Michaelmas Term
[2017] UKPC 31
Privy Council Appeal No 0090 of 2015

JUDGMENT

Mohammed (Appellant) *v* Public Service Commission and others (Respondents) (Trinidad and Tobago)

From the Court of Appeal of Trinidad and Tobago

before

Lord Kerr
Lord Clarke
Lord Wilson
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

19 October 2017

Heard on 19 July 2017

Appellant	*Respondents*
Richard Clayton QC Anand Ramlogan SC Phillip Patterson Kent Samlal (Instructed by Alvin Pariagsingh)	Satvinder S Juss (Instructed by Charles Russell Speechlys LLP)

THE FOLLOWING JUDGMENT OF THE BOARD WAS DRAFTED BY LORD WILSON:

1. In the relatively small community of Trinidad and Tobago there is considerable sensitivity about the risk of political influence upon the process of making appointments, including promotions, of officers in the public service. Constitutional provisions are designed to buttress the independence of the process; see the analysis offered by Lord Diplock on behalf of the Board in *Thomas v Attorney-General of Trinidad and Tobago* [1982] AC 113 at 124.

2. The issue in the present appeal is a sequel to the judgment of the Board in *Cooper and another v Director of Personnel Administration and another* [2006] UKPC 37, [2007] 1 WLR 101. That appeal concerned the promotion of police officers, which, under section 123(1) of the Constitution, is the responsibility of the independent Police Service Commission. In 2003, however, the commission had declared that the conduct of examinations for promotion within the force was the responsibility of the Public Service Examination Board ("the PSEB"), being the second respondent to the present appeal, whose members had for long been appointed by the Cabinet. By its order, the Board (of the Privy Council) declared that under the Constitution it was the responsibility of the commission, rather than of the executive in the form of the Cabinet, to appoint the members of the board which, under its ultimate control, would set and mark examinations within the police service.

3. The present appeal concerns the promotion of fire-fighters rather than of police officers. Under section 121(1) of the Constitution their appointment, including their promotion, is the responsibility of the independent Public Service Commission ("the PSC"), being the first respondent to the appeal. Until 14 December 2007 it had been the practice of the PSC to cede to the PSEB (appointed by the Cabinet) responsibility for the setting and marking of examinations in the areas of public service assigned to it under the Constitution; and, in respect of the setting and marking of examinations for fire-fighters, it had been the practice of the PSEB to cede responsibility to the Fire Service Examination Board ("the FSEB"), being the third respondent to the appeal. The members of the FSEB had been appointed by the Minister of National Security: regulation 14(1) of the Fire Service (Terms and Conditions of Employment) Regulations, made by the President under section 34 of the Fire Service Act, provided in terms for an "Examinations Board" referable to fire-fighters to be "appointed in writing by the Minister".

4. In the light of the judgment of the Board in the *Cooper* case, which was delivered on 6 July 2006, the PSC came to realise that its practice and that of the PSEB in respect of examinations for fire-fighters, set out in para 3 above, needed to change. On 14

December 2007 the PSC arrogated to itself the responsibility for appointing the members of the PSEB and therefore relieved the Cabinet of responsibility for doing so. It therefore became lawful for the PSEB to direct the conduct of the examinations in the areas of public service (including the fire service) for which responsibility was assigned to the PSC under the Constitution. In respect of examinations for fire-fighters, an early plan to keep the FSEB in being, albeit with members appointed by the PSC rather than by the Minister, seems to have been abandoned; for the Board is told that the FSEB has become defunct. The PSEB must have made another arrangement for the future setting and marking of examinations for fire-fighters.

5. On 14 December 2007 the PSEB, as reconstituted on that day, addressed a particular problem: what was to be done about the results declared by the FSEB of examinations for promotion which it had conducted in October and December 2006? Those results had been declared in July 2007 but had not by then been acted upon by the PSC in the making or refusing of promotions. On that day the PSEB reached the decision which is under challenge in the present proceedings: it decided to adopt the results which the FSEB had then declared.

6. The appellant has been a fire-fighter since 1987. In 2006 he sought promotion to the rank of fire sub-officer. In December 2006 he therefore underwent a practical examination set by the FSEB. In July 2007 he learnt of the FSEB's decision that he had failed the examination. Early in 2008 he learnt that the PSEB had decided to adopt the results declared by the FSEB.

