Trinity Term
[2019] UKPC 35
Privy Council Appeals No 0007 and 0008 of 2018

JUDGMENT

Smart (Appellant) *v* Director of Personnel Administration and another (Respondents) (Trinidad and Tobago)
Almarales and others (Appellants) *v* Director of Personnel Administration and another (Respondents) (Trinidad and Tobago)

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

before

Lord Wilson
Lord Carnwath
Lord Hodge
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

15 July 2019

Heard on 27 March 2019

1st Appellant
Rowan Pennington-Benton
Ms Alana Rambaran
(Instructed by Alvin Pariagsingh)

Respondents
Howard Stevens QC
Ms Hafsah Masood
(Instructed by Charles Russell Speechlys LLP)

2nd – 4th Appellants
Peter Knox QC
Robert Strang
(Instructed by BDB Pitmans LLP)

Appellants:-

(1) Nairob Smart
(2) Lesley Almarales
(3) Svetlana Dass
(4) Savi Ramhit

LORD CARNWATH:

Introduction

1. This appeal concerns the legality of the process adopted by the respondent Commission in making appointments to the Judicial and Legal Service ("the Service") as long ago as October 2013. The appellants were all legal officers employed in the Chief State Solicitor's Department ("the Department"), which is part of the Ministry of the Attorney General.

2. The respondents are the Judicial and Legal Service Commission ("the Commission") and the Director of Personnel Administration ("the Director"). The Commission is the body established under the Constitution (sections 110-111) to make appointments to offices in the Service. Under the Public Service Commission Regulations ("the Regulations") the administration of the process of appointment by the Commission is entrusted to the Director. As this Board explained in *Endell Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113, 124 per Lord Diplock, the purpose of vesting powers of appointment and dismissal in an independent commission was to "insulate [them] … from political influence exercised directly upon them by the government of the day".

3. It is not suggested by the appellants that the process should now be re-run or the appointments invalidated, but they seek appropriate declarations, and clarification of the process for the future. Mr Smart also seeks damages for what is said to have been "loss of a real prospect of securing promotion to the position of Senior State Solicitor".

The Regulations

4. Regulation 13(1) provides that, as soon as it is known that a vacancy will occur, the Permanent Secretary or Head of Department is to communicate to the Director in writing and "shall make his recommendations regarding the filling of the vacancy". By regulation 13(4), the Director is required from time to time to publicise notice of vacancies which exist in the particular service, following which -

> "… 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."

5. The principal issues in the appeal concern the interpretation of, and relationship between, regulations 14, 15 and 18, which are in the following terms (preceded in italics by their marginal notes):

> "*Appointments to be by competition within the particular service*
>
> 14. Whenever in the opinion of the Commission it is possible to do so and it is in the best interest of the particular service within the public service, appointments shall be made from within the particular service by competition, subject to any Regulations limiting the number of appointments that may be made to any specified office in the particular service.
>
> *Advertisement of vacancies*
>
> 15. Where the Commission considers either that there is no suitable candidate already in the particular service available for the filling of any vacancy or that having regard to qualifications, experience and merit, it would be advantageous and in the best interest of the particular service that the services of a person not already in that service be secured, the Commission may authorise the advertisement of such vacancy.
>
> …
>
> *Principle of selection for promotion*
>
> 18(1) In considering the eligibility of officers for promotion, the Commission shall 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.
>
> (2) The Commission, in considering the eligibility of officers under subregulation (1) for an appointment on promotion, shall attach greater weight to -

(a) seniority, where promotion is to an office that involves work of a routine nature, or

(b) merit and ability, where promotion is to an office that involves work of progressively greater and higher responsibility and initiative than is required for an office specified in paragraph (a).

