

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No: CV2016-01437**

BETWEEN

**ROY THOMPSON  
LENNOX CLARKE**

**Claimants**

AND

**THE PUBLIC SERVICE COMMISSION**

**Defendant**

Before the Honourable Madam Justice Eleanor J. Donaldson-Honeywell

Appearances:

Mr. Kenneth Thompson, Attorney-at-Law for the Claimant

Ms. Nadine Nabie and Ms. Elena Da Silva instructed by Ms. Avaria Niles, Attorneys-at-Law for the Defendant

**Delivered on March 22, 2017**

**JUDGMENT**

## **I. Introduction**

1. The Claimants have in the present case filed judicial review proceedings against the Public Service Commission [“the Commission”] for failure to conduct interviews with the Claimants for promotion to the position of Assistant Divisional Fire Officer (“ADFO”) in the Public Service.
2. Their application is based on several grounds, namely:
  - a. That the failure to interview the Claimants contravened the Claimants’ right to equality of treatment afforded to them by **S.4 of the Constitution**;
  - b. That the decision not to interview the Claimants was in breach of their legitimate expectation due to its prior conduct of accepting applicants in a similar position as well as the prior indication that they would be interviewed; and
  - c. That the decision contravened the principles of natural justice and was unreasonable;
  - d. That **Regulation 9(1) of the Fire Service (Terms and Conditions of Employment) Regulations 1998** contravenes the principle of separation of powers and is therefore unconstitutional and void.

## **II. Evidence**

3. The claim is based upon the following facts as summarised from the joint Affidavit of the Claimants, Roy Thompson and Lennox Clarke filed herein on June 2, 2016 and the Affidavit of Mrs. Coomarie Goolabsingh filed by the Defendant on November 4, 2016.
4. The Claimants applied for appointment to a vacant position in the office of ADFO which was advertised in April, 2012. At the time of their application they held the substantive office of Fire Sub Station Officer (“FSSO”). The First and Second Claimant were promoted thereafter to the office of Fire Station Officer (“FSO”) on 4<sup>th</sup> February, 2015 and 3<sup>rd</sup> June, 2016 respectively.

5. The First and Second Claimants were contacted by Ms Kissoon of the Service Commission Department on 14<sup>th</sup> January, 2016 and were told they would be interviewed for the position of ADFO on the 20<sup>th</sup> January, 2016 and 21<sup>st</sup> January, 2016 respectively.
6. Thereafter, on 19<sup>th</sup> January, 2016 the same Ms. Kissoon contacted them again to inform them that the Commission would no longer be interviewing them for appointment to the office as they did not satisfy **Regulation 9(1) of the Fire Service (Terms and Conditions of Employment) Regulations 1998** as they were not holders of the office of FSO or Fire Equipment Officer (“FEO”) when they made their applications.
7. Subsequently, the Claimants were informed by letters dated 2<sup>nd</sup> February, 2016 that the Commission had decided that as at the closing date of the notice of vacancy (16<sup>th</sup> March, 2012) the Claimants did not satisfy the requirements to be interviewed for promotion to ADFO and had been shortlisted in error.
8. The Claimants were therefore not interviewed. Other applicants who held the position of FSO at the relevant time were interviewed and were promoted effective February, 2016.
9. The Claimants claim that four officers (David Thomas, Clunis Wallen, Andy Hutchinson and Stephen John) had held the office of FSSO in 2009 and even though they didn’t meet the requirement of **Regulation 9(1)** had been appointed to the position of ADFO that year. They claim accordingly, that this gave rise to a legitimate expectation, that they too would be interviewed for the ADFO vacancies despite the fact that they had not attained the required position of FSO at the time of their applications.

### **III. Issues**

10. The issues in the present case are as follows:
  - i. Whether the failure to interview and promote the Claimants amounts to a breach of legitimate expectation;

- ii. Whether the failure to interview and promote the Claimants amounted to a breach of their rights to equality and non-discrimination under the Constitution;
- iii. Whether the failure to interview the Claimants was a breach of natural justice;
- iv. Whether **Regulation 9(1)** breaches the principle of separation of powers.

