

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**Civil Appeal No. 257 of 2015
CV No. 2761 of 2014**

BETWEEN

**UMAWATIE DIPCHAN
AGINDER MUNGAL
SUNIL RAGBIR
MADAN SANKAR
DAVANAND RAGHUNANAN
RICKHI PARTAP**

Appellants

AND

**THE CHAIRMAN OF THE BOARD OF INLAND REVENUE
THE PUBLIC SERVICE COMMISSION
THE PERMANENT SECRETARY MINISTRY OF FINANCE AND THE ECONOMY
THE CHIEF PERSONNEL OFFICER OF THE PERSONNEL DEPARTMENT OF T&T**

Respondents

AND

FINBAR BOLAND & 15 OTHERS

Interested Parties

APPEARANCES:

Mr D. Mendes SC and Mr D. Maharaj instructed by Ms K. Bharath for the Appellants.

Mr R. Martineau SC and Ms K. Prosper instructed by Ms A. Ramsook for the Respondents.

Mr R. Rajcoomar, Mr G. Saroop and Mr I. Ali instructed by Ms A Rambaran for the Interested Parties.

**Civil Appeal No. 258 of 2015
CV No. 00365 of 2013**

BETWEEN

THE CHAIRMAN OF THE BOARD OF INLAND REVENUE

Appellant

AND

FINBAR BOLAND & 15 OTHERS

Respondents

APPEARANCES:

Mr R. Martineau SC and Ms R. Hinds instructed by Ms M. Benjamin and Ms L. Thomas for the Appellant.

Mr R. Rajcoomar, Mr G. Saroop and Mr I. Ali instructed by Ms A. Rambaran for the Respondents.

PANEL: P. MOOSAI, JA

J. JONES, JA

A. DES VIGNES, JA

DATE OF DELIVERY: 7 September, 2020.

I have read the judgment of Moosai JA and agree with it.

**J. Jones
Justice of Appeal**

I too, agree.

**A. des Vignes
Justice of Appeal**

JUDGMENT

Delivered by Moosai JA

I. Introduction

[1] There are two appeals. The appeals both treat with the question of the requirements for promotion in the public service to the office of Field Auditor III (FA III) at the Board of Inland Revenue (BIR). The appellants, who were the claimants in *CV 02761-2014* (the 2014 action), all have professional qualifications in accounting or its equivalent. The respondents in *CV 00365-2013* (the 2013 action) do not have such qualifications but claim to be eligible for both substantive and acting appointments to the office of FA III by virtue of their seniority, training and experience.

CA 257 of 2015: The 2014 Action

II. Relevant Facts & Background

[2] The six appellants (Dipchan, Mungal, Ragbir, Sankar, Raghunanan and Partap) are part of a larger group of claimants, namely seventeen (17) Field Auditors in the Inland Revenue Division, Ministry of Finance and the Economy who commenced proceedings for judicial review.

[3] At the time of the commencement of proceedings in 2014, each of the seventeen claimants:

- i. Was employed in the public service for between fifteen (15) to thirty (30) years more or less.
- ii. Commenced employment in the Inland Revenue Division between 1985 to 2001 and in the Field Auditor Stream between 1993 to 2004.
- iii. Was the substantive holder of the office of Field Auditor I (FA I) or Field Auditor II (FAII).
- iv. Was the holder of a recognised professional qualification in accounting from the Association of Chartered Certified Accountants (ACCA) which was obtained between the period 1996 and 2008.

[4] The substance of the representation on which the appellants rely as inducing a legitimate expectation is contained in paragraph 9 of the affidavit of 6 August 2017. They depose that they were informed (i) orally by Human Resource Department personnel; (ii) through memoranda circulated to the staff, (iii) through correspondence with the Public Services Association (PSA); and (iv) from other staff members who had worked in the Inland Revenue Department, that in order to be considered for acting or permanent appointments to the post of FA III they would have to attain professional qualifications from a recognised body. The appellants relied on the following correspondence in support of their legitimate expectation claim, namely, the undated job description, a letter dated 6 May 1991 and memorandum of 28 April 1999. It is common ground that the undated job description headed “Field Auditor III” contains a job description for that office agreed between the Chief Personnel Officer (CPO) acting on behalf of the State as employer and the PSA, the recognised association acting on behalf of public officers. It includes a statement of the qualities required to perform the duties of the office and, *inter alia*, describes the kind of work and its distinguishing features in the ensuing terms:

Kind of Work

Highly specialised auditing work.

Distinguishing Features of Work

An employee in this class is required to perform highly specialised auditing work relating to the investigation and examination of taxpayers returns. Work involves the auditing of tax returns in respect of the larger companies and examination of the accounting records to ensure compliance with the regulations. Work also involves supervision and direction of the work of a group of subordinates engaged in similar duties but in the less difficult assignments. Work is performed with considerable independence and is reviewed by a superior officer for compliance with tax laws and departmental policies through inspections, reports and meetings.

