

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No 687 of 2005

IN THE MATTER OF AN APPLICATION OF
MR. WINSTON GIBSON FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW PURSUANT TO THE
JUDICIAL REVIEW ACT 2000

BETWEEN

WINSTON GIBSON

Applicant

AND

THE PUBLIC SERVICE COMMISSION

Respondent

REASONS

Before the Honourable Madam Justice Dean-Armorer

Appearances:

Mr. Anand Ramlogan instructed by Mr. Lalbeharry for the Applicant

Mr. F. Hosein (S.C.) led by Mr. B. Primus and Fr. Pierre instructed by

Mr. S. Lalla and Ms. D. Dilraj for the Respondent

On 29th July 2005, I delivered an oral ruling granting the following relief in favour of the Applicant:

- “i) The Applicant is eligible to be considered by the Public Service Commission either for appointment or appointment to act in the post of Permanent Secretary in the Ministry of Agriculture in April, 2005.*
- ii) The Public Service Commission ought to reconsider the Applicant’s claim to act as the Permanent Secretary in the Ministry of Agriculture at the end of the present period of acting.*
- iii) The Applicant has been treated unfairly in that he had conceived a legitimate expectation by virtue of the undertaking by the Director of Personnel Administration in a letter dated 14th January 2005, which undertaking was never honoured.*
- iv) The Respondent to pay the Applicant’s costs fit for Advocate Attorney.”*

This matter was an Application for Judicial Review. Having obtained leave as required by O. 53 r. 3, ***Rules of the Supreme Court***, the Applicant filed his Notice of Motion on the 25th April, 2005.

The Applicant sought the following relief:

- “a) An order of certiorari to remove into this Honourable Court and quash the decision of the Public Service Commission to allow the said Trevor Murray and/or Dr. John Pegus to continue to act in the said offices after 31st day of March 2005;*

- b) *A declaration that the continuing acting appointment of the said Mr. Trevor Murray and/or Dr. John Pegus in the offices of Permanent Secretary and Deputy Permanent Secretary in the Ministry of Agriculture, Land and Marine Resources (“the said offices”) after 31st day of March 2005, is illegal;*
- c) *An order of certiorari to remove into this Honourable Court and quash the decision of the Public Service Commission (“PSC”) to recommend and/or appoint Trevor Murray and/or Dr. John Pegus to act in offices of Permanent Secretary and Deputy Permanent Secretary respectively after 31st day of March 2005;*
- d) *A declaration that the Applicant has been treated unfairly, in violation of the principles of natural justice and/or the Public Service Commission Regulation;*
- e) *An order directing the Public Service Commission to reconsider the Applicant’s claim to be appointed to at in the said offices;*

- f) *A further order directing the Public Service Commission to provide the Applicant with a statement of reasons as to why he has been bypasses and/or denied the said acting appointment(s);*

- g) *An order that the Respondent has been guilty of unreasonable delay in filling the vacancies in the said offices;*

- h) *Costs;*

- i) *Pursuant to Section 8 (d) of the Act, such further orders, directions or writs as the Court considers just and as the circumstances warrant.”*

In the course of the hearing, Mr. Ramlogan for the Applicant abandoned paragraphs (f) and (g) of the reliefs. He relied on the following grounds as identified at s. 5(3) of the Judicial Review Act 2000:

- a) *That the decision was in any way unauthorized or contrary to law;*

- b) *Excess of jurisdiction;*

- c) *Failure to satisfy or observe conditions or procedures required by law;*
- d) *Breach of the principles of natural justice;*
- e) *Unreasonable, irregular or improper exercise of discretion;*
- f) *Abuse of power;*
- g) *Acting on instructions from an unauthorized person;*
- h) *Conflict with the policy of an Act;*
- i) *Deprivation of a legitimate expectation;*
- j) *An exercise of power in a manner that is so unreasonable that no reasonable person could have so exercised the power”.*

Brief History of Proceedings

- (i) The Applicant sought leave to apply for Judicial review by way of Statement filed on 21st April, 2005.

