TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. Cv. S. 637 of 2004

IN THE MATTER OF THE CONTINUING FAILURE AND/OR REFUSAL BY THE OFFICE OF THE CHIEF MEDICAL OFFICER AND/OR THE PERMANENT SECRETARY, MINISTRY OF HEALTH TO INFORM THE APPLICANT OF THE PRECISE NATURE OF THE ALLEGATIONS MADE AGAINST HIM AS DOCUMENTED IN A LETTER DATED 31ST DAY OF OCTOBER, 2003.

AND

IN THE MATTER OF THE APPOINTMENT OF JUNIOR DOCTORS TO ACT IN THE OFFICE OF SPECIALIST MEDICAL OFFICER, DEPARTMENT OF OBSTETRICS AND GYNECOLOGY AT THE SAN FERNANDO GENERAL HOSPITAL AND THE CONTINUED UNLAWFUL BYPASSING OF THE APPLICANT FOR THIS ACTING APPOINTMENT.

BETWEEN

KRISHNA RAMPERSADSINGH APPLICANT

AND

CHIEF MEDICAL OFFICER (DR. ROHIT DOON)

PERMANENT SECRETARY,
MINISTRY OF HEALTH (HAMID O'BRIEN)

RESPONDENTS

BEFORE THE HONOURABLE MR JUSTICE JAMADAR

APPEARANCES
Mr. A. Ramlogan for the Applicant
Mr. N. Byam for the Respondents

JUDGMENT

The Applicant was the Senior Registrar in the Department of Obstetrics and Gynecology at the South West Regional Health Authority (SWRHA) during the period under consideration. He is the third most Senior Registrar in this Department in the Public

Service. At the material time the first and second ranked Registrars were acting as Specialist Medical Officers (SMO's) Port of Spain General Hospital.

In this application the Applicant has raised two complaints. First is a long standing complaint that has recurred at least four times during his period of secondment from the Ministry of Health to the SWRHA, which is, that he has been bypassed for acting appointments to the post of SMO with out reasons while he was the most senior Registrar in the Department. Second, that the actions of the Chief Medical Officer (CMO) and/or the Medical Chief of Staff (MCOS) and/or the decisions by them (or either of them) not to consider the Applicant for any acting appointments to senior positions, because of a letter dated the 31st October, 2003 from the CMO to the Chief Executive Officer, SWRHA, which referred to unspecified "allegations … of a serious nature" made against the Applicant by unnamed "professionals holding senior positions," and which stated that the allegations had been "partially investigated but inconclusive" and which advised that the Applicant not be appointed to any senior position until "an independent investigation" into the allegations was conducted, were unfair and in breach of the principles of natural justice.

THE BYPASSING OF THE APPLICANT

On the 1st March, 1998 the Applicant was seconded from the Ministry of Health to the SWRHA for three years (to the 1st March 2001), to serve there as a Registrar. This was effected by notification from the Permanent Secretary, Ministry of Health and crystallized in a three year contract between the Applicant and the SWRHA. This initial period of secondment was followed by a second three year secondment from the 2nd March, 2001 to the 1st March, 2004 and another contract between the Applicant and the SWRHA.

During this six year period of secondment the Applicant was appointed to act as SMO on six separate occasions, as follows:

(i) 13/08/01 - 09/09/01

(ii) 29/07/02 - 01/09/02

(iii) 17/01/03 - 31/01/03

(iv) 09/04/03 - 20/04/03

(v) 08/08/03 - 07/10/03

(vi) 08/10/03 - 09/11/03

Each of these acting appointments was confirmed by separate contracts between the Applicant and the SWRHA.

However, during his secondment, the Applicant was also bypassed on at least four occasions, as follows:

(i) 18/03/02 - 06/05/02

(ii) 16/12/02 - 06/01/03

(iii) 01/08/03 - 19/08/03

(iv) In February, 2004

On each of the occasions in which the Applicant was bypassed he complained. In each instance the Applicant complained directly to the MCOS (though the complaints were copied to the CMO and the Permanent Secretary, Ministry of Health).

The first complaint (12th April, 2002) was in the form of any inquiry: "what is the policy with respect to acting appointments?" The second (22nd November, 2002), requested reasons and referred to the 'tradition' of seniority in the Public Service. In response (29th November, 2002), the MCOS stated that "all acting appointments are made on the recommendation of the Head of Department and his/her advice takes precedence over traditional practice." The third (4th August, 2003), again referred to "the long established practice" whereby the most senior Registrar was invited to fill vacancies for acting appointments to the post of SMO; threatened legal action; and challenged the assertions of the MCOS (of the 29th November, 2002), citing the Public Service Regulations. The fourth complaint (25th February, 2004), noted the absence of reasons and cited a decision of this Court (**Furlonge v O'Brien** H.C.A. No. 2098 of 2003): in which it was held, that with respect to acting appointments not as a prelude to a substantive appointment (Reg.