It is also common ground that this document sets out the minimum requirements for appointment to the particular office.¹ Under the heading “Minimum Experience and Training” it provides:

Experience in auditing work relating to taxpayers returns, and training as evidenced by a recognised professional qualification in accounting, supplemented by the successful completion of an in-service training course in Revenue Auditing work; or any equivalent combination of experience and training.

Further, all parties have completed the in-service training course in Revenue Auditing.

[5] The CPO, as far back as 6 May 1991, in her letter to the PSA, sought to clarify certain issues raised by the Association earlier that year with respect to officers in the field auditing stream. With respect to the minimum requirements for appointment to the office of FA III, the CPO stated that:

¹ *Teaching Service Commission v Ramsahai* CA 58 of 2006, [25].

1. The phrase... "or any equivalent combination of experience and training" has not been removed from the job specification for Field Auditors III. However, you will appreciate that the word "equivalent" is very important. Where, as in the case under reference, a professional qualification is required equivalence demands a qualification of a similar professional type.

Pausing there, it is clear that the minimum requirements for appointment to the office of FA III stipulated by the CPO included the obtaining of a professional qualification. With respect to knowledge of the qualification requirements for this office, and providing some support for the appellants' contention as to actual circulation of this correspondence to public officers at the BIR, the CPO found it "difficult to accept that there are now officers holding the position of Field Auditor II who are unaware" of these requirements.

Further, the CPO by this document, (i) "recognised that the actual appointing of officers whether in an acting or permanent capacity was a matter for the Service Commission; and (ii) considered that the office of FA III was to be treated as part of the professional class requiring professional qualifications.

[6] Consistent with the CPO's view as to the qualification requirements for that office set out in 6 May 1991 correspondence, the memorandum to the Director of Personnel Administration (DPA) some eight years later dated 28 August 1999 indicated that the **stipulated minimum requirements** were set based on advice from the Ministry of Finance (effectively the officers' employer). The CPO stated:

The condition introduced at paragraph 2(b) of my memorandum dated June 1 1995 was designed both to serve as an incentive to officers involved to take steps to ensure that they acquire the training required at this level and higher in the Field Auditor ranks and to preserve the integrity of the value and purpose of setting minimum training requirements. The stipulated minimum requirements were set based on advice from the Ministry of Finance. The problems which have been encountered are well known by both our Departments. However, I maintain the position that those persons who do not possess the minimum stipulated [academic] requirements and who have not completed additional training towards the acquisition of an acceptable professional qualification should not advance by any appointment in the Field Auditor stream unless the requirements are satisfied.

[7] The appellants contended that in light of the professional qualifications required to advance in the higher echelons of the field auditing stream, they pursued and obtained their qualifications. The evidence discloses that all these claimants obtained the ACCA sometime between 1996 and 2008.

[8] Matters appeared to have come to a head in 2006 with the publication to all members of staff of two circular memoranda by Chairman of the Board of Inland Revenue (CBIR), the first on 9 March and the other in the same terms on 15 May 2006. These dealt with the subject "Guidelines for

making recommendations for acting appointments and promotions in the Field Auditor and Tax Officer streams” as follows:

A. Acting appointments in the post of Tax Officer I:

(i) Staff who have completed Levels I or II ACCA or equivalent

B. Acting appointments in the post of Field Auditor I:

(i) Staff who have attained the full ACCA or other professional accounting qualification.

(ii) Tax officers who have finished 8-9 courses (Level II) ACCA or equivalent.

(iii) Tax officers possessing a BSC degree in Accounting or Management with Accounts.

C. Acting appointments and promotions in the post of Field Auditor III:

(i) Staff who have attained the full ACCA or other professional accounting qualification and at least three (3) years’ experience as a Field Auditor or Tax Officer.

(ii) Staff with a BSC degree in Accounting; Management with Accounts or MBA and at least five (5) years’ experience as a Field Auditor II.

(iii) Staff with at least eight (8) years’ experience as a Field Auditor II.

These guidelines were stated to be instituted to ensure some measure of equity in recommendations for appointments and would be effective for all promotions and acting appointments to be recommended from 1 April 2006.

[9] By letter dated 11 May 2006, an Attorney at Law, Mr Sheldon Ramnanan, representing Field Auditors who were pursuing or had professional accounting qualifications, complained to the Service Commissions Department that those guidelines emanating from the BIR sought:

...to broaden the scope of the required recognised qualifications that have been traditionally accepted as the basis for promotion and acting appointments by including unspecified “equivalent” qualifications...

I am instructed that these new guidelines are an attempt to manipulate the established criteria for promotion which has been based on the attainment of ACCA or CIMA degrees which are internationally recognised professional qualifications...

...the acceptance and implementation of these proposed guidelines by your office would be arbitrary, unfair, irrational and unreasonable.