7. In the present proceedings, brought by way of judicial review, the appellant seeks a declaration that the decision of the PSEB on 14 December 2007 to adopt the examination results declared by the FSEB in July 2007 was unlawful. He argues that the appointment by the Minister of the members of the FSEB was unconstitutional; that Regulation 14, which required him to appoint them, was therefore void; that its decisions were therefore unlawful; and that they could not have been made lawful as a result of their adoption by the PSEB. On 15 February 2011 Dean-Armorer J dismissed the claim and on 24 November 2014 the Court of Appeal (Archie CJ and Jamadar JA, and Smith JA who gave the only substantive judgment) dismissed the appellant's appeal. Against their decision he brings this further appeal before the Board.

8. In substance, submits Mr Clayton QC with the charm and skill which are characteristic of him, it was the islands' government which decided that his client had failed the examination. All results declared by the FSEB, appointed by the Minister, were (so the argument continues) void as in breach of the constitution: so its declarations that others had passed the examinations in 2006 were equally void, as were all its declarations of the result of examinations which it had set in previous years, although (adds Mr Clayton) the law of limitation would now preclude challenge to promotions granted or refused by reference to them.

9. Mr Clayton's submission requires the Board to give close attention to its judgment in the *Cooper* case, cited at para 2 above. For Lord Hope, who delivered it on behalf of the Board, added a subtle qualification to its conclusion that it was the responsibility of the Police Service Commission, rather than of the Cabinet, to appoint the board which would set and mark examinations within the police service. The qualification, set out in para 28, was as follows:

> "A distinction can be drawn between acts that dictate to the Commissions what they can or cannot do, and the provision of a facility that the Commissions are free to use or not to use as they think fit. The appointment of a Public Service Examination Board by the Cabinet for the commissions to use if they choose to do so is not in itself objectionable. The advantages of using such a centralised body are obvious, and in practice the commissions may well be content to continue to make use of them."

Lord Hope added at para 29:

> "The Constitution, for its part, does not permit the executive to impose an examination board on the Commission of the executive's own choosing. It is for the Commission to exercise its own initiative in this matter, free from influence or interference by the executive. It may, if it likes, make use of a Public Service Examination Board appointed by the Cabinet. There may be advantages in its doing so. This no doubt is a service that must be paid for somehow. Where resources are scarce the Commission cannot be criticised if it chooses to make use of an existing facility. On the other hand it cannot be criticised if it chooses not to do so. The Constitution requires that it must have the freedom to exercise its own judgment."

10. On the face of them Lord Hope's dicta clearly yield the answer to the appellant's claim. For, if it was within the power of the Police Service Commission to choose to make use of the results of examinations set and marked by a body appointed by the Cabinet, it was surely within the power of the PSEB, once appointed by the PSC, to choose to adopt the results of an examination set and marked by a body appointed by the Minister.

11. Mr Clayton seeks to escape this conclusion by reference to Lord Hope's use of the word "facility". The word, so it is said, looks to the future. He contends that, although the PSEB may have been entitled to elect to make use of some form of governmental assistance in the setting and marking of future examinations in the fire

service, it was not entitled retrospectively to adopt examination results already declared by a body appointed by the Minister; and that no greater validity could attach to these results on 14 December 2007 than had attached to them on 13 December 2007. But Mr Ramlogan SC, in a short but forceful submission which followed that of Mr Clayton, challenged Lord Hope's dicta head-on. They were (he submitted) too broad; they had already caused problems on the islands; and they detracted from the constitutional imperative of protection from the potential for executive interference in this area.

12. The Board has acceded to the appellant's request that it should look critically at its dicta in the *Cooper* case but in the event it finds no reason either to depart from them or to distinguish them from application to the facts before it. In the Board's view its dicta in the *Cooper* case drew a distinction which was not only helpfully pragmatic but stayed loyal to the constitutional imperative to which Mr Ramlogan referred. On 14 December 2007 the PSEB, by then lawfully appointed by the PSC, exercised its own judgement in deciding to adopt the results of the examinations in 2006 declared by the FSEB; and, analogously, the PSC later exercised its own judgement in deciding to use them in its grant and refusal of promotions. There is before the Board (and was before those two bodies) no suggestion of any actual executive interference in the work of the FSEB in the setting and marking of the examinations in 2006; and the common sense which underlay the decisions first to adopt and later to use the results, and conversely the complications which would have attended any decision not to do so, need no elaboration.

13. Both of those decisions were lawful and the appeal must be dismissed.