



Easter Term

[2020] UKPC 12

Privy Council Appeal No 0024 of 2019

JUDGMENT

**Chief Fire Officer and another (Respondents) v Felix-Phillip and others (Appellants)
(Trinidad and Tobago)**

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

before

Lord Kerr

Lord Wilson

Lord Carnwath

Lady Black

Lady Arden

JUDGMENT GIVEN ON

4 May 2020

Heard on 3 March 2020

Appellants

Ramesh L Maharaj SC

Robert Strang

Kingsley Walesby

(Instructed by Sheridans)

Respondents

Peter Knox QC

(Instructed by Charles Russell Speechlys LLP)

LADY ARDEN:

1.

By Fire Service Orders (“FSOs”) Nos 9, 23 and 24 of 2008 and dated 16 April, 1 December and 31 December 2008 respectively the Chief Fire Officer of Trinidad and Tobago promoted a large number of fire officers to the next most senior rank by acting appointments but only “until further notice”. By Station Notice No 36 of 2009, the Chief Fire Officer adopted a points-based system (“PBS”) for assessing officers for promotion. When making permanent promotions in 2009 and 2010 using the PBS, the Chief Fire Officer passed over many of the officers who had been appointed to acting positions.

2.

Under the Fire Service Act Chapter 35:50, the Fire Service is divided into two divisions, the First and the Second Division. The lowest grades in the Second Division are, in ascending order: Firefighter, Fire Sub-Officer, Fire Sub-Station Officer and Fire Station Officer. The appellants were within the Second Division and held the office of Firefighters or Fire Sub-Station Officers.

3.

There were 38 officers who brought proceedings for judicial review of the Chief Fire Officer's decision not to promote them. Several issues were raised but two match the issues raised on this appeal. First, the officers submitted that their appointments were made "until further notice", that is, indefinitely, when there was only power to make temporary appointments for a specified period. Therefore, they argued, their appointments took effect as appointments to permanent positions. Second, the officers contended that the Chief Fire Officer's points-based system for promotions was irrational, unfair and contrary to the relevant regulations. On their case, those Regulations required the Chief Fire Officer to give preference to those who had been appointed to posts on merit on an acting basis over other candidates. The scheme was irrational and unfair for failing to give them this priority.

4.

At trial, Madam Justice Charles accepted the appellants' case. Her decision was reversed by the Court of Appeal (Bereaux, Moosai and Rajkumar JJA). The officers now appeal to the Judicial Committee.

Legal Framework

5.

The Constitution of Trinidad and Tobago provides for the setting up of a Public Service Commission and vests the power to appoint persons to public offices, including offices in the Fire Service, in that Commission. The Board explained the significance of this in *Endell Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113 in the following passage from the speech of Lord Diplock, giving the judgment of the Board:

"The whole purpose of chapter VIII of the Constitution which bears the rubric 'The Public Service' is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous commissions, although public authorities, are excluded by section 105(4)(c) from forming part of the service of the Crown. Subject to the approval of the Prime Minister they may delegate any of their powers to any of their members or to a person holding some public office (limited in the case of the Police Service Commission to an officer of the police force); but the right to delegate, though its exercise requires the approval of the Prime Minister, is theirs alone and any power so delegated is exercised under the control of the commission and on its behalf and not on behalf of the Crown or of any other person or authority.

In respect of each of these autonomous commissions the Constitution contains provisions to secure its independence from both the executive and the legislature. No member of the legislature may serve on the commission; all members must be appointed for a fixed term of years which must not be less than three or more than five, during which a member may only be removed for inability to discharge his function or for misbehaviour ..." (p 124)

6.

The second paragraph of that citation refers to sections 120, 121 and 126 of the Constitution. As indicated in the first paragraph of the citation, section 127 of the Constitution enables the Public Service Commission to delegate functions, and, while this qualifies the constitutional safeguards described by the Board in *Endell Thomas*, the core principle of appointments and promotions by or under the supervision of an independent person or body remains. This is also the important principle on which judicial appointments are made in the United Kingdom, even though it does not have a codified constitution. By Public Service Commission (Delegation of Powers) Order, the Public Service Commission delegated to the Chief Fire Officer the power to appoint persons and fire officers on promotion to offices in the Second Division of the Fire Service below the office of Fire Station Officer. Nonetheless, certain of the Public Service Commission Regulations Chapter 1:01 ("PSCR") continue to apply to fire officers, including Regulation 50 referred to below.