[10] By letter dated 13 June 2006 the DPA, it being common ground acting on behalf of the Public Service Commission (PSC),² indicated to Mr Ramnanan that in discussions with CBIR, the latter had given the assurance that the circular would be retracted.

[11] Retraction by CBIR occurred shortly thereafter in the ensuing manner. By separate circular memoranda of 22 and 26 June 2006, CBIR informed staff that those guidelines, with the exception of clause c (i), were rescinded pending the decision of the CPO on the matter. These two memoranda, the claimants contended, contain the representation by the PSC grounding their claim to a legitimate expectation. The justification put forward for such a change of position was stated by CBIR to be:

The action to rescind is taken on recent advice of the [DPA] who has indicated that the Circular seeks to change the terms and conditions of service applicable to posts in the streams. The [DPA] has stated that the Commission will not approve recommendations for officers who do not meet the requirements of the job specifications as presently interpreted by the [CPO] in letter to the PSA dated May 6, 1991 and copied to CBIR. The Commission will be adhering to its stipulations as identified in Service Commissions Department Circular Memorandum No. 2 of 2004, dated December 8 2004.

Notwithstanding the position adopted by the Commission in these two memoranda, CBIR maintained its view that “where job specifications so provide, appointment of officers with equivalent combination of experience and training should be made...” However, CBIR concluded by stating that she was pursuing the matter with the CPO.

[12]The appellants rely on these two memoranda in the preceding paragraph for the representation by the PSC which they contend grounds their claim for legitimate expectation. The appellants submit that they were legitimately entitled to expect that, in deciding upon who should be recommended for promotion to the post of FA III and in deciding who should be promoted to that post, the BIR and the PSC respectively would only consider persons who, in accordance with the letter dated 6 May 1991, had a recognised professional qualification in accounting, supplemented by the successful completion of an in-service training course in Revenue Auditing work or a qualification of a similar professional type; but that the CPO could waive the qualification requirements on the merits of a particular case.

[13] On the issue of the grant of waivers referred to in the letter of the CPO of 6 May 1991, by memorandum dated 14 May 2009,³ the CPO advised that the waiver of the minimum **training** requirements of officers in the Civil Service would no longer be granted. However, consideration

² CAT dated 17 April 2019 pp 90-91.

³ Affidavit of Charmaine Phillips-Henry filed 20 February 2015.

would be given “to the grant of waivers of minimum experience requirements based on the merits of each case and subject to the agreement of the Public Service Association.” It is common ground that the Personnel Department has not since 14 May 2009 granted any waivers to officers in the Field Auditing stream who it considers does not possess the requisite professional accounting qualifications.⁴

[14] In or about 2013 and onwards, the appellants began expressing concerns with respect to what they perceived as a proposed change in the policy for recommendations of appointments and promotions to the Field Auditor stream by removal of the requirement for professional qualifications. These concerns were clearly triggered by the prospect that appointments to the office of FA III were being considered. Moreover, it had come to the appellants’ knowledge in early 2014 that the interested parties, whom the appellants contend were not qualified to be appointed, had commenced judicial review proceedings against the CBIR for her failure to recommend them for acting appointments to the office of FA III.

[15] By staff notice dated 17 January 2014, the CBIR invited all Field Auditors to a meeting on 29 January 2014 at which the DPA was to inform staff of the guidelines for acting arrangements in respect of FA I to FA V.

[16] Consequently, at this meeting on 29 January 2014 between Field Auditors and the CBIR and the DPA, the subject as to acting appointments and promotions was discussed. Shortly after, by letter of 3 February 2014 addressed to the CBIR, these Field Auditors sought to confirm that what was clarified at the meeting was, *inter alia*:

- i. the DPA indicated that she was guided by Regulations 13, 18, 24 and 26 of the PSC Regulations in making appointments/promotions within the public service;
- ii. the FA III job required a professional qualification or a waiver by the CPO. However, the CPO was not prepared to grant waivers as there were enough persons satisfying the requirements.

These Field Auditors noted their eligibility for appointment by virtue of their qualifications, they being appointed to act in the office of FA III, and requested that recommendations be made to fill vacancies for this post (FA III).

[17] By letter dated 26 February 2014 to the PSC, Attorneys for the appellants, Messrs R Lalla and Company, noted, *inter alia*, that their clients:

- i. Had been acting in the post of FA III for more than eight years;

⁴ *Ibid*; CV No 2761 of 2014, [14]; Appellants’ Submissions, [16].

