

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cv. A No. 24 of 2005

BETWEEN

DEVANTMAHARAJ

APPELLANT

AND

STATUTORY AUTHORITIES SERVICE COMMISSION

RESPONDENT

PANEL:

**M. Warner, J.A.
W. Kangaloo, J.A.
S. John, J.A.**

APPEARANCES:

Mr. A. Ramlogan, Ms. C. Bhagwandeem, Mr. C. Satram for the Appellant

Mr. E. Prescott S.C., Ms. K. Seenath, Mrs. K. Mohammed-Carter for the Respondent

DATE DELIVERED: 27TH February 2008

Delivered by M. Warner J.A.

I have read in draft the judgment delivered by Warner J.A. I agree with it and I have nothing to add.

W. Kangaloo
Justice of Appeal

I also agree

S. John
Justice of Appeal

1. The appellant was appointed to the post of Marketing and Public Relations Officer of the National Lotteries Control Board (NLCB) on the 3rd December 1993. He had, on occasions, acted as Deputy Director of the NLCB. As a result of the suspension of the substantive holder of that office, a vacancy arose.

2. By letter dated 7th November, 2002, the appellant complained to the Statutory Authorities' Services, Commission (the Commission) that they had failed to appoint him to act in the post and that he, the most senior officer, had been bypassed in favour of a more junior officer, Ms. Patricia Pierre-Joseph. He requested that he be informed of the criteria used for selection. He, not having received a reply, wrote another letter to the Commission on the 14th February, 2003, in which he made a similar protest. Despite the fact that he was later interviewed by the Commission, an officer junior to him, Ms. Gemma Joseph was appointed to act in the post. The Commission informed him of the decision by letter dated 3rd February, 2004.

3. Tiwary-Reddy J. granted the appellant leave to move for judicial review on the 17th February 2004 in respect of the Commission's decision. On the 18th February 2004, she directed that the Chairman of the NCLB be served with the proceedings. She also granted a stay of the appointment of any other officer to act in the office of Deputy Director, pending the determination of the matter.

4. On the 15th December, 2004, Dean-Armorer J. after hearing full argument, made an order quashing the decision to appointment Ms Joseph in priority to and /or instead of the appellant and granted declarations that the Commission was not required to consult the Prime Minister or obtain his concurrence as a precondition to any appointment to act in the position. The importance of this last mentioned declaration will become apparent later in this judgment. She remitted the matter to the Commission for its reconsideration

in accordance with the findings of the court and on the 21st January 2005, ordered that each party bear its own costs.

5. After the judge handed down her decision, by letter dated the 11th January, 2005, the Commission wrote to the appellant informing him that he had been appointed to act in the post. That was not the end of the matter. The appellant, by this appeal, insisted that all the declarations he sought ought to have been granted.

The appellant appealed the Judge's decision on the following grounds:

- i. her failure to grant damages;
- ii. her failure to grant an order of mandamus directing the Commission to appoint him to act as Deputy Director. This head of relief is no longer being pursued.
- iii. her failure to grant a declaration that he was unfairly treated and a declaration that the decision of the Commission to appoint the appellant, "as contained in a letter to the Prime Minister dated 10th June, 2003, was an effective and valid appointment".

6. That letter was in the following terms:

"The Honourable Patrick Manning, M.P.
Prime Minister of the Republic of Trinidad
and Tobago
Office of the Prime Minister
Whitehall
Queen's Park West
PORT OF SPAIN

Honourable Prime Minister

The Statutory Authorities Service Commission is considering the acting appointment of Mr. Devant Maharaj, Marketing and Public

Relations Officer (Range 46) as Deputy Director (Range 55D), National Lotteries Control Board, with effect from the date of his assumption of duty and continuing, vice Ms. Carmel Smith, on suspension with effect from August 05, 2002.

Based on its assessment following interviews of the two more senior officers at the Board, the Commission was of the view that Mr. Devant Maharaj should at the present time be preferred for the now available acting appointment. Mr. Maharaj satisfies the minimum experience and training requirements for the post. His particulars are attached.

The Commission proposes to approve the acting appointment at paragraph one but first wishes to know whether you have any objection to the proposal.

