



Trinity Term
[2023] UKPC 27
Privy Council Appeal No 0028 of 2022

JUDGMENT

**The Chairman of the Board of Inland Revenue
(Respondent) v Finbar Boland and 15 others
(Appellants) (Trinidad and Tobago)**

**From the Court of Appeal of the Republic of Trinidad
and Tobago**

before

**Lord Kitchin
Lord Sales
Lord Burrows
Lady Rose
Lord Richards**

**JUDGMENT GIVEN ON
18 July 2023**

Heard on 13 June 2023

Appellant

Richard Clayton KC

Anand Ramlogan SC

Robert Strang

(Instructed by Freedom Law Chambers)

Respondent

Thomas Roe KC

(Instructed by Charles Russell Speechlys LLP (London))

LADY ROSE:

1. This appeal arises from an application brought by sixteen auditors who held office as Field Auditor II in the Inland Revenue Division of the Ministry of Finance. It concerns the lawfulness of the alleged failure of the respondent, the Head of the Inland Revenue Division, to recommend to the Public Service Commission that the appellants be appointed to act in the higher office of Field Auditor III between the months of October 2012 and December 2012. The Public Service Commission (“the Commission”) is constituted under section 120 of the Constitution and is the body responsible for appointments to these, and other, public service posts, on the recommendation of the Chairman of the Board of the Inland Revenue. The appellants’ application for judicial review was lodged on 29 January 2013.

2. At the outset it is important to make clear that there are three different ways in which an officer at the Inland Revenue can occupy the post of Field Auditor III. The officer can be appointed to the substantive post as Field Auditor III. An officer can also be appointed to “act” in that post, which is a temporary appointment rather than a permanent promotion to the higher grade. Further, there are two kinds of “acting” posts, one which is a prelude to the officer being promoted to the substantive post as Field Auditor III (“prelude acting”) and one which is not a prelude to such a promotion (“non-prelude acting”).

3. The relief sought by the appellants in their application was a series of declarations, the first of which was that the Chairman of the Board of the Inland Revenue had acted unlawfully in failing to recommend the appellants for appointment as acting Field Auditors III whilst recommending other Field Auditors II to act in that office. The complaint was, broadly, that some Field Auditor II officers who were junior (in terms of length of service) had been appointed ahead of the appellants and that other Field Auditor II officers who were similarly circumstanced to the appellants had been appointed whereas the appellants had been passed over.

4. A further declaration sought, which turned out to raise the key point in this appeal, was a declaration that there is no legal requirement that an officer must hold a professional qualification in accounting in order to act in or to be promoted to the office of Field Auditor III and that the appellants were eligible to act in that office and to be promoted thereto. The appellants did not hold a professional accounting qualification but asserted that they were holders of other qualifications at a tertiary level. They also had extensive experience in revenue auditing work and had successfully completed the relevant in-service training course. They were, they said, eligible for substantive and acting appointment to the office of Field Auditor III. Their complaint was that the respondent had refused to recommend them for appointment

to act as Field Auditor III on the grounds in part at least, they believed, that they did not have a professional accounting qualification.

5. As well as the declaratory relief, the appellants said that they had suffered loss in the form of the monthly increment of about \$300 to their salary they would have earned in the acting Field Auditor III post.

6. By the time of the hearing before the Board, a large measure of agreement had been reached by the parties on the following points:

(i) The respondent accepted that the appellants were right in so far as they asserted that they did not need a professional qualification in accountancy in order to be appointed to the post of non-prelude acting Field Auditor III.

(ii) The appellants accepted that a professional qualification in accountancy was necessary in order for an auditor to be appointed both to the substantive post as Field Auditor III, and to the post of prelude acting Field Auditor III, prior to being promoted to substantive appointment.

(iii) In so far as the High Court in granting the appellants' judicial review application and the Court of Appeal in allowing the Inland Revenue's appeal had stated in their judgments that the law was different from (i) and (ii) above, those judgments were in error.

(iv) The allegations of unlawfulness put forward in the appellants' application were not tenable and there was no basis on which the Board needed to remit the matter for further consideration to the High Court.