- ii. Were eligible for appointment thereto; and
- iii. Requested their appointments forthwith to the post of FA III with retroactive effect.⁵

[18] Following an exchange of correspondence, the DPA responded on 29 April 2014 to Messrs Lalla & Co. as follows:

- i. Efforts were being made to regularise appointments/promotions to offices in the Field Auditor stream.
- ii. She had received recommendations for the filling of vacant offices of FA II and III from the CBIR which were endorsed by the Permanent Secretary.
- iii. She had received representations from the PSA and an Attorney at Law on behalf of the FA II officers, regarding further acting appointments and promotions to the office of FA III.
- iv. Ms Lalla's clients were not the senior officers to be considered for acting appointments as FA III.
- v. There was a decision of Smith J (as he then was) in *HCA No 01483 of 2006 Welch & Hackett v The Attorney General of T&T & the PSC*.
- vi. The CPO in her memorandum of 14 May 2009 had decided that the waiver of the minimum training requirements for offices in the Civil Service would no longer be granted, but consideration would be given to the grant of waivers of minimum experience requirements based on the merits of each case and subject to the agreement of the PSA.
- vii. In light of that decision at (vi) above, the CPO was requested to indicate whether she was prepared to grant waivers based on the experience and training of FA II officers for their promotions or acting appointments as FA III. The CPO requested additional information which the DPA was in the process of obtaining. Finally, the DPA indicated to Ms Lalla that her clients' matter was receiving attention and a further response would be forwarded once finalised.

[19] It is noteworthy that on this very date, 29 April 2014, there is a memorandum from the DPA to the Permanent Secretary, Ministry of Finance and Economy (the Permanent Secretary), showing that nine persons, namely Ian Bourne, Cheryl Ann Andrews-Cave, Patricia Cumberbatch-Walkins, Finbar Boland, Dhanmatie Gosine, Helen Thomas, Ann Marie Ali, Deomatie Ramdass and Leon Latchmansingh as being promoted to FA III. At this stage, it is also worth mentioning that those

⁵ Affidavit of Appellants, ROA Vol 1 p 82; ROA Vol 1 p 826.

promoted included not only those the appellants contend are not qualified, but the latter four who possessed professional accounting qualifications.⁶

[20] The appellants, in summary, contend that the decision of the PSC to appoint unqualified persons to the position of FA III is null, void and of no legal effect.

[21] Several affidavits were filed on behalf of the respondents to which brief reference can be made.

Mary Allison Raphael

[22] Ms Mary Allison Raphael (Ms Raphael), the Chairman of the Board of Inland Revenue, deposed that the memorandum dated 26 June 2006⁷ set out what has been the view of the BIR throughout. Thus, where the job specifications so provide, officers with the equivalent combination of experience and training should be given consideration in the relevant posts. She is aware that Ms Patricia Walkins, even though not holding recognised professional qualifications, was recommended for promotion to the position of FA III.

Mona Aknath-Afong

[23] Ms Aknath-Afong, the Acting Deputy DPA since 12 June 2014 summarises the position of the PSC.

[24] At the time of their acting appointments, the appellants were appointed to act pursuant to regulation 26 of the Public Service Commission Regulations (PSCR). Thus, as a general rule, the senior officer eligible would be appointed.

[25] Regulation 18 is the relevant regulation for making permanent appointments. As far as the PSC is aware, CBIR has not without notice or consultation, changed the policy with regard to appointments to the office of Field Auditors III that has been in place for over twenty-five years. That policy has been and remains that provided for under regulation 18. The position of the PSC is and has remained that appointments to the various public offices including Field Auditors is a matter for the PSC acting as an independent body.

[26] The PSC denies that it has failed to consult the appellants on any change of policy. The appointment for permanent appointment policy has been and continues to be based on regulation 18, but where there are provisions for specific qualifications or its equivalent experience and training, the PSC has regard to these two alternatives in making appointments. The court in 2009 directed and guided the PSC on the importance of considering “equivalent combination of experience and training”. As a result, the PSC, in exercising its powers under regulation 18, made

⁶ Affidavit of Mary Allison Raphael, ROA Vol 2 p 1013 [10].

⁷ *Ibid* “AA 10”.

the appointments of Field Auditors in April 2014. The PSC did so notwithstanding the view of the CPO expressed in correspondence dated 6 May 1991 and 28 April 1999.⁸

[27] It is not correct, as alleged by the appellants at paragraph 36 (xi) of their affidavit, that those positions have been filled by unqualified persons. The persons filling them have the requisite equivalent combination of experience and training and satisfied the requirements of regulation 18 where permanent appointments have been made; and regulation 26 where they are appointed to acting positions not as a prelude to permanent positions.

Charmaine Phillips-Henry

[28] Ms Phillips-Henry is the Senior Human Resource Adviser at the Personnel Department which is established under section 13 of the Civil Service Act. The Personnel Department sets the minimum training and experience requirements for positions in the Civil Service.

[29] The DPA has previously made requests to the CPO for the grant of waivers of the qualifications/experience requirements for posts in the field auditor stream. In submitting these requests, the DPA would usually state that they were considering proposals for filling vacancies in the Field Auditor stream and there were no Field Auditors who satisfied the minimum requirements for the office, and whether on the basis of experience and training, the Personnel Department could grant a waiver to specified officers to enable them to be considered for promotion.