(3) In the performance of its functions under subregulations (1) and (2), the Commission shall take into account as respects each officer -

(a) his general fitness;

(b) the position of his name on the seniority list;

(c) any special qualifications;

(d) any special courses of training that he may have undergone (whether at the expense of Government or otherwise);

(e) the evaluation of his overall performance as reflected in annual staff reports by any Permanent Secretary, Head of Department or other senior officer under whom the officer worked during his service;

(f) any letters of commendation or special reports in respect of any special work done by the officer;

(g) the duties of which he has had knowledge;

(h) the duties of the office for which he is a candidate;

(i) any specific recommendation of the Permanent Secretary for filling the particular office;

(j) any previous employment of his in the public service, or otherwise;

(k) any special reports for which the Commission may call;

(l) his devotion to duty.

(4) In addition to the requirements prescribed in subregulations (1), (2) and (3), the Commission shall consider any specifications that may be required from time to time for appointment to the particular office."

6. In *Sankar v Public Service Commission* [2011] UKPC 27 the Privy Council had to consider the relationship between regulations 14 and 18. Lord Mance (giving the judgment of the Board) observed that the relationship between the various regulations was "not straightforward" (para 17). He rejected a submission for the Commission that the reference to "eligibility" in regulation 18 indicated that the criteria there set out applied only to the initial decision to accept a candidate for consideration for promotion, rather than the actual decision to promote. As he said:

> "18. It is true that this word can have the threshold meaning assigned to it by Mr Knox's submission (as the word 'eligible' in regulation 13(4), (5) and (7) appears to). But in the context of regulation 18 the Board has no doubt that the word 'eligibility' is the equivalent of 'suitability', and relates to the final decision whether or not to promote. Otherwise, the Regulations would contain no criteria at all regarding the basis for final decisions whether or not to promote. The Board therefore agrees with the Court of Appeal that regulations 14 and 18 must be read together. Where a promotion is to be made from within the public service, it should be by competition, but the decision which of the competitors to promote should be made taking into account the criteria set out in regulation 18."

7. This passage makes clear that the criteria in regulation 18 must be taken into account in choosing between internal candidates under regulation 14. It says nothing about their relevance if any to the advertisement procedure under regulation 15, which is in issue in this appeal.

The factual background

8. At the relevant time appellants Lesley Almarales, Nairob Smart and Svetlana Dass held the post of State Solicitor II; Savi Ramhit held the post of State Solicitor I. The post of State Solicitor II is a post in the civil law section of the Service, identified in the First Schedule to the Judicial and Legal Service Act. In the Department, it is senior to the post of State Solicitor I, and junior to the post of Senior State Solicitor. Ms Almarales was the most senior State Solicitor II in the Department; Ms Ramhit was the most senior State Solicitor I.

9. In July 2012, there was a vacancy for the office of Senior State Solicitor. On 25 July 2012, the Chief State Solicitor in response to memoranda from the Director gave his views on the filling of the vacant office. He gave brief details of Ms Almarales' and one Ms Ramdin's service as State Solicitor II, commenting that he was "not in a position to advance one's cause against the other". He believed that "the fairest resolution of this issue would be if in accordance with regulation 14" both would be interviewed and "the one who tops the interview process" should be the "one to be promoted on merit".

10. On 20 September 2012, the Chief State Solicitor wrote to the Attorney General, copied to the Director. He referred to Ms Petal Roopnarine, a Legal Officer III, who had been working in the Department since 2006, not as a member of the Service but on successive fixed term contracts. He attached her letter expressing her frustration at remaining in a post without security of tenure and her wish to take up a post in the Department. The Chief State Solicitor warmly recommended her skills, her experience gained in private practice, and her qualifications, and recommended that "everything be done to assist [her]" in her quest to join the establishment. He concluded by asking the Attorney General to -

> "… use your good offices to ensure by communication with the Chief Justice as head of the Judicial and Legal Service Commission that the vacancy in the post of Senior State Solicitor that currently exists on the Chief State Solicitor's establishment be urgently advertised so that the process of interviews can commence."

