

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**C.A. No. P 117 of 2014
No. CV 2012-0408**

Between

THE PUBLIC SERVICE COMMISSION

Appellant

And

KENNY GOPAUL

Respondent

APPEARANCES:

**Mr. R. Martineau SC, Ms. A. Ramsaran instructed by Ms. M. Benjamin for the appellant
Mr. K. Thompson for the respondent**

PANEL:

**P. Jamadar JA
N. Bereaux JA
P. Rajkumar JA**

I have read the judgement of Rajkumar JA and I agree.

.....
Peter Jamadar
Justice of Appeal

I have read the judgement of Rajkumar JA and I also agree.

.....
Nolan Bereaux
Justice of Appeal

Dated October 31st 2018

Delivered by Rajkumar JA

Background

1. The respondent, a fire officer, challenged two decisions of the Public Service Commission (PSC), namely:

(i) the decision not to promote him to the vacant position of Assistant Chief Fire Officer (ACFO) on 18th October 2011 (the first decision), and

(ii) the decision not to interview him for the position of Deputy Chief Fire Officer (DCFO) on 9th July 2012 (the second decision). He sought leave for judicial review by application filed on October 5th 2012.

First Decision

2. With respect to the first decision he claims that while there were three vacant positions of ACFO, and he was number two on an order of merit list (OML) for Divisional Fire Officer (DFO), only one was filled, (by Mr. Rampersad the person who ranked first on the OML).

Second Decision

3. With respect to the second decision he contends that he was not invited to an interview for the vacant position of DCFO, although persons who were junior to him, and / or ranked below him on the OML, were invited to attend interviews for promotion to that position.

Appellant's Position

4. The appellant contends that with respect to the first position of ACFO it was entitled to fill only one of the positions and was not obligated to fill all the vacant positions. Further, because it appointed the person who placed first on the OML it contends there was no unfairness in the process.

5. The appellant contends that with respect to the position of DCFO:

i. it had established a threshold criterion of 6 years managerial experience as at February 28th 2011 - the cutoff date for applications, (the experience criterion or requirement).

ii. the respondent did not meet the experience criterion.

iii. the respondent was not entitled to be considered for an interview for the position of DCFO as he had not satisfied the threshold criterion.

iv. the respondent was not therefore similarly circumstanced to persons who did satisfy that criterion and who were entitled to be interviewed for that position.

6. However the appellant concedes that it did invite a person for an interview for that position who did not satisfy that experience criterion. It claims that this was done inadvertently, and that upon receipt of the respondent's attorney's letter, the respondent was invited to an interview. (As at the date of the interview - July 9th 2012, he had attained the 6 year experience requirement). In any event no person had been appointed to the position of DCFO who did not satisfy the experience criterion at the material time, even if interviewed.

7. The respondent declined the invitation offered to attend that interview, because by the date of that invitation, on or around October 24th 2012¹ the position of DCFO had already been filled. In fact, by letter dated September 11th 2012, Mr. Rampersad had been informed of his promotion to the post of DCFO with effect from 1st October 2010². The successful candidate was the same person who had ranked number one on the OML and who had been promoted to ACFO. It is not in dispute that the successful candidate had the necessary 6 years managerial experience as at the cutoff date for receipt of applications. Neither is it in dispute that neither the respondent, nor the junior person who had in error been invited to be interviewed, satisfied the 6 year managerial experience requirement as at the cutoff date for receipt of applications for the post of DCFO³.

Findings of the trial judge

8. The trial judge found that the respondent had been treated unequally by the PSC i) when he was not appointed to the position of ACFO, as well as ii) when he was not afforded an interview for the position of DFCO. The court ordered, inter alia, that the appellant promote the respondent to the position of ACFO, that the appellant invite the respondent to be interviewed for appointment to the office of DCFO, and that damages be assessed by a Master for breach of his right to equality of treatment.

¹ Paragraph 17 of Affidavit of A. Creed

² Page 243 record of appeal

³ Affidavit of Gopaul sworn Jan 24th 2014 page 346 Paragraph 11 record of appeal.

