



Easter Term

[2019] UKPC 19

Privy Council Appeal No 0086 of 2017

JUDGMENT

**Sahatoo (Appellant) v The Attorney General of Trinidad and Tobago (Respondent)
(Trinidad and Tobago)**

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

before

Lord Kerr

Lord Hodge

Lady Black

Lord Lloyd-Jones

Lord Kitchen

JUDGMENT GIVEN ON

13 May 2019

Heard on 26 March 2019

Appellant

Richard Clayton QC

Anand Ramlogan SC

Tom Richards

Alana Rambaran

(Instructed by Alvin Pariagsingh)

Respondent

Tom Poole

(Instructed by Charles Russell Speechlys LLP)

LORD KITCHIN:

1.

This appeal concerns the right of an individual to equality of treatment from a public authority under section 4(d) of the Constitution of Trinidad and Tobago (“the Constitution”).

2.

The appellant, Mr Sahatoo, complains that he was treated unequally by the respondent, the Public Service Commission (“the Commission”), in appointing him to the position of Road Officer 1 in the public service with effect from 9 August 1993. He compares himself to ten other applicants who were

appointed to that position before him, despite being placed below him on an order of merit list drawn up by the Commission in 1986 on the basis of examination results and interviews. He contends that his bypassing for appointment by these other applicants has had a long-term effect on his seniority within the service.

3.

The Commission accepts that ten applicants were appointed to the position of Road Officer I before Mr Sahatoo despite appearing below him on the order of merit list but says this was justified because each of them had acted as a temporary appointee to that office for several years before him. Mr Sahatoo responds that the experience gained by these persons through their temporary appointments cannot justify his different treatment because the Commission represented to him on two occasions that offers of permanent appointment would be made solely on the basis of the order of merit list, and that accepting a temporary appointment would not accelerate the process. He also says that he relied upon these representations in declining to apply for temporary appointment.

4.

Mr Sahatoo issued these proceedings on 22 August 2008 by originating motion pursuant to section 14 of the Constitution. After hearing evidence, cross-examination and full argument, the judge, Dean-Armorer J, dismissed his application. She held, in summary, that Mr Sahatoo's comparators, the ten persons appointed on a permanent basis before him, were materially different from him because they had all accepted temporary appointments and had in that way gained relevant experience. That was so despite the representations made to him by the Commission.

5.

Mr Sahatoo was not satisfied with this result and so appealed to the Court of Appeal. It held, in outline, that Mr Sahatoo's situation was broadly similar to that of his comparators but that the practical experience these comparators had acquired through their temporary appointment as Road Officers I justified their different treatment. Further, they had acquired that experience in large part before any representation had been made to him that such experience would not assist him.

6.

Mr Sahatoo now appeals to Her Majesty in Council. He contends that the Court of Appeal fell into error in finding that there were differences between him and the ten other applicants which justified their difference in treatment, and that it ought to have found:

i)

that the Commission's departure from the order of merit list was irrational and inconsistent with the scheme of the Public Service Commission Regulations; and

ii)

that the service by these other applicants as temporary appointees to the position of Road Officer I was not a factor capable of justifying his unequal treatment in light of the representations made to him by the Commission that such service would make no difference to his prospects of permanent employment, and the fact that he had relied upon those representations.

7.

The Commission responds that neither ground has merit. It argues that the first ground is raised for the first time before the Board; that it amounts to a challenge to the decision of the Commission on public law grounds; and that it is not the proper subject of an application by motion under section 14

of the Constitution. It also argues that the second ground is a reiteration of the argument run by Mr Sahatoo before the Court of Appeal and the Board should reject it for the reasons that court gave.

The facts

8.

Mr Sahatoo applied for appointment to the office of Road Officer I in 1985. He sat the necessary examination and attended for interview. On 19 September 1986 he was told that, based upon the results of the examination and the interview, he would be placed on the order of merit list of candidates approved for appointment, and that he would be offered an appointment when a suitable vacancy arose.

9.