11. On 25 October 2012, the Chief State Solicitor wrote another memorandum to the Director, referring back to the earlier exchanges and confirming his recommendation that the (now) two posts of Senior State Solicitor should be advertised. On 26 October 2012, the Chief State Solicitor sent this memorandum to the Permanent Secretary in the Ministry of the Attorney General, asking him to forward it to the Director as a matter of urgency. This he did with a covering letter, in which he noted that the Chief State Solicitor's department had been faced with a severe shortage of experienced Attorneys-at-Law at the mid-management level due to a rapid turnover of staff at that level; and

said that in an effort to attract attorneys with "considerable legal experience, practice, knowledge and expertise" to the Department, the Chief State Solicitor was of the view that it is "in the best interests of the Department that these positions be advertised and thus such a recommendation was made". He asked the Director to advertise the two positions "as a matter of urgency to address the current staff shortage within the Department at this level". In a further memorandum dated 16 November 2012 the Permanent Secretary repeated and endorsed the Chief State Solicitor's recommendation.

12. The Director advertised the vacancies internally within the public service by means of a circular memorandum dated December 2012. In response, on 13 December 2012 Mr Smart applied for the position of Senior State Solicitor. The Director also advertised the vacancies publicly by means of newspaper advertisements in December and January. These led to applications by (among others) Ms Roopnarine and Ms Almarales. Ms Dass and Ms Ramhit were unaware of the advertisements or the circular memorandum, and made no applications. (Both were working in other Ministries at the time.) They became aware of the vacancies after they had been filled, and after Mr Smart issued his claim in the High Court.

13. Interviews were conducted in June 2013. The candidates included, in addition to Ms Roopnarine, four internal candidates (the appellants, Mr Smart and Ms Almarales; and Ms Ramdin and Ms Priscilla Rampersad), and another outside candidate (Ms Mitchell). As a result of the interviews, an "Order of Merit" list was drawn up, which placed Ms Roopnarine first, Ms Ramdin (State Solicitor II) second, and Ms Priscilla Rampersad (State Solicitor I) third. The first two were offered appointments to the two posts. Ms Roopnarine accepted appointment with effect from 1 October 2013. Ms Ramdin was offered promotion to the second vacant post, but did not take it up, and Ms Rampersad was subsequently appointed.

14. The appellants were not immediately informed of the results of the competition. It is to be noted also that the exchanges in 2012 between the Chief State Solicitor and the Director first became known to the present appellants in July 2014, in a somewhat belated response to a Freedom of Information request made by Mr Smart in December 2013.

The proceedings

15. The present proceedings were commenced initially by Mr Smart by application for leave in January 2014. The other three appellants made separate applications in July 2014. They made a number of complaints about the procedure, but (at least by the time the case came to trial) the principal grounds of challenge related to the failure to assess them for promotion in accordance with regulation 18, and the unjustified use of advertisement and interviews under regulation 15 to create an Order of Merit list for the

appointments. There was also an allegation by Mr Smart that the Chief State Solicitor had acted in bad faith in seeking to prefer Ms Roopnarine.

16. Evidence in reply to the claims was given in an affidavit by Ms Pile-O'Brady, the Acting Director of Personal Administration. Having described the exchanges leading to the advertisement and interviews, and the subsequent procedure, she addressed the complaints under the rules. She said that the office had been advertised under regulation 15 because the Commission "considered it advantageous and in the best interest of the Service to do so having regard to the matters stated in regulation 15"; and that in those circumstances regulation 18 was "not applicable". She rejected the claim that the Commission had "deliberately departed from regulation 18 so as to facilitate Ms Petal Roopnarine and appoint her to the office of Senior State Solicitor", saying:

> "This was not a situation of promotion within the Service. It is a regulation 15 appointment."

Although there had been an application to cross-examine her on certain parts of her affidavit, the court was later informed that the parties had agreed not to pursue it.