[30] In such instances, the Personnel Department would analyse the documentation submitted and, based on the merits of each case, would decline to grant or would grant waivers. In granting waivers, some of the factors included the dearth of candidates for the position, the number of vacancies in the specified position and the negative impact which such unfilled vacancies was having on the work of the BIR. In instances where waivers were granted, the written agreement of the PSA was obtained given that waivers have facilitated the appointment of persons who did not possess the requirements specified in the relevant job specification.

[31] Since 2009 she has not granted waivers to officers in the field auditor stream who do not possess the requisite professional accounting qualifications.

III. Trial Judge's Findings

[32] The trial judge held:

- i. The appellants are not by virtue of their professional accounting qualifications, entitled to, or entitled to be recommended for, promotion to the office of FA III and above in priority over the interested parties who are not similarly qualified.

⁸ See [5]-[6] above.

The PSC in coming to its decision, properly applied the relevant regulations, in particular regulation 18, and determined that those promoted had satisfied the requirements for appointment to the particular office. The judge considered that the appellants' heavy reliance on the CPO's interpretation of the job specifications for the post of FA III could not trump the contents of the PSCR.⁹

- ii. At its highest, any legitimate expectation of the appellants for promotion could only have commenced after the issuance of the 2009 memorandum. Prior to that, consideration for promotion by the PSC was based both on training and experience. The appellants' reliance on the statements of the CPO could not found a legitimate expectation; moreover they are not binding on the CBIR and the PSC who have a duty to implement the regulations. Thus no legitimate expectation was created that the claimants would be recipients of a promotion above those who had the equivalent combination of training and experience themselves.

IV. The Arguments

[33] The appellants who all have professional accounting qualifications (ACCA), contend that they had a legitimate expectation that in deciding who should be recommended for promotion and who should be appointed to the post of FA III, the CBIR and the PSC respectively, would only consider persons who had a recognised professional qualification in accounting, supplemented by the successful completion of an in-service training course in revenue auditing work, or a qualification of a similar professional type; but that the CPO could waive the qualification requirements on the merits of the particular case. The underpinning of the appellants' case is based on the contention that the CPO stipulated, in accordance with regulation 18(4), certain specifications that are required for the office of FA III, including as a threshold condition having a professional qualification in accounting, or a qualification of a similar professional type.¹⁰ The appellants contend that the persons who were appointed ahead of them in April 2014 did not have the necessary qualifications and were not the beneficiaries of waivers from the CPO.

[34] The respondents argued that:

- i. The statement of the DPA as contained in correspondence dated 22 and 26 June 2006 is in conflict with the job specifications and regulation 18 of the PSCR and could not give rise to a legitimate expectation (it being unlawful).

⁹ *CV No 2761 of 2014*, [19].

¹⁰ See [5]-[6] above.

- ii. The representation allegedly made was not clear and unambiguous and does not come from either the PSC or the first and third respondents (CBIR and the Permanent Secretary respectively).
- iii. Equivalent combination of experience and training is not the same as an equivalent combination of experience and qualification.
- iv. In any event, the interpretation placed by the CPO¹¹ is illegal and irrational.

[35] The interested parties, who are the claimants in the 2013 action, were joined in the 2014 action. They filed essentially the evidence relied on in the 2013 action and adopted Mr Martineau's submissions.

V. Issues

[36] The essential issues that arise for determination can be summarised under four principal headings:

- I. Did the minimum requirements for appointment to the office of FA III as interpreted by the CPO in the letter dated 6 May 1991 constitute specifications within the meaning of regulation 18 (4) of the PSCR?
- II. Was there a representation made by, or on behalf of the PSC?
- III. If so, did that representation give rise to a legitimate expectation that in deciding who should be recommended for promotion and who should be promoted to the post of FA III, the BIR and the PSC respectively would only consider persons who had recognised professional qualification in accounting, supplemented by the successful completion of an In-Service training course in Revenue Auditing, or a qualification of a similar professional type, but that the CPO could waive the qualifications requirements on the merits of the particular case.
- IV. If so, was the PSC entitled in law to resile from the expectation so created?

VI. Discussion

[37] The resolution of the issues in this case turns principally on the interpretation of the PSCR, in particular regulations 18, 24 and 26 which are set out below. The CBIR under regulation 13 is responsible for making recommendations to the DPA for the filling of vacancies.

13. (1) As soon as it is known that a vacancy will occur the Permanent Secretary or Head of Department shall communicate to the Director in writing and shall make his recommendations regarding the filling of the vacancy.

¹¹ As set out in [5] above.

[38] The principles of selection for promotion which are to be made by reference to a number of criteria are set out in regulation 18. Regulations 18(1) to 18(3) set out the requirements which the PSC has to take into account in considering the eligibility of officers for promotion.

18. (1) In considering the eligibility of officers for promotion, the Commission shall take into account the seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such officers, and in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy.

