dhaban can have a viable claim based on section 4(d) going back many years which arose only in retrospect when the Port Authority re-employed Mr Hypolite in 1990. For present purposes, however, as this issue was not raised by the Port Authority in its oral or written submissions on the appeal, the Board will proceed on the assumption that this feature of Mr Dhaban's case is not fatal to his claim.

25. At the hearing of the appeal, the Board permitted Mr Poole to present submissions regarding the two new grounds of claim referred to above, which it heard *de bene esse*. The Board reserved its decision whether to allow Mr Dhaban's executor to expand his case by adding these new grounds.

26. It is well established that the Board will generally not allow a party to raise a new point on an appeal before it. In *Baker v The Queen* [1975] AC 774, 788 the Board said that its usual practice was:

> "not to allow the parties to raise for the first time in an appeal to the Board a point of law which has not been argued in the court from which the appeal is brought. Exceptionally it allows this practice to be departed from if the new point of law sought to be raised is one which in the Board's view is incapable of depending upon an appreciation of matters of evidence or of facts of which judicial notice might be taken and is also one upon which in the Board's view they would not derive assistance from learning the opinions of judges of the local courts upon it."

In line with its usual practice, the Board does not consider that it is appropriate at this late stage to allow Mr Dhaban's executor to add either of the new grounds to his case.

27. As regards the delay issue, it formed no part of Mr Dhaban's grounds of claim as pleaded, was not raised as a ground of appeal by him against the limited declaratory relief granted at first instance and was not the focus of the reasoning of the courts below. In the absence of a properly pleaded case to raise the delay issue the Board does not consider that the Port Authority had a fair opportunity to marshal evidence which might be relevant to meeting such a case and is not confident that such comments as the courts below made about this issue involved a complete and thorough examination of it. The evidence available does not provide the Board with anything like a full understanding of the reasons which the Port Authority had in 1969 for refusing to re-employ Mr Dhaban, what work was available at that time, what the attitude of the relevant trade union would have been to Mr Dhaban's re-employment at that time, and so forth. The delay issue is, moreover, one in relation to which the Board would have been greatly assisted by having the fully informed and considered opinions of the courts below.

28. So far as concerns the new complaint that Mr Dhaban was not re-employed in 1980 as a port follower, that was not part of Mr Dhaban's pleaded case and was not touched upon at all in the courts below. The Port Authority has not had a fair opportunity to adduce evidence to meet this complaint in the proceedings below and the Board has not had the assistance it would have expected from consideration of this complaint by the local courts. For reasons similar to those given above in relation to the delay issue, there are no good grounds for the Board to depart from its usual practice to refuse permission to allow a new complaint such as this to be raised for the first time on an appeal to the Board. Moreover, so far as the Board can tell, there appears to be no merit in this complaint, since Mr Dhaban said in his affidavit dated 12 January 2006, at para 7, that after 1980 he was employed continuously by the Port Authority and was never turned away because of the unavailability of work. Thus the re-employment of Mr Dhaban as a daily paid temporary worker rather than as a port follower has not had any material detrimental effect upon him.

29. The Board turns to deal with the appeal against the decision of the Court of Appeal. In the Board's judgment, the appeal should be dismissed, essentially for the reasons given by the Court of Appeal.

30. It is common ground that the proper approach to the application of section 4(d) of the Constitution is that set out by Baroness Hale in giving the judgment of the Board in *Webster v Attorney General of Trinidad and Tobago* [2015] UKPC 10; [2015] ICR 1048, para 24:

> "(1) The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment. (2) Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment. (3) To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. (4) Weighty reasons will be required to justify differences in treatment based on the personal characteristics mentioned at the outset of section 4: race, origin, colour, religion or sex. (5) It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged)."

31. In the present case, the Court of Appeal was entitled to make the evaluative assessment it did at para 34 of its judgment as to how the comparative features of Mr Dhaban's case and Mr Hypolite's case were to be characterised. The court found that they were properly to be regarded as suitable comparators by virtue of characterisation of their respective cases at a fairly high level of analysis: each of them had been employed by the Port Authority, had lost his job through spending a substantial period of time in prison, and after that had sought and obtained employment once again from the Port Authority.

32. On the basis of that characterisation of their cases in order to find that Mr Dhaban and Mr Hypolite were comparable, the Court of Appeal was correct in its analysis that there was no difference in treatment between them. Both were former employees who were re-employed as temporary workers. There was no relevant difference in treatment which required to be justified.

33. The Board notes that Mr Dhaban sought to maintain a case that Mr Hypolite was re-employed *in the same grade of employment he had previously had* with the Port Authority (ie as a temporary worker) and that therefore he, Mr Dhaban, had a right to be re-employed in the same grade of employment which he had previously had with the

Port Authority (ie as a permanent worker). However, this way of putting Mr Dhaban's case fails for two reasons. First, the Court of Appeal's characterisation of the way in which Mr Dhaban and Mr Hypolite stood to be compared as set out above was lawful and cannot be faulted. Secondly, this way of putting Mr Dhaban's case requires characterising their respective positions by reference to the grades in which they were previously employed by the Port Authority; but then Mr Hypolite cannot be regarded as a suitable comparator for Mr Dhaban, by virtue of the very fact that there was a material difference between their respective positions in that Mr Hypolite was previously employed only as a temporary worker whereas Mr Dhaban had previously been employed as a permanent worker. In the context of working for the Port Authority, the difference between employment as a permanent worker and employment as a temporary worker was very important, as explained above. The issues regarding re-employment of Mr Dhaban as a permanent worker, in terms of the precedence and favourable treatment that would automatically give him by comparison with large numbers of other workers employed by the Port Authority who had blameless and continuous work records, were completely different from those which arose in relation to the re-employment of Mr Hypolite as a temporary worker.

34. For these reasons, the Board dismisses this appeal.