

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2006-01483

BETWEEN

**SHERWIN WELCH
CYNTHIA HACKETT**

Claimants

AND

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO
THE PUBLIC SERVICE COMMISSION**

Defendants

CV 2007-03007

BETWEEN

**SHERWIN WELCH
CYNTHIA HACKETT**

Claimants

AND

THE CHIEF PERSONNEL OFFICER

Defendant

Before the Honourable Mr. Justice G. Smith

Appearances:

Mr. Thompson for the Claimants

Ms. Thurab for the Defendants

REASONS

PART I

INTRODUCTION

1. The First Claimant (Welch) alleges that by failing to consider him for promotion to the position of Field Auditor IV at the Board of Inland Revenue, the Chief Personnel Officer (C.P.O.) breached a legitimate expectation which he has entertained. Welch also alleges that by failing to consider him for promotion to the position of Field Auditor IV, the State breached his right to equality of treatment under section 4(d) of the Constitution of Trinidad and Tobago.

The Second Claimant (Hackett) alleges that by failing to promote and/or to consider her for promotion to the position of Field Auditor IV at the Board of Inland Revenue until some time after the commencement of these proceedings, the C.P.O. breached a legitimate expectation which she entertained. Hackett also alleges that by failing to promote her and/or to consider her for promotion until after the commencement of these proceedings, the State breached her right to equality of treatment under section 4(d) of the Constitution.

Since the arguments advanced on behalf of Welch and Hackett are the same, I will deal with them together in this judgment.

2. I find that the C.P.O. breached the legitimate expectation of Welch and Hackett to be considered for promotion to the position of Field Auditor IV and I grant a declaration in such terms.

I also order that:

- (i) The C.P.O. consider Welch for promotion to the post of Field Auditor IV
- (ii) Welch and Hackett are to be awarded damages.
- (iii) The Attorney General is to pay the costs of these applications.

3. Let me state that this litigation was long and protracted for the following three reasons. Firstly, the parties needed time to obtain instructions and to file lengthy affidavits. Secondly, there were several lengthy interlocutory applications. Thirdly, the state informed me several times that they were going to settle these matters; as a result, on several occasions generous extensions of time and lengthy adjournments were granted. Eventually, all recognized that these matters would not be settled and that a full hearing was necessary.

PART II

THE FACTS:

4. I will first set out the factual matrix then I will set out additional facts elicited from the cross-examination. I will do this in some detail since my decision in these matters is influenced by its special facts.

(a) *The factual matrix:*

5. Hackett was promoted to the post of Field Auditor III at the Board of Inland Revenue on 1st June, 1995. Welch was promoted to the same post on the 18th October 1995. The post of Field Auditor III was considered as a professional level post for which professional qualifications in accounting was necessary. Neither Hackett nor Welch had such professional accounting qualifications at the date of their promotions. However, because there was an acute shortage of staff with the necessary qualifications at the Board of Inland Revenue, the C.P.O. granted Hackett and Welch waivers of the professional accounting requirement for promotion to the post of Field Auditor III. In fact, the C.P.O. obtained legal advice that there was no stipulation for professional qualifications in the Civil Service Regulations for the post of Field Auditor III. The C.P.O. was free to waive the requirement for this post. The same applied to the post of Field Auditor IV. Other officers at the Board of Inland Revenue were also granted waivers of the professional accounting requirement for the post of Field Auditor III. Some were granted unconditional waivers. These unconditional waivers allowed them to be eligible for promotion to the next level of Field Auditor IV. Others like Hackett and Welch were granted conditional waivers. These conditional waivers stipulated that the recipients

were not to be considered for promotion to the post of Field Auditor IV and above unless they attained professional qualifications in accounting.

Hackett and Welch felt aggrieved by the conditional waivers they were granted. They sought to obtain unconditional waivers so that they could be considered eligible for promotion to the higher levels in the Board of Inland Revenue.

6. In August 1999, the conditions which were placed on the promotion of Welch and Hackett were waived. This waiver was contained in two memoranda from the office of the C.P.O.. The first memorandum was dated 23rd August 1999 and was addressed to the D.P.A.. The second memorandum was dated 24th August 1999 and was addressed to the Chairman of the Board of Inland Revenue. I will refer to these two memoranda collectively as the August 1999 memoranda. The writer of the August 1999 Memoranda specifically asked the Chairman of the Board of Inland Revenue to inform Hackett and Welch of the removal of the conditions attached to their waiver.