(2) The Commission, in considering the eligibility of officers under subregulation (1) for an appointment on promotion, shall attach greater weight to—

(a) seniority, where promotion is to an office that involves work of a routine nature, or

(b) merit and ability, where promotion is to an office that involves work of progressively greater and higher responsibility and initiative than is required for an office specified in paragraph (a).

(3) In the performance of its functions under subregulations (1) and (2), the Commission shall take into account as respects each officer –

(a) his general fitness;

(b) the position of his name on the seniority list;

(c) any special qualifications;

(d) any special courses of training that he may have undergone (whether at the expense of Government or otherwise);

(e) the evaluation of his overall performance as reflected in annual staff reports by any Permanent Secretary, Head of Department or other senior officer under whom the officer worked during his service;

(f) any letters of commendation or special reports in respect of any special work done by the officer;

(g) the duties of which he has had knowledge;

(h) the duties of the office for which he is a candidate;

(i) any specific recommendation of the Permanent Secretary for filling the particular office;

(j) any previous employment of his in the public service, or otherwise;

(k) any special reports for which the Commission may call;

(l) his devotion to duty.

Regulation 18 (4) goes on to provide:

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

...

[39] Acting appointments: (i) as a prelude to a substantive appointment, and (ii) otherwise than as a prelude to a substantive appointment, are set out in regulations 24 and 26 respectively:

24. (1) *The Permanent Secretary or Head of Department shall ensure that any recommendation made in relation to an acting appointment as a prelude to a substantive appointment shall be based on the principles prescribed in regulation 18.*

(2) *Where, in the exigencies of the particular service, it has not been practicable to apply the principles prescribed in regulation 18, an officer selected for an acting appointment in consequence of a recommendation made under subregulation (1) shall not thereby have any special claim to the substantive appointment.*

(3) *In considering the claims of eligible candidates for a substantive appointment, the Commission shall take into account the claims of all eligible officers.*

....

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 Ministry or 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 district next in line of seniority to act when there is an officer in the same district who is capable of performing the duties of the higher grade, and in such examination the question of additional Government expenditure for travelling and subsistence allowances and other expenditure shall be borne in mind.*

[40] Section 121 of the Constitution provides that, subject to the provisions of the Constitution, power to appoint persons to hold or act in offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Public Service Commission. Section 129 (1) provides that a Service Commission may, with the consent of the Prime Minister, by regulation or otherwise, regulate its own procedure. The procedure of the Public Service Commission is regulated by the PSCR. It is manifest that the PSC is so composed, structured and regulated as to ensure, consistent with its constitutional imperative, that it is independent and immune from political pressure, the object being to ensure that civil servants are similarly independent and immune: *Perch v AG (2003) 62 WIR 461 at [5] per Lord Bingham*.

[41] While the PSC is exclusively responsible for appointments, promotions and disciplinary matters concerning public officers, the contract of employment is between public officers and the State. Thus the PSC has no power to lay down terms and conditions of service for public officers.¹² It is the Personnel Department (headed by the CPO) established under section 13 of the Civil Service Act, which is essentially under the direction and control of the Minister of Finance, which is the

¹² *Thomas v AG of T&T [1981] 32 WIR 375, 386 (UKPC)*.

department of government with responsibilities, as the Privy Council recognised in **Romain v Police Service Commission [2014] UKPC 32 at [8]**, across the whole of the public service on matters relating to the terms and conditions of employment and which conducts negotiations from time to time on behalf of the State with associations representing police and other public officers on employment matters; however it is not responsible for making decisions about appointments and promotions of public officers. In **Cooper v Director of Personnel Administration (2006) UKPC 37 at [27]**, Lord Hope elucidated the distinctive functions performed by the independent service commissions and the executive as follows:

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.

[42] It must be remembered that the office of Field Auditor III, as the job description states,¹³ is one in which the office holder enjoys a considerable degree of independence (subject to review by a superior officer), in performing highly specialised auditing work relating to the investigation and examination of taxpayers returns involving: (i) auditing of tax returns in respect of the larger companies and ensuring compliance with tax laws; (ii) supervision and direction of the work of subordinates. The office holder is therefore required to possess considerable knowledge of: accounting principles and the analysis and interpretation of accounting data; tax laws; auditing procedures and techniques. Additionally, he or she has to be able to supervise and direct the work of subordinates; and write clear and concise reports of varying complexity. This can be contrasted with the less demanding office of Field Auditor II where the office holder is engaged in “specialised auditing work of varying complexity”. Further it is clear that Parliament has entrusted a specialist body, the Personnel Department, which is subject to the direction of the Minister of Finance, with

¹³ “AA 6” ROA p 663.

responsibilities across the entire spectrum of the public service on matters of terms and conditions of service. As part of the terms and conditions of service, the State as employer, after consultation with the relevant officers' association, has specified, as it was entitled to do, the minimum requirements for appointment to the office of Field Auditor III. For ease of reference they are:

Experience in auditing work relating to taxpayers returns, and training as evidenced by a recognised professional qualification in accounting, supplemented by the successful completion of an in-service training course in Revenue Auditing work; or any equivalent combination of experience and training.