17. The claims were heard together by Jones J on 6 May 2015. In a judgment dated 29 May 2015 she dismissed all the claims. She held (inter alia) that the Commission had been entitled to advertise under regulation 15, whenever it considered that either of the two conditions therein was satisfied; that regulation 15 was a "stand-alone" regulation which did not require the Commission to apply the regulation 18 criteria; that it was fair to proceed by way of an interview process and compile an order of merit under which all candidates were treated equally; and that while the Chief State Solicitor's letter of 20 September had been "inappropriate" the applicants had failed (in the absence of cross-examination) to justify the inference that it had been drawn to the attention of the Commission.

18. The appellants appealed to the Court of Appeal. They argued inter alia that the judge had erred in holding that the Commission was entitled to advertise under regulation 15 without first considering the suitability of the appellants for the post, and also in declining to infer that the Chief State Solicitor's letters had been before the Commission. The appeals were heard by the Court of Appeal (Yorke-Soo Hon, Narine and Mohammed JJA) on 15 June 2016, and dismissed by a majority. In the majority judgment (given by Mohammed JA) the court held in summary that the words "where the Commission considers" in regulation 15 conferred a discretion on the Commission to decide whether it should authorise the advertisement of a vacancy, and that it was not necessary first to make an assessment that officers within the service were not suitable; that, in so far as there was any lack of express evidence of the Commission's thinking, "the presumption of regularity" applied so that it was presumed to have taken the proper

criteria into account; that regulation 15 did not require the application of the regulation 18 criteria; and that, although (contrary to the judge's view) it was reasonable to infer that the earlier letters would have been before the Commission, there was no evidence that the Commission was wrongly influenced by them or abdicated its independent decision-making function.

19. Dissenting, Narine JA held that the decision to engage regulation 15 was flawed, there being no evidence that the Commission had conducted any exercise to ascertain whether there was any suitable candidate within the Service, nor evidence of the "qualifications, experience and merit" on which it based its conclusion that it was advantageous and in the best interest of the Service to advertise the vacancies; and further that the letter of 20 September 2012 should have been disclosed at the earliest opportunity, and that, in the absence of evidence of whether and how it was taken into account, it had had "the potential to unfairly and improperly influence the Commission in favour of appointing Roopnarine".

20. Before the Board, submissions for Mr Smart were made by Mr Pennington-Benton of counsel, who also adopted the fuller submissions for the other appellants made by Mr Peter Knox QC. Mr Howard Stevens QC replied for the two respondents, the Director and the Commission. There were raised in summary three issues:

i) Was the decision to advertise externally unlawful, having regard to the correct construction of regulations 14 and 15?

ii) Did the Commission in any event err in failing to apply the criteria set out in regulation 18?

iii) Was the decision tainted by the existence of undisclosed documents?

The Board will take these in turn.

Regulations 14 and 15

21. This issue raises a short point of construction of the relevant regulations. Without disrespect to Mr Knox's careful submissions, the Board has no doubt the courts below were correct to hold that regulation 15 is self-standing, and that its application is not dependent on the Commission forming a prior view as to the lack of suitable internal candidates, under regulation 14 or otherwise. Not only is there no such pre-condition in the wording of regulation 14 or 15, but regulation 15 clearly gives the Commission a choice between two alternatives, neither dependent on the other.

22. The first applies where the Commission considers that there is no suitable candidate within the service. The second by implication may apply even where there are suitable internal candidates. It requires no more than that the Commission should consider it "advantageous and in the best interest of the service" to secure the services of a person not already in the service. That view must be formed "having regard to qualifications, experience and merit". Contrary to Mr Knox's submissions, those words cannot be read as requiring separate consideration of the qualities of the officers within the service. The criteria are expressed in general terms, apt to apply to the consideration of the range of the qualities required for the post, whether from internal or potential external candidates. They may be contrasted with the similar criteria in regulation 18, which are addressed specifically to the qualities of the internal candidates ("… educational qualifications, merit and ability … of *such* officers" (emphasis added)).