7. Soon thereafter, the Chairman of the Board of Inland Revenue allowed Hackett, Welch and several other Field Auditors III to act in the post of Field Auditor IV. The D.P.A. asked the C.P.O. to confirm the waivers granted to Hackett and Welch (inter alia) on the 4th May 2000. The C.P.O. responded, requesting the bio data of eligible Field Auditors III for consideration. Thereafter, from the correspondence, the C.P.O. and the D.P.A. appear to have been concerned with the issue of “equivalence”. Equivalence relating to further qualifications the Field Auditors III obtained, and whether they could be considered as equivalent to professional accounting qualifications. The

representatives of the CPO and the D.P.A. stated that they were also concerned with the validity of the waivers granted in the August 1999 Memoranda. Nevertheless, no steps were taken to revoke those memoranda.

In the meantime Hackett completed her ACCA studies (the recognized professional accounting qualification) in December 2002. Welch obtained an MBA from Herriott Watt University some time in July 2003.

8. As was stated before Hackett and Welch had been performing the duties of Field Auditor IV since 1999, and still had not been promoted to the substantive post by 2007. Further, on the 12th January 2007, the Chairman of the Board of Inland Revenue wrote a circular memorandum to persons in the position of Hackett and Welch threatening that if they did not perform the functions of the level of Field Auditor IV they would be disciplined. Hackett and Welch named several persons who had been promoted to the more senior posts at the Board of Inland Revenue, even to the highest post of Chairman, without having attained the recognized professional accounting qualifications.

9. In June 2006, Hackett and Welch filed the present constitutional motion, alleging inequality of treatment for the failure of the State to consider them for promotion to the post of Field Auditor IV. It is interesting to note that the D.P.A. in an affidavit in response to this motion acknowledged that Hackett had obtained the necessary accounting qualification since 2002(the ACCA). This meant that she had now obtained the professional accounting qualification for the post of Field Auditor IV and above. In spite of this, the D.P.A. strangely alleged that Hackett could not be promoted since Welch

was her senior and he had not attained the recognized accounting qualification. (See the affidavit of Gloria Edwards-Joseph filed on the 21st November 2006 paragraph 20).

After the commencement of this constitutional motion, the C.P.O., withdrew the August 1999 memoranda on the 16th May 2007. This prompted Hackett and Welch to file for Judicial Review of the decision of the C.P.O. to withdraw the full waiver they had previously received via the August 1999 Memoranda.

10. As was stated before, Welch had obtained an MBA in 2003. After much to and fro, the Accreditation Council of Trinidad and Tobago decided that while the ACCA and the MBA were not equivalent qualifications, they were both considered as post graduate qualifications. It was open to an employer to determine the relative value of either when making decisions on employment and further study.

11. Sometime after the filing of these actions, Hackett was promoted to the post of Field Auditor IV.

12. At the start of the final arguments the State conceded that they would pay Hackett and Welch for acting in the post of Field Auditor IV from 1999 even if these were unauthorized acting appointments.

(b) *Facts elicited in cross-examination:*

13. Even though cross-examination in public law matters is not a usual practice, there was a fair bit of cross-examination in these matters. This cross-examination proved

useful in helping to untangle some of the excessive factual material before me. I note the following salient facts:

- (i) At present only Welch and maybe one or two others would be affected by the waiver of conditions granted to Field Auditors III by the August 1999 memoranda. This is because firstly, the memoranda, stated that only Hackett and Welch were to be informed of the waiver and Hackett has already been promoted. Secondly, most of the other other officers who could have been affected have retired from the service.
- (ii) The decision of the C.P.O. to grant some unconditional waivers and some conditional waivers was a one off decision. It had never been done before and has never been done again. In deciding how to grant such different waivers, there were no criteria or guidelines that were used. It was merely an ad hoc decision based on the perceived difference between:
 - (a) qualifications which were not of a professional level but which contained a significant accounting bias (in which case there would be an unconditional waiver) and
 - (b) qualifications which were not of a professional level but where the accounting element was not as involved (in which case there would be a conditional waiver).
- (iii) Even though more senior personnel at the Board of Inland Revenue do not have professional accounting qualifications, the C.P.O. is still insisting that Welch should obtain professional qualifications or its equivalent. Further, one Natalie Willis who is an advisor in the Personnel Department has accepted

that the C.P.O. has granted unconditional waivers in cases where persons did not have any equivalent professional qualifications in accounting.

