



Trinity Term

[2014] UKPC 32

Privy Council Appeal No 2012 of 0100

JUDGMENT

Lovell Romain (Appellant)

v

The Police Service Commission (Respondent)

From the Court of Appeal of the Republic of

Trinidad and Tobago

before

Lord Kerr

Lord Wilson

Lord Carnwath

Lord Toulson

Lord Hodge

JUDGMENT DELIVERED BY

LORD TOULSON

ON

Monday 13th October 2014

Heard on 2 July 2014

Appellant

Sir Fenton Ramsahoye QC

Tom Richards

(Instructed by Asal Vakilzadeh, Bankside
Commercial Ltd)

Respondent

Peter Knox QC

(Instructed by John Almeida, Charles
Russell LLP)

LORD TOULSON

Introduction

1.

The appellant is a constable in the Trinidad and Tobago Police Service. In 1995 he sat an exam for promotion to the rank of sergeant. On 21 October 1996 he was told that he had passed the exam, but he was not promoted. Since then he has made various unsuccessful attempts to persuade the respondent that he should be exempted from being required to take an exam for promotion to the rank of corporal.

2.

The respondent is a body established under the Constitution with responsibilities which include making promotions within the police service. Its constitutional position was explained by the Board in *Cooper v Director of Personnel Administration* [2006] UKPC 37, [2007] 1 WLR 101. Lord Hope said that the function of appointing officers, including their promotion, is a matter exclusively for the respondent. (Under an amendment to the Constitution made in 2006 the Commissioner of Police now has power to make promotions within the service in accordance with the Police Service Act and Regulations, but that amendment does not affect the present case.)

3.

Under section 129 of the Constitution the respondent may, with the consent of the Prime Minister, by regulation or otherwise regulate its own procedure. Provisions regarding the procedure for making appointments and promotions are set out in chapter III of the Police Service Commission Regulations (“the regulations”). The regulations were made under the 1962 Constitution but were preserved by section 19 of the Constitution Act 1976 and are deemed to have been made under section 129 of the present Constitution. They have been amended from time to time.

4.

The core issue in the present case is whether the provisions of the regulations regarding the procedure for making promotions are a comprehensive code or whether the respondent has a discretionary power to depart from the regulations.

Facts

5.

By a memorandum dated 9 September 1997 the appellant applied for an exemption from being required to pass an exam to be eligible for promotion to the rank of corporal, because he had passed the exam that corporals were required to pass in order to be promoted to sergeant. In a handwritten reply dated 16 September an acting senior superintendent told the appellant that passing the exam for promotion to sergeant did not exempt an officer from having to pass the exam for promotion from constable to corporal.

6.

On 16 December 1997 the appellant renewed his request for an exemption, expanding his argument in support of the application. It is unclear what correspondence followed, except that the application was refused by a letter dated 31 March 2000.

7.

The appellant turned for support to the Trinidad and Tobago Police Service Social and Welfare Association, who wrote on 21 May 2002 to the chief personnel officer at the Department of Personnel Administration asking her to use her good offices to arrive at the grant of an exemption.

8.

The Department of Personnel Administration was established under section 14 of the Civil Service Act. Its role was considered by the Board in *Cooper v Director of Personnel Administration*. It has responsibilities across the whole of the public service on matters relating to terms and conditions of employment, and it conducts negotiations from time to time with associations representing police and other public officers on employment matters, but it is not responsible for making decisions about appointments and promotions in the police service.

9.

In January 2004 the appellant re-applied to the respondent for an exemption. By a letter dated 11 March 2005 the chief personnel officer informed the appellant's association that in her view he should be exempted from having to sit the exam for promotion to corporal, but he would still have to satisfy the other criteria for promotion.

10.

On 12 April 2006 the appellant's attorney-at-law wrote a letter before action to the respondent threatening to bring judicial review proceedings unless the respondent accepted the validity of the exemption granted by the chief personnel officer, as the letter described it.

11.

On 20 June 2006 the respondent replied that the chief personnel officer had no power to exempt any officer from taking an exam, but that discussions about the matter were ongoing and the appellant would be notified when a final decision was made.

12.