Moreover, as far back as 1991, the CPO on 6 May 1991 provided the following clarification to the PSA on the meaning of the phrase "or any equivalent combination of experience and training" in the job specifications for Field Auditors III:

1. The phrase... "or any equivalent combination of experience and training" has not been removed from the job specification for Field Auditors III. However, you will appreciate that the word "equivalent" is very important. Where, as in the case under reference, a professional qualification is required equivalence demands a qualification of a similar professional type.

[43] Further, as the CPO highlighted to the DPA in its memorandum of 28 August 1999, stipulated minimum requirements for this post were set based on advice from the Ministry of Finance with the rationale being:

The condition introduced at paragraph 2(b) of my memorandum dated June 1 1995 was designed both to serve as an incentive to officers involved to take steps to ensure that they acquire the training required at this level and higher in the Field Auditor ranks and to preserve the integrity of the value and purpose of setting minimum training requirements. The stipulated minimum requirements were set based on advice from the Ministry of Finance. The problems which have been encountered are well known by both our Departments. However, I maintain the position that those persons who do not possess the minimum stipulated [academic] requirements and who have not completed additional training towards the acquisition of an acceptable professional qualification should not advance by any appointment in the Field Auditor stream unless the requirements are satisfied.

[44] Thus I am of the view that there is nothing unreasonable, irrational or illegal either: (i) in the stipulation by the CPO of minimum requirements for the office of Field Auditor III; or (ii) in the assessment by the CPO of what amounts to equivalence in the circumstances outlined at paragraphs 42 and 43 above. It cannot be said to be irrational or unconnected with the desire to improve the calibre of persons promoted to the office of Field Auditor III to undertake the highly specialised nature of the auditing work required. There can therefore be no question, as submitted by Mr Martineau, of the CPO acting illegally.

[45] Having regard to the fact that the State as employer is empowered to stipulate the minimum requirements for appointment to that office (the obtaining of a professional qualification being one), I am of the view that these requirements are “specifications...required...for appointment to the particular office”, within the meaning of regulation 18(4). Consequently, the purview of the PSC would be to apply those specifications to the appointment process within the confines of the PSCR: *Teaching Service Commission v Ramsahai Civ App No 58 of 2006 [12] per Archie CJ*. As was made clear in *Sankar v Public Service Commission*:¹⁴ “Regulation 18 (4) directs the Commission to consider any specifications that may be required from time to time for appointment; it does not authorise the Commission itself to introduce specifications.” Thus, in considering the eligibility of officers for promotion, whether by way of a substantive appointment or as a prelude to permanent promotion to the office of Field Auditor III, the PSC, in addition to the requirements prescribed in regulation 18 (1), (2) and (3), is required by regulation 18 (4) to consider any specifications that may be required from time to time for appointment to the particular office. Specifications for the post have been established by the CPO and are contained in the job description¹⁵ as clarified by the CPO in its correspondence to the PSC dated 6 May 1991.¹⁶ That the PSC understood this to be the minimum requirements of the job specifications is made clear by circular memoranda dated 22 and 26 June 2006 from the CBIR, a person who plays an integral role in the promotion process under regulation 13, in which the DPA communicated the official position of the PSC and which in my view is a reliable account and, contrary to Mr Martineau’s submission, binds the PSC.¹⁷ These memoranda set out that the DPA “has stated that the Commission will not approve recommendations for officers who do not meet the requirements of the job specifications as presently interpreted by the [CPO] in letter to PSA dated May 6, 1991 and copied to CBIR”. Thus, to be considered for the post on promotion a person is required, inter alia, to have a professional qualification in accounting or a qualification of a similar professional type as a threshold condition. In accordance with regulation 18 (4) the PSC is required to limit its consideration of the persons to be promoted to the post to those meeting the specifications and from those persons so qualified, then apply regulation 18 (1) (2) and (3) in order to select the persons for promotion from those qualified candidates. The question of what weight is to be given to each of the criteria in regulation 18 (1) (2) and (3) would be a matter solely for the PSC. Additionally, in the application of the specifications under regulation 18 (4), the PSC’s discretion is in no way fettered as it remains within

¹⁴ [2011] UKPC 27.

¹⁵ “AA 6” ROA p 663.

¹⁶ “AA 4” ROA p 653; See also *Sankar v The Public Service Commission* [2011] UKPC, [26]-[28].

¹⁷ See [11] above; “AA 10” pp 685-687; *Sahatoo v AG* CA S014 of 2012, [37]; [2019] UKPC 35, [24].

their exclusive jurisdiction to determine what will suffice as a qualification of a similar professional type in order to satisfy the requirement of an equivalent combination of training and experience.