- (iv) One Debbie Sobers who represented the C.P.O. in this litigation insisted that the C.P.O. only became aware of the removal of the conditional waivers granted in August 1999 memoranda in the year 2002. This was contrary to the documentary record where the D.P.A. wrote the C.P.O. requesting confirmation of this removal of the conditional waivers in May 2000 (see paragraph 7 above). Ms. Sobers even tried to contend that the C.P.O. and the D.P.A. knew that the August of 1999 memoranda were unauthorized and that the C.P.O. orally informed the Chairman of the Board of Inland Revenue and Hackett and Welch of this; but this contention is contrary to the later statement of Ms. Sobers that they were still in the process of investigating the validity of the August 1999 memoranda up to their withdrawal in May 2007. If the C.P.O. knew that the August 1999 Memoranda were invalid, why were they still in the process of investigating their validity? Further the contention that the C.P.O. knew that the August 1999 Memoranda were not valid did not stand up to scrutiny. Ms. Sobers admitted the contrary by stating to me that both the C.P.O. and the D.P.A. could have decided to accept the removal of the conditional waivers in the August 1999 Memoranda as valid at any time before their withdrawal in May 2007.
- (v) Ms. Sobers admitted that there was no stipulation in law that a Field Auditor IV must have professional accounting qualifications. Therefore, it was open to the C.P.O. to waive such a requirement once the Union representing the

Field Auditors agreed to the same. Mrs. Sobers also indicated that the union agreed to the grant of the waivers.

- (vi) While Ms. Sobers had stated on affidavit that no one was affected by the memorandum of May 2007 which withdrew the August 1999 memoranda, she admitted to me that the May 2007 memorandum directly affected Hackett and Welch. She accepted that once it was withdrawn, Welch could not be promoted. In spite of this, she still insisted that Welch was not prejudiced by the removal of the waiver.

PART III

ANALYSIS:

14. Hackett and Welch have brought two sets of proceedings. Firstly, the constitutional motion which alleges inequality of treatment. Secondly, the judicial review application which alleges a breach of their legitimate expectation to be considered for promotion pursuant to the August 1999 memoranda.

The proceedings were heard together. The root cause of the complaint of Hackett and Welch lies in the frustration of their legitimate expectations to be considered for promotion and I will deal with the judicial review application first.

A. JUDICIAL REVIEW

15. “Legitimate, or reasonable expectation may arise either 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”. (See CSSU v Minister for the Civil Service [1984] 3 All ER @ 936 a).

There are three recognized types or situations where the doctrine can be invoked. (See Ex Parte Coughlan 2001 Q.B.213 pages 241 and 242, paragraph 57).

Firstly, the court may decide that a public authority is required to bear in mind its previous policy before deciding whether to change its course. This review by the court would be based on “Wednesday” reasonableness principles.

Secondly, the court may decide that the promise or practice induces a legitimate expectation of consultation before a decision is taken. This second type or situation is also referred to as procedural legitimate expectation.

Thirdly, the court may consider “that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural..... here too the court will decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.” [per Lord Woolf M.R. in Ex Parte Coughlan op cit pg 242 at paragraph 57). This third type or situation is also referred to as substantive legitimate expectation.

16. The present matter deals with the third type or situation of legitimate expectation (substantive legitimate expectation) and to a lesser extent the second type (procedural legitimate expectation) I will deal firstly with the substantive legitimate expectation.

(i) Substantive legitimate expectation:

17. The quote from Lord Woolf M.R. in Ex Parte Coughlan cited above sets out the three guidelines which are relevant for the establishment of a substantive legitimate expectation. They are firstly, the lawfulness of the promise. Secondly, the requirements of fairness. Thirdly, the non-existence of any overriding interests for the change of policy. I will now deal with these three requirements:

(a) *The lawfulness of the promise*

18. Let me say from the outset that in this case, there is no issue as to the lawfulness of the promise contained in the August 1999 memoranda. As was stated in paragraphs 5 and 13 (v) above, there was no stipulation in the Civil Service Regulations that candidates for promotion to the posts of Field Auditor III and IV must have professional accounting qualifications. That job specification could be waived by the C.P.O. The waiver of professional accounting qualifications for the post of Field Auditor IV as contained in the August 1999 memoranda was not illegal.

The State based its defence to this legitimate expectation on an allegation that the person who made the representation did not have the authority to do so. This argument does not assist the state since even on the authorities cited by the State (and indeed in the written submissions of the State), it is accepted that the representation may be made by a person who has actual or ostensible authority to make it. (See the written submissions of the State filed on 20th August 2008 at paragraph 40 and see *Judicial Review of Administrative Action – de Smith, Woolf and Jowell* 5th ed paragraph 13 -030 and see *South Bucks District Council v Flanagan* [2002] 1 WLR 2601.)