7.

The Constitution and the PSCR make frequent reference to acting appointments and to persons holding or acting in different offices (see, for example, section 121 of the Constitution). The PSCR define "acting appointment" and make special provision for information to be given to officers about acting appointments and for the case where acting appointments are made because of illness or other special circumstances. It seems that such appointments are a familiar occurrence in Trinidad and Tobago and indeed they were involved in another appeal recently before the Board: *Sahatoo v Attorney General of Trinidad and Tobago* [2019] UKPC 19. Apart from the fact that acting appointments are expressly recognised and may be made where the existing office holder is ill or in other exceptional circumstances, the Board has no special insight into why acting appointments are so regularly made. Regulation 2 of the PSCR defines "acting appointments" as follows:

"'acting appointment' means the temporary appointment of an officer to a higher office or otherwise whether that office is vacant or not;"

First issue: the contractual status of the appellants

8.

Mr Ramesh Maharaj SC, for the appellants, submits that Regulation 50 of the PSCR sets out an exclusive code for the termination of the services of fire officers and that, properly construed the Chief Fire Officer cannot make temporary appointments for an indefinite period terminable by notice. This does not fulfil the requirement in Regulation 50 that the appointment should be for a specified period. On Mr Maharaj's submission the authorities show that the effect in law of an appointment which does not comply with Regulation 50 is that the officer must be taken to have a permanent appointment.

9.

Regulation 50 of the PSCR provides:

"The services of an officer may be terminated only for reasons stated hereafter -

- (i) where the officer holds a permanent appointment - ...
- (ii) where the officer holds a temporary appointment -
 - (a) on the expiry or other termination of appointment for a specified period;
 - (b) where the office itself is of a temporary nature and is no longer necessary;

- (c) on the termination of appointment in the case of an officer on probation;
- (d) on the termination of appointment in the case of an officer holding a non-pensionable office with no service in a pensionable office;
- (e) on dismissal or removal in consequence of disciplinary proceedings;
- (f) ill health."

10.

On Mr Maharaj's submission, the purpose of Regulation 50 was to prevent the Chief Fire Officer from making appointments terminable at any time. The Constitution guarantees equality of treatment. The dismissal of individual members of a public service at whim would be a negation of equality of treatment: see Endell Thomas:

"The contention was that the commission need not look for any reasonable cause for exercising its power of dismissal in the particular case, although in practice it would normally do so; nevertheless, it is legally entitled to act without any reasonable cause but simply and solely at its own whim; though that, of course, is not what it purported to do in the instant case.

In their Lordships' view there are overwhelming reasons why 'remove' in the context of 'to remove and exercise disciplinary control over' police officers in section 99(1) and in the corresponding sections relating to the other public services must be understood as meaning 'remove for reasonable cause' of which the commission is constituted the sole judge, and not as embracing any power to remove at the commission's whim. To construe it otherwise would frustrate the whole constitutional purpose of chapter VIII of the Constitution which their Lordships have described. It would also conflict with one of the human rights recognised and entrenched by section 1(d) of the Constitution, viz 'the right of the individual to equality of treatment from any public authority in the exercise of any functions.' Dismissal of individual members of a public service at whim is the negation of equality of treatment." (pp 126 to 127)

11.

Mr Maharaj submits that his argument about the application of Regulation 50 is supported by the following passage from the opinion of the Board in *Jhagroo v Teaching Service Commission* [2002] UKPC 63; 61 WIR 510:

"In the latter case (*Public Service Appeal Board and Director of Personnel Administration v Tudor*, Civil Appeal No 52 of 1985) *des Isles JA* (with whom *McMillan JA* and *Davis JA* agreed) referred to section 58 of the Act and stated,

'No law, correctly interpreted, permits a temporary appointment other than for a specified limited period. There cannot be a temporary appointment *ad infinitum* ...'." (para 12)

12.