The Commission wrote to Mr Sahatoo on various occasions thereafter inviting him to confirm whether he was still interested in appointment. He indicated that he was. From time to time the Commission also wrote to him asking if he would be interested in appointment on a temporary basis. He responded that he would prefer to wait for an appointment of longer duration, no doubt for perfectly good reasons.

10.

In May 1990 Mr Sahatoo visited the offices of the Commission and, in response to one of his questions, was informed by a Ms Ellis that temporary appointment would not give him any special claim to a permanent appointment and that offers of appointment on a permanent basis were based solely upon an applicant's place in the order of merit list. In August 1992 Mr Sahatoo returned to the offices of the Commission and was assured by Ms Ellis once again that any offer of permanent employment would be based solely upon his position in the order of merit list.

11.

In September 1992 Mr Sahatoo wrote to the Commission seeking confirmation that his name was still on the order of merit list and in May 1993 he was told that it was. Meanwhile, in March 1993, and apparently after a change of heart, he was appointed as a Road Officer I on a temporary basis. In September 1995 he was appointed as a Road Officer I on a permanent basis with effect from 9 August 1993.

12.

In November 1998 Mr Sahatoo was promoted to the position of Road Officer II on a temporary basis. He was also appointed to that position on a temporary basis on further occasions between 2001 and 2004. He was eventually appointed as a Road Officer II on a permanent basis with effect from 26 June 2004.

13.

In 2005 it came to the attention of Mr Sahatoo that appointments to the position of Road Officer I may not have been made solely in accordance with the order of merit list. He wrote to the Commission on several occasions in the course of that year asking for an explanation. He also sought a copy of the list but it was not forthcoming. The Commission said it could not be located. Eventually Mr Sahatoo's attorney found it in an exhibit to an affidavit made in other proceedings. Twenty names appear on it. The sixth is that of Mr Sahatoo. It confirmed Mr Sahatoo's suspicions. Ten persons below him had been offered permanent appointments before him.

The decisions below

14.

Mr Sahatoo issued these proceedings in 2008. He supported them with an affidavit in which he related his central complaint that ten persons below him on the order of merit list had bypassed him for appointment to a permanent position as Road Officer I and that they had later gained promotions consistent with their seniority.

15.

Ms Dawn Harding, the Commission's Deputy Director of Personnel Administration, gave evidence in response. She explained that each of the ten persons appointed to the position of Road Officer I prior to Mr Sahatoo had accepted temporary appointment to that office in 1986 or 1987 and had served in that capacity for a number of years before being offered a permanent appointment. Indeed, by May 1990, nine of the ten had served as Road Officers I for between three and four years and the tenth for about two and a half years. As a result, each had gained valuable and relevant experience.

16.

As has been mentioned, Dean-Armorer J rejected Mr Sahatoo's application on the ground that the circumstances of the ten officers preferred for appointment to a permanent position were materially different from his own in light of their prior experience. Accordingly, he could not establish that he had been treated differently from persons who were similarly circumstanced.

17.

Dean-Armorer J also dealt with the representations made to Mr Sahatoo by Ms Ellis. She accepted Mr Sahatoo's evidence and found that Ms Ellis had indeed told him on more than one occasion that a temporary appointment would not give an applicant for permanent appointment a competitive edge, and that permanent appointments were made solely on the basis of the order of merit list. She also held that these representations were made on behalf of the Commission and that Mr Sahatoo was entitled to rely upon them. However, she continued, they did not assist Mr Sahatoo in his claim because they did nothing to diminish the differences between his circumstances and those of the ten officers preferred for appointment.

18.

The Court of Appeal dismissed Mr Sahatoo's appeal but for rather different reasons. Bereaux JA, with whom Mendonça and Yorke-Soo Hon JJA agreed, thought that Mr Sahatoo and the other ten officers were, broadly speaking, similarly circumstanced, but that there were differences between them which justified their difference in treatment. He took the view that the Commission's approach struck a balance between merit and experience which was rational and proportionate to the aim of appointing the best officers to permanent posts as they became available, and that it was fair.

19.