In this case, I find that even though it is arguable that the writer of the August 1999 memoranda may not have had the actual authority to grant the waiver of the conditions attached to the promotion of Hackett and Welch, she did have ostensible authority to grant the waiver. I say so for the following four reasons.

Firstly, all parties accept that the C.P.O. had the authority to grant the waivers. The memoranda emanated from the office of the C.P.O. They were also signed for (on

behalf of) the C.P.O. The memoranda were issued by someone with ostensible authority to act for the C.P.O.

Secondly, both the C.P.O. and the D.P.A. who are responsibly for these promotions purported to act on the memoranda. The D.P.A. requested confirmation of the memoranda in May 2000 and in response the C.P.O. began a process of requesting bio-data of eligible candidates for consideration. (See paragraph 7 above). Acting on the memoranda could be construed as an ostensible acceptance of its validity.

Thirdly, the Chairman of the Board of Inland Revenue allowed Hackett and Welch to act in the post of Field Auditor IV since 1999. The D.P.A. and, it seems, the C.P.O. were aware of these acting appointments. Further, the state has accepted a responsibility to pay them for such duties. Again this is an ostensible acceptance of the validity of the memorandum.

Fourthly, Ms. Debbie Sobers, the representative of the C.P.O. in the litigation, accepted in cross-examination that both the C.P.O. and the D.P.A. could have decided to accept the waiver as valid at any time before it was withdrawn. (See paragraph 13 (iv) above). This is clear evidence that the person who made the representation had ostensible authority to do so.

(b) Fairness

19. Hackett and Welch were entitled to rely on the representations in the August 1999 memoranda. These representations were made by a person with the ostensible authority to do so. Hackett and Welch entertained a legitimate expectation to be considered for promotion to the position of Field Auditor IV. It was unfair to the extent of being an abuse of power for the State to have unilaterally revoked the representations made in the

August 1999 memoranda by the May 2007 memorandum. I say so for the following five reasons:

Firstly, the representation in memoranda of August 1999 were kept alive for a long period of time, namely, from 1999 to 2007; (eight years).

Secondly, Hackett and Welch have acted in the post of Field Auditor IV for eight years and were even threatened with disciplinary action if they did not perform these functions (see paragraph 8 above).

Thirdly, there are many more persons at the Board of Inland Revenue, who have reached the post of Field Auditor IV and above, even to the head of the organization without having attained professional accounting qualifications.

Fourthly, the representations were made only to Hackett and Welch; and now, since Hackett's promotion, it affects only Welch and possibly one or two others (see paragraph 13(i) above).

Fifthly, Hackett went on to achieve the professional qualification and Welch went on to further his studies by obtaining an MBA. They have not sat by idly during the eight year period but sought to improve themselves. It is unfair to deprive them of the fruits of their industry.

(c) *No overriding policy interests*

20. There is no overriding policy interest to insist on the change of policy and so defeat the legitimate expectations of Welch and Hackett. I say this for the following three reasons:

Firstly, since Hackett has been promoted, only Welch and maybe one or two others would be affected by the August 1999 memoranda. This suggests that it will have very little detrimental effect on the operations of the Board of Inland Revenue.

Secondly, there are others who have been promoted to the more senior posts at the Board of Inland Revenue who do not have such professional qualifications. Therefore, it is not vital to the functioning of the establishment to insist on the qualifications.

Thirdly, Hackett and Welch had been performing the duties of Field Auditor IV for over nine years now and there could be little question of their competence to fill the post.

21. In all the circumstances, I find that Hackett and Welch entertained substantive legitimate expectations that the August 1999 memoranda would not be withdrawn to their detriment. The purported withdrawal of the same in May 2007 breached their legitimate expectations. Since Hackett has already been promoted to the post of Field Auditor IV, I only need order the C.P.O. to consider Welch for promotion to the post of Field Auditor IV. Further, based on the undertaking of the state to pay Hackett and Welch for the time they acted in the post Field Auditor IV, I order an assessment of damages for Welch and Hackett.

“Obiter”

22. I have already decided that the writer of the August 1999 memoranda had ostensible authority to grant the waivers that she did. I now wish to deal summarily with two issues. They are firstly, whether the August 1999 memoranda were valid or made with actual authority. Secondly, whether it could be argued that they were issued by a mistake which would not bind the C.P.O.. I address these issues out of deference to Counsel who focused much of their arguments on these aspects of the case.