#### **IV. Law and Analysis**

##### *Separation of Powers*

11. The Claimants argue that the making of **Regulation 9(1)** by the Executive and/or Parliament is a breach of the separation of powers doctrine as the Executive could thereby influence directly or indirectly the decision making of the Commission in the selection of persons for appointment to the office of ADFO.

12. **Section 121(1) of the Constitution** provides that:

*“Subject to the provisions of this Constitution, power to appoint persons to hold or act in offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices and to enforce standards of conduct on such officers shall vest in the Public Service Commission.”*

13. The Public Service Regulations passed under the Constitution set out how this power of the Commission is to be exercised. **Regulation 18 of the Public Service Commission Regulations** states:

*“(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. ....*

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

**Regulation 158**, specifically applicable to the Fire Service, provides,

*(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 who appears 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*

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*(a) His general fitness;*

*(b) Any special qualifications;*

*(c) Any special courses of training that he may have undergone (whether at the expense of Government or otherwise);*

*(d) The evaluation of the officer's performance as reflected in his performance appraisal report;*

*(e) Any letters of commendation or special report in respect of any special work done by the 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;*

*(h) Any specific recommendation of the Permanent Secretary or chief Fire Officer for the filling of the particular office;*

*(i) Any previous, relevant employment of his in the Service, the public service, or elsewhere;*

*(j) Any special report for which the Commission may call;*

*(k) His devotion to duty.”*

14. The Constitution is not the sole Statute applicable to the appointment of Fire Officers. By **Act 10 of 1997 the Fire Services Act Chapter 35:50** was amended to provide at **Section 34(1) (a) and (aa)** that the President could prescribe not only the terms and conditions for employment but specifically the qualifications for appointment to an office in the Fire Service. This provision allowed for the setting of type of specifications required from time to time for appointments to particular offices as would have been contemplated in **PSC Regulation 18(4)**.

15. Shortly thereafter **Regulation 9(1) of the Fire Service (Terms and Conditions of Employment) Regulations 1998** was prescribed. The Regulation states:

*“A candidate for appointment Assistant [sic] to the office Divisional Fire Officer shall be selected from among those persons holding the office of Fire Station Officer or Fire Equipment Supervisor with at least ten years’ service in the Service.”*

16. The Claimants cite the case of **Endell Thomas v AG**<sup>1</sup> as having enunciated the rationale for creation of the Public Service Commission. At page 124, the Privy Council stated that the purpose of the Public Service Chapter of the Constitution is to insulate members of the Public Service from political influence from the government. Therefore, the Commission was set up with the power to make all appointments, promotions and transfers.

17. In **Thomas**, which was decided under the former Constitution in which the equivalent chapter (although it bore a different headnote) was Ch. VIII, Lord Diplock said:

*“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 upon them directly by the government of the day. The means adopted for doing this was to vest in autonomous*

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<sup>1</sup> [1982] AC 113, 124, [1981] 3 WLR 601

*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 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, although its exercise requires the approval of the Prime Minister, is theirs alone and any power to delegate is exercised under the control of the commission and not on behalf of the Crown or of any other person or authority."*

18. The case of **Cooper v Director of Personnel Administration and Police Service Commission**<sup>2</sup> identifies the issue to be addressed as whether, and if so to what extent, the alleged alteration conflicts with the guidance given in that paragraph. Citing this case, the Claimants argue that **Regulation 9(1)** made by the Executive/Parliament could influence directly or indirectly the selection of persons for appointment to the office of ADFO and therefore infringes on the Commission's power of appointment and promotion.
19. The Claimants further cite the case of **Harridath Maharaj v AG**<sup>3</sup> as authority for the proposition that the Executive is to have no role in the process leading to the selection of persons for appointment in public offices. The main issue in **Maharaj** was whether the Commissioner of Police and Deputy Commissioner of Police (Selection Process) Order 2015 interfered with the Police Service Commission's independence or autonomy in relation to appointments to the offices of Commissioner of Police and Deputy Commissioner of Police.