Issues

9. a. Whether in respect of the first decision the respondent was treated unequally so as to entitle him to relief for the breach of his constitutional right to equality of treatment from a public authority.
- b. Whether the failure to appoint the respondent to one of two remaining vacant positions of ACFO was unreasonable, or a denial or breach of any legitimate expectation on his part to be so appointed.
- c. Whether in respect of the second decision the respondent was treated unequally so as to entitle him to relief for the breach of his constitutional right to equality of treatment from a public authority.
- d. Whether the failure to invite and/or interview the respondent for the position of DCFO on or around July 9th 2012 was a denial or breach of any legitimate expectation on his part to be so invited.
- e. If so what relief would be appropriate in the circumstances?

Conclusion

First Decision

10. The person who had been appointed to the position of ACFO had placed first on the OML. The respondent had not therefore been treated unequally in relation to any other person who was similarly circumstanced to him. By definition, he having placed second on that OML, was not similarly circumstanced to another who had placed first on that OML.

11. There was no basis in law for any expectation by the respondent to be entitled to fill/be appointed to one of the two remaining vacant positions of ACFO. The appellant was entitled in the exercise of its constitutional discretion to determine whether, and if so, what appointments were to be made. (See section 121 of the Constitution). There was no basis in law for the order of the trial court that the respondent be appointed to the position of ACFO and that order must therefore be set aside.

Second Decision

12. Mr. Rampersad had satisfied the experience criterion, six years managerial experience as of the cutoff date for applications. The respondent had not. The respondent was not therefore similarly circumstanced to Mr. Rampersad. The respondent was not therefore treated unequally in relation to Mr. Rampersad.

13. However the appellant admitted that through an error there was one person who at the date of **interview** did not satisfy the six year experience qualification but who was **interviewed**.⁴ That person, Mr. Springle, was similarly circumstanced to the respondent in that neither of them satisfied the 6 year managerial experience requirement. The respondent was therefore treated unequally when Mr. Springle, despite not satisfying the 6 year managerial experience requirement, was afforded the opportunity to be interviewed on 9th July 2012 for the position of DCFO.

⁴ Paragraph 14 affidavit of A. Creed, page 203 record of appeal.

14. Neither Mr. Springle nor the respondent was qualified for the position of DCFO based upon the publicly stated criteria for that position⁵. The respondent was therefore not entitled to be interviewed for the position of DCFO and the trial judge was wrong to so order. For the same reason, neither was he entitled to the assessment of damages in respect of any breach of his right to equality of treatment.

15. There was no loss or damage occasioned to the respondent in respect of the failure to afford him an interview for the position of DCFO for which he did not satisfy the publicly stated threshold qualification at the material time, namely the experience criterion.

16. Any loss or damage as could have been occasioned to the respondent would have arisen from the inadvertent **invitation** to Mr. Springle to attend an **interview** for that position, despite his not then satisfying the threshold experience requirement, and the perception of unfairness that would have necessarily been engendered.

⁵ (It should be noted that the respondent does in fact possess substantial qualifications, including a B.Sc. in Management Studies and has, since the institution of these proceedings, acted in the post of Chief Fire Officer on occasion. When reference is made to qualifications however it is only to **the specific qualification** required at the material time by the circular memorandum E-03-2011 dated 27th January 2011 (page 221 Record of Appeal) of 6 years managerial experience as the closing date for applications).

17. In those circumstances the decision of the appellant to invite to the interviews held on July 9th 2012 a candidate/ applicant who did not satisfy the publicly advertised requirement of 6 years managerial experience as at the closing date for applications, was unreasonable.

18. However the process did not produce an **appointment** of Mr. Springle or of anyone who was not qualified for the position of DCFO. The process produced an appointment with a candidate who satisfied the six year experience requirement. The inadvertent **invitation** to Mr. Springle to attend an interview did not actually taint the process of **appointment** of Mr. Rampersad to DCFO as no unqualified candidate was appointed.