23. With respect to the validity of the August 1999 memoranda, I accept the submissions of Counsel for Hackett and Welch that on a balance of probabilities they were valid. I say so for the following three reasons:

Firstly, as was stated before, (see paragraph 7 above) the Defendant did act on the memoranda of August 1999 by requiring bio data on Hackett, Welch and other Field Auditors III for over seven years instead of asserting the lack of validity of the memoranda.

Secondly, I find it highly unusual for the C.P.O. to merely inform parties orally of the lack of validity of a memorandum for eight years while at the same time entertaining their request for promotion by requesting bio data.

Thirdly, in cross-examination, Ms. Sobers admitted that the C.P.O. and the D.P.A. could have acted on the August 1999 memoranda at any time up to their revocation in May 2007. How could they have acted on them if they were invalid?

On a balance of probabilities, I find as a fact that while the C.P.O. entertained a doubt about the proper origins of the August 1999 Memoranda they never invalidated the same and kept them “alive” until their purported revocation in May 2007.

The purported revocation of the August 1999 memoranda was a breach of the Claimants’ legitimate expectations for the same reasons as were stated at paragraphs 18 and 19 above.

24. Even if the Defendants sought to argue that the August 1999 Memoranda were issued in error, Hackett and Welch would still not be denied their legitimate expectation for consideration for promotion to the post of Field Auditor IV.

Even in the case of a mistake it is possible that a legitimate expectation should not be frustrated. This though is the exception. As was said in Ex Parte Begbie [2001] 1 WLR 1115 “where the court is satisfied that a mistake was made ... the court should be slow to fix the public authority permanently with the consequences. It may be that a mistaken statement will, even if subsequently sought to be corrected, give rise to a legitimate expectation, whether in the person to whom the statement is made or in others who learnt of it ... The court must be alive to the possibility of such unfairness to the individual by the public authority in its conduct as to amount to an abuse of power.” (See also Rowland v Environment Agency [2003] Ch 581 and Reynold Beddeau v Public Service Commission Cv 2006-00254 (T&T).

I find that even if the of August 1999 memoranda were issued in error or by mistake, for the same reasons as I stated in paragraph 18 above, it would be unfair amounting to an abuse of power to allow the C.P.O. to revoke the memoranda as against Hackett and Welch in breach of their legitimate expectations.

(ii) Procedural Legitimate Expectation

25. “The court may decide that a promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness demands.” (See Ex Parte Coughlan op cit page 242 paragraph 57).

26. In the present case, there was no consultation before the C.P.O. made the decision to withdraw the August 1999 Memoranda. I now consider firstly, the adequacy of the reasons advanced for the change of policy and secondly, the demands of fairness.

(a) *The adequacy of the reasons for the change of policy*

27. The only reason advanced for the withdrawal of the August 1999 Memoranda was that they were unauthorized. As I stated before (see paragraph 18), the writer of the August 1999 memoranda had ostensible authority to make the representations and this is

good enough in law to found the legitimate expectation claimed. The C.P.O. cannot assert the alleged lack of authority of the writer of the August 1999 memoranda as an adequate reason for not consulting Hackett and Welch before withdrawing the same. Further, as I stated before at paragraph 23 on a balance of probabilities, I find that the writer of the August 1999 Memoranda did have the actual authority to make the representations. The C.P.O. cannot, bona fide, assert the alleged lack of authority of the writer of the August 1999 Memoranda as an adequate reason for not consulting Hackett and Welch before withdrawing the same. Lastly, I also find that even if the Defendant asserts in the alternative that the August 1999 memoranda were issued in error, they can still, on the special facts of this case be relied on by Hackett and Welch as founding a basis for a legitimate expectation for consideration for promotion to the post of Field Auditor IV, (see paragraph 24 above). The C.P.O. cannot assert the alleged mistake in issuing the August 1999 memoranda as an adequate reason for not consulting Hackett and Welch before withdrawing the same.

I find that the reasons advanced by the C.P.O. for not consulting Hackett and Welch before withdrawing the 1999 Memoranda are not adequate.

