In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2006: No. 39

IN THE MATTER OF AN APPEAL PURSUANT TO THE HUMAN RIGHTS ACT 1981

AND IN THE MATTER OF ORDER 55 OF THE RULES OF THE SUPREME COURT

BETWEEN:

AHMED TROY CAINES

Appellant

-and-

THE PUBLIC SERVICE COMMISSION
THE DEPARTMENT OF HUMAN RESOURCES
WINIFRED FOSTINE-DESILVA
(Collector of Customs)
MINISTER OF FINANCE

Respondents

Date of Hearing: Wednesday April 23, 2008
Date of Judgment: Wednesday May 14, 2008

Mark Diel of Marshall Diel & Myers for the Appellant; and
Gregory Howard of the Attorney General's Chambers for the Respondents.

JUDGMENT

INTRODUCTION

1. This is an appeal under section 21 of the Human Rights Act 1981 ('the Act'). The appeal is against the decision of a Board of Inquiry ('the Board') appointed by the

Minister under section 18[1] of the Act to hear a complaint of discrimination by the appellant against the respondents.

2. The appellant is a Customs Officer. In 2002 he held the rank of Senior Customs Officer, having been in the service since 1983. He, amongst others, applied for the job of Assistant Collector of Customs, when it was advertised internally. At that time Assistant Collector was not the next step up for him, the next post in the hierarchy being Principal Customs Officer. None of the applicants were appointed as a result of that recruitment round, a decision being taken to recruit overseas, and that was notified to all the staff by a memorandum of 4 September 2002[2], which said *inter alia* –

> "None of the candidates were able to persuade the Panel that they had the prerequisite management, administrative and financial experience required to successfully carry out the duties of the post. The Panel recommended, and the Public Service Commission authorized, for the post to be advertised overseas and filled with a fully trained Customs manager on a three-year fixed term basis. During this period all officers currently holding management positions will be offered additional training to prepare them for the position and the post will be re-advertised".

3. The appellant made his first complaint of discrimination under the Act to the Human Rights Commission ('the Commission') on 8 January 2003. Subsequent to that, and as a

---

[1] **References to a board of inquiry**

18 (1) Where—

(a) it appears to the Commission that—

(i) it is unlikely in the circumstances to be able to settle the causes of a complaint; or

(ii) the Commission has been trying for a period of nine months to settle the causes of a complaint but has been unsuccessful,

and the complaint is not of such a kind or of such gravity as to warrant a prosecution, the Commission shall refer the complaint to the Minister who may, in his discretion, refer it to a board of inquiry appointed under subsection (2).

. . .

(2) The Minister shall from time to time publish a list of persons from whom he shall select boards of inquiry required for the purposes of subsection (1) and, where he decides to submit a complaint to such a board, he shall appoint one or more persons from such list to be the board; and if he appoints more than one person he shall nominate one of those persons to be the Chairman.

[2] See p. 92 of the record.

result of the overseas recruitment exercise, a female Canadian Customs Officer, Mrs. Joan Crown, was appointed to the post with effect from 3 March 2003. According to the Board's decision, the appellant then made further complaints on 13 August 2003 and 3 October 2003, but these were apparently in the same terms, and the Board treated the last complaint as the one before it. In December 2002 a vacancy for the post of Principal Customs Officer was advertised, and the appellant also applied for that, but was not appointed. An attempt to expand the complaint by Further and Better Particulars of 18 April 2005 to include that was refused by the Board, although they let it in by the back door as an allegation of retaliation, and they considered and dealt with it on that basis.

4. The Board was appointed on 4th January 2005, after a preliminary investigation by the staff of the Commission. The Board appears to have commenced its hearings on 15 September 2005, when it dealt with discovery and other procedural issues, and this continued on 16 September. The hearing then resumed on 10 October 2005. In the interim, on 30 September, the Governor had issued a certificate that all documents relating to the non-appointment of Mr. Caines were privileged and that their production would not be in the public interest. This was apparently in response to a subpoena served on the Secretary to the Commission on 29 September, and it is fairly clear from the evidence that it was the Commission which took the matter up with the Governor[3].