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<sup>2</sup> PC No. 47 of 2005

<sup>3</sup> CV2016-01218

20. The Order provided that the selection process for appointments to these offices now required a request from the Minister of National Security as well as compliance with the Central Tenders Board Act. This was held to be a fetter upon and interference with the independence, jurisdiction, and functions of the Police Service Commission.

21. This is distinguishable from the present case as the Order concerned had modified the Commission's role in the appointment of the officers by the addition of the Minister's request. In the present case, the Regulations do not alter the process of selection but merely the qualification of the office.

22. In the case of **Thomas**, at pg. 128 Lord Diplock said:

*"The functions of the Police Service Commission fall into two classes: (1) to appoint police officers to the public service, including their transfer and promotion and confirmation in appointments and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers; this is for the legislature and, in respect of any matters not dealt with by legislation, whether primary or subordinate, it is for the executive to deal with in its contract of employment with the individual police officer. Terms of service include such matters as (a) the duration of the contract of employment, e.g. for a fixed period, for a period ending on attaining retiring age, or for a probationary period as it envisaged by the reference to 'confirmation of appointments' in section 99(1); (b) remuneration and pensions; and (c) what their Lordships have called the 'code of conduct' that the police officer is under a duty to observe."*

23. In **Cooper** it was argued that as passing a promotion examination was a form of qualification and this fell within the sphere of the functions of the executive, the Cabinet had power to appoint the Public Service Examinations Board. However, the Court held:

*"On the one hand there is the function of appointing officers to the police service, including their promotion and transfer. This is a matter*



*exclusively for the Police Service Commission. On the other hand there are the terms of service which are to be included in the contract of the individual police officer. The Police Service Commission does not employ the police officer. His contract is with the executive. **Terms of service, of which Lord Diplock gave various examples, may be laid down by the legislature. Where they are laid down in that way they must form part of the contract. Where there are gaps because the matters at issue have not been dealt with by the legislature, they may be dealt with by the employer. In the case of police officers, their contract of service is with the executive. So it is open to the executive to fill the gaps. But this has nothing whatever to do with the matters that lie within the exclusive preserve of the Police Service Commission. It is for the Commission, and the Commission alone, to appoint and promote police officers. Terms of service are what each police officer enters into with his employer following the confirmation by the Commission of his appointment to, or his appointment on promotion within, the police service.***

24. They therefore concluded that the appointment of the Examination Board did interfere with the Commission's power of appointment. In the present case, however, the stipulations of **Regulation 9(1)** do not interfere with the appointment process but merely address the terms of service and in particular the terms as to eligibility criteria for promotion. This was considered both in **Thomas** and in **Cooper** to be within the ambit of both the legislature and the executive as the contract is between the officer as employee and the Executive as employer.
25. Such an alteration in the terms of service of the employment as to qualification for promotion to the office of ADFO is a legitimate exercise of the legislature's powers and therefore does not violate the separation of powers principle. The Claimants' claim on this point is therefore without merit.

Legitimate Expectation

26. The Claimants allege that they had a legitimate expectation that they would be interviewed for the position of ADFO due to 1) the representation by Ms Kissoon that they would be interviewed and 2) the fact that the Commission had interviewed and thereafter promoted three officers in the position of FSSO to the office of ADFO in 2009.
27. The court has held that legitimate expectations were capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis – **AG of Hong Kong v Ng Yuen Shiu**<sup>4</sup>. According to **CCSU v Minister for Civil Service**<sup>5</sup>, a legitimate expectation arises “*from an express promise given on behalf of a public authority or from the existence of a regular practice which the Claimant can reasonably expect to continue.*” Where a court finds that such a promise or practice is considered to have induced a legitimate expectation of a substantial benefit, it must decide whether frustrating that expectation will amount to an abuse of power – **R v North & East Devon Health Authority, ex p Coughlan**<sup>6</sup>.
28. In **Paponette v The Attorney General**<sup>7</sup>, the court dealt with what constituted ‘legitimate expectation’ and Warner J.A. opined that a Claimant must demonstrate “*clear, precise and unambiguous representation devoid of any qualifications; additionally, the court must be persuaded that there has been ‘conspicuous unfairness’ amounting to an abuse of power in order to found a claim of substantive legitimate expectation*”.
29. **R v Newham London Borough Council, ex p Bibi**<sup>8</sup> outlined the approach to be taken by the court in legitimate expectation cases in three questions: 1) to what has the public authority, whether by practice or by promise, committed itself; 2) whether the authority has acted or proposes to act unlawfully in relation to its commitment; and 3) what the court should do.