- (ii) Leave was granted by the Honourable Justice Tiwary on 25th April, 2005. The application for Judicial Review was made returnable before me on 2nd May, 2005.
- (iii) On the 2nd May, 2005 I gave directions for the filing of affidavits by the Respondent.
- (iv) No affidavits were filed. However, at the adjourned directions hearing Senior Counsel Mr. Hosein sought a further adjournment and indicated that he needed time to advise his client. The matter was transferred to Port of Spain to the 2nd June, 2005 for mention and was fixed for hearing on 9th June, and 10th June.
- (v) The Learned Senior Counsel for the Respondent at the hearing indicated its willingness to be bound by the following declaration:

“The Applicant was eligible to be considered by the Public Service Commission for appointment either as acting Permanent Secretary or alternately as Deputy Permanent Secretary in April, 2005.....”
- (vi) On the authority of ***Colin Furlonge vs P.S. /Health*** Learned Senior Counsel conceded that seniority is the primary consideration where an Acting appointment is being made and where such appointment will not be a prelude to a permanent appointment.
- (vii) Learned Senior Counsel conceded further that on the 1st April, 2005, the Applicant being senior was eligible to be appointed to act in the posts of either Deputy Permanent Secretary or Permanent Secretary, Ministry of Agriculture.

- (viii) Both Learned Senior Counsel, Mr. Hosein and learned Counsel, Mr. Ramlogan agreed that the only issue before the Court was the appropriate relief to which the Applicant was entitled.
- (ix) In the context of the history of these proceedings it is important to note that Mr. Ramlogan on the 9th June sought an amendment to his Notice of Motion. The proposed amendment was formulated orally. When we took the adjournment to the 10th June, Mr. Ramlogan indicated that there would be a written formulation of application to amend. Mr. Ramlogan was absent on 10th June and his junior Mr. Lalbeharry held for him. Mr. Lalbeharry was altogether unable to assist the Court and the application for leave was refused because the Court was of the view that it would introduce a new case and be unfair to the Respondent.

Brief History of Facts

1. The Applicant had, prior to the events which led to the initiation of these proceedings a long and distinguished career in the Public Service.
2. While he held the post of Chief Technical Officer, he obtained no pay leave for one year to take up a post in Guyana.
3. At the end of his no pay leave, he returned to Trinidad and resumed his duties as Chief Technical Officer.
4. Upon his return, he encountered two (2) of his juniors acting in the posts of Permanent Secretary and Deputy Permanent Secretary respectively, posts which had been vacant for sometime.

5. The Applicant wrote to Director of Personnel Administration (“the D.P.A.”) on the 2nd September 2004, the day after he resumed duties.
6. Not having received a response by 4th October, 2004 he again wrote to the D.P.A.
7. With yet no response from the Public Service Commission (“the PSC”), the Applicant encountered a copy of a memo from Director of Personnel Administration to Permanent Secretary Ministry of Agriculture indicating that Mr. Trevor Murray had been appointed to act as Permanent Secretary with effect from 7th March, 2003 and Dr. John Pegus to act as Deputy Permanent Secretary.
8. The Applicant having received no response to two (2) letters applied by another letter of 6th December 2004 for a statement of reasons as to why he was bypassed.
9. By this letter, the Applicant applied to be considered for “any new or subsequent acting appointment...” to the offices of Permanent Secretary and Deputy Permanent Secretary. The Applicant also requested reasons for his having been by-passed previously.
10. The Applicant’s last letter provoked a response. By letter dated the 14th January 2005, the D.P.A. responded to the Applicant’s request. The complete text of this letter is set out hereunder:

*“Mr. Winston Gibson,
Chief Technical Officer,
Ministry of Agriculture, Land
and Marine Resources.*

Dear Sir,

Your letters dated 2nd September 2004 and 6th December 2004 refer.

Public Service Commission has considered the representations contained in your letters.....and noted that you have been absent from the Ministry from 26th August 2002 to 31st August 2004.

