



[2014] UKPC 26

Privy Council Appeal No 0095 of 2012

JUDGMENT

Balram Singh (Appellant) v The Public Service Commission (Respondent)

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

before

Lord Neuberger

Lord Kerr

Lord Wilson

Lord Carnwath

Lord Hodge

JUDGMENT DELIVERED BY

Lord Carnwath

ON

29 July 2014

Heard on 3 July 2014

Appellant

Sir Fenton Ramsahoye SC

Tom Richards

(Instructed by Bankside Commercial Solicitors)

Respondent

Peter Knox QC

(Instructed by Charles Russell LLP)

LORD CARNWATH:

Introduction

1.

The Appellant worked as an acting “Motor Vehicle Officer I” in the Ministry of Works and Transport from August 1989, and from 31 May 2005 he was appointed to the substantive post with retroactive effect from 11 August 1992. In July 2002 and again in October 2003 he applied for appointment to the acting post of “Motor Vehicle Inspector I”. He says that he was wrongly passed over for that post, in that during this period a number of officers junior to him were appointed, contrary to the general rule of seniority imposed by regulation 26 of the Public Service Commission Regulations (“the regulations”). Following the commencement of these proceedings, on 16 October 2007 he was

appointed acting Motor Vehicle Inspector I. He now seeks no financial or other substantive relief, but simply a declaration that the Commission acted unlawfully.

The proceedings

2.

The applications which led to these proceedings were dated 4 July 2002 and 14 October 2003. The appellant initially received no response to these applications. Having become aware that officers (as he thought) junior to him were given acting appointments ahead of him, from 16 September 2004 onwards he sought information from the respondent as to the reasons for the decision to bypass him. It is unnecessary to review in detail the subsequent exchanges, involving both the Director of Personnel Administration (on behalf of the respondent Commission) and the Ministry of Transport. Eventually on 21 September 2006 the Director replied to his lawyers stating:

“... the office of Motor Vehicle Inspector I is the entry-level position for the Motor Vehicle Inspector stream and in the absence of an Order-of-Merit-List for the office, qualified officers in the Licensing Division are recommended for acting appointment as Motor Vehicle Inspector I on the basis of date of qualifications.

The officers to whom reference was made in your letters satisfied the requirements of the office of Motor Vehicle Inspector I before Mr Singh and as such they were recommended for acting appointment in the office ahead of him. Mr Singh would be considered for acting appointment as a Motor Vehicle Inspector I on the basis of the date of his qualifications, pending the establishment of an Order-of-Merit-List for the office.”

In a letter of the same date to the appellant, the Director indicated that his name had not been on the list of qualified officers for the post submitted by the Permanent Secretary in 2001 since he was not qualified for it at the time, but that he was on the list submitted on 11 November 2003.

3.

The present proceedings were begun by application for leave to apply for judicial review on 20 April 2007. The Appellant sought a declaration that the decision to use the date of an officer’s qualification for the office as the basis for making acting appointments was illegal and ultra vires, and an order remitting the matter for reconsideration by the respondent. In October 2007, as already noted, he was appointed to the post of acting Motor Vehicle Inspector I, but the proceedings continued. In an affidavit filed in December 2007 the respondent explained that the position of Motor Vehicle Inspector I was regarded as being in a “different stream” from that of Motor Vehicle Officer I, and that accordingly the view had been taken that weight should be given to the date of attainment of the special qualifications required for appointment in that stream.

4.

On 17 December 2008 Pemberton J gave judgment for the respondent with costs. On 7 October 2011 the appeal to the Court of Appeal was dismissed. On 27 April 2012 final leave was given by the Court of Appeal to appeal to the Privy Council.

The regulations

5.