26 of the PSCR), where the next most senior officer eligible for an acting appointment is not being recommended, that such officer should be informed of the recommendation and reasons (for being passed over) within a reasonable time so as to allow the affected officer sufficient time to be heard or to make representations before the date on which a decision is to be made by the Public Service Commission to fill the vacancy.

This fourth instance of being passed over was one catalyst for this action and for the relief claimed at (a), (b) and (d) of the Notice filed on the 26th April, 2004. The hurdle the Applicant faces is that in these proceedings he has chosen not to serve or give notice of same to the SWRHA or the MCOS; but rather to name as putative Respondents the CMO and the Permanent Secretary, Ministry of Health.

On the evidence it is clear that the Applicant was on contract with the SWRHA and on secondment from the Ministry of Health during the complained of decision (the February 2004 passing over). On the evidence it is also clear that the Applicant had been appointed to act as SMO on each prior occasion on the basis of a contract with the SWRHA. His complaint is really against the SWRHA on this issue. Indeed, it was argued that the SWRHA is bound by the Public Service Commission Regulations with respect to acting appointments to the post of SMO (in this case presumably, not as a prelude to a substantive appointment); by the decision in **Furlonge** (above); and/or these principles stated in those sources based on its course of dealing with and/or representations to the Applicant from 1st March, 1998. Yet this Court has not had the opportunity to hear from the SWRHA by reason of the Applicant's choice as to the named Respondents.

As Chief Justice de la Bastide pointed out in **The Public Service Association v The Minister of Health and the Regional Health Authorities** Civ. App.123 of 2000, at page 3:

> The Regional Health Authorities were established by the Regional Health Authorities Act, 1994. By that Act each Authority was created a body corporate with its own Board of Directors (section 4). The Authorities

> therefore are legal entities separate and distinct from the Government of Trinidad and Tobago. Among the powers expressly given to them by the Act is the power to appoint employees (section 26 (1) (a)). Persons whom the Authority employs in exercise of that power, are not in the public service – they are not civil servants. The manifest policy of the Act is that the Regional Health Authorities should take over the provision of health services in Trinidad and Tobago.

The consequence is that the Applicant was an employee of the SWRHA at the material time, though still substantively a Public Servant by reason of his secondment (Reg.31 of the Civil Service Regulations) – one who has temporarily moved to an office or position outside the Civil Service (Reg.2, CSR). In my opinion, prima facie, during a period of secondment such as this the SWRHA is not in law bound by the Civil Service Regulations or the Public Service Commission Regulations, and, prima facie, the Applicant is not the beneficiary of same. To find that the contrary is the case (as the Applicant would have this Court do), in the absence of an opportunity being given to the SWRHA to be heard, would fly in the face of natural justice. In the exercise of its discretion this Court is not prepared to do so. This Court will therefore make no findings or orders on this first issue raised by the Applicant.

Indeed, there is no evidence that the named Respondents participated in the decision making process which resulted in passing over the Applicant in February, 2004 or on the three other occasions during his secondment – which, on the evidence, it is implicit that the Applicant knew. This distinction between the status of the Ministry of Health and the SWRHA as employer of the Applicant during his period of secondment is demonstrated not only by the fact of the Applicant's letters of complaint being principally directed to the MCOS, but also in his letter of the 25th March, 2004 to the Director of Personnel Administration (DPA), about the issue of acting appointments to the post of SMO. The distinction is also apparent in a letter of the 8th August, 2003 to the MCOS from the Principal Medical Officer (PMO) about the Applicant, in which it was stated:

> I am to inform you that the principle governing promotion in the Public Service whereby the most senior eligible Officer should be offered the option of "acting" in the higher grade continues to hold primacy.
>
> The determination of seniority and related matters are clearly enunciated in the Public Service Regulations which should guide the selection of Medical Officers to act in higher grades.
>
> It should be noted that although Regional Health Authorities have been empowered to make appointments, it is unlikely that the intention was to deny individuals their legitimate expectation of promotion regardless of their employer.

Indeed, one can take judicial notice of the fact that whereas the posts of CMO and PMO are Public Service positions which remained so after the creation of the RHA's; the position of MCOS is a hybrid post, in which the holder is a public servant who is also responsible to the relevant Boards of the RHA's (and is a RHA employee). The post of MCOS thus does not appear in Part II of the Schedule to the Civil Service Regulations, whereas the others do -–PMO and CMO.

No doubt, that is why the complaints by the Applicant were directed to the MCOS. And why the CMO and PMO only tendered opinions to the MCOS as to the effect of seniority where acting appointments were to be made (letter of the 8th August, 2003 above).

Finally, there is no evidence that either the Public Service Commission or the DPA was involved in the recommendations for or appointments to the post of acting SMO while the Applicant was on secondment to the SWRHA. This further demonstrates the separation of function and governance between the Ministry of Health and the RHA's – in so far as the SWRHA was exclusively responsible for the delivery of health care services, which included the power to appoint employees. [See also sections 27, 28 and 29 of the RHA Act].