As for the representations made to Mr Sahatoo by Ms Ellis, Bereaux JA considered the judge was right to find that these were made on behalf of the Commission and that Mr Sahatoo was entitled to rely upon them. However, they did not assist Mr Sahatoo in his claim because, by May 1990, the time the first representation was made to him, the other officers had been holding acting appointments for a considerable period of time, and so had accumulated significant practical experience. Indeed, many of them had acted as Road Officers I, albeit in a temporary capacity, from a time prior even to Mr Sahatoo's interview on 23 June 1986. This experience was sufficient to warrant special consideration and justified their different treatment.

20.

The Court of Appeal therefore held that, while the Commission did treat Mr Sahatoo differently from the other applicants on the order of merit list, it had properly explained its reasons for doing so. Accordingly, it had not acted in breach of section 4(d) of the Constitution and the appeal fell to be dismissed.

The appeal to the Board

21.

Section 4 of the Constitution declares, so far as relevant:

“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 ... (b) the right of the individual to equality before the law and the protection of the law ... (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions ...”

22.

The content of section 4(d) has been considered in a number of decisions of the Board and of the courts of Trinidad and Tobago in recent years. Many of them were referred to 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](#). There she summarised the approach to be adopted to section 4(d) at 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).”

23.

Mr Sahatoo invites the Board to depart from this approach and to hold that there is no burden on an individual to prove that the circumstances of a comparator are the same or similar before a public authority is required to explain and justify the different treatment of which complaint is made. It is contended on his behalf that it is enough for an individual to show different treatment and it is then for the authority to justify that difference, and to the extent *Webster* holds otherwise, it should not be followed.

24.

The Board declines that invitation and sees no reason to question the helpful and structured approach explained by Baroness Hale. Further, as Mr Sahatoo recognises, the point is academic in this appeal because the Commission accepts that his circumstances and those of his ten comparators are sufficiently similar for the difference in his treatment to require an explanation. What is more, Mr Sahatoo does not challenge the general utility of a framework in which one asks, first, whether the situations are comparable, and secondly, if they are, whether the difference in treatment is justified. In these circumstances the Board need only focus in this appeal on whether the Commission can justify the difference between Mr Sahatoo’s treatment and that of his ten comparators; and it has no doubt that this appeal is not an appropriate vehicle for a wider consideration of the relationship between similarity or “sameness” of circumstances and justification.

25.

Mr Sahatoo turns next to regulation 12(1) of the Public Service Commission Regulations which provides:

“Candidates for permanent appointment to public offices in the clerical or secretarial classes as prescribed by the Civil Service Regulations and to such other classes in the public service as the Commission may from time to time specify, shall be selected on the basis of written competitive examinations and interviews.”

26.

Mr Sahatoo accepts that Road Officer I is an office in the technical class and not the clerical or secretarial classes. Nevertheless, he contends that it was within the Commission’s power under regulation 12(1) to specify that applicants for appointment to that office must sit an examination and attend for interview, and then to draw up an order of merit list based on the results of that examination and those interviews. Having decided to draw up and publish the order of merit list as it did, so the argument continues, the Commission was required, in accordance with regulation 12(1), to select appointees on that basis alone, and not by reference to any other criterion such as performance in and experience gained through a temporary appointment. It is also submitted that, in these circumstances, it was arbitrary and unfair for the Commission to make appointments other than on the basis of the list.

27.

This argument is, in substance, that the Commission has acted unlawfully, and it is presented for the first time on this appeal to the Board. Indeed, it was conceded by Mr Sahatoo before the Court of Appeal that the Commission was entitled to depart from the order of merit list if it had proper grounds for doing so. Mr Sahatoo therefore needs and seeks the permission of the Board to withdraw that concession.

28.

It is well established that the Board will generally not allow a party to raise an entirely 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.”

29.

This is not an exceptional case which would justify a departure by the Board from its usual practice. That is so for the following reasons.

30.