19. Because no appointment or permanent damage resulted from that error this would not therefore be an appropriate case to merit the discretionary exercise of the jurisdiction to grant an equivalent declaration of constitutional breach. Given the nature and minimal permanent impact of the admitted error in the interview procedure in this case, there would be no justification for such further relief in the circumstances.

20. Accordingly, the further issue of the impact if any, of intentionality, on the discretion to grant constitutional relief, does not need to be further considered.

Disposition and Order

21. i. The appeal is allowed.
- ii. The orders of the trial judge are set aside.

Analysis

22. Before the trial court the Respondent challenged two decisions of the Public Service Commission. The first decision was made on or around October 18th 2011 (page 64 Record of Appeal) and related to the appointment process in respect of the office of **Assistant Chief Fire Officer** (ACFO).

23. The second decision was the decision not to interview the respondent for the position of DCFO on 9th July 2012.

24. With respect to **the first decision**, one Mr. Rampersad (who was first on an Order of Merit List which had initially been prepared in relation to Divisional Fire Officers (DFO)), was appointed to the position of ACFO.

25. There were then three vacancies for ACFO. The respondent, who was number two on the existing OML, was not appointed at that time to any of the two remaining vacant positions of

ACFO. Those positions were not filled. He contends that he should have been appointed to one of them.

Whether the OML for ACFO can now be challenged

26. On the hearing of this appeal he further contended that the process with respect to the appointment of ACFO was flawed in that there was no further aspect to the process of appointment other than consideration of the then existing Order of Merit List. However, this had been created in respect of another office, that of DFO.

27. This argument had not been fully canvassed in the Court below, and certainly no relief had been sought for the setting aside of any appointments that had been made in respect of the process for the appointment of ACFO, as an examination of the grounds of application clearly revealed. (See also paragraph 6 of the written submissions of the respondent filed July 7th 2014)

28. In any event no opportunity had been provided for the intervention or response of Mr. Rampersad, who had been appointed ACFO as a result of that process, and based on that OML. There was therefore no necessity to deal with that aspect of the respondent's contention and challenge. Nevertheless, as it can be disposed of easily, the opportunity is taken to so do as follows:

i) this ground, namely that the process with respect to the appointment of ACFO was flawed, was not raised in the respondent's notice of application for Judicial Review;

- ii) there was no opportunity provided to Mr. Rampersad to respond to that challenge;
- iii) the respondent's own claim to one of the remaining positions of ACFO was in fact based on his own ranking at number two on that very OML. If that OML were permitted at this very late stage to itself, be the subject of challenge then the basis of the respondent's own claim to be appointed to one of the remaining positions of ACFO would be uncertain.
- iv) given the obvious delay in a **challenge** now for the first time to that **OML**, utilised for the first decision on October 18th 2011, such a challenge would hardly qualify for the grant of leave for judicial review.

Fairness

29. Service Commissions must be permitted flexibility with respect to the process of appointments on promotion with which they are entrusted under the Constitution. Courts should be slow to second guess the **merit** of such appointments unless there are grounds, inter alia, of unfairness, illegality, irrationality or unconstitutionality with respect to such appointments. See also **Harinath Ramoutar v Commissioner of Prisons & PSC** [2012] UKPC 29, delivered 16th August 2012 per Lord Sumption, in particular paragraph 20.

The courts do not sit as a court of appeal from the decisions of the Commissioner of Prisons or the Public Service Commission, and are in no way concerned with the merits of candidates for promotion or the micro-management of personnel decisions in the prison service. The courts are, however, concerned to ensure that public bodies carry out the functions that the relevant legislation assigns to them....

30. The main contention of the respondent that was explored in his written submissions, was that he had a **legitimate expectation** to be appointed to the vacant position of ACFO, as he was

number two on the Order of Merit List, and there was a vacancy to which he could have been appointed.

31. A court cannot compel the filling of a vacancy in the public service. It is entirely a matter for the Public Service Commission's discretion as to whether or not it fills an existing vacancy. The considerations which would go towards that determination are considerations that are more appropriately addressed by the Service Commission in its constitutionally appointed role.