23. Even on this basis, Mr Knox submits that there is inadequate evidence of the consideration given by the Commission to this issue. To justify the use of the advertisement procedure, it is not enough, he submits, for the Acting Director simply to assert that the Commission "considered it advantageous and in the best interest of the Service to do so having regard to the matters stated in regulation 15". Not only is there no indication of the source of her knowledge of the consideration given by the Commission; but she does not say to whose "qualifications, experience and merit" (apart from those of Ms Roopnarine) the Commission had regard.

24. The Board is not persuaded by this submission. In the absence of any challenge to the good faith or conduct of the Commission itself, it was appropriate and normal for the evidence on its behalf to be given by the Acting Director as the officer responsible for the administration of the process. The request for cross-examination was not pursued, and there was, as the Board understands, no challenge to the reliability of her evidence in that respect. The principal complaint to which she was responding at that stage was that the Commission had failed to treat consideration of the internal candidates as a pre-condition to advertisement. If, as the Commission considered, that was not required on a proper interpretation of the Regulations, it was a sufficient response to make that position clear. Further, the evidence went on to quote the memorandum of 26 October 2012 which referred to the "severe shortage of experienced Attorneys-at-Law at the mid-management level …", and the wish to attract new recruits with considerable legal experience and expertise. There is no basis for suggesting that this assessment was unjustified, nor that the Commission could not, or did not, properly give it weight.

Regulation 18

25. This again raises a short issue of interpretation. The courts below accepted the Commission's submission that regulation 18 is relevant, as its marginal note implies, only to selection for promotion within the service, and has no application to the outside advertisement procedure under regulation 15. Mr Knox submits that this was wrong. As

I understand it, he does not argue that the regulation 18 criteria are relevant to the assessment of outside candidates as such. Indeed some criteria (such as "the evaluation … in annual staff reports …") are clearly inapplicable. Rather, in so far as a choice falls to be made between internal candidates, they must be judged by reference to those criteria.

26. In this case, therefore, it was unlawful, in his submission, for the Commission to judge Ms Rampersad against the other internal candidates simply by reference to the interview process. Instead, as between them, the choice should have been made in accordance with regulation 18. Further there was good reason to think that as a result the appellants lost a good chance of promotion. They were all senior to Ms Rampersad, and they all asserted that they had more experience and qualifications than her. Indeed Ms Almarales had already been recommended as a candidate for promotion to Senior State Solicitor in the Chief State Solicitor's memorandum of 25 July 2012.

27. The Board is unable to accept this submission. It has some sympathy for Ms Almarales in particular, who may feel in retrospect, at least having seen the various exchanges between her superior officer and the Director in 2012, that the procedure was weighted against her by the decision to advertise. However, it is impossible in the Board's view to read into the Regulations a hybrid process of the kind which Mr Knox appears to envisage. Once the decision has been made under regulation 15 to advertise a post, there is nothing to indicate that internal and external candidates should be treated any differently. The Commission's duty, in the absence of provision to the contrary, is to secure a level playing-field between all candidates, whether internal or external. There might well be complaints of a different kind if it were otherwise. There is no suggestion, and no basis for any suggestion, that the Commission failed in that respect.

28. It is worth noting in any event that in general the criteria under regulation 18 are no more than matters to be "taken into account". With limited exceptions (in regulation 18(2)), they give rise to no presumption as to the weight to be given to any particular factors. Thus, for example, seniority is a matter to be given "greater weight" only where promotion is to an office "that involves work of a routine nature" (regulation 18(2)(a)). It seems unlikely that the office of Senior State Solicitor, which was in issue in the present case, could have been regarded as falling into that category. Thus, even under a procedure governed by regulations 14 and 18, there could have been no necessary expectation that seniority, or any other particular criterion, would have carried the day.