Mr Maharaj submits that it follows from this case that the defective temporary appointment must take effect as a permanent appointment. The Chief Fire Officer had power to make permanent appointments. In this case, he should be treated as having made such appointments with effect from the date of the order for making the temporary appointments.

13.

The Court of Appeal rejected Mr Maharaj's argument on this issue. *Bereaux JA* held:

“... Regulation 50(b)(i) provides that the services of an officer holding a temporary appointment, (defined by regulation 2 to be an acting appointment) may be terminated ‘on the expiry or other termination of an appointment for a specified period.’ The regulation contemplates that, ordinarily, the period of the appointment will be specifically fixed by dates. The question is whether an acting appointment, which is not fixed by dates but which is made ‘until further notice’, is for a ‘specified period’. In my judgment ‘specified period’ does not necessarily require that the period be fixed or closed by dates, provided that by the terms of the appointment it is clear that the appointment is temporary. In this case the term ‘until further notice’ coupled with the fact that it is an acting appointment conveys that it is a temporary appointment which would be terminated upon the giving of formal notice. The giving of such notice concludes the period.” (para 48)

14.

The Board agrees with the Court of Appeal. The key, applying a purposive interpretation, when it comes to genuinely temporary appointments, is that there should be transparency and that, interpreting the appointment against the matrix of fact known to both parties at the date of the appointment, the appointee should be in no doubt that his appointment is only temporary. This interpretation gives effect to what may be presumed was the intention of the legislature. The reasons for making an acting appointment include such matters as illness of the permanent office holder. In those circumstances the legislature must have anticipated that an acting appointment would have to be made other than for a pre-determined fixed period. It would, moreover, be artificial and unsettling and thus contrary to good industrial relations practice to require that the acting appointment was renewed from week to week.

15.

Furthermore, a textual interpretation leads to the same result. The expression “specified period” does not mean that there have to be specified dates or that the dates have to be specified in advance. It simply means that the period has to have a transparent, fixed reference point so that the employer cannot evade his obligations to treat a person as a permanent employee by employing him on an indefinite basis.

16.

It is of course a significant matter that appointments and promotions of persons working in the public services are governed by the Constitution for the reasons which the House gave in *Endell Thomas*. However, as *Bereaux JA* pointed out in his judgment, the Constitution refers to acting appointments. That means that the legislature recognised the utility of acting appointments and intended that they should be a class of appointments which were temporary and not permanent.

17.

There is no suggestion in the present case that the temporary nature of the appointments was a device to make the officer removable on an event when he was in truth a permanent employee. That was the position in both *Aldric Tudor* and *Jhagroo*.

18.

In *Aldric Tudor*, *Des Iles JA* held that where a teacher was originally employed on a contract of indefinite duration it was not open to the Teaching Service Commission to rely on a term of appointment on a transfer to a different district that stated that his appointment was purely temporary:

“... if the Service Commission wanted to appoint the respondent temporarily, then it should have specified the period for which the appointment was being made. Not having done so, the letters of 16

March 1977 and 17 September 1979, in law constitute a contract of employment for an indeterminate period. No law, correctly interpreted, permits a temporary appointment other than for a specified limited period. There cannot be a temporary appointment ad infinitum and I would so hold.

Since the Teaching Service Commission had seconded the respondent to the post of Technical Vocational Teacher 1, which is a permanent office in the Teaching Service as set out in the Division II of the First Schedule to the Education Act, Chapter 39:01, without stating any specified period, in law the respondent was appointed thereto for an indeterminate period and his appointment was not of a temporary nature, but one that made him a permanent member of the Teaching Service.”

19.

In Jhagroo, the appellant was a teacher who was employed for a series of fixed terms. In every case the specified period had already commenced, and in some cases (including the final one) had already expired, by the time he received the relevant letter of appointment. The Board accepted the argument that he was in reality employed for an indefinite period. The decision to give him the retrospective letter of appointment was in substance a decision to terminate his employment. At the time of his dismissal, therefore, he was not holding an appointment for a fixed term.