Regulation 26 appears in Chapter III of the regulations, headed “Appointments, Promotions, and Transfers”. It is one of three regulations (24-26) dealing with “acting appointments”. An acting appointment is defined as “the temporary appointment of an officer to a higher office or otherwise

whether that office is vacant or not” (regulation 2). Regulation 26 has the side-note “Principles of selection for acting appointment not as prelude to appointment”. It provides:

“26(1) Where an acting appointment falls to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall –

(a) as a general rule be the senior officer in the Ministry or Department eligible for such acting appointment;

(b) assume and discharge the duties and responsibilities of the office to which he is appointed to act.

(2) In submitting any recommendations for an acting appointment, the Commission shall examine whether the exigencies of the particular service would best be served by transferring an officer from another district next in line of seniority to act when there is an officer in the same district who is capable of performing the duties of the higher grade, and in such examination the question of additional Government expenditure for travelling and subsistence allowances and other expenditure shall be borne in mind.”

The issues and submissions in summary

6.

The agreed issues in the appeal are:

(i) Were regulation 26 and the concept of “seniority” which it contains applicable to the appellant’s case, and if so, in what sense could he be said to have been senior to those appointed before him?

(ii) If regulation 26 applied, did the selection method used by the respondent amount to a breach of regulation 26?

(iii) In any event, was the appellant’s claim that he had been bypassed by officers junior to him after 2002 made out on the evidence?

7.

Issue (i) arises out of the respondent’s submission that regulation 26 had no application to this appointment because it applies only to promotions, properly understood. This is apparent from the heading of this chapter (referring to “appointments, promotions and transfers”), and the appearance of this group of sections immediately following those concerned specifically with promotion. It also appears from emphasis in the regulation itself to “seniority” as a criterion for appointment, which is only understandable in the context of promotion. The words “or otherwise” in the definition cannot alter this purpose; they are designed simply to cater for the possibility that (as happened with the appellant) a person can be appointed to an acting post before he holds any substantive “office” at all.

8.

In response it is submitted that there is no such limitation in the section. The definition means what it says: acting appointment under the definition may be to “a higher office or otherwise”, which is apt to cover at least appointment to a more demanding post albeit within the same grade. The inspector post had more demanding entry requirements, which justified its having been treated as a form of promotion. Although the two appointments were within different classes (respectively “manipulative” and “technical”) that is immaterial because the regulation only requires them to be in the same “Ministry or Department”, as they were.

9.

On issue (ii) the respondent relies on the fact that the seniority principle under regulation 26 is only a “general rule”, and so “capable of being displaced by other relevant considerations” (per Lord Sumption in *Ramoutar v Commissioner of Prisons*[2012] UKPC 29, para 12). The appellant only acquired the necessary qualification to act as a Motor Vehicle Inspector I in December 2002. He was subsequently added to the list of officers qualified for that job, and appointments were considered by reference to date of qualification. This was an entirely rational policy for a job requiring some technical expertise, and a justifiable departure from the general seniority rule.

10.

In response, the appellant relies on another passage in the same judgment of Lord Sumption. It establishes, he submits, first, that while the respondent had a wide discretion to depart from the general rule, he could not do so without first considering the effect of applying the general seniority rule with regard to the most senior eligible officer, and, secondly, that “eligible” officers for this purpose included all existing officers in the Ministry who were capable of performing the duties of Motor Vehicle Inspector I. It was clear on the evidence that the respondent did not consider the result of applying the general seniority rule before considering whether to depart from it, but instead substituted a quite different rule based on the date of obtaining the necessary qualifications.

11.

Under issue (iii) the appellant submits in short that on his evidence at the trial, which was not subject to cross-examination, several officers, all junior to him, and some of whom he named, had been given acting appointments before him. If he had wished to contradict this, the respondent could have referred to the seniority lists which the Director of Public Administration was required to keep under regulation 20. The respondent relies on the conclusions to opposite effect of the courts below. It is common ground that issue (iii) only arises if the appellant succeeds on both issues (i) and (ii).

Discussion

12.

In the Board’s view, the respondent is clearly right under issue (ii). This makes it unnecessary to reach a concluded view on issue (i) although the Board sees some force in the respondent’s submission that it is concerned with promotion in the true sense. It is also unnecessary to consider the factual questions raised by issue (iii).