5. The Governor's certificate was a matter for discussion when the hearing resumed on 10 October, and that continued on 12 October, when the Governor issued a further certificate, waiving privilege for those documents already disclosed and in the public domain, but extending it to include documents relating to the appointment of Mrs. Crown. This letter also identified the Governor's authority as reg. 4(1) of the Public Service Commission Regulations 2001[4], and stated that the public interest concerned was to "maintain the integrity of the functions of the Public Service Commission".

---

[3] See transcript p. 803

[4] **Privileged communications**

"4 (1) Any report, statement, record or other document which is prepared by, or on behalf of, or for the purposes of, the Commission or which is a communication to or from the Commission, or any member thereof acting in the course of his duties as such, shall be privileged in that in the event of legal proceedings

6. The hearing proper finally got under way on 7 November 2005, with the evidence of the appellant. It then continued on 8 November, when the Board heard from the Collector of Customs, and 9 November, when there was evidence from the Secretary of the Public Service Commission, although she was restricted in what she could say by the Governor's certificate. The transcript ends there.

7. The decision of the Board was eventually delivered on 11 October 2006, nearly a year after the conclusion of the evidential hearing. There is no explanation for what, on the face of it, seems an unacceptable delay. Nor did the delays end there. The Notice of Appeal was issued on 3 November 2006, but it did not come on for hearing until 23 April 2008. I am told that the reason for this delay was that the Commission could not find the documents exhibited at the hearing, and that the record had to be recreated. Given that I was referred to almost none of those documents, that seems a rather pointless exercise, made worse by the fact that in July last year I gave directions for the record to be agreed within 21 days, and the matter to be set down for hearing. It is, of course, undesirable for matters such as this to drag on almost indefinitely, and it is the duty of all parties to ensure that they do not.

8. The Board gave a written judgment, and they concluded:

> "The Panel finds having considered the evidence before it that there was no retaliation against the Complainant for making his complaint to the Human Rights Commission when he was not offered the position of Principle Customs Officer.
>
> The Panel after considering all of the evidence and listening to all the witnesses before it find as a fact that there has been no discrimination against the Complaint (sic). Having said that, clearly the way that promotions and the state of labor relations in the Customs Service were conducted at the time of the application of the Complainant for the position of Assistant Collector of Customs together with the errors in the advertising of the positions would and did contribute to this Complainant's belief that he was being discriminated against, but it is the finding of this Panel that it is a belief without the support of evidence."

The Board, therefore, dismissed the complaint against all the respondents.

---

no person shall be required to make discovery of such document or to produce it for inspection if the Governor, acting in his discretion, certifies that such discovery or production is not in the public interest."

THE LAW ON DISCRIMINATION

9. The complaints allege discrimination on the grounds of race and national origin. Discrimination is defined in section 2(2) of the Act:

> "(2) For the purposes of this Act a person shall be deemed to discriminate against another person—
>
> (a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because—
>
> (i) of his race, place of origin, colour, or ancestry;
>
> (ii) . . . "

10. To be unlawful under the Act discrimination must fall within one of its operative sections, and the relevant provisions in respect of employment are contained in section 6, subsection (1) of which lists various prohibited ways of discriminating. The applicant brought his complaint under three of those, being paragraphs (c), (f) and (g), which provide -

> **"Employers not to discriminate**
>
> 6 (1) Subject to subsection (6) no person shall discriminate against any person in any of the ways set out in section 2(2) by—
>
> (c) refusing to train, promote or transfer an employee;
>
> (f) maintaining separate lines of progression for advancement in employment or separate seniority lists, in either case based upon criteria specified in section 2(2)(a), where the maintenance will adversely affect any employee; or
>
> (g) providing in respect of any employee any special term or condition of employment: . . . "

THE APPEAL

11. The appeal is brought under section 21[5] of the Act, which confers the right of appeal on a party "against whom an order has been made by a board of inquiry". The powers to make orders against parties are set out in section 20, and these include powers to order compliance with the Act, to award compensation and costs. None of those orders were in fact made against this appellant, and it may be, therefore, that in this case no appeal lies. However, the point was not taken at the hearing of the appeal, and I do not consider it further, merely flagging it.

12. The Court's powers on such an appeal are set out in section 21(3) of the Act –

> "(3) An appeal under this section may be made on questions of law or fact or both and the Court may affirm or reverse the decision or order of the board or the Court may substitute its own order for that of the board."