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<sup>4</sup> [1983] All ER 636

<sup>5</sup> [1985] 1 AC 374

<sup>6</sup> [2000] 3 All ER 850

<sup>7</sup> [2010] UKPC 32

<sup>8</sup> [2002] 1 WLR 237

30. The dicta of Sir John Dyson SCJ in **Paponette and Others v The Attorney General** of Trinidad and Tobago is helpful in guiding the court on how to determine what it should do:

*“The initial burden lies on the applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. This is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.”*

31. The Defendant argues firstly that the interviewing and promotion of the FSSO’s in 2009 is not sufficient to amount to an established practice or procedure. The Defendant does not put forward any explanation for the interviewing and promotion of three FSSO’s in 2009 other than it may have been done in error. Despite this, these three appointments are not sufficient to be considered evidence of an established/settled/regular practice (as it is referred to in several local decisions<sup>9</sup>).

32. The Defendant further argues that even if there has been established a clear, unambiguous promise or established practice, the Defendant had good, proportionate reason to deny the Claimants of the opportunity to be interviewed and be promoted due to the qualification expressed in the Regulations as well as the fairness to other candidates who possessed the requisite qualifications and were interviewed.

33. These justifications are clearly in the interest of overall fairness and good administration. It is reasonable that the Commission should follow the Regulations which govern the terms of service of officers in the position of the Claimants as to how and when they would be

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<sup>9</sup> *Allan Ramai v Commissioner of Police* CV 2014-01289; *Paul Lai v AG* CA29 of 2012

eligible for appointment to the office of ADFO. This requirement to adhere to the criteria set out in the Regulation would have been reinforced in the mind of the Defendant based on the 2011 decision in **Robert Ramsahai v TSC PCA No. 43 of 2010** which came after their apparently erroneous appointments in 2009.

34. In that case it was also based on a the Teaching Service Commission's application of a Regulation governing employment criteria that its decision making with regard to bypassing an applicant who did not meet a five year experience requirement was being challenged. The Court of Appeal accepted the argument of the Teaching Service Commission that this requirement was not merely a factor to be taken into account; it was a condition precedent to the appointment of any candidate. This decision which was upheld by the Privy Council held that the said requirement was a modification of the minimum requirements for appointment to the relevant posts which was authorised by **Regulation 4 of the Education Regulations**. It was therefore a regulation which the Commission had to consider under **Regulation 18(4) of the PSC Regulations** and from which it could not depart because it was a mandatory requirement.

35. In seeking to distinguish the facts in **Ramsahai** from the instant case, much was made in the Claimant's closing submissions of the fact that there was no reference to the **Regulation 9(1)** requirement in the Circular Memorandum which advertised the vacancies in the office of ADFO. The Claimants' Counsel submitted:

*“6. The question that now arises is whether Ramsahai has any relevance to the instant case. It is to be noted that in Ramsahai the requirement that an applicant for the office must have five years, teaching experience after obtaining the postgraduate Diploma in Education was stipulated in the memorandum by which the vacancy was advertised. By contrast, the memorandum which invited applications for the vacancy in the instant case did not specify as a requirement that an applicant must be the holder of the office of FSO or Fire Equipment Officer by the closing date for making applications. A perusal of the memorandum of the 10th day of February 2012, exhibited as “CG1” to the affidavit of Mrs.*

*Coomarie Goolabsingh, stipulates, under the rubric "Experience" the following:- Twelve (12) years working experience in the Fire Service, including five (5) years in Operations, two years at the level of Fire Station Officer".*