First, regulation 12 is primarily concerned with appointments to offices in clerical or secretarial classes, and Road Officer I is not such an office. It is true that the regulation also applies to public offices in such other classes in the public service as the Commission may from time to time specify, but it has not been shown that the Commission has ever specified for this purpose the office of Road Officer I. Certainly this cannot be inferred from the fact that Mr Sahatoo and the other applicants

were required to sit an examination and attend for interview. Similarly, the Board does not find convincing the argument that, having published an order of merit list on the basis of competitive examination and interview, it was arbitrary and unfair to take into account any other factors. To the contrary, it is the Board's view that it was entirely rational to take into account a candidate's practical experience of and performance in a technical office such as Road Officer I, albeit held on a temporary basis.

31.

Secondly, this is one of those cases where it would have been of great assistance to the Board to have the considered views of the judges of the local courts. Furthermore, had Mr Sahatoo's arguments been raised in a timely manner, the Commission might well have adduced relevant and helpful evidence, not least as to the reasons for its adoption of the practice of which complaint is now made and the importance of a candidate's relevant experience when deciding whether to appoint him or her to a technical office such as Road Officer I.

32.

Thirdly, the Commission submits and the Board agrees that Mr Sahatoo's new arguments are, in substance, a public law challenge to the Commission's decisions taken between 1991 and 1993 to appoint Mr Sahatoo's comparators to the office of Road Officer I in the way that it did, and its failure to appoint him. This challenge ought properly to have been made, if it were to be made at all, by an application for judicial review, and the time for making such an application has long passed.

33.

Accordingly, the Board refuses to allow Mr Sahatoo to raise his new arguments based upon regulation 12 on this appeal. It is the Board's preliminary view that these arguments have no merit and it would be manifestly unjust to the Commission to allow Mr Sahatoo to raise them at this late stage.

34.

The Board now turns to Mr Sahatoo's appeal from the decision of the Court of Appeal on the issue which was before it, namely whether the service of his ten comparators in temporary appointments could be relied upon as a valid distinguishing criterion, justifying his different treatment, in circumstances where he had been told that such service would make no difference. Here he contends that he had a legitimate expectation, based upon the assurances he was given, that service in temporary appointments would not be taken into account.

35.

It is the opinion of the Board that the decision of the Court of Appeal on this issue was entirely correct. Mr Sahatoo was given the opportunity to apply for temporary appointment in the period from September 1986 to May 1990 but he preferred to wait until a vacancy for a permanent appointment arose. That was a perfectly reasonable approach for him to adopt. His ten comparators took a different view and took advantage of the opportunity to secure temporary appointments, and they gained experience as a result of doing so. Thus far, Mr Sahatoo makes no complaint; nor could he. He had been treated by the Commission in the same way as his comparators.

36.

In May 1990, however, Mr Sahatoo was assured by Ms Ellis that a temporary appointment would not assist him to secure a permanent appointment and that offers of permanent employment were based on the order of merit list alone. That assurance and the further assurance to the same effect which she gave to him in August 1992 were wrong. In deciding which candidate to appoint to the office of Road Officer I on a permanent basis, the Commission did take into account the experience a candidate

had gained as a result of any temporary appointment, and it did so in the case of Mr Sahatoo's ten comparators. No doubt it would have done so in Mr Sahatoo's case too, had he accepted such an appointment.

37.

The unequal treatment which underpins Mr Sahatoo's complaint is therefore the misinformation he was given first in May 1990 and then again in August 1992 and which, it must be assumed, was not given to his comparators. It was regrettable that Mr Sahatoo was treated in this way. But it does not follow that it resulted in the preferment of his ten comparators for permanent appointment. It could only have done so if they secured their appointments as a result of the experience they gained after May 1990. The Court of Appeal was satisfied on the basis of the findings of the judge and the evidence of Ms Harding that they did not. By May 1990 these comparators had held appointments as Road Officers I for a significant period of time.

38.

In all these circumstances the Court of Appeal was entitled to find as it did that the experience which the comparators had gained before May 1990 was sufficient to justify their appointment to the office of Road Officer I on a permanent basis before Mr Sahatoo.

39.

It follows that this appeal must be dismissed.