[46] It is therefore unnecessary in these circumstances to consider Mr. Mendes' primary submissions on the representation made by the PSC in 2006 giving rise to a legitimate expectation on the appellants' part, although it is difficult to reconcile that claim for a legitimate expectation with one where there are specifications in the same terms required by the employer under regulation 18 (4) which the PSC is obliged to consider. Further, in so far as Mr Martineau relied on the authorities of *Maharaj* and *Welch* as guidance to the PSC in the application of the training and experience requirements, I am of the view that neither is relevant to the determination of the issue in this appeal. Neither case dealt with regulation 18 (4) and the specifications established by the employer for appointment to the office of FA III.

[47] Having regard to the foregoing analysis, it is my view that the decision of the trial judge must be set aside as she fell into error in her consideration and application of regulation 18 to the present case, as well as in her determination of the issue of the appellants' legitimate expectation. In fairness to the judge however, undue criticism cannot be levied against her as it is apparent from the record that submissions were not placed before her on the significance of regulation 18 (4) and its potential impact on any decision that she was being called upon to make.

[48] The courts do not sit as a court of appeal from the decisions of the PSC, and are in no way concerned with the merits of candidates for promotion. The courts are, however, concerned to ensure that public bodies carry out the functions that the relevant legislation assigns to them: *Ramoutar v Commissioner of Prisons [2012] UKPC 29 at [20] per Lord Sumption*. In this case the evidence reveals that the PSC in 2014 promoted not only those persons who satisfied the threshold condition stipulated in regulation 18 (4), but others who did not. In that regard the approach taken by the PSC was fundamentally flawed and I so declare. However, it is not suggested by Mr. Mendes, a position with which I agree, that the decisions of the PSC in promoting those persons who did not satisfy this threshold condition be set aside or invalidated, but he seeks clarification of the process for the future. Accordingly, the appropriate relief, in my view, is that the appeal be allowed and the matter be remitted to the PSC urgently to review the appellants' (who all have ACCA qualifications) eligibility for promotion in light of the decision of this court.

CA 258 of 2015: The 2013 Action

[49] Given the analysis and conclusions arrived at in the 2014 action, the judgment of the trial judge in favour of the interested parties, who are the respondents in this appeal to the 2013 action, must now

be set aside. The case for the respondents was based primarily on their alleged eligibility to be appointed to act, albeit in a non-prelude capacity, in the post of FA III for the period October 2012 to December 2012. Having now determined that the CPO as employer was entitled to specify the possession of a professional qualification in accounting, or a qualification of a similar professional type as a threshold condition to be applied by the PSC before consideration could be given to appointment to the post, any of the respondents who did not possess such qualifications, would not be eligible.

[50] Regulation 26, which speaks to non-prelude acting appointments, requires that prospective candidates be **eligible** for consideration. The case of *Ramoutar*¹⁸ saw the PSC attempt to treat the possession of a degree in Social Work as matter of threshold eligibility in considering the appellant's application to be appointment to act under regulation 26. Lord Sumption in concluding that it ought not to be so treated, was particularly unimpressed with the suitability of the Job Description as the medium through which the possession of a degree, as a matter of threshold eligibility, could be established. The facts of the present case are however materially different, and for the reasons already outlined in the 2014 action, the PSC was bound to apply the minimum requirements relative to the eligibility of candidates whenever the question of appointment to the post of FA III arose.

[51] Eligibility for the purposes of regulation 26 demands the possession of a professional qualification in accounting or a qualification of a similar professional type as a threshold condition. Thus, those respondents who at the relative time did not possess such qualifications, would therefore not have been eligible for consideration for acting appointments. However, as stated above, the promotion of some of these respondents to the post of FA III has already taken effect and cannot properly be invalidated or set aside.¹⁹

VII. Disposition

CA 257 of 2015

[52] The appeal is allowed.

[53] There will be a declaration that the appellants are qualified and eligible to be considered for promotion to the office of Field Auditor III.

[54] The appellants have been successful in this appeal and should be entitled to their costs against the respondents both before this court and in the court below. Consequently, costs in the high court are

¹⁸ [2012] UKPC 29.

¹⁹ See [47] above.

to be assessed by the Registrar and paid by the respondents to the appellants certified fit for one Senior Advocate and one Junior Advocate attorney. Costs before this court, also certified fit for one Senior Advocate and one Junior Advocate, are to be two-thirds of the costs as assessed by the Registrar in the high court action.

[55] The interested parties have filed a counter-notice solely on the issue of costs. This cross-appeal is dismissed. The costs of this counter-notice are to be assessed by the Registrar and paid by the interested parties to the appellants certified fit for one Senior Advocate and one Junior Advocate Attorney.

CA 258 of 2015

[56] The appeal is allowed and the orders of the trial judge set aside.

[57] The counter-notice of the respondents is dismissed.

[58] I am of the view that the respondents' claim had no merit and the costs, both in the high court and in the court of appeal, should be paid by the respondents to the appellant.

P. Moosai
Justice of Appeal