(v) The Board should therefore dismiss the appeal from the Court of Appeal's order but make clear in its judgment that the reasons for dismissal were not the reasons on which the Court of Appeal based its judgment, and set out the correct position, as now agreed by the parties.

7. The only remaining issue between the parties was whether the Board should grant declaratory relief to the appellants, declaring the law to be as now agreed, or whether a judgment of the Board clarifying the legal position was sufficient. The Board returns to this question at the end of this judgment.

Field Auditors working for the Inland Revenue

8. The application for judicial review was supported by an affidavit by the appellants in which they set out the background to the claim. This described how in 2006, the then Chairman of the Board of Inland Revenue made recommendations to the Commission that three of the appellants be appointed to act as Field Auditors III but had shortly thereafter rescinded those acting appointments. They exhibited to the affidavit the letter sent by the Inland Revenue to Mr Boland, the first appellant, expressing their deepest regret that “in the present circumstances” Mr Boland would have to revert to his substantive position as Field Auditor II and making clear their “sincere appreciation for [his] past and continuing excellent performance and high level of commitment to the Division”. The affidavit also stated that since the lodging of the claim, some of the appellants had in fact been appointed to the office of acting Field Auditor III.

9. The affidavit responding to the application for judicial review was sworn by Allison Raphael, Acting Chairman of the Board of the Inland Revenue. She had held that post since March 2013. She explains that given the nature of the work of a Field Auditor at level III, the Chairman of the Board of Inland Revenue had considered what specifications were required for appointment to the substantive post and to the prelude acting post. She also refers to the possibility of the requirement for a professional accounting qualification being waived. She also states:

“8.The Claimants are eligible for acting appointments to the office of Field Auditor III, hence the recommendations of Messrs. Finbar Boland and Ian Bourne and Mmes. Cheryl-Ann Andrews-Cave and Dhanmatie Gosine as stated in paragraph forty-four (44) of the Claimants’ affidavit. They have been selected for recommendation by me on the basis of their seniority. ...

11 The position of the Board of Inland Revenue and in particular its Chairman is and has been that Field Auditors II without the professional qualifications are eligible for recommendation to act. Where, as the Claimants state in paragraph nineteen (19) of their affidavit, Field Auditors II junior to them have been recommended to act as Field Auditors III, they have been so appointed to act as a prelude to a substantive appointment and to assess their performance while so acting. This is so in the case of [four

named officers] referred to in paragraph nineteen (19) of the Claimants' affidavit.”

10. In an affidavit in reply dated 3 October 2014 the appellants record that they have all, except one, been promoted to the office of Field Officer III. This appointment appeared to have been retrospective, taking effect as from April 2013, and was said to be “on one year’s probation”.

11. As the claim proceeded towards a hearing in the High Court, 17 other Inland Revenue officers were joined to the claim as Interested Parties. They were auditors who did have professional accounting qualifications and were claimants in a separate application for judicial review asserting that they had a legitimate expectation that the post of Field Auditor III would be limited to those with such qualifications.

12. Judgment was given in the present claim by Kangaloo J on 15 September 2015. The judge noted at paras 5 and 6 of her judgment that the respondent had acknowledged in the proceedings that the appellants were qualified and entitled to act as Field Auditors III, that they were eligible for acting appointments and that “they were indeed persons who ought to be considered for recommendations to act in the post of Field Auditor III”. The issue on which she focused was therefore whether there had been a breach of natural justice in failing to recommend them for appointment. She held that there had been such a breach and granted a declaration to that effect.

13. She also granted a declaration that the appellants “were eligible to act in the office of Field Auditor III and to be promoted thereto”. She ordered that monetary compensation be assessed at a future date. She made no order as to costs. Kangaloo J’s judgment did not consider whether the position might be different as between promotion to the substantive office and acting office, or as between prelude and non-prelude acting office.