Whether any basis for a legitimate expectation

32. The proposition that once there is a vacant position in the Public Service it **must** be filled, is conspicuously devoid of authority. No duty to fill the two then vacant positions of ACFO has been demonstrated or established. Therefore no basis has been established for any expectation, far less any legitimate expectation, that all then vacant positions of ACFO had to be filled, or would be filled. The financial considerations or human resource implications involved in filling all or any particular vacancies in the public service are just some of the matters, (and the list is not intended to be exhaustive), that are outside the scope of a Court's jurisdiction. While **the legality of the process** for such appointments can be reviewed, no ground of unfairness nor any ground for challenge has been demonstrated in respect of the **process** that was adopted by the Commission for the appointment of Mr. Rampersad to the position of **ACFO**.

Equality of Treatment – Law

33. In **Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago [2004] UKPC 21, Privy Council Appeal No. 45 of 2003 (Bhagwandeem)** the Privy Council indicated what must be proved to constitute infringement of the right to equality of treatment.

At paragraph 18 it was stated (all emphasis added):

*"A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that **the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.***

34. Equality of treatment, does not therefore exist in a vacuum. It must be assessed in relation to suitable comparators.

35. The trial judge found that there had been a breach of the constitutional right of the respondent to equality of treatment and in fact ordered the appellant to promote the respondent to ACFO. However, as seen above the respondent was not similarly circumstanced to Mr. Rampersad in relation to the first decision to promote Mr. Rampersad to ACFO, as Mr. Rampersad had placed first on the existing OML while the respondent had not.

Second Decision – Deputy Chief Fire Officer

36. With respect to the position of Deputy Chief Fire Officer (DCFO), the following chronology is relevant:

- i. On 27th January 2011, the Commission issued a Circular Memorandum inviting applications for the position of DCFO;
- ii. In that Circular Memorandum it stipulated a closing date of February 28th 2011 for receipt of applications. It also stipulated that the minimum experience required for that position was to include at least six years managerial experience. Therefore, as at the closing date for receipt of applications an applicant would have been expected to satisfy the minimum experience required. (See *Ramsahai* infra);
- iii. It is common ground therefore that as at the closing date for receipt of applications the respondent did not satisfy the six year managerial experience requirement);
- iv. Despite the advertised requirement for six years managerial experience another person was invited by the appellant to attend an interview, who did not possess six years managerial experience;
- v. A letter from an Attorney at Law was written on behalf of the respondent on October 18th 2012 complaining, inter alia, of the failure to invite the respondent for an interview;
- vi. On October 18th 2012 in response to a previous letter from the respondent's former Attorney at Law, the appellant invited the respondent to attend an interview for the position of DCFO;
- vii. As at that date Mr. Rampersad had already been appointed to the position of DCFO based upon interviews for the position which had been conducted on July 9th 2012;

viii. By letter dated September 11th 2012 Mr. Rampersad had been notified that he had been appointed to the position of DCFO and his appointment had also been made retroactive to October 1st 2010. (Page 243 Record of Appeal).

37. It is therefore indisputable that on the record there was by that time no vacancy of **Deputy Chief Fire Officer** available to be filled by the respondent, this having already been filled by the appointment of Mr. Rampersad. The respondent chose not to attend that interview. He considered it to be an exercise in futility because there was no chance that he could have been appointed to a position (a) which did not exist or (b) which had already been filled by Mr. Rampersad.

Validity of the requirement for six years managerial experience as of the cutoff date for applications

38. Regulations 158 (1), (2) and (3) respectively of the Public Service Commission regulations require experience, relevant and relative experience, as well as special qualifications to be taken into account for promotion.

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

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

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

(a) his general fitness;

(b) any special qualifications;.....

39. In **Ramsahai v TSC** [2011] UKPC 26 delivered 9th August 2011 (@ paragraphs 14 to17) it was decided that there was nothing unreasonable about a requirement that the cutoff date for a five year experience requirement be the closing date for applications, as opposed to the subsequent date of interviews.