29. Before leaving this aspect, the Board should note Mr Knox's suggestion in oral argument that the process was flawed also by reason of the Commission's failure to consider the potential qualifications of even those officers, such as two of his clients, who made no application. He relies on regulation 13(4) which provides in terms that "failure to apply shall not prejudice the consideration of the claims of all eligible public officers". The Board is unable to read this as overriding the detailed processes prescribed by the following regulations. As the Board reads the regulation, it is simply

making clear that failure to follow the particular procedure there prescribed does not in itself invalidate a claim for consideration. It does not impose on the Commission a general obligation to investigate the potential qualities of internal candidates who have not shown any overt interest in the post in question.

Undisclosed documents

30. On the material before the Board, there seems, at least, to have been an unfortunate lack of transparency about the appointment process. Once the decision had been made to advertise, arrangements should have been made to ensure that interested candidates were kept fully informed of the process and the decisions. It also seems unfortunate that the response to Mr Smart's Freedom of Information request was so delayed. It is perhaps not surprising that his suspicions were aroused. The judge described some of the Chief State Solicitor's language as "inappropriate" and spoke of a "lack of candour" by the Director in not disclosing the correspondence at an earlier stage. But neither she, nor the Court of Appeal, found any basis for inferring that the Commission had been improperly influenced by the letters or had abdicated its independent decision-making function in the appointment process. These were concurrent findings on what was essentially a question of fact, with which the Board would rarely if ever interfere.

31. The Board agrees with the Court of Appeal that the Chief State Solicitor was clearly entitled to express his views on the appropriate course for the Commission, and on the merits of a particular candidate. The only criticism that could be made was of the implied suggestion that the Attorney General might bring his political influence to bear. But the Board sees no reason to question the Court of Appeal's conclusion as to the integrity of the Commission's own consideration of the matter.

32. Mr Knox seeks to develop a legal challenge by reference to the Court of Appeal's reliance on the so-called "presumption of regularity", which he says cannot override the well-established duty on a public authority to respond to a judicial review application with "all the cards face upwards on the table" (*R v Lancashire County Council, Ex p Huddleston* [1986] 2 All ER 941, 945, per Sir John Donaldson MR).

33. There is no doubt as to the application of the same principle in this jurisdiction. In *Police Service Commission v Dennis Graham*, 26 March 2010, Jamadar JA (at paras 19-20) affirmed the duty of a public authority respondent, once permission for judicial review has been granted, to cooperate with the court by making available "all the relevant facts and reasoning underlying the decision under challenge". He continued:

> "20. It is in this context of cooperation, where a court has granted leave to pursue judicial review and where the full and candid

> disclosure of the claimant's evidence as well as the full, frank and uninhibited explanation - with all primary documents relevant to the challenge (subject only to lawful exemptions) of the public authority are before the court, that the process of evaluation contemplated by judicial review is to be undertaken. … the presumption of regularity ought not to operate as a shield behind which a public authority can hide by refusing to give evidence on the basis that it is for a claimant to prove his case. This is an erroneous and misplaced view of how the presumption of regularity ought to operate in public law matters. Indeed, a presumption of bona fides ought to willingly lead to full disclosure of all relevant information at the earliest opportunity - including in response to pre-action enquiries."

34. The Board readily endorses that statement of the correct approach. However, it is necessary also to bear in mind the guidance given by Parker LJ in the *Huddleston* case (at p 947) as to the procedures available to the trial judge (in that case the Divisional Court) to deal with any failure by the authority in this respect, for example by ordering interrogatories or cross-examination. These are matters to be sorted out, if necessary, at that stage. In the present case, the appellants did not pursue their application to cross-examine, perhaps because they reasonably expected the determinative issues to be ones of law, turning on the construction of the Regulations. That was entirely understandable. But that course having been adopted, it was for the trial judge to draw such inferences as she thought appropriate on the evidence as presented. It is far too late now to seek to reopen those issues before the Board.

Conclusion

35. For these reasons, the Board dismisses the appeals, and confirms the orders of the courts below.