The procedure on such an appeal is governed by Order 55 of the Rules of the Supreme Court 1985. There are also well established principles governing the approach of an appellate court. Such a court will not interfere with the exercise of a discretion unless it can be shown that the person to whom that discretion was entrusted erred in principle, and it will not lightly interfere with findings of fact by a decision maker who has had the benefit of hearing the witnesses and seeing them cross-examined.

13. The relief sought in the Notice of Appeal was that the decision be quashed and there be an assessment of damages either by this Court or the Board. Either seems misconceived. Were I to quash the decision, it would not amount to a finding that the

---

[5] **Appeal from decision of boards of inquiry**

21 (1) Any party against whom an order has been made by a board of inquiry may, subject to this section, appeal to the Supreme Court.

(2) Any party to the proceedings before a board of inquiry shall be entitled to be heard on the appeal and the Commission shall likewise, if it so wishes, be entitled to be heard.

(3) An appeal under this section may be made on questions of law or fact or both and the Court may affirm or reverse the decision or order of the board or the Court may substitute its own order for that of the board.

appellant had been discriminated against. It would leave nothing. Before damages can be assessed there would have to be a finding that the appellant had been discriminated against. That is not a finding I could properly make, at least not without an extensive review and consideration of the evidence, and even then I would have had no chance to assess the witnesses. In such a case the proper order would, in my judgment, be to remit the matter to the Board for rehearing and determination by it, pursuant to RSC Order 55, r. 7(5)[6], but in the event that does not arise.

THE ISSUES

14. There are six grounds of appeal, but really they cluster around three broad issues:

(i) Who were the proper parties?

(ii) Was the Canadian appointee, Mrs. Crown, qualified?

(iii) What inferences, if any, should be drawn from the Governor's certificate?

(i) Who were the proper parties?

15. The Board found at p. 8 of the decision that the Governor was the appellant's employer, apparently because the appointment of public officers is vested, by the Constitution, in the Governor. The Governor was not a respondent to the complaint, and Mr. Diel complains that that point was only taken in closing submissions, and he was not given an opportunity to amend to meet it, or to address the issue in evidence.

16. It seems to me, with respect, that this is a complete red-herring. Government employees are employed by the Government of Bermuda. The full way of expressing that is "the service of the Crown in a civil capacity in respect of the government of

[6] "(5) The Court may give any judgment or decision or make any order which ought to have been given or made by the court, tribunal or person and make such further or other order as the case may require *or may remit the matter with the opinion of the Court for rehearing and determination by it or him*."

Bermuda[7]". However, in most of the extra-constitutional legislation governing the public service that is handily condensed to 'the Government of Bermuda[8]'. For these and similar purposes, the Government of Bermuda is deemed to have a personal identity as a corporation sole.[9]

17. The confusion appears to have been introduced by the then counsel for the respondents, and to have been based upon the fact that the Governor is the nominal agency for making appointments to the public service under section 82 of the Constitution.[10] However, that does not give him a discretion or a choice about appointments, for he is obliged to "act in accordance with the recommendation of the Public Service Commission". That mandates him to act as they recommend, subject only to the right to ask them to reconsider once [11]. Moreover, a court is obliged to assume he did act on their recommendation, because that question may not be inquired into by any court[12]. The end result is that it is the Public Service Commission which is the decision making body in respect of appointments within the public service.

18. In the circumstances, therefore, the Board had the relevant agencies before it, being the Public Service Commission and the Collector of Customs, who had chaired the interview panel which made the initial recommendations concerning this post. The essence of the appellant's complaint was that he had been refused promotion on the grounds of race or national origin, and either or both of the Public Service Commission

---

[7] See the definition of "public service" in section 102(1) of the Constitution, and section 3 of the Interpretation Act 1951.
[8] See e.g. the definition of "Government employee" in the Government Employees (Disability etc. Benefits) Act 1953; and the definition of "public service" in the Public Service Superannuation Act 1981, where it is defined as "service in a civil capacity under the Government of Bermuda".
[9] See section 44 of the Interpretation Act 1951.
[10] **Appointment etc., of public officers**

> 82 (1) Subject to the provisions of this Constitution, power to make appointments to public offices, and to remove or exercise disciplinary control over persons holding or acting in such offices, is vested in the Governor acting in accordance with the recommendation of the Public Service Commission.