13.

As already noted, both parties rely on the judgment of the Board in *Ramoutar* but draw different conclusions from it. It is important therefore to have in mind the facts of the case and the nature of the issue. The applicant, who held the rank of Prison Welfare Officer II, applied for the acting position of Chief Prisons Welfare Officer. He was the most senior candidate, but he lacked one of the qualifications required for a permanent appointment, that of “a bachelor’s degree in social work from a recognised institution or equivalent”. The Commission determined accordingly that he was not “eligible” for the purposes of regulation 26, and rejected his application without any consideration of its merits. That was held to be an error of law. In the passage on which the respondent now relies, Lord Sumption explained the issue then before the Board (para 12):

“Regulation 26 does not impose an absolute rule of appointment by seniority, but only a ‘general rule’ to that effect. In other words, it is capable of being displaced by other relevant considerations. But this is irrelevant to the issue before the Board. In Mr Ramoutar’s case, the general rule of appointment by seniority was not displaced by other considerations. He was not considered at all...”

14.

The appellant relies on a later passage in the same judgment in which Lord Sumption was explaining why “eligibility” should be governed simply by capability to perform the relevant duties, rather than the “numerous and highly subjective criteria” listed in the Job Specification. He said:

“As between officers who are capable of performing the duties, the most senior is entitled to be appointed unless there are reasons for displacing the ‘general rule’. The Commission has a very wide discretion to determine what reasons it will regard as sufficient to justify departing from the general rule in a particular case. But this is not a discretion that can be exercised without considering the result of applying the general rule of appointment by seniority. To do that, they must at the very least consider the qualities of the most senior eligible officer.” (para 18 emphasis added)

Mr Tom Richards, junior counsel for the appellant, places particular weight on the last sentence, which he said was part of the ratio of the decision. He accepts that the Commission were entitled to depart from the general rule for good reason and he does not question the lawfulness or rationality of the criteria in themselves. However, according to his submission, the Commission should first have given consideration to the application of the general rule to the appellant’s case, and to his qualities as the most senior eligible officer. This they failed to do.

15.

In the Board’s view this is to read too much into one sentence of the judgment, without sufficient regard to its context. It cannot fairly be read as intended to prevent the Commission from departing from the general rule by adopting alternative criteria for considering a particular appointment or category of appointment. There was no question in that case of departing from the general rule for good reason, whether by reference to an alternative policy or to the appellant’s individual circumstances. As the earlier passage of the judgment made clear, Mr Ramoutar’s complaint was that he had been excluded from consideration altogether, on grounds which were held to be wrong in law. In the present appeal, by contrast, the appellant’s case has been considered by reference to criteria admittedly representative of a departure from the general rule, but which, as is conceded, were both lawful and rational. On that short ground, the appeal must fail.

16.

The Board cannot leave the case without expressing concern at the time and expense which must have been incurred, both by the appellant and the respondent Commission (not to speak of court resources), in pursuing this appeal to this level. Even if it had been successful it would have achieved no substantive benefit other than possibly a declaration as to the legality of decisions made almost a decade ago. However it is not the practice of the Board to grant declarations of law in the abstract or for no practical purpose. There is no information as to the motives of the appellant in continuing to pursue the proceedings after December 2007 when he achieved what was presumably his primary aim. It is said on his behalf that there is a public interest in ensuring the lawful administration of the Regulations. In general of course that is so. But there is no evidence that this aspect of the Regulations has given rise to more general problems, nor of support for the appellant from any union or other representative body. In such circumstances it should not be assumed that even a successful appellant will be entitled to a bare declaration unless it can be shown to have some practical purpose for him or others, nor that he will necessarily be entitled to an order for costs.

17.

In the present case (subject to any special circumstances of which the Board is unaware) the order for costs in favour of the respondents will follow the dismissal of the appeal.