40. See also **Ashford Sankar v PSC** [2011] UKPC 27 delivered 9th August 2011, and in particular the Board's conclusion at paragraph 30 that, in that case it was legitimate to use the results of an ACE assessment exercise to short list candidates for promotion, even though that assessment covered only some of the criteria required by regulation 18 of the Public Service Commission Regulations. Similarly in this case it would be legitimate for the appellant to have used a minimum experience requirement or criterion as a **threshold** to short list candidates eligible to be invited to an interview for the position of DCFO.

Whether unequal treatment in relation to Mr. Rampersad

41. It is not in dispute that Mr. Rampersad possessed the necessary **threshold** requirement of six years managerial experience as of the cutoff date for applications but the respondent did not. In relation to the decision to offer an interview for the position of DCFO to Mr. Rampersad, and the appointment of Mr. Rampersad to that position, the respondent was not similarly circumstanced to Mr. Rampersad as he did not then qualify for an interview for that position. Mr Rampersad was not a suitable comparator to the respondent as they were not similarly circumstanced. There was

therefore no inequality of treatment as between Mr. Rampersad and the respondent. It is not contended that anyone had been appointed DCFO who did not have the qualification of six years managerial experience as at the cut of date for applications.

Whether unequal treatment in relation to Mr. Springle

42. However the respondent complains that he had not been offered the opportunity for an interview when Mr. Springle, similarly circumstanced to the respondent in not possessing six year managerial experience as at the cutoff date for applications, was offered the opportunity to be interviewed. Mr. Springle would be a suitable comparator. His treatment can be considered and contrasted with that of the respondent in determining whether there had been inequality in their treatment. There was inequality of treatment with respect to Mr. Springle and the respondent based on the respondent not having been invited to be interviewed, when Mr. Springle, despite also not having six years managerial experience as at the cutoff date for applications, had been offered the opportunity for an interview.

Effect of unequal treatment

43. However the unequal treatment alleged, in relation to Mr. Springle and implicitly admitted by the appellant, did not result in any substantial detriment to the respondent, in that,

i. as of the cutoff date for receipt of applications the respondent did not satisfy the six years managerial experience requirement, unlike the person who was eventually appointed DCFO. He was not therefore entitled to the offer of an interview. Therefore even if he were to have been

offered an interview as at July 9th 2012, (the date the interviews were conducted), there would be no reason to believe that he could have succeeded in displacing the candidate, who unlike him, did satisfy the six year managerial experience requirement.

ii. Mr. Springle, who had been offered the opportunity to be interviewed, despite not having satisfied the six year managerial experience requirement as at the cutoff date, was **not selected** to fill the position.

44. Attorney at law for the respondent attempted to suggest that the appointment of Mr. Rampersad should have been rescinded because of the flaw in the procedure adopted. In principle there is no basis upon the above facts for that contention. This is because the procedure in respect of the appointment of Mr. Rampersad was not in itself flawed. The defect that did occur was not in the failure to invite the respondent for an interview for the position of DCFO, but in the invitation to another party who was similarly unqualified to attend an interview. In any event that person was unsuccessful in his application.

45. The loss or damage to the respondent in not being called for an interview for the position of DCFO is therefore limited to his disappointment, or dismay that other persons, junior to him, and equally unqualified for the position, were invited to an interview. Mr. Springle did not then satisfy the requirement of six years managerial experience as at the cutoff date for applications, and he was not selected. Based on the advertised criteria for appointment to the position of DCFO Mr. Springle should not have been invited for an interview. However ultimately it made no difference as the qualified candidate was selected. No unqualified candidate was selected via that

process. The invitation to Mr. Springle therefore cannot possibly translate to or be converted into a right in the respondent to challenge the appointment of Mr. Rampersad. In any event Mr. Rampersad never had the opportunity to be heard on this issue.

Disposition and Order

46. The orders of the trial judge in this regard are wrong and must be set aside for the reasons above.

The appeal must therefore be allowed and the following orders made.

- i. The appeal is allowed.
- ii. The orders of the trial judge are set aside.

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Peter A. Rajkumar
Justice of Appeal