[11] See s. 21(3) of the Constitution.
[12] See Ibid. s. 21(6).

and the Collector could, in theory, have been responsible for that. It would not have advanced matters in any way for the Governor to have been joined[13].

19. Nevertheless, it does seem as if the Board allowed itself to be bemused by this point. On page 8 it states what is (subject to the erroneous substitution of "subsection (6)" for "section 6") the correct position:

> "While subsection (6) does not say expressly employer, clearly it must include employer or a person acting for the employer. That person could discriminate against an employee (expressly set out in the section) by refusing to do the things set out in (c) (f) (g) of Subsection (6) (set out above) as read with section 2(2)."

The Board got it right again in the last paragraph on page 10, where it appeared to accept the submission that the Public Service Commission was capable of discriminatory conduct within section 6(1)(c) of the Act, but three paragraphs later it seems to resile from that:

> "Section 6(1)(c) does not assist the Complainant as it is directed at the acts of an employer, and it is accepted that neither the PSC, Mrs. Fostine-Desilva or the Collector of Customs were the Complainant's employer."

20. I cannot reconcile those statements, and the Board's approach is such that, had it decided the complaint on this point alone, I would have been concerned. But in the end it did not. In the end it also decided the complaint on the evidence, saying:

> "However if we are wrong about our interpretation of this section [i.e. section 6] there still remains, in our view, the inescapable fact that there is no evidence of discrimination contrary to section 2(2) under this section or otherwise."[14]

---

[13] The Board found that there was no case at all against the other two nominal respondents to the complaints, being the Department of Human Resources and the Minister of Finance, and I do not understand the appellant to challenge that.

[14] See page 11 of the decision. See also the Board's conclusion set out in paragraph 8 of this Judgment, and the further sections quoted in paragraphs 29 - 31 below.

(ii) The Qualifications of the Appointee

21. The argument turns on one of the requirements in the job description for an Assistant Collector of Customs. The job description calls for "a Bachelor's degree in Business/Management Sciences or equivalent". The appellant had a BSc in Management Studies and an MA in Finance, so he more than met this aspect of the requirements. Mrs. Crown, however, had a BA in English and Italian. At the hearing before the Board, there was argument and evidence as to whether this was properly regarded as meeting the requirement in the job description, the point being whether equivalency related to the grade or the subject of the degree.

22. It is unnecessary to resolve this. The question before the Board was not whether the Public Service Commission was entitled to appoint Mrs. Crown, but whether in doing so, and in failing to appoint the appellant, they were motivated by racial bias. The equivalency question was but one aspect of that. The weight to attach to it was a matter for the Board, and there is nothing to suggest that they went wrong in that respect.

23. In particular, this was not like the case of a lawyer or a doctor, where a certain qualification is an absolute prerequisite, and it is an abuse of language to describe Mrs. Crown as "unqualified," as Mr. Diel was in the habit of doing. In fact, she had an impressive curriculum vitae, and her wide experience was something which any rational appointments agency could properly take into account. The weight to be given to it when appointing Mrs. Crown was very much a matter for the Public Service Commission.

(iii) The Inference from the Governor's Certificate

24. The Board were plainly dismayed by the assertion of privilege, and felt that it "had a chilling effect" on the whole inquiry. They were invited to draw an adverse inference from it, but in the end decided that that would be inappropriate:

> "The failure to produce the evidence is as a consequence of the Fiat[15] which the tribunal has no power to set aside or ignore or draw an adverse inference from the failure to adduce it."

[15] This was how the Board referred to the Governor's certificate throughout its decision.