14. The judgment of the Court of Appeal, handed down on 7 September 2020, was given by Moosai JA with whom J Jones and A des Vignes JJA agreed. This was the judgment in two appeals, an appeal from the claim brought by the appellants (who did not have professional accounting qualifications) and an appeal from the judgment of Kangaloo J in the separate legitimate expectation claim brought by the 17 auditors who did have professional accounting qualifications (who were the 17 Interested Parties in the claim with which the Board is concerned).

15. The Court of Appeal's judgment set out the statements that had been made over the years about whether or not there was a requirement that Field Auditors III have a professional accounting qualification. Briefly, the position is as follows.

16. In May 1991 a job description for the post of Field Auditor III was agreed between the Chief Personnel Officer ("the CPO") acting on behalf of the State as employer and the Public Services Association ("the PSA"), being the association recognised to negotiate on behalf of public officers. That job description included a statement of the kind of work that was performed by a Field Auditor III, describing it as "highly specialised auditing work" relating to the investigation and examination of taxpayers' returns. Such work had to be performed with "considerable independence". The job description also set out the minimum requirements for appointment to the office. Under the heading "Minimum Experience and Training" it provided:

"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."

17. The reference at the end of that passage to "any equivalent combination of experience and training" was clarified by the CPO also in May 1991. She circulated a memorandum stating:

"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."

18. The confusion about the necessity for a professional accounting qualification seems to have stemmed from two memoranda circulated by the Chairman of the Board of Inland Revenue to all members of staff in March and June 2006. These dealt with "Guidelines for making recommendations for acting appointments and promotions in the Field Auditor and Tax Officer streams". As regards Field Auditors III the memorandum circulated on 9 March 2006 said:

"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.”

19. Sub-paragraph C(iii) seemed to suggest that an acting appointment and promotion to Field Auditor III were available to someone with at least eight years' experience as a Field Auditor II even if they did not have a professional accounting qualification. Field Auditors who were pursuing or had professional accounting qualifications objected to this apparent change and the “guidelines” were promptly retracted by the Chairman of the Board of Inland Revenue in so far as they went beyond what had been set out at point C(i). The retraction memorandum, dated 26 June 2006, confirmed that the Commission would not approve recommendations for officers who did not meet the requirements set out in the job description set out in the May 1991 letter between the CPO and the PSA.

20. The Court of Appeal's judgment then turned to the Public Service Commission Regulations which are deemed to be made under section 129 of the Constitution (“The PSC Regulations”). The PSC Regulations define “acting appointment” to mean “the temporary appointment of an officer to a higher office or otherwise whether that office is vacant or not”: see regulation 2. Chapter III of the PSC Regulations governs appointments, promotions and transfers.

21. Regulation 18 provides the principles for selection 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).”

22. Regulation 18(3)(a) – (l) then sets out a list of factors that the Commission must take into account, including any special qualifications, any special training courses the officer has undergone and his or her previous employment in the public service. Subregulation (4) then provides:

“(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.”

23. Regulation 24 deals with the principles of selection for acting appointment as a prelude to appointment:

“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.”

24. Regulation 25 sets out the procedure to be followed where an acting appointment falls to be made whether as a prelude to a substantive appointment or not.

25. Regulation 26 then deals with non-prelude acting appointments:

“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.”

26. Regulation 28 provides that in submitting recommendations for acting appointments, Permanent Secretaries and Heads of Department shall state the reasons why officers, if any, are being passed over.

27. The Court of Appeal considered first the issues in the appeal in the Interested Parties’ legitimate expectation claim. The main issue was whether the minimum requirements for the appointment to the office of Field Auditor III as clarified by the CPO in May 1991 amounted to “specifications” for the purposes of regulation 18(4), such that the Commission was bound to apply them. The Court of Appeal described the difference in functions of the Commission under sections 121 and 129 of the Constitution. It was manifest, the Court said, that the composition, structure and regulation of the Commission was (para 40):

“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.”