Yours sincerely

Signed LOUIS BRIAN
Chairman
Statutory Authorities' Service Commission"

7. In order to put the appeal in its proper perspective, it is necessary to provide some additional background to the matter. The evidence on the Commission's behalf had been presented in the affidavit of the Commission's Acting Executive Officer, Ms Jeanette Renaud. It was made plain that the Commission, after having interviewed the appellant and another officer Patricia Pierre-Joseph for appointment to the acting appointment, despite the express reservations of the Chairman of the NCLB (the Chairman) to the appointment of either Officer, had approved the acting appointment of the appellant to act as Deputy Director. According to the letter, this would have taken effect from his assumption of duties, "subject to the concurrence of the Prime Minister." The Commission informed the Chairman of its position by the letter of the 12th June 2003. Ms. Renaud further deposed that the appellant was not informed about the Chairman's adverse comments because the Commission gave no consideration to them.
8. As stated before, the other relevant and important item of evidence was that the Commission had sought the concurrence of the Prime Minister in respect of the appointment to the office. The Commission had adopted this course in reliance on a

previous practice to do so, and under the umbrella of Sections 5 and 6 of the Statutory Authorities Act which provided that:

“5. (1) The Commission shall have power to appoint persons to be or act as officers and to transfer, promote, remove and exercise disciplinary control over persons so appointed.

(2) The powers conferred on the Commission may with the approval of the Prime Minister be delegated by directions in writing to any other person or authority.

6. The Commission may with the consent of the Prime Minister by Regulations or otherwise regulate its own procedure, including the procedure or appointment, promotion, transfer and removal from office of officers of statutory authorities and for the exercise of disciplinary control over such officers.”

8. Additionally, the Commission had consulted with the Prime Minister in order to bring its procedure in line with other Service Commissions.

9. In her judgment, the Judge said:

“Unreasonableness had been canvassed as a ground for judicial review. I am not however convinced that it has been established as a ground for relief in this case. It is clear that the SASC in adopting their “procedure” acted in good faith and in what they perceived to be the best interest of the authorities which they served. The absence of bad faith is underscored by the equal treatment meted out to both the Applicant and Ms. Pierre-Joseph. In my view it is possible to understand the rationale of the SASC’s decision, flawed and illegal though it may have been. Accordingly, I respectfully disagree with learned Senior Counsel for the Applicant that the decision was unreasonable or irrational.”

10. The sequel to these events was, that after the judgment was delivered, the appellant was granted two years no pay leave on the grounds of public policy and another officer was appointed to the post of Deputy Director.

11. While Mr. Ramlogan accepts that the remission to the Tribunal was within the court’s powers, he contends that the way in which it was done was wrong. It appears that the Commission did not interview the appellant once again, before the letter of the 11th January 2005 was written to him.

12. Counsel mounts his arguments on two fronts - by virtue of the veto which the Commission had sought to impose and on the Commission's failure to inform the appellant about the exchange of correspondence between it and the other individuals involved. It is of relevance that the appellant was provided with copies of the Commissions' written communications pursuant to a request made under the Freedom of Information Act.

13. As to the declaration the appellant sought, in terms of the Commission's letter of the 10th June 2003, Counsel for the appellant contends that he is entitled to relief as if the Prime Minister had never intended to disqualify him from the appointment.

14. The decision whether or not to grant the declarations was a matter for the discretion of the judge. The appellant must therefore demonstrate that the judge was wrong in principle, that her decision exceeded the ambit within which reasonable disagreement is possible; that she took into account irrelevant factors, ignored relevant factors or the making of a decision that is "palpably" or "plainly" wrong.

15. In her analysis of the facts, the judge made three important findings. She found that the Commission, in seeking the concurrence of the Prime Minister, acted in good faith and in what they perceived to be in the best interest of the authorities which they served; that the Commission did not consider the views of the Chairman in coming to its decision; that the Commission meted out the same treatment to Ms Pierre Joseph as it accorded the appellant.

16. It is not in dispute that the acting appointment was "not as a prelude to a substantive appointment" Regulation 26 is therefore relevant. It provides as follows:

"26. (1) Where an acting appointment falls to be made otherwise than as a prelude to a substantive appointment, the officer appointed shall:-

- (a) as a general rule be the senior officer in the Department eligible for such acting appointment;
- (b) assume and discharge the duties and responsibilities of the office to which he is appointed to act.