The Commission proposes to fill the vacant offices of Permanent Secretary and Deputy Permanent Secretary by the end of March 2005 and considers it counter productive to disrupt the acting appointments as Permanent Secretary and Deputy Permanent Secretary.....at this time.”

11. The Applicant responded to the D.P.A. by letter dated 2nd February 2005. This letter reflected his reliance on the statement which had been made in the D.P.A.’s letter of 14th January 2005. In the first paragraph of the Applicant’s letter of the 2nd February 2005, the Applicant re-iterated his view that he had been unfairly by-passed, but added:

“However, I am not taking issue with your decision having regard to the shortness of the proposed extension of the acting and your stated commitment to deal with the substantive promotion in which I am interested....”

12. At the same time and in a letter which was also dated the 2nd February 2005, the Applicant wrote to apprise the Chairman of the Public Service Commission of “....*on-going communications between myself and the Service Commission Department....and the*

stated commitment of the Director of Personnel Administration to fill both recent posts by 31st March 2005.”

13. The Applicant, received a reply dated 10th February 2005 from the Chairman of the PSC, informing him that the DPA had been directed to submit the matter for the consideration of the PSC.
14. The DPA also responded to the Applicant by a letter dated 28th February 2005 promising further communication.
15. By the date of the hearing of this matter, the Applicant had received no communication from the DPA and both positions of Permanent Secretary and Deputy Permanent Secretary remained vacant.

Reasoning and Decision

1. As indicated above, the Respondent had conceded that the Applicant had been eligible to be considered for appointment and that he was entitled to a declaration in those terms.
2. Both Counsel agreed that the only issue left for me to decide was what were the appropriate items of relief to which the Applicant is entitled.
3. The Respondent's concession appears to have been based on a recognition of the Applicant's seniority as well as on the terms of

regulation 126 (1) (a) of the Public Service Commission Regulations, which require the PSC to make acting appointments on the basis of seniority when the relevant acting appointment is not a prelude to a permanent appointment.

4. Although it was not expressly stated by learned Senior Counsel for the Respondent, the draft declaration which the Respondent has proposed appears to have been motivated by a recognition of merit in the first ground cited in s. 5(3) of the Judicial Review Act and recited in the Applicant's Notice of Motion:

"That the decision was....contrary to law...."

5. On the premise of the concession I have considered each of the items of relief sought.
6. At paragraph (a) of the Notice of Motion, the Applicant claimed an order of certiorari *"....to remove into this Honourable Court and quash the decision of the Public Service Commission to allow the said Trevor Murray and/or John Pegus to continue to act in the said offices after the 31st March 2005..."*
7. At paragraph (c), the Applicant sought certiorari *"....to quash the decision of the Public Service Commission to recommend and/or appoint Mr. Trevor Murray and/or Dr. John Pegus to act in the offices of Permanent Secretary.....after 31st March 2005...."*

8. It is well established that remedies in applications for judicial review are discretionary. At paragraph 11 – 001 of Lewis, ***Judicial Remedies in Public Law*** (2000 ed.), the learned authors refer to the discretionary nature of the prerogative remedies:

“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies. A court may in its discretion refuse to grant a remedy even if the Applicant can demonstrate that a public authority has acted unlawfully....”

9. Two considerations upon which the Court exercises its discretion to withhold relief are the impact of the order on third parties and the impact of the order on administration. See para 11 – 033 and para. 11 – 035 of Lewis, ***Judicial Remedies in Public Law*** (2000 ed.).

10. In my view the grant of certiorari as sought at paras. (a) and (c) would be detrimental both to good administration and the interest of third parties.

11. The instant application was heard in June 2005 and the proposed orders, if granted, would have been made in July 2005. If granted, orders of certiorari would have had the effect of nullifying the acting appointments of the acting Permanent Secretary and the acting Deputy Permanent Secretary. In my view there would be clear detriment to Dr. Pegus and Mr. Murray who had not been made parties to these proceedings and accordingly had no voice in the matter.