20.

Those cases do not support the weight which Mr Maharaj places on them, and the passage from the judgment in Aldric Tudor which the Board cited in Jhagroo must be read in the context of the factual situation in that case.

21.

Mr Maharaj submits that, if the appeal fails, valuable constitutional protection is lost, because the Chief Fire Officer was in the practice of making many acting appointments. The effect was to create a permanent second class of officers who could be demoted at any time and this was inconsistent with the constitutional scheme set out in Endell Thomas . It also meant that the individuals lost pay because under Regulation 30(1) and 32(1) of the Fire Service (Terms and Conditions of Employment) Regulations, they were entitled to be paid an acting allowance but this was delayed for many years. They were thus treated differently from those who had actual promotions. They were also disadvantaged on seeking further promotions because they would have to retire earlier as members of the second division. Mr Maharaj relied on these matters to demonstrate the importance to the appellants of this appeal but he accepted that these complaints were not before us.

22.

The Court of Appeal considered whether it was unreasonable to regard the acting appointments as temporary appointments in this case. The Board agrees that it was a relevant question for the Court of Appeal to consider, particularly in the light of the provisions of the Constitution but it has no basis for departing from the view of the Court of Appeal. Bereaux JA concluded on this point that:

“In this case it cannot be said that the acting appointments were so inordinately long as to raise any issue of them becoming permanent.” (para 51)

23.

The Board did not call on Mr Peter Knox QC to make oral submissions, but it had the benefit of his written submissions. In those submissions, he sought to argue that Regulation 50 did not apply to acting appointments on the basis that the termination of an acting appointment simply led to resumption of the earlier office held and that an acting officeholder does not “hold” an office. To succeed on that argument, he would have to argue that the decision of Bereaux J (as he then was) in

Melville v Lalla , 4 December 2000 was wrong. As Mr Maharaj pointed out, in that case Bereaux J held:

“Having regard to regulation 2, there is no basis for construing ‘termination’ of the services of an officer to mean only such termination as results in the complete separation of the officer from the Civil Service. Rather, in the case of an acting appointment it includes termination of the services of an officer where those services are being performed in a post higher than that to which he or she is substantively appointed. Upon the expiry of the specified period of the acting appointment the officer simply reverts to his or her substantive appointment. Reference to ‘other termination’ in regulation 50 relates to early termination consequent upon disciplinary proceedings pursuant to regulation 123.”

24.

Bereaux JA referred in his judgment in this case to his judgment (para 50) in that case, but on a different point. So, Mr Knox would need leave to raise this new point. The Board does not grant leave for that point to be taken because it was not taken below, and the Board would wish to have the views of the Court of Appeal before considering the point itself.

Second issue: preference on promotion and lawfulness of the PBS

25.

Regulations 154 to 158 of the PSCR apply to the promotion of officers, including those on acting appointments, and they provide as follows:

“154(1) Subject to regulation 157, the Chief Fire Officer shall ensure that recommendations made in relation to an acting appointment are based on the criteria prescribed in regulation 158.

(2) Where, in the exigencies of the Service it is not practicable to apply the principles prescribed in regulation 158, the fire officer selected for an acting appointment shall not be given any preference over other eligible officers for a substantive appointment.

155 (1) Subject to regulation 157, where an acting appointment falls to be made by the Commission, the Chief Fire Officer shall notify all eligible fire officers.

(2) For the purpose of sub-regulation (1), the notice may be in respect of an acting appointment which falls to be made within a period specified in the notice.

(3) The Chief Fire Officer shall allow a period of seven (7) days to elapse after the issue of the notice before forwarding any recommendations to the Director for the purpose of allowing the fire officers to make representations in respect of that acting appointment.

(4) Where representations are made to the Chief Fire Officer by or on behalf of a fire officer, the Chief Fire Officer shall forward the representations in their original form to the Director.

(5) When submitting recommendations to the Commission for an acting appointment to an office, the Chief Fire Officer shall advise the Commission of the reasons why an eligible fire officer who is more experienced than the recommended officer is being passed over.