On 7 December 2006 the appellant filed an application for permission to apply for judicial review. On 15 December Gobin J granted him permission to apply for various forms of relief. These included a declaration that there had been unreasonable and illegal delay in making a decision on the appellant's representations regarding "the validity and status of the exemption granted to him by the chief personnel officer" on 11 March 2005; a declaration that the exemption was valid and binding; and a declaration that the appellant was eligible to be considered for promotion to the rank of corporal.

13.

On 23 February 2007 the respondent informed the appellant and his attorney-at-law that it had received legal advice that the appellant must pass the exam for promotion to corporal before being promoted to that rank, and on the basis of that advice it had decided that he would not be granted an exemption.

The regulations

14.

The appellant took the sergeant's exam pursuant to regulation 14A, which then provided

"(1) An officer in the Second Division [which included the appellant] may apply to the Commission to be allowed to take any promotion examination for an office in the Second Division when he has been in the Service for at least three years except where the period is waived by virtue of the officer's possession of educational qualifications that are equivalent, or superior, to those prescribed in regulation 8(3) of the Police Service Regulations.

(2) A police officer who is successful in the promotion examination may be considered for promotion in accordance with regulation 15."

15.

This regulation was amended as from 1 June 2006 so as to introduce a tiered structure, requiring a candidate to have passed the corporal's exam before being allowed to sit the sergeant's exam. In its amended form the regulation reads:

"(1) An officer in the Second Division may apply to the Commission to be allowed to take the Corporal examination when he has been in the Service for at least three years except [etc].

(2) An officer in the Second Division who has successfully passed the Corporal examination may apply to the Commission to be allowed to take the Sergeant's examination.

(3) A Police Officer who is successful in a promotion examination may be considered for promotion in accordance with regulation 15."

16.

The other relevant regulations have remained unchanged.

17.

Regulation 15 provides:

"(1) The Commissioner shall, after taking into account the criteria specified in regulation 20, submit to the Commission a list of the officers in the Second Division -

(a) whom he considers suitable for promotion to an office; and

(b) who are not being considered for promotion yet but who have served in the Service for a longer period in an office, or who have more experience of performing the duties of that office, than the officers being recommended.

(2) The Commissioner shall also advise those officers referred to in subregulation (1)(b) of their omission from the list for promotion, together with the reasons for such omission.

(3) An officer who is advised under subregulation (2) may make representations on his own behalf to the Commission within fourteen days of being so advised and the Commission may invite him for interview on the basis of his representations.

(4) The Commission shall advise those officers making representations under this regulation of the outcome of their representations.

(5) The Commission may, after considering the recommendations made, endorse, or otherwise, the recommendations of the Commissioner when promoting an officer."

18.

The criteria specified in regulation 20, to which regulation 15(1) refers, include matters such as experience, merit and ability, educational qualifications and efficiency.

19.

Regulation 16(1) provides:

"If a police officer has been successful in a promotion examination held after the coming into force of these regulations and that police officer is not appointed on promotion within three years of his passing of that examination, he shall in order to qualify for promotion resit and pass such an examination."

Judicial review proceedings

20.

On 18 December 2007 Gobin J delivered a written judgment in favour of the appellant. She held that the chief personnel officer's letter dated 11 March 2005 was a grant of an exemption and was binding on the respondent. She further held that there was unlawful delay by the respondent between that date and the commencement of the judicial review proceedings. She granted relief in the form of declarations including a declaration that the appellant was eligible and entitled to be considered for promotion to the rank of corporal without having to sit the promotion exam for that rank, together with a costs order in his favour.

21.

The respondent appealed to the Court of Appeal. The appeal was heard on 30 September 2011 by Mendonca, Beraux and Smith JJA. At the end of the hearing Mendonca JA delivered a short ex tempore judgment allowing the appeal.

22.

During the argument reference was made, for the first time in the proceedings, to regulation 16(1). In his judgment Mendonca JA held that the chief personnel officer's letter did not give rise to any right or legitimate expectation, because it was for the Commission to grant any exemption, if it had the power to do so; and that the clear effect of regulation 16(1) was to require an applicant for promotion to have passed the necessary exam within the preceding three years. The court set aside the order of Gobin J and ordered the appellant to pay the Commission's costs at first instance and in the Court of Appeal in the sums of \$150, 000 and \$100,000.