12. Further there would be detriment to good administration since the quashing of the acting appointments from March 31st 2005 would render null and void administrative acts of the acting Permanent Secretary and Deputy Permanent Secretary from March 31st 2005.
13. Moreover the grant of certiorari could serve no useful purpose since the Applicant had not been de facto acting in either of these positions and could not be the beneficiary of a retroactive acting appointment.
14. At para (b) of his Notice of Motion the Applicant sought a declaration of illegality in respect of the acting appointments of Mr. Murray and Dr. Pegus.
15. I have decided to exercise my discretion to refuse this relief on grounds similar to those stated supra. In my view the grant of such a declaration will impact unfairly on the two officers who had not been parties to these proceedings.
16. Similarly, it is my view that such a declaration will be detrimental to good administration because the unavoidable implication of such a declaration would be to clothe all administrative acts of Mr. Murray and Dr. Pegus with the label of illegality after March 31, 2005.
17. I decided to grant a declaration that the Applicant had been treated unfairly. In my view there was a clear representation emanating from the DPA in the letter of the 14th January 2005, of the intention of the PSC to fill the vacant offices by the end of March 2005.

18. The Applicant acted cautiously and took the unusual step of writing directly to the Chairman of the PSC. As a matter of practice correspondence in respect of the business of a Service Commission flows to and from the DPA. The Chairman of the PSC did nothing to discourage the expectation of the Applicant that the posts would be filled by the end of March 2005.

19. Learned Senior Counsel argued that the Applicant could not have held a legitimate expectation because the representation lacked clarity and because there was not benefit accruing from the promise.

20. I respectfully disagree with Learned Senior Counsel. In my view the representation was clear. The DPA forecasted clearly that the Commission proposed to fill the vacant posts by the end of March 2005. Clarity must be assessed in relation to the context of the representation. It seems to me that the representation of the DPA, in the particular context, could have meant nothing other than that the Commission proposed to make permanent appointments to posts of Permanent Secretary and Deputy Permanent Secretary, by March, 2005.

21. I respectfully agree with Learned Senior that there was no representation that the Applicant would receive a benefit. In my view however, the existence of a legitimate expectation does not depend on the promise of a benefit.

22. In the Privy Council decisions, *AG of Hong Kong v Ng Yuan Shui* [1983] 2 AllER 346, Lord Fraser at p. 351 expressed the following view:

“...when a public authority has promised to follow a certain procedure it is in the interest of good administration that it should act fairly and should implement its promise so long as its implementation does not interfere with its statutory duty....”

23. Moreover in *AG v KC Confectionery* Justice of Appeal Persaud held that the concept of legitimate expectation was *“...inextricably bound up with the rules of natural justice particularly the right of the citizen to be heard and the obligation of a Government or other authority to act fairly....”*

24. In my view the reliance of the Applicant on the official representation of the DPA was sufficient to impose on the DPA an obligation to act fairly by either abiding by its representation or notifying the Applicant of its intention to renege thereon. It is now established that the representation was never honoured and that by the time of these proceedings the posts remained vacant.

25. I decided to accept the draft declaration proposed by the Respondent.

26. Mr. Ramlogan, had abandoned the relief sought at paragraphs (e) and (f) of the Notice of Motion. I made the orders set out at p. 2 of 16 above.

Orders

Accordingly I granted the following declarations:

- 1) The Applicant is eligible to be considered by the Public Service Commission either for appointment or appointment to act in the post of Permanent Secretary or Deputy Permanent Secretary in the Ministry of Agriculture in April 2005.
- 2) The PSC ought to reconsider the Applicant's claim to act as Permanent Secretary in the Ministry of Agriculture at the end of the present period of acting.
- 3) The Applicant has been treated unfairly in that she conceived a legitimate expectation by virtue of the undertaking of the DPA in a letter dated 14th January 2005 which undertaking was never honoured.
- 4) The Respondent to pay the Applicant's costs fit for Advocate Attorney-at-Law.

Dated this 14th day of December, 2005.

Mira Dean-Armorer
Judge of the High Court