*7. Absolutely no mention is made in the memorandum with respect to the office which an applicant was required to hold to be considered "a suitably qualified officer". From the content of the said memorandum it is absolutely clear that the Commission targeted not only FSOs, but also other officers, including FSSOs who were suitably qualified. This was precisely the approach which the Commission adopted when it advertised vacancies in the office in or about 2009 which led to the promotion of Mr David Thomas and other FSSOS to ADFO by passing the office of FSO. According to the Defendant's evidence and submissions, the Defendant decided at a meeting it held on the 19th day of January 2016 that all persons for interview must satisfy the job specifications for ADFO at the closing date of applications - 16th March 2012. [See paragraph 17 of the Defendant's submissions].*

*8. The purported requirement with respect to being the holder of the office of FSO and/or satisfying the job specification, was therefore imposed by the Defendant after it advertised the vacancies. Thus no such requirement existed."*

36. It is my finding, however, that the wording "suitably qualified" had to be read by any applicant in the context of known pre-existing qualifications for the position. The fact that any specific qualification prescribed by law was omitted from the advertisement did not mean that it was not required for the prospective applicants to be considered as suitable. It is therefore not correct to say as submitted by the Claimants that there was no such requirement for persons to be holding the office of FSO in order to be considered for ADFO vacancies. The requirement had existed since 1998 in the Regulations. In all the

circumstances, interviewing applicants in 2016 who did not satisfy the requirements of **Regulation 9(1)** at the relevant time would not only be futile but could also prejudice the applications of those who had the requisite qualifications.

37. These considerations of the Commission were sufficient to provide good grounds to frustrate any legitimate expectation and therefore failing to interview the Claimants could not amount to an abuse of power by the Commission. In any event it is my finding that the alleged telephone invitation by Ms. Kissoon and the one off example given as to appointment of non FSO office holders as ADFOs in 2009 were insufficient per se to amount to the basis for legitimate expectation. The Claimants' claim on this point also fails.

38. One area of concern that remains hanging however is the basis upon which some ten months after commencement of this Claim to challenge scheduled January, 2016 interviews from which the Claimants were excluded and five months after other interviewed officers were appointed in June, 2016, the Commission appointed the first Claimant to the position by "round robin". There is neither explanation by the Defendant in submissions nor an indication as to the qualifications considered however, Counsel for the Claimant observed in Submissions in Reply filed herein as follows:

*"Round Robin implies seniority. Seniority is a criterion among several criteria which the Defendant is required to take into account when it is considering the question of promoting officers of the Fire Service."*

39. What is clear is that by the time of the First Claimant's appointment to ADFO in October, 2016 he met the **Regulation 9(1)** criteria as he had been appointed an FSO since 2015. There is no accounting however for the failure to appoint the other Claimant on the same basis. It is noted however that he had retired since June, 2016 just before the other interviewed officers were appointed as ADFOs. Any possible anomaly regarding the appointment of one Claimant herein and not the other to the position they both sought to be interviewed for is not the subject matter of the instant Claim. It may provide grounds for a challenge by the second Claimant as to why there was unequal treatment between

himself and the first Claimant when the Commission allowed him to retire without being appointed to the position.

40. The question that remains to be answered though arising subsequently to the issues pleaded herein is succinctly put in the submissions of the Claimant as:

*“18. At paragraph 44 of its submissions, the Defendant submits that the Claimants could not have had a legitimate expectation to be interviewed for a position to which they were not entitled. This submission gives rise to two questions. They are as follows:-*

*(a) If the Claimants were not eligible or entitled to be interviewed for the office because they were not FSOs when they applied for it, why did the Defendant promote the First Claimant to the said office?”*

This is a question that must be carefully considered by the Defendant. It is strongly recommended that the Defendant seek to engage in alternate dispute resolution processes with the Second Claimant so as to avoid the commencement of future litigation.

#### Right to Equality

41. **Section 4(d) of the Constitution** provides:

*“It is hereby recognised and declared that in Trinidad and Tobago 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: the right of the individual to equality of treatment from any public authority in the exercise of any functions”.*

42. The Claimants allege that the Commission breached their right to equality of treatment protected by the Constitution. A Claimant alleging breach of this right must establish *“that he has been or would be treated differently from some other similarly circumstanced person or persons... as actual or hypothetical comparators”* and *“the comparison must be*

*such that the relevant circumstances in the one case are the same or not materially different in the other*”<sup>10</sup>.