Analysis

23.

It was submitted on the appellant's behalf that the Commission's power to make appointments on promotion under section 123 of the Constitution is broad and that it is not precluded from granting an exemption in an appropriate case from the procedural requirements set out in the regulations. It was therefore under a duty to consider the appellant's application for an exemption on its merits. On this argument, the Court of Appeal was wrong to regard regulation 16(1) as fatal to the appellant's claim. The Commission had a discretion, it was submitted, to exempt an applicant from having passed an exam within the time scale specified in the regulations, or at all.

24.

The argument was attractively presented by Sir Fenton Ramsahoye SC and Mr Tom Richards, but the Board does not accept it. The structure and contents of the regulations made by the Commission, with the agreement of the Prime Minister, are incompatible with the making of exceptions other than those provided for in the regulations. They provide a public appointment process which is clearly defined.

25.

Regulation 14A provides the gateway to consideration of a candidate for promotion under regulation 15. This is implicit in the language of regulation 14A(3) as it now is (or regulation 14A(2) as it was until 1 June 2006). If an officer who passes a promotion exam for an office is not promoted within three years, regulation 16(1) closes the gateway until the officer resits the exam and passes it.

26.

Regulation 14A(1) ordinarily requires an officer to have been in the service for three years before he may apply to take a promotion exam, but there is a specific exception in the case of a candidate with particular educational qualifications. It is noteworthy that the exception is limited to the possibility of being permitted to take the exam earlier. By contrast, there is no provision for a candidate being excused from having to take the exam if he has other equal or superior educational qualifications.

27.

Regulation 14A fits coherently with regulations 15, 16 and 20. The exam under regulation 14A is a qualifying exam. The next stage is for the Commissioner under regulation 15 to select those to be recommended for promotion, applying the selection principles specified in regulation 20. If the pool is not limited to those who have passed the qualifying exam but may include any police officer, it would follow that the Commissioner must consider every officer as a candidate. Every officer not selected by him, but who had more service experience than a selected candidate, would have to be given an explanation for not being selected and an opportunity to make representations. This would run counter to the basic structure of the promotion scheme, which is in two parts, comprising a qualifying exam followed by an assessment of the comparative merits of those who have passed.

28.

There is also a public interest in the process for the appointment of public officers such as police officers being clearly defined, and potential candidates knowing what it is. To permit the Commission to waive parts of the process when it thinks it appropriate would have the potential to create an uncertain and unequal playing field.

29.

For those reasons the Board accepts the submission made by Mr Peter Knox QC on behalf of the respondent that the regulations are intended to provide a self-contained, comprehensive code governing promotions within the service. The Board recognises that it seems anomalous that the appellant should have been required to take the corporal's exam when he had passed the sergeant's exam. The anomaly was cured for the future by the amendment of regulation 14A in 2006, which precludes an officer from taking the sergeant's exam before he has passed the corporal's exam. But the appellant has not argued that as a matter of construction the regulations can be read so as to treat the sergeant's exam as a qualifying test for promotion to corporal. He has had to advance a much broader argument about the Commission having a discretion to make promotions in circumstances where the requirements of the regulations have not been met, which the Board rejects.

30.

The appellant advanced a further argument about the Commission's delay, but that falls away with the Board's conclusion on the main issue. It is regrettable that the Commission took a long time after the chief personnel officer's letter dated 11 March 2005 before it told the appellant that it had decided to refuse his application. But the application had already been refused in September 1997 and in March 2000, and the Commission was not obliged to consider it again.

31.

The appellant also challenged the order for costs made by the Court of Appeal. If the sole ground on which the appellant failed had been regulation 16(1), which was first raised during the hearing before the Court of Appeal, there would have been force in the argument that the Commission's lateness in raising the point should have been reflected in the order for costs, but regulation 16(1) was only part of the appellant's difficulty. His application was properly refused in 1997 and there is no injustice in the appellant being held liable to pay the respondent's costs.

32.

The Board dismisses the appeal, and the appellant must pay the costs.