Fairness

28. As for the demands of fairness, the same consideration as applied to the breach of the substantive legitimate expectation apply here (see paragraph 19 above). I will repeat these reasons in a summary form:

- (i) The representations were kept alive for eight years

- (ii) Hackett and Welch acted in the post of Field Auditor IV for eight years and upon threat of disciplinary action for non-performance.
- (iii) Other senior persons even up to the most senior position at the Board of Inland Revenue were not required to have the professional accounting qualifications.
- (iv) Only Hackett (and may be one or two others) would be affected by the representation.
- (v) Hackett and Welch acted on the representations; and in the case of Hackett, acted to his detriment by pursuing an MBA instead of the ACCA.

An additional factor in this case is that the memorandum of May 2007 which purported to withdraw the August 1999 Memoranda mentions the need for negotiation with the Union concerned. However, it incorrectly asserts that the Union was not consulted about the August 1999 Memoranda. In cross-examination Ms. Sobers admitted that the relevant union has agreed to the waivers. That being the case, the C.P.O. ought fairly to have also consulted with the Union representing Hackett and Welch before withdrawing the August 1999 memoranda.

For the reasons that I have just stated, I find that it was highly unfair in this case, for the C.P.O. to withdraw the August 1999 memoranda without first consulting Hackett, Welch and their Union.

29. In all the circumstances I find that (a) in the absence of a credible reason and (b) bearing in mind the demands of fairness, the failure of the C.P.O. to consult with Hackett, Welch and their Union before purporting to withdraw the August 1999 memoranda

deprived Hackett and Welch of their procedural legitimate expectation to be consulted before the same were withdrawn. However, since I already:

- (a) granted a declaration that the withdrawal of the August 1999 memoranda was a breach of the legitimate expectations of Hackett and Welch;
- (b) Ordered to the C.P.O. to consider Welch for promotion to the post of Field Auditor IV;
- (c) Ordered an assessment of damages.

There is no need to make any separate order for this breach of their procedural legitimate expectations.

B. THE CONSTITUTIONAL MOTION

30. The Constitutional Motion in this case alleges inequality of treatment contrary to section 4(1) d of the Constitution. It was filed on the 8th June 2006, before the judicial review application. At that date the August 1999 memoranda had not been withdrawn. They were only withdrawn in May 2007. Since the August 1999 memoranda were in force at the commencement of this action, it meant that the restriction on promotion to the post of Field Officer IV imposed on Hackett and Welch was effectively waived. They could have been considered for promotion to that post. It also meant that there was no valid distinction between persons with unconditional waivers and persons like Hackett

and Welch with conditional waivers. The failure of the C.P.O. to consider Hackett and Welch for promotion meant that persons who were similarly circumstanced were being treated differently. At the time of filing of the constitutional motion, Hackett and Welch had a strong case for arguing that their right to equality of treatment by a public authority had been breached.

For the reasons stated before, this litigation had become protracted. By the time the parties were ready to argue this constitutional motion, the C.P.O. had withdrawn the August 1999 memoranda. As I have held in this judgment, the withdrawal of the August 1999 memoranda was in breach of the legitimate expectations of Hackett and Welch and founded a successful case for judicial review. However, since it lay within the powers of the C.P.O. to withdraw the 1999 memoranda, this withdrawal could not be totally ignored for future action. It now meant that Hackett and Welch may not have been similarly circumstanced to those who had unconditional waivers.

Hackett and Welch argued that the distinction between the unconditional waivers and the conditional waivers was artificial and that I should still consider the grant of relief under the constitutional motion.

I find that bearing in mind my decision in favour of Hackett and Welch in the judicial review application, the argument on the motion is now academic, and I prefer to make no decision on it.

Nevertheless, bearing in mind that it was a very strong case when commenced, I decided to award the costs of the motion to Hackett and Welch. Counsel for the Attorney General agreed to be liable for such costs.

PART IV

THE ORDER

- (a) I grant a declaration that the decision of the C.P.O. as contained in a memorandum of the 16th May 2007 to the D.P.A. whereby she withdrew the memoranda of the 23rd and 24th August 1999, by which the claimants were granted a waiver of professional accounting qualification for promotion to the office of Field Auditor IV and higher offices contravenes section 3m of the Judicial Review Act 2000 by breaching their legitimate expectations that they would be eligible for promotion to the office of Field Auditor IV and higher offices and paid for acting in the office of Field Auditor IV
- (b) I order the C.P.O. to submit the name of the First Claimant to the Public Service Commission for consideration for promotion to the post of Field Auditor IV
- (c) I order that damages be awarded to the Claimants to be assessed on a date to be fixed
- (d) I order the Attorney General to pay the Claimants' costs of the Constitutional Motion and the Judicial Review application.

Dated this 24th day of March 2009

Mr. Justice G. Smith

Judge