43. Further in **Police Service Commission v Dennis Graham**<sup>11</sup>, Mendonca JA held that an applicant “*need only show that he was treated less favourably than one similarly circumstanced*”.

44. In the case of **Bishop of Roman Catholic Diocese of Port Louis v Tengur**<sup>12</sup>, Lord Bingham referred to authorities from several jurisdictions including the Strasbourg court in outlining the elements to be proved in establishing discrimination:

*“Where apparently discriminatory treatment is shown, it is for the alleged discriminator to justify it as having a legitimate aim and as having a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”*

45. In the present case the Claimants have shown that they were treated differently from the three FSSO’s that were interviewed in 2009 and promoted thereafter to ADFO. The Defendant’s evidence does not contradict this fact as laid out in the Claimant’s affidavits and annexed list of promotions. The burden of proof therefore now shifts to the Defendant to show an objective justification for such differential treatment<sup>13</sup>.

46. The Defendant’s main argument is that the Claimants were not lawfully entitled to be considered for the ADFO position due to their lack of qualification under **Regulation 9(1)** and as such this differential treatment could not constitute discrimination. They cite the Privy Council decision of **Maharaj v Teaching Service Commission & Anor**<sup>14</sup>:

*“The Appellant's claim that he had been unfairly treated and discriminated against failed, because the removal of a benefit to which he was not*

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<sup>10</sup> *Bhagwandeem v AG PC* App No 45 of 2003 [18]

<sup>11</sup> Civ. App. 27 of 2006 and Civ. App. 8 of 2008

<sup>12</sup> [2004] UKPC 9

<sup>13</sup> *Graham* [25]

<sup>14</sup> [2006] UKPC 36



*lawfully entitled could not constitute discrimination or inequality of treatment.”*

47. This was a summary of the Court of Appeal’s decision in that matter by their Lordships in the Privy Council. The final court’s decision was not based upon that reasoning but rather that they agreed with the lower courts in accepting the Respondent’s evidence on the date of appointment of the Appellant. However, it did not reverse the Court of Appeal’s decision nor overturn that particular finding of the court.

48. Therefore, the Claimants in the present case cannot succeed in proving discrimination where there was a removal of a benefit that they were not lawfully entitled to. Even barring this, the Commission does have an objective justification for such treatment which is that it was not empowered by the Regulations to promote persons holding the office of FSSO to ADFO and that the 2009 promotions appeared to be in error. It is reasonable that the actions of the Commission would be guided by evolving jurisprudence on the issues at hand. In 2011 after the instance of appointment of some persons in 2009 who were not qualified as FSOs the Commission would have had the benefit of the decision in **Ramsahai**. That decisions underscored the need to abide by relevant stipulations as to the criteria for appointment as prescribed from time to time based on regulations. The Claimants’ claim therefore fails on this issue.

#### Natural Justice

49. **Kanda v Government of Malaya**<sup>15</sup> outlines the elements of natural justice:

*“The rule against bias is one thing. The right to be heard is another. Those two rules are essential characteristics of what is called natural justice.”*

50. The Claimants in their submissions do not say specifically which of these they allege has been breached in the present case but simply assert that the unfairness arose from the conduct of the Commission in failing to interview them. It can be inferred from this that they are alleging they were denied the right to be heard.

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<sup>15</sup> (1962) AC 322

51. The **Section 20 of the Judicial Review Act Chap 7:08** provides:

*“An inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner.”*

52. According to the **Halsbury’s Laws of England on Judicial Review**<sup>16</sup> the right to be heard applies not only to judicial bodies, but also to administrative actions:

*“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”*

53. The primary consideration in deciding whether there is a right to be heard in a particular instance is fairness<sup>17</sup>. According to the Stair Memorial Encyclopaedia, *“the question whether there is a right to be heard in an administrative process may be subsumed in the broader question of whether the course of action adopted by the decision-maker was fair.”*<sup>18</sup>

54. In the present situation, the Commission’s decision resulted in the Claimants not being interviewed for the position of ADFO. The Commission made the decision based upon recognition of the Regulations which limited the class of applicants which could be appointed to the office.