In these circumstances, as stated above, this Court in the exercise of its discretion will make no findings or orders on this first issue – except to say that it is an issue which manifestly needs to be resolved in the interest of good administration; and which can effectively be resolvedby a clear and specific directive from the Minister of Health made pursuant to section 5 of the RHA Act.

THE LETTER OF THE 31ST OCTOBER, 2003

The undisputed evidence is that on the 26th February, 2004 the Applicant was summoned to a meeting with the MCOS (SWRHA) to discuss his written complaint (of the 25th February, 2004) with respect to the February, 2004 passing over. At that meeting, for the first time, the Applicant was shown the letter of the 31st October, 2003 described above. That letter was from the CMO, who is a named Respondent in this action. By that letter the CMO advised the MCOS (SWRHA) not to appoint the Applicant to act in any senior positions, such as SMO, until an investigation was done into unspecified allegations by unnamed persons, which it seems the CMO had already partially investigated (unknown to the Applicant). At that meeting the MCOS (SWRHA) told the Applicant that because of this letter he could not appoint the Applicant to any acting senior positions.

The background to this meeting was of course the fourth letter of complaint by the Applicant with respect to a vacancy to act as SMO that had arisen since January, 2004 and for which he had been bypassed. A reasonable inference to draw is that the MCOS had been influenced by this letter in deciding not to appoint the Applicant in February, 2004, hence the production of the letter at the meeting on the 26th February, 2004. No complaint is made in this case against the MCOS or the SWRHA, or will be entertained, as explained above. The only question therefore, is whether a reviewable complaint lies against the named Respondents. In my opinion one does.

Despite a request by the MCOS (SWRHA) in writing of the 26th February, 2004 to the relevant Head of Department for reasons for not recommending the Applicant, and a written request of the 1st March, 2004 by the Applicant to the CMO for particulars of the allegations and investigations referred to in the letter of the 31st October, 2003, there has

been no response up to the commencement of the hearing of this action (16th July, 2004). Indeed, pursuant to an application under the Freedom of Information Act, the Applicant gained access to his personal file at the Public Service Commission on the 23rd March, 2004. There is no copy of the letter of the 31st October, 2003 on that file, though the letter was purportedly copied to the Permanent Secretary, the PMO, the MCOS and to "File."

The Applicant's concerns about this letter and its consequences are understandable. He has already suffered as a result of it, in so far as the MCOS staff acted upon it in not considering him for an acting senior position. But, of greater concern, is that there has been no indication from either the Permanent Secretary or the CMO as to what is the status of this letter and/or the allegations and/or investigations referred to. What remains however, is a positive statement from the CMO that the Applicant should not be considered for any appointment to a senior position until some "independent investigation" is conducted – conducted into what? When? By whom?

In my opinion, fundamental fairness demands that this Applicant be told, with sufficient particularly of the allegations against him, of the persons making them and of any investigations conducted. The failure to do so, in the circumstances of this case, especially where a written request for same was made since the 1st March, 2004, amounts to a breach of the principles of fundamental fairness and natural justice; as also would any future actions against the Applicant related to appointments based on this letter of the 31st October, 2003

In my opinion, this Applicant is therefor entitled to a declaration that the Respondents' failure to inform the Applicant in a timely manner with sufficient particularity of the allegations against him, of the persons making them and of the investigations conducted, arising out of the letter of the 31st October, 2003, have resulted in the Applicant being treated unfairly and in contravention of the principles of natural justice. And also, to a declaration that any future actions taken by the Respondents against the Applicant related

to appointments to senior positions based on the letter of the 31st October, 2003, would also be in contravention of the principle of natural justice. And this Court so declares.

This kind of conduct by a CMO and/or a Permanent Secretary is not conducive to good public administration. Such conduct can only undermine public trust and confidence in Public Administration, and demotivate and discourage public servants. Though true for all the Public Service, it is critically imperative that in the Health Care Sector, the highest standards of Public Administration are maintained – for here, what is at stake are the lives and limbs of the Nation's people.

COSTS

In this matter the most time and attention was spent on the first issue, on which the Applicant has not succeeded. In fact, counsel for the Respondents did not dwell at length on the issue of the substantive unfairness of the actions of the Respondents related to the letter of the 31st October, 2003. Instead, he argued that this second issue was not one that was arguable on the basis of the relief and grounds pleaded by the Applicant. I disagree. Relief (d) is clearly referable to this second issue, as are Grounds 9, 10, 14 and 15.

However, I think that given the Applicant's failure on the first issue and the Respondents non-involvement in it, it would unjust to make the Respondents pay the entire costs of this action. It is ordered therefore that the Respondents pay the Applicant one-half of the costs of this application, to be taxed in default of agreement. Such an apportionment seems fair in the circumstances of this case.

Dated this 30th day of July, 2004

P. Jamadar
Judge