28. However, the Commission had no power, the Court of Appeal held, to lay down terms and conditions of service for public officers. That was the task of the Personnel Department headed by the CPO and established under section 13 of the Civil Service Act. Parliament had entrusted the Personnel Department, as a specialist body subject to the direction of the Ministry of Finance, with matters of terms and conditions. There was nothing unreasonable in the CPO's stipulation made in 1991 and confirmed in 1999 that a professional accounting qualification was required for the Field Auditor III post. That requirement was, the Court held, a "specification" for the purpose of regulation 18(4) and the Commission had to apply those specifications in the appointment process.

29. The Court of Appeal correctly held (para 45):

"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." (emphasis added)

30. Thus far there is nothing controversial about the Court of Appeal's judgment. However, the Court then, unfortunately, went awry when it turned to consider the appellants' appeal. The Court said that the result in that appeal followed on from its decision about the specification for the post. The Court recognised that the appellants' case "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". The Court concluded, at para 49, that:

"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."

31. The Court referred then to the position of non-prelude acting appointments made under regulation 26:

“[50] Regulation 26, which speaks to non-prelude acting appointments, requires that prospective candidates be eligible for consideration. The case of [*Ramoutar v Commissioner of Prisons* [2012] UKPC 29] 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 [Interested Parties’] 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.”

32. As mentioned at the outset of this judgment (see para 6 above), the parties to the appeal before the Board accept that the Court of Appeal erred in failing to distinguish between the requirements for appointment to, on the one hand, the substantive post of Field Auditor III under regulation 18 and to prelude acting Field Auditor III under regulation 24 and, on the other hand, to non-prelude acting Field Auditor III under regulation 26. That such a distinction should be made is clear from the decision of the Privy Council in *Ramoutar* to which the Court of Appeal referred. That case concerned a judicial review challenge to a decision not to consider Mr Ramoutar for appointment as acting Chief Prison Welfare Officer in the Trinidad & Tobago Prisons Service. The job specification for the substantive post included a requirement for a bachelor's degree in social work from a recognised institution or equivalent. Mr Ramoutar did not have such a degree and his application was rejected. The relevant provision in the PSC Regulations for the substantive appointment of prison officers to the relevant post was regulation 172. This was in similar terms to regulation 18 except, significantly, that there was no equivalent of regulation 18(4) providing for additional specifications to be considered. Regulation 24 therefore applied for prelude acting appointment to the post of Chief Prison Welfare Officer but substituting a cross-reference to regulation 172 for the cross-reference to regulation 18.

33. Lord Sumption, giving the opinion of the Board in *Ramoutar*, considered what was meant by the requirement in regulation 26(1)(a) that the officer appointed shall be as a general rule the senior officer “eligible for such acting appointment”. Did that import into regulation 26 the threshold requirement of a social work degree in

regulation 172? The Board held that it did not for three reasons, of which the first is the most germane to the appellants' appeal (para 15):

“The first is that it is apparent from Chapter III of the Regulations read as a whole that the criteria for making permanent appointments and acting appointments as the prelude to permanent appointments have no application to acting appointments where the person appointed is simply standing in for permanent office-holder. Appointments of the latter kind are subject to a distinct regime. In the case of permanent appointments and appointments intended as the prelude to permanent appointments, seniority is one factor among many in the assessment of candidates, but it is never conclusive, and for the more responsible appointments it may be of very limited weight; whereas for purely acting appointments it is stated to be the general rule. This reflects significant differences in the nature of these appointments. The appointment of a stand-in on an acting basis is essentially an internal reallocation of the duties of existing staff to meet the exigencies of the service. It is temporary. It may fall to be made at short notice and sometimes for short periods. Those who are chosen will necessarily be within the prison service already and have satisfied the criteria for appointment to an office at the next level down. This is, as it appears to the Board, the reason why the Regulations require acting appointments which are the prelude to permanent appointments to be made on the same principles as permanent appointments, but impose no corresponding requirement for the appointment of stand-ins on a purely acting basis.”

34. The second reason was that the job specification imposing the requirement for a social work degree had no statutory status; it did not record the terms of service. Third, even if the Board had been persuaded that the prison service had been under a statutory duty to produce the job description, that description would not bind the Commission to treat it as a statement of the criteria for threshold eligibility. The Board therefore allowed Mr Ramoutar's appeal and issued a declaration that the Commission had acted unlawfully by treating him as ineligible for appointment because he did not have a degree in social work.