156. Except in very special circumstances or in cases of sudden illness, the Chief Fire Officer shall submit his recommendation for an acting appointment to an office no later than twenty-eight (28) days preceding the date on which the acting appointment is intended to become effective.

157 (1) Where an acting appointment falls to be made as a result of sudden illness or other special circumstances for a period not exceeding twenty-eight (28) days, the Commission may appoint, as a

general rule, the most experienced eligible officer from within the Division in which the acting appointment is to be made.

(2) In making an acting appointment under sub-regulation (1) the Commission shall -

(a) examine whether the exigencies of the Service are best served by appointing an eligible fire officer from another Division to act when there is an eligible officer in the Division; and

(b) take into account additional Government expenditure for travelling and subsistence allowances and other related expenses.

158 (1) In considering eligible fire officers for promotion, the Commission shall take into account the experience, educational qualifications, merit and ability, together with the relative efficiency of those fire officers.

(2) Where the Commission has to select an officer for promotion from officers who appear to be of equal merit, the Commission shall determine its selection on the basis of the relevant and relative experience of the officers.

(3) In the performance of its functions under sub-regulation (1), the Commission shall take into account as regards each fire officer -

...

(f) the duties to be performed in the office of which the fire officer has experience;

(g) demonstrated skills and ability relevant to the office; ..."

26.

What is here in issue is whether an officer who has an acting appointment in relation to a particular level should have preferential treatment when the Chief Fire Officer proposes to make permanent appointments at that level. This would have the effect that that person would be appointed, if he was appointable, despite the fact that there were other candidates who had more merit.

27.

Mr Maharaj argues that Regulation 154(2) is inserted in order to set out an exception to a general rule that preference will be given to a person in an acting position when the office for which he is an acting officer becomes vacant. The judge held that this was the clear effect of Regulation 154(2). So in circumstances other than those described in the opening wording of Regulation 154, the officer holding an acting appointment would have a preferential consideration when the substantive appointment was made. The Board, however, agrees with Bereaux JA. He held:

"But it does not follow that an acting appointment effected by applying regulation 158(3) criteria, requires that those appointees be preferred when permanent promotions are to be made to the substantive post. Express provision to that effect is required. In the absence of such express provision, a substantive appointment can only be based on regulation 158(3) criteria, in which experience in the acting appointment is taken into account (but not preferred)." (para 55)

28.

Regulation 154(2) is intended to deal with a situation where an officer is appointed to meet an urgent situation. The full processes may not have been gone through. Therefore, Regulation 154(2) makes it clear that an officer acting in that office should not be preferred when the permanent promotion comes to be made.

29.

Mr Maharaj submits that the PBS introduced by the Chief Fire Officer was unlawful because it was irrational. His first ground for making this contention is that it ought to have allowed for preference to be given in the way described in para 26 above. He submits that the PBS did not state that this preference was given and therefore he contends that it did not achieve the purpose for which it was set up (see *Ganga v Comr of Police* [2011] UKPC 28, para 21 applying the test that “[t]he measures designed to further the objective must be rationally connected to it” from *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, para 40. That argument must fail in light of the Board’s view on Regulation 154. The PBS did, moreover, recognise the experience which the acting office holder had obtained in “performing duties in the vacant office in the Fire Service” by allocating points to that experience according to the length of time involved. It would not be for the Board to suggest that more or fewer points should have been given for this.

30.

Furthermore, Mr Maharaj submits that there should have been a carve-out from the PBS for those who had been appointed to acting positions before the PBS was brought into effect. The PBS was therefore unlawful or irrational. Those officers expected to be appointed to a substantive appointment, but they were in fact passed over because of the adoption of the PBS.

31.

The Board does not accept these submissions. The heading to the FSOs by which the acting appointments in issue were made stated clearly “it must be noted that these acting appointments are not as a prelude to promotion to the substantive rank”. The officers could not therefore expect to have preferential treatment when permanent appointments were being made even if they were appointed to their acting positions before the PBS was adopted.

32.

The Board therefore dismisses this appeal.