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<sup>16</sup> Judicial Review (Vol. 61 (2010)) [639]

<sup>17</sup> *Lloyd v McMahon* [1987] AC 625

<sup>18</sup> Administrative Law (1999) (Reissue) [68]

55. In the case of **Barnett v Commissioner of Police**<sup>19</sup>, the court considered a situation where the Commissioner of Police made the decision to promote officers who ranked below the Claimants on the Order of Merit list. The court determined that this was within the Commissioner's powers but that there had been an established practice of making promotions in accordance with such list and the Claimants were justified in conceiving a legitimate expectation of such continued practice. On this basis the judge determined:

*“17. ...However, in so far as the claimants held a legitimate expectation, fairness required that they be afforded an opportunity to be heard before action was taken against their expectations.”*

56. This view is supported by Denning MR in the case of **Breen v Amalgamated Engineering Union**<sup>20</sup>. At p. 1154 he stated:

*“It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim—such as an appointment to some post or other—then he can be turned away without a word. He need not be heard. No explanation need be given”.*

57. This can be contrasted with the present case where such an established practice has been determined not to have existed, and even if it had, the Commission did not act unfairly in not continuing such practice. It follows therefore that there could be no real unfairness in not hearing the Claimants before the decision was made. Therefore, the Claimants' claim under this head must also fail.

## **V. Conclusion**

58. The Claimants have not succeeded in their claim against the Defendant for Judicial Review of its decision not to interview them for the position of ADFO for the following reasons:

- a. With regard to the claim that the **Fire Service Regulation 9(1)** violated the principle of separation of powers, the decisions of **Thomas** and **Cooper** consider

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<sup>19</sup> CV2010/05005

<sup>20</sup> [1971] 1 All ER 1148

alterations to the terms of service of the contracts of employees of the state to be within the powers of the Legislature. **Regulation 9(1)** merely specifies the qualifications necessary for the post of ADFO and does not infringe on the Commission's process of appointment. As a result, this cannot be considered to be a breach of the separation of powers principle.

- b. With regard to the claim that the Claimants had a legitimate expectation that they would be eligible for interview and promotion to the office of ADFO based on the past instance of promoting FSSO's in 2009 to the office of ADFO, it is clear that the promotion of these officers does not satisfy the requirement of an established practice by the Commission. Furthermore, the Commission has properly cited adherence to **Regulation 9(1)** as a good, proportionate reason for not acting as it did in 2009, particularly in light of fairness to other more qualified applicants. In addition, the invitation issued by Ms. Kissoon for the Applicants to attend an interview was not sufficient to amount to a promise by the Commission. Once the Commission had considered the matter the invitation was withdrawn a few days thereafter with an appropriate explanation citing the mandate to abide by **Regulation 9(1)** criteria not met by the Claimants.
- c. With regard to the claim that the Commission has breached the Claimants' right to equality and non-discrimination, although the Claimants have shown that there are similarly circumstanced persons who were treated differently, they are claiming a benefit that they were not lawfully entitled to. Furthermore, the Commission does have an objective justification for such treatment which is that it was not empowered by the Regulations to promote persons holding the office of FSSO to ADFO and that the 2009 promotions appeared to be in error.
- d. With regard to the claim that the Claimants' right to be heard was breached, due to the lack of proof of a legitimate expectation of the practice of promoting FSSO's to the position of ADFO, the Claimants have not proved that fairness required them to be heard before a decision not to interview them was taken.

59. In all the circumstances, the Claimants have not substantiated a case for the relief claimed herein. Accordingly, it is hereby ordered that:

- a. The Claim is dismissed.
- b. The Claimants are to pay the costs of the Defendant to be assessed by the Master if not agreed.

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**Eleanor Joye Donaldson-Honeywell**

**Judge**

**Assisted by: Christie Borely  
Judicial Research Counsel I**