35. It appears that the Court of Appeal in the present case at para 50 of its judgment (set out at para 31 above) regarded *Ramoutar* as distinguishable on the basis that the requirement for a social work degree was not incorporated as a specification into the eligibility criteria for the substantive post and the prelude acting post (in the absence of a provision corresponding to regulation 18(4)). By contrast, the Court of Appeal had held that the requirement for a professional accounting qualification was part of the eligibility criteria for the substantive and prelude acting post of Field Auditor III because it amounted to a specification for the purposes of regulation 18(4).

36. The Board agrees with the parties that *Ramoutar* cannot be distinguished on this basis. The first reason given in para 15 of *Ramoutar* applies just as much to the non-prelude acting appointment for Field Auditors III as it does to the non-prelude acting appointment of prison officers. That is part of the ratio of the case and was binding on the Court of Appeal. Further, the Board in *Ramoutar* held that the nature and wording of the document relied on by the Commission in that case was ambivalent as to whether it prescribed a social work degree as a criterion for threshold eligibility even for the substantive post. The document, the Board considered, may have left open the possibility that “sound knowledge of principles and practices of social work” could be acquired by some means other than a degree. By contrast, again, the Court of Appeal in the present case had, earlier in its judgment, held that the job specification agreed between the CPO and the PSA in May 1991 was not only a specification for the purposes of regulation 18(4) but did have the effect of imposing a requirement for a professional accounting qualification for the substantive and prelude acting post.

37. According to *Ramoutar* therefore, the non-prelude acting post does not import the eligibility criteria that apply for the substantive and prelude acting posts. Although an auditor must have a professional accounting qualification in order to be appointed under regulation 18 and hence under regulation 24 to the post of Field Auditor III, there is no such requirement for appointment under regulation 26.

The disposition of the appeal to the Board

38. Having concluded that the Court of Appeal erred in its reasoning, the Board must nevertheless dismiss the appeal. The claim put forward in the appellants’ application is that the failure of the respondent to recommend them for appointment under regulation 26 was unlawful. If there had been evidence that that failure had resulted from the mistaken belief that non-prelude acting appointments needed a professional accounting qualification then there may have been merit in the claim. It is clear, however, from the unchallenged evidence of Ms Raphael that that was not the reason for them appearing to have been passed over. The appellants asserted in their affidavit that the Director of Personnel Administration and successive Chairmen of the

Board of Inland Revenue had “over the years for the most part” insisted on officers possessing such qualification in order to act in that office or to be promoted substantively to it. That affidavit, however, went on to give an example of a Field Auditor II officer who was recommended to act as a Field Auditor III without a professional accounting qualification. As Ms Raphael pointed out in her affidavit, the position of the Inland Revenue “is and has been” that the appellants are qualified for non-prelude acting appointments and had in fact been so appointed. Some of those who were junior to the appellants but were promoted ahead of them were appointed to prelude-acting posts and others had been granted waivers of the professional accounting qualification requirement. There was no real challenge to the evidence of Ms Raphael that there had been a good reason for all the appointments and recommendations that had been made and about which the appellants complained.

39. The claim that the failure to appoint the appellants was unlawful must therefore be dismissed.

40. Turning finally to the question of whether the Board should make a declaration that Field Auditors II can be appointed to the post of non-prelude acting Field Auditor III, the Board does not consider it appropriate to make such a declaration. A declaration may be the appropriate relief where the Board has concluded that the defendant public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order: see *R (Hunt) v North Somerset Council* [2015] UKSC 51; [2015] 1 WLR 3575, para 12. Lord Toulson JSC observed there that in some cases “simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice”.

41. The present appeal is different because there has been no finding that the public body has acted unlawfully. Although the order of the Board will dismiss the appeal, this judgment should suffice to make the position clear, namely that the reasoning of the Court of Appeal was wrong but that the claim must, for different reasons, fail.