(2) In submitting any recommendations for an acting appointment, the Commission shall examine whether the exigencies of the particular service would best be served by transferring an officer from another Authority or district who is next in line of seniority to act where there is an officer in the same Authority or district who is capable of performing the duties of the higher grade, and in such examination the question of additional expenditure for travelling and subsistence allowances and other expenditure payable by the Statutory Authority shall be borne in mind”

In other words, this regulation addresses vacancies which would arise where, for example the substantive holder of the post is unable to carry out the duties temporarily.

17. I think it is well settled that the Commission’s power to appoint persons to hold or to act in offices which fall within their purview must be exercised free from interference or influence of any kind by the executive. **In Cooper and Balbosa v the Director of Personnel Administration and the Police Service Commission Privy Council**

Appeal No. 47 of 2005. Lord Hope at paragraph 28 said:

“The Constitution requires that the powers which it has given to the Public Service Commissions, and to the Police Service Commission in particular, to appoint persons to hold or act in public offices and to make appointments on promotion must be exercised free from inference or influence of any kind by the executive. There is room in this system for the taking of some initiatives by the Cabinet. A distinction can be drawn between acts that dictate to the Commissions what they can or cannot do, and the provision of a facility that the Commissions are

free to use or not to use as they think fit... And in practice the Commissions may well be content to continue to make use of them.”

Emphasis added

The same principles apply to the appointment of officers who fall within the purview of the Statutory Authorities Act.

18. The judge’s appraisal and her reasoning cannot therefore be faulted. As discussed in **Cooper and Balbosa**, and as the judge appropriately concluded, the Commission imposed a fetter on their own jurisdiction. The quashing of the decision was therefore appropriate. In remitting the matter to the Commission for its consideration, the court was complying with the law’s insistence that judicial review is concerned with reviewing the decision making process and not the merits of the decision.

19. In considering whether the judge ought to have gone on to grant the further declarations sought, the appropriate test is set out in section 8(2) of the Judicial Review Act, which provides that:

A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review seeking such relief has been made, and the Court considers that, having regard to-

- a. The nature of the matters in respect of which relief may be granted by orders of mandamus prohibition or certiorari;**
- b. the nature of the persons and bodies against whom relief may be granted by such order; and**
- c. all the circumstances of the case.**

It would be just and convenient for the declaration to be made or injunction to be granted, as the case may be.

20. In Credit Suisse v Aldergate Borough Council [1997] QB 306 at 355, Lord

Hobhouse summarised the principles as follows:

“The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act: see, for example, Agricultural Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd. [1972] 1 W.L.R 190.”

21. In the present case, at least, for part of the period under review, another officer or officers would have held acting appointments and carried out the duties of the office. According to Mr. Prescott, although a stay was obtained and applied during the years 2004 and 2005, two other persons held the office prior to that period. It is therefore difficult to appreciate the usefulness of making a declaration to effect that the appellant was validly appointed in June 2003. It clearly would not have presented a case for good administration, to do so. As to fairness, the fact that the appellant was not singled out for treatment was also a factor which the judge considered.

22. I am of the view that the judge did not fall into error. There is no reason to interfere with the exercise of the court’s discretion.

DAMAGES

23. In order to support a claim for damages, the court must be satisfied that if the claim had been made in an action begun by the appellant at the time of making the application, the appellant could have been awarded damages (Section 8(4)(b) of the Judicial Review

Act.) This means that damages could only be awarded if there was a right to damages at private law.

24. The appellant's claim to an award for damages in the court below was based on the proposition that appellant's terms and conditions of service were affected. In fairness however to counsel for the appellant, this aspect of the case was not aggressively pursued in this Court.

25. It needs however to be said that while the Commission appoints persons to be or act as officers, the Commission is not "the employer". The employer in this case is the NCLB. This dichotomy is recognised and explained in **Cooper and Balbosa**, at paragraph 27, in the context of police officers whose employer is the executive. Lord Hope said:

"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."

Emphasis added

26. No contract of employment exists between the appellant and the Commission. The claim for damages must fail.

27. I would therefore dismiss this appeal with costs fit for Senior Counsel and Junior Counsel.

Margot Warner
Justice of Appeal