25. Mr. Diel argues that that was wrong and that they should have drawn adverse inferences from the issue of the Governor's certificate. However, in my judgment the Board was not wrong. The confidentiality of the Public Service Commission is recognized by the Constitution. Thus section 84(5) provides -

> "(5) Subject to the provisions of this Constitution, the Governor, acting after consultation with the Premier and the Public Service Commission, may by regulations make provision for regulating and facilitating the performance by the Commission of its functions under this Constitution, including (without prejudice to the generality of the foregoing power) provision for any of the following matters—
>
> (a) . . .
>
> (b) the protection and privileges of members of the Commission in respect of the performance of their functions and *the privilege of communications to and from the Commission and its members in the case of legal proceedings*;" [my emphasis]

26. Reg. 4(1) of the Regulations (see above), under which the Governor acted, was made pursuant to that provision, and the explanation given in his second certificate is consonant with it. The Constitution describes the confidentiality of the Public Service Commission's deliberations and communications as a "privilege." As with the exercise of any privilege it would, therefore, be wrong to draw an adverse inference from its exercise. No authority was produced for this proposition[16], but I consider it trite law, for it robs the privilege of its purpose and utility if it can be subject to such a collateral attack.

27. Were I wrong on that, and were it the case that the Board should at least have considered whether to draw an adverse inference from the certificate, I would still not have interfered with their decision, for two reasons.

28. First, some at least of the authorities on which Mr. Diel relied were cases concerning the proper inference to be drawn from a failure to call evidence or offer an explanation. But this was not a case where the respondents failed to produce evidence to rebut the allegation or explain the decision. In this case ample explanation was forthcoming. The

[16] The respondents did cite R (Commissioners of Customs & excise) v Nottingham Magistrates' Court [2004] EWHC 1922, but whatever else that case decides, it is not this.

respondents called the Collector of Customs, against whom the primary allegation was made, and she gave evidence and was cross-examined. There is no evidence that she played any part in procuring the certificate, and, indeed, she appeared to resent it[17]. The Collector explained that the appellant lacked the necessary senior management experience, and that was not contested[18]. As a result he failed the interview process[19], at which point he was passed over, and, because there were no other suitable local candidates, the post was advertised overseas. At the conclusion of the overseas round, when it is perhaps important to bear in mind that the appellant was no longer in contention, Mrs. Crown was selected. She had nine years senior management experience and the Collector considered her degree equivalent[20]. All of that is an explanation. It was for the Board to consider whether they believed it and, if they did, whether it was an adequate explanation. They plainly accepted it on both counts, and I see no reason to dissent from their conclusion.

29. Second, the cases relied upon by Mr. Diel show that an adverse inference alone is not enough to prove a case. There must be some evidence, however weak, adduced by the complainant[21]. However, the Board found that there was no such evidence:

> "Even if the panel accepted the evidence of the Complainant without question or reservation he did not offer one scintilla of evidence that his employer or those said to be acting for the employer did, knew, accepted, allowed or encouraged any thing which could be said to fall within the terms of (c) (f) (g) of Subsection (6) (set out above) as read with section 2(2)."

30. Indeed, this was a theme constantly repeated throughout the Board's written reasons. In respect of the Collector of Customs, against whom the complaint was made in both her official and personal capacities, the Board held:

> "Was there any evidence that she discriminated against the Complainant in not recommending him for the appointment as Assistant Collector of Customs. We

[17] See the Board's decision, p. 5.
[18] Indeed, it was admitted: see transcript, p. 358, ll. 19 – 23.
[19] Transcript, p. 609, l. 11
[20] Transcript, p. 571 l. 18 – p. 572 l. 3
[21] See Mr. Diel's submissions, p. 13, at (3).

> are asked to draw that inference from the evidence. We are unable to do so as there is no evidence before us that shows that Mrs. Fostine-Desilva in either her personal capacity or as Collector of Customs allowed, encouraged, supported or discriminated against the Complainant."

31. As to the Public Service Commission, the Board similarly held:

> "No evidence has been adduced to show that the PSC in not recommending the Complainant for the position of Assistant Collector of Customs did so in a way which is in breach of section 2(2) of the Act."

32. The Board even addressed this absence of evidence in the light of the Governor's certificate:

> "Notwithstanding the issuing of the Fiat however, there is nothing before the Panel to support a complaint that any of the Respondents acted unlawfully in their treatment of Mr. Caines."

CONCLUSIONS

33. The Board were the body entrusted by the Act with determining the appellant's complaint of discrimination. They were entitled to reach the factual conclusions that they did, and, for the reasons given above, I do not consider that they erred in their approach. I find, therefore, that the complaints made about their decision are without foundation, and I dismiss the appeal. I will hear the parties on costs.

Dated the 14th of May 2008.

Richard W. Ground
Chief Justice