

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2018/0028

BETWEEN:

BRIAN SAMUEL

Appellant

and

THE PUBLIC SERVICE COMMISSION

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

The Hon. Mr. Brian Cottle

Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Prospere for the Appellant

Mr. Vilan Edward and Mrs. Grace Ward-Glasgow for the Respondent

2021: March 9;
2022: August 17.

Civil appeal – Judicial review – Irrationality – Procedural impropriety – Wednesbury unreasonableness – Whether learned trial judge acted unreasonably by failing to properly analyse a crucial consideration that weighed heavily against the appellant when the Public Service Commission was considering his interview - Whether the procedures adopted by the Public Service Commission were manifestly unfair to the appellant and contravened the rules of natural justice

The appellant was an unsuccessful applicant for promotion to the position of Superintendent of Police within the Royal Saint Lucia Police Force. He was dissatisfied with his non-selection and sought and obtained leave to apply for judicial review of the decision by the Public Service Commission (“PSC”) to appoint a competing candidate for the post. The grounds upon which he relied were, crucially, the allegation that the PSC had acted irrationally,

unreasonably and in breach of the principles of fairness and natural justice. The learned judge considered the application and refused to grant the appellant the relief he sought.

Being dissatisfied with the learned judge's decision, the appellant appealed. At the hearing of the appeal, there were two issues for the Court's determination. The first was whether the learned trial judge acted unreasonably by failing to properly analyse a very crucial consideration that weighed heavily against the appellant when the PSC was considering his interview – the issue of the results of a polygraph test. The second complaint was that the procedures adopted by the PSC were manifestly unfair to the appellant and contravened the rules of natural justice.

Held: dismissing the appeal and making no order as to costs, that:

1. In reviewing administrative actions, a reviewing court is concerned to examine the impugned action to ensure that it was not arrived at illegally, irrationally, or by means of procedural impropriety. Irrationality is defined as 'where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision'. It is a statutory requirement for the appointment of a candidate to the post of Superintendent of Police to have successfully undergone polygraph testing. The legislation places the burden of supplying the information on the Ministry of Home Affairs and National Security. The Ministry of the Public Service, Information and Broadcasting was then mandated to submit this information to the PSC for consideration. There is no evidence that either ministry carried out these tasks and there was no complaint before the learned judge about this failure. The learned judge did consider the actions of the PSC concerning the polygraph test and concluded that the PSC had been reasonable in the treatment of the appellant during his evaluation. The PSC did not rely on the absence of the polygraph test in selection of a successful candidate but merely concluded that the performance of another candidate was superior to that of the appellant. The learned judge cannot be said to have been unreasonable in her analysis.

Gary Nelson v Attorney General of Antigua and Barbuda et al ANUCVAP 2012/0001 (delivered 26th May 2014, unreported) applied; **Council of Civil Service Unions and others v Minister for the Civil Service** 1984 3 All ER 935 applied.

2. An appellant alleging discrimination must show that he has been treated differently to some other similarly circumstanced person or persons. In this case, the appellant has not demonstrated that that test had been met. He is an applicant who has been outperformed at the interview by other applicants and the facts do not substantiate that he was not successful merely because of the absence of confirmation that he had been polygraphed. It would be immaterial that he be allowed to be tested after the interview as he had not been selected for other reasons, the unreasonableness of which in the *Wednesbury* sense have not been demonstrated. There is no basis to disturb the learned judge's finding that the appellant failed to provide evidence that he had been the subject of discriminatory treatment.

Bhagwandeem v Attorney General of Trinidad and Tobago [2004] UKPC 21 applied.

JUDGMENT

- [1] **COTTLE JA [AG]:** This appellant was an unsuccessful applicant for promotion to the position of Superintendent of Police within the Royal Saint Lucia Police Force. He was dissatisfied with his non- selection. He sought and obtained leave to apply for judicial review of the decision by the Public Service Commission (“PSC”) to appoint a competing candidate for the post. The learned trial judge considered his application and in a carefully written judgment she refused to grant the appellant the relief he sought. She made no order as to costs as is the common practice in these courts when dealing with matters for judicial review of administrative actions when such actions are reasonably instituted. In his appeal against the decision in the court below, the appellant listed several grounds of appeal. Before this Court some of those grounds were abandoned. This appeal deals with the remaining issues which were helpfully distilled by counsel for the appellant. I shall list them below but a brief foray into the facts is warranted.

The Facts

- [2] The appellant had enlisted in the Royal Saint Lucia Police Force in 1983. He served in many departments and by 2016 he had attained the rank of Assistant Superintendent of Police. In February 2016, the appellant and other candidates were interviewed for the vacant position of Superintendent of Police. The appellant thought that he had performed brilliantly in the interview. He was disappointed when he was not selected as the successful interviewee. He believed that the respondent had acted unreasonably when they chose another candidate instead. He thereupon sought and obtained leave to file a claim for judicial review of the decision of the PSC to appoint another candidate. The grounds upon which he relied were, crucially, the allegation that the PSC had acted irrationally, unreasonably and in breach of the principles of fairness and natural justice.

The Grounds of Appeal

- [3] At the hearing of the appeal, counsel for the appellant quite properly conceded that the only grounds of appeal on which the appellant would rely can be distilled into two

issues. The first is whether the learned trial judge acted unreasonably by failing to properly analyse a very crucial consideration that weighed heavily against the appellant when the PSC was considering his interview. The second complaint is that the procedures adopted by the PSC were manifestly unfair to the appellant and contravened the rules of natural justice.

- [4] The very crucial consideration that the appellant speaks of is the issue of the results of a polygraph test. At the stage of the interview, the PSC wrote to the Commissioner of Police enquiring about the results of a polygraph test of the appellant. The Commissioner of Police responded that he had no evidence in his files which showed that the appellant had been tested. The appellant produced no evidence before the PSC that he had been tested. The learned trial judge noted that the appellant had presented an email which he said showed that he had been tested. The author of the email did not testify at the trial and the judge attached little or no evidential value to the document. The appellant showed nothing else which could substantiate his claim of having been tested. There was nothing before the judge which could support the conclusion that the absence of confirmation of polygraph testing played a crucial role or indeed an important part in the decision of the PSC not to select that appellant for the vacant position.
- [5] The learned judge noted that the chairman of the PSC in his affidavit swore that although the appellant performed well in the interview, the performance of another candidate was superior. There can be no complaint that the judge acted unreasonably in her analysis of the evidence on this point. The difficulty is that the appellant seeks to contend that the decision to appoint another candidate was heavily influenced because the PSC was not persuaded that he had undergone polygraph testing. The learned judge concluded that the reason that the appellant failed to secure the position was simply that he was not the best applicant as evaluated by the PSC. Quite properly the judge declined to substitute her evaluation of the performance of the candidates during the application process for that of the PSC.

- [6] The applicable test is well known. In reviewing administrative actions, a reviewing court is concerned to examine the impugned action to ensure that it was not arrived at illegally, irrationally, or by means of some procedural impropriety. The Court of Appeal repeated the test in the case of **Gary Nelson v Attorney General of Antigua and Barbuda et al.**¹
- [7] In **Council of Civil Service Unions and others v Minister for the Civil Service**² Lord Diplock in the House of Lords defined illegality in the context of judicial review as ‘where the decision-making body has been guilty of an error of law, e.g. by purporting to exercise a power it does not possess’. The appellant in this case does not suggest that the PSC acted illegally. Lord Diplock went on to define irrationality as ‘where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision’. Procedural impropriety in the view of the learned law Lord connotes a failure of the decision-making body to perform its ‘duty to act fairly’.
- [8] In the present case, the appellant accepts that the PSC was duty bound to consider the question of a candidate having successfully undergone polygraph testing. This was a statutory requirement for the appointment of a candidate to the post of Superintendent of Police. The appellant did not challenge the constitutionality or lawfulness of the relevant legislation in his pleadings before the learned judge. At paragraphs 32 and 33 of her judgment the judge noted this and concluded at paragraph 33 that until ‘a court [declares] the requirement for polygraph testing to be unlawful or unconstitutional, it is to be presumed lawful (*omnia praesumuntur rite esse acta*)’.
- [9] The PSC carried out the statutory mandate imposed on it. I am in agreement with the learned judge that in so acting the PSC did not act unreasonably. It appears to me that the true nub of the appellant’s complaint under this head is that the PSC failed to

¹ ANUCVAP 2012/0001 (delivered 26th May 2014, unreported).

² 1984 3 All ER 935.

ascertain from the relevant ministries, confirmation of his having undergone polygraph testing. The legislation placed the burden of supplying the information on the Ministry of Home Affairs and National Security. The Ministry of the Public Service, Information and Broadcasting was then mandated to submit this information to the PSC for consideration. There is no evidence that either ministry carried out these tasks. There was no complaint before the learned judge about this failure. The argument of the appellant, to my mind, misunderstands the role of the trial judge upon the consideration of an application for judicial review. Her Ladyship did consider the actions of the PSC concerning the polygraph test. She concluded that the PSC had been reasonable in the treatment of the appellant during his evaluation. The PSC did not rely on the absence of the polygraph test in selection of a successful candidate. They merely concluded that the performance of another candidate was superior to that of the appellant. The learned judge cannot be said to have been unreasonable in her analysis.

- [10] The second ground upon which the appellant relies is the suggestion that the PSC was manifestly unfair in its procedure and contravened the rules of natural justice. This complaint is based on the assertion that the PSC allowed one Gregory Michael Alexander to undergo polygraph testing after having been interviewed for the post of Assistant Superintendent of Police. This ground can be disposed of very shortly. The Privy Council, in the case of **Bhagwandeem v Attorney General of Trinidad and Tobago**³ noted that an appellant alleging discrimination must show that he has been treated differently to some other similarly circumstanced person or persons. The present appellant has not demonstrated that that test had been met. He is an applicant who has been outperformed at the interview by other applicants. It may be that Mr. Gregory Michael Alexander was the best performer at the interviews for the post of Assistant Superintendent of Police and the PSC then allowed him to completely qualify himself for appointment by undergoing the polygraph test. His position is in no way analogous to that of the present appellant.

³ [2004] UKPC 21.

[11] The facts do not substantiate that this appellant was not successful merely because of the absence of confirmation that he had been polygraphed. It would be immaterial that he be allowed to be tested after the interview as he had not been selected for other reasons, the unreasonableness of which in the Wednesbury sense have not been demonstrated. At paragraph 90 of her judgment, the judge noted that the appellant had failed to produce evidence that he had been the subject of discriminatory treatment. I see no reason to disturb this finding.

[12] For the reasons I have explained, I conclude that the appeal in this case should be dismissed. As the judge did in the court below, I would make no order as to costs.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar