

NMCS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 16 OF 2003

**BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.**

BETWEEN	LACKSTON ROBINSON	APPELLANT
AND	DAISY COKE	1ST RESPONDENT
AND	MICHAEL FENNELL	2ND RESPONDENT
AND	EDWIN JONES	3RD RESPONDENT
AND	PAULINE FINDLAY	4TH RESPONDENT
AND	GEORGE PHILLIP	5TH RESPONDENT

(Members of the Public Service Commission)

AND	THE ATTORNEY GENERAL	6TH RESPONDENT
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R.N.A Henriques Q.C and Ransford Braham instructed by Livingston Alexander and Levy for Appellant.

Dennis Morrison Q.C, Mrs. Nicole Foster Pusey and Miss Katherine Denbow instructed by the Director of State Proceedings for Respondents.

October 3, 4, 5 and 6, 2005; & November 8, 2006

FORTE, P.

I have had the opportunity of reading in draft the judgment of Smith, J.A. and agree with his decision and the reasons therefor. However, for emphasis I re-iterate one aspect.

At the time when the appellant was appointed to act as Deputy Solicitor General, there was no clear vacancy, and consequently because of his seniority the provisions of section 18(2) would give him some claim to be appointed to act in the post. The position of Deputy Solicitor General became vacant thereafter when Mr. Patrick Robinson proceeded on pre-retirement leave. Consequently, any appointment to act in the post became one which was "prelude" to the filling of the substantive post. The provisions of section 18(1) then became applicable bringing into consideration the matters set out in section 17. Section 17(3) sets out inter alia, the following which are to be taken into account in recommending an officer to act in such circumstance:

- "(a) his general fitness
- (b) the position of his name on the list, and
- (c) any specific recommendation of the Permanent Secretary or Head of Department for filling the particular post.

The Solicitor General as head of the department would be required to make his recommendation in regard to the appointment of the appropriate officer.

When the post became vacant, different considerations became relevant, as to the officer to be appointed to act in the vacant post. In

particular, seniority was not the only criteria to be used, but was only one of the considerations. In those circumstances, particularly having regard to the fact that the Solicitor General was relatively new to the post, it was fair and reasonable for him to be given the opportunity to see how another officer would perform in the post before making his recommendation. There was no decision that ultimately the appellant would not be appointed to the post.

In my view, given those factors there could be no valid complaint that the Commission and/or the Solicitor General acted in breach of the provisions of the regulations.

SMITH, J.A:

This appeal concerns the question of the power of the Solicitor General to recommend the reversion of the appellant and the appointment of a junior person to act in his place. The appellant entered the Civil Service after graduating from The Norman Manley Law School in 1988. He was appointed to act as Crown Counsel in the Attorney General's Department. In 1990 he was confirmed in that post.

In 1991 he was appointed to act as Assistant Attorney General. In 1993 his appointment to the substantive post was approved by the Public Services Commission on the recommendation of the Solicitor General.

In February, 1999, on the recommendation of the Solicitor General the Public Services Commission approved his appointment as Divisional Director.

In November, 2000, the Solicitor General recommended his appointment to act as Deputy Solicitor General vice Mr. Patrick Robinson and in place of Mr. Lennox Campbell, Q.C. who was appointed to act as a Puisne Judge. Mr. Patrick Robinson, who was seconded to the United Nations International Criminal Tribunal, retired from the Public Service in November 2002. Mr. Lennox Campbell was confirmed as a Pusine Judge in August 2001. Accordingly, the post became vacant.

The late Dr. Kenneth Ratray Q.C. demitted the office of Solicitor General in December, 2000 and Mr. Michael Hylton, Q.C. was appointed to that office in January, 2001.

According to the appellant sometime in October, 2001 the Solicitor General informed him that he intended to recommend that Mr. Hugh Salmon act as Deputy Solicitor General for a period of six months after which he would decide who should be appointed Deputy Solicitor General. Mr. Salmon had joined the Department in March, 1997. The appellant expressed his disagreement with the Solicitor General's proposal. On the 19th October 2001, the Solicitor General addressed the following memorandum to the appellant:

"Further to our recent discussions, I confirm that I propose, to implement the following with effect from December 1, 2001:

- (a) I am recommending to the Public Service Commission that Mr. Salmon act as Deputy Solicitor General for a period of six (6) months. He will continue to do the Commercial and other legal work which he is now doing, and will also be responsible for the Deputy Solicitor General's administrative functions indicated on our organizational chart.
- (b) Mr. Robinson will continue to do Litigation work, and will assume responsibility as Director of the General Legal Advice Division.
- (c) You can decide whether any other adjustments (e.g. in relation to rooms) will be necessary to effect the above."

The Solicitor General also sent the appellant a memo captioned, "Your Status and Performance as Deputy Solicitor General (Acting.)" I will return to this memo. On the same day the Solicitor General wrote to the Chief Personnel Officer in the Office of the Services Commission in the following terms:

"As you know, Mr. Lackston Robinson has been acting as Deputy Solicitor General, vice Mr. Patrick Robinson who is on pre-retirement leave.

It would be appropriate, in my view, that other persons be allowed an opportunity to act in that capacity before a decision is made as to who should be recommended in due course for appointment.

I therefore recommend that with effect from December 1, 2001, and for a period of six (6) months. Mr. Hugh Salmon act as Deputy Solicitor General. Mr. Lackston Robinson would therefore revert on December 1 to his substantive post as Senior Assistant Attorney General."

Approval was given for Mr. Salmon to act in place of Mr. Lackston Robinson, the appellant. On the 9th April, 2002, the appellant filed an Originating Summons for the determination of the following questions (as amended):

- " 1. Whether or not the Solicitor General has power to rotate officers in the Attorney General's Department be they senior or junior to perform the functions of a higher office before making a recommendation to the Chief Personnel Officer under Section 18(2)(b) of the Public Service Regulations 1962.

2. The hierarchy of offices in the Attorney General's Department being the Attorney General, the Solicitor General and two Deputy Solicitors General one of which will become vacant whether or not it is the duty of the Solicitor General to recommend the most senior officer in the department to the rank of Deputy Solicitor General pursuant to the Regulations aforesaid.
3. Whether it is lawful for the Chief Personnel Officer to ignore the provisions of the Constitution and the Public Service Regulations 1961 where there is a clear vacancy in a post by appointing a person junior in rank to the Plaintiff without first making a determination as to whether the Plaintiff who at the material time was duly appointed to act in the said post, is suitable to be appointed to the post aforesaid.
4. Whether it is lawful for the Chief Personnel Officer to remove the Plaintiff from his post of Acting Deputy Solicitor General where a clear vacancy exists in relation to the said post for reasons other than those related to performance or conduct; in that
 - (i) there was no assessment of the Plaintiff's performance in the post as required by the Public Service Regulations 1961; and
 - (ii) the purported assessment was not disclosed to the plaintiff in order that he may have the opportunity to respond thereto, and consequently was deprived of being heard concerning same in breach of the rules of natural justice.

5. Whether the action of the Public Service Commission in reverting the Plaintiff to his substantive post with the consequential reduction in salary and other benefits amount to deprivation of property without lawful authority within the meaning of Section 18 of the Constitution.
6. Whether it is lawful for the Chief Personnel Officer to revert the Plaintiff to his substantive post on grounds other than those prescribed in the Public Service Regulations 1961.
7. The Plaintiff, having acted in the post for several months and there being a clear vacancy and having regard to the Public Service Regulations and established practice, had a legitimate expectation of being confirmed in the post, have the actions of the Chief Personnel Officer deprived the Plaintiff of the legitimate expectation of being confirmed."

The Originating Summons was dismissed by Harris J with costs to the respondents. This is an appeal against the decision of Harris J.

The Issues

Some fourteen (14) grounds of appeal were filed on behalf of the appellant. It is common ground that these grounds raised four (4) issues:

- "(1) Whether or not the system of rotation which the Solicitor General was implementing is permissible under the Public Service Regulations 1961, in particular section 18(2).
- (2) Whether or not the Chief Personnel Officer could on the fact of this matter make the decision to revert the appellant without his having the opportunity of being heard in particular by

reliance on the memo which the appellant had not had an opportunity to respond to.

- (3) Whether or not the appellant would have had a legitimate expectation pursuant to the Public Service Regulations that a junior officer would not be promoted to act over him without cause being shown why he should be reverted.
- (4) Whether or not the appellant has been denied procedural fairness in relation to the decision which had been made adverse to his interests both professional and economical."

Issue No 1 **The System of Rotation**

The Solicitor General in his memo dated October 19, 2001 and captioned "Your Status and Performance..." (supra) stated in the second paragraph:

"I am today writing to the Public Service Commission recommending that effective December 1, 2001, you cease acting as Deputy Solicitor General and revert to your substantive post. As discussed with you and with the Executive Committee, I am doing so on the ground that I would wish to see how other persons perform in that role before making a recommendation as to who should be appointed to fill the post when it becomes vacant..."

Mr. Henriques Q.C. for the appellant contends that Regulation 18(2) of the Public Service Regulations [1961] (The Regulations) circumscribes the power of the functionary making or recommending an acting appointment. The functionary, he argues, must confine himself to

Regulation 17 considerations. The learned trial judge, he contends, fell into error when she concluded that Regulation 18(2) did not in any way fetter the Solicitor General's right as to how he made his recommendation or as to whom he recommends to act in the post.

It might be convenient at this point to set out the provisions of Regulations 17 and 18:

"17—(1) From time to time as vacancies occur the Commission shall consider the eligibility of all officers for promotion, and in respect of every such officer shall take into account not only his seniority, experience and educational qualifications but also his merit and ability.

(2) For promotion to a post involving work of a routine nature more weight may be given to seniority than where the work involves greater responsibility and initiative. Merit and ability shall be given more weight progressively as the work involves a higher degree of responsibility and initiative.

(3) In the performance of its functions under paragraphs (1) and (2), the Commission shall take into account as respects each officer ---

- (a) his general fitness;
- (b) the position of his name on the seniority list;
- (c) his basic educational qualifications and any special qualifications;
- (d) any special course of training that he may have undergone (whether at the expense of the Government or otherwise);
- (e) markings and comments made in confidential reports by any Permanent Secretary or other senior officer under whom the officer worked during his service;

- (f) any letters of commendation in respect of any special work done by the officer;
- (g) the duties of which he has knowledge;
- (h) the duties of the post for which he is a candidate;
- (i) any specific recommendation of the Permanent Secretary or Head of Department for filling the particular post;
- (j) any previous employment of his in the public service or otherwise;
- (k) any special reports for which the Commissioner may call."

Regulation 18 –(1) reads:

"~~18—~~(1) The procedure for making a recommendation in relation to an acting appointment as a prelude to a substantive appointment shall be the same as that prescribed in regulation 17 in relation to a promotion.

(2) Where an acting appointment falls to be made otherwise than as a prelude to a substantive appointment the officer 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 post to which he is appointed to act."

By virtue of the **Delegation of Functions (Public Service) Order 1963**

the power to make acting appointments pursuant to Regulation 18(2) is vested in the Chief Personnel Officer (CPO): – see Section 3 item 10 of the Schedule.

Mr. Henriques submitted that the scheme mandates the procedure to be followed and must be complied with. It is, he argued, designed to prevent cronyism, arbitrariness or favouritism in the Public Service.

It is his contention that the proposal of the Solicitor General to have a junior officer act for a period of time otherwise than as a prelude to a substantive appointment, is clearly contrary to the Regulations. The general rule should have been followed. The Regulations do not recognize a system of rotation he submitted. The learned judge in giving recognition thereto fell into error, he said.

Learned Queen's Counsel for the appellant conceded that the general rule may be dispensed with for cause. However, he contended that it could only be dispensed with if it were shown that the appellant was completely unsuitable for the post. Further, he submitted that if the general rule was to be displaced it could only be done by taking into account those factors mentioned in Regulation 17. The learned judge, he concluded, fell into error when she held that Regulation 18(2) did not in any way fetter the Solicitor General's rights as to how he makes his recommendation or as to whom he recommends to act. Reliance was placed on the case of **Public Services Association v Industrial Development Corporation** No. 59 of 1993 Trinidad and Tobago (unreported), delivered 12th June, 1994.

Mr. Morrison, Q.C. for the respondents submitted that the learned trial judge was right, in holding that the general rule referred to in Regulation 18(2) (a) did not impose a mandatory condition for a senior officer to be automatically appointed to act in a higher post. The rule could be displaced. Further, he argued that the learned judge was right in concluding that the circumstances described by the Solicitor General were sufficient to displace the said general rule. It is his contention that the Solicitor General took an entirely reasonable position as a person who had just assumed office.

In my view the submissions of Mr. Morrison, Q.C. are correct. I am unable to accept the submissions of Mr. Henriques Q.C. that: "Section 18 (2) circumscribes the power of any functionary acting thereunder from making any recommendation without taking into account the factors set out in Section 17." (supra)

Section 124 of the **Jamaica (Constitution) Order in Council, 1962** establishes the Public Service Commission (the Commission). By virtue of Regulation 14 of the **Public Service Regulations 1961**, it is the duty of the Commission to make recommendations to the Governor General with respect to the appointments, promotions and transfers of certain public officers. The procedure prescribed under Regulation 17 relates to the performance of the functions of the Commission in their recommendation of officers for substantive appointment to fill vacancies. Regulation 17(3)

does not relate to the performance of the functions of the Solicitor General in recommending an officer to the Commission for appointment.

Regulation 18(1) provides that the procedure for making recommendation in relation to an acting appointment as a prelude to a substantive appointment shall be the same as that prescribed in Regulation 17(3) in relation to promotion. Appointments to act under Regulation 18(1) are made by the Governor General on the recommendation of the Commission. Thus the procedure prescribed under Regulation 17(3) are relevant to acting appointments under Regulation 18 (1). The Commission must take into account Regulation 17(3) in making a recommendation for acting appointments under Regulation 18 (1).

Regulation 18(2) concerns acting appointments otherwise than as a prelude to a substantive appointment. We have seen that the powers of the Governor General to make acting appointments under Regulation 18(2) were transferred to the CPO. Regulation 18(2) does not require the functionary acting thereunder to take into account the factors set out in Regulation 17(3) when making a recommendation for an acting appointment otherwise than as a prelude to a substantive appointment. Neither does it require the CPO to consider the said factors in relation to such appointments.

The appellant's complaint concerns an acting appointment otherwise than as a prelude to a substantive appointment. Accordingly, this falls under Regulation 18(2). Under this provision, generally, seniority is the determinative factor in choosing the person to be appointed to act. Counsel on both sides are at one that this general rule may be displaced or dispensed with.

The Solicitor General could therefore recommend that a person junior to the appellant be appointed to act. Of course, the decision as to who is to be appointed to act pursuant to Regulation 18(2) is within the discretion of the Chief Personnel Officer – see Section 3 item 10 of the **Delegation of Function (Public Service) Order 1963** (supra). It is the contention of Mr. Morrison, Q.C. that on the evidence the appellant was appointed to act as Deputy Solicitor General prior to Mr. Salmon. Thus, he argued, the general rule was applied as between the appellant and Mr. Salmon. I am inclined to agree with this view. However, even if the general rule was displaced in relation to the appellant (I am not saying it was) it is my view that the exercise of the Chief Personnel Officer's discretion was fair and reasonable and that Harris J (as she then was) was right in not disturbing it. I say this for the following reasons.

- (1) It was known to the Solicitor General and to the Chief Personnel Officer that Mr. Patrick Robinson, who occupied the post of Deputy

Solicitor General, was on pre-retirement leave thereby creating a vacancy.

(2) At the time when the Solicitor General assumed office the appellant was already acting as Deputy Solicitor General.

(3) In his communication of the 19th October, 2001 to the appellant and the Chief Personnel Officer, the Solicitor General indicated that he would wish to see persons other than the appellant act in the capacity of Deputy Solicitor General before deciding whom to recommend for the substantive appointment.

(4) In the memo captioned "Your Status and Performance as Deputy Solicitor General (Acting)" which was sent to the appellant and the Chief Personnel Officer, the Solicitor General enumerated his concerns about the appellant's performance in every area, and made it clear that he considered the appellant's performance to be unsatisfactory.

In ***Public Services Association v Industrial Development Corporation***

(supra) the Industrial Court of Trinidad and Tobago had to determine whether the Corporation had acted contrary to the provisions of a regulation similar to Regulation 18(2). In that case, as it is in this case, the complaint was that a worker was by-passed for promotion and that contrary to the provisions of the relevant regulation, an employee who was junior was put to act above her. The Industrial Court held that the

worker was unfairly by-passed as no evidence was advanced by the Corporation to show that the appointment in question was of an exceptional nature and hence taking it outside the dictate of the relevant regulation. This is not so in the instant case.

As I have already stated, in the instant case the circumstances in which the recommendation was made were sufficient to displace the general rule as to seniority. The finding of the judge below was correct.

Issue No. 2 –Legitimate Expectation of Procedural Fairness

Mr. Henriques, Q.C. submitted that the Regulations create a legitimate expectation for the benefit of members of the public service with respect to their promotion or otherwise. Procedural fairness, he contended, must be adopted when decisions are being made both adverse and complimentary to such officers. The Commission, he said, has to follow mandatorily the procedure set out in the Regulations. The appellant having acted in the post for several months had a legitimate expectation that a junior officer could not be promoted over him where such appointment was otherwise than a prelude to a substantive appointment. Further, he complained, the appellant was reverted without cause being established and without having an opportunity to challenge same. Learned Queen's Counsel for the appellant also submitted that

the appellant had a further legitimate expectation that the general rule would not be discarded on the basis of rotation which was not permissible under the regulations. Accordingly, he contended that where the CPO purported to act under Regulation 18(2) and revert the appellant she acted in breach of the Regulations. He added that she was also in breach of natural justice and procedural fairness when she placed reliance on a memo which she received on a request for an evaluation without affording the appellant the opportunity to respond thereto and relied on same to support her unlawful action. The learned trial judge, he submitted, erred when she found that the appellant chose not to respond to the memo in that the appellant did not know that it was sent to the Commission. Reliance was placed on **Doughnath Rajkumar v Kenneth Lalla and Others** Privy Council Appeal No. 1 of 2001 Trinidad and Tobago delivered 29th November, 2001; **Attorney General (N.S.W) v Quinn** [1990] 170 CLR 1FC 90/022; **Attorney General of Hong Kong v NG Yuen Shiu** [1983] 2WLR 735.

Mr. Morrison Q.C. on the other hand submitted that, where, as in the instant case, legitimate expectation is said to have its genesis in the Regulations themselves, the expectation cannot go beyond what the Regulations say. There was no evidence, he submitted, of any practice of considering the performance of a person acting in a post before he was reverted. Further, he said, there was no evidence of any representations

or undertakings to the appellant in this regard. He pointed out that, to the contrary, there was evidence that whenever the appellant was appointed to act, such appointment was limited by the words "until further orders". He referred to the undisputed evidence that when the Solicitor General was making the appointment for a junior person to act, the appellant was advised in advance. The assessment provided by the Solicitor General was not a factor which caused the appellant's reversion; it was merely a response to a request, he argued. He urged the Court to hold that the judge below was correct in concluding that there was nothing to ground the appellant's claim to legitimate expectation of procedural and professional fairness. He referred to the cases cited by the appellant and to **Council of Civil Service Unions (C.C.S.U) v Minister for Civil Service** [1985] 1 A.C. 374.

Where a person has no legal right to a benefit or privilege as a matter of private law he may have a legitimate expectation of receiving such benefit or privilege, and if so, the courts will protect his expectation by judicial review as a matter of public law – see the **C.C.S.U** case at page 701A. The claim of the appellant that he had a legitimate expectation of procedural fairness is based on Regulations 17 and 18(2). We have seen that by virtue of Regulation 18(2) where an acting appointment is to be made otherwise than as a prelude to a substantive appointment, as a general rule, seniority is the determinative factor. As I

have already stated, it is not in dispute that the general rule as to seniority may be displaced. I have already concluded that there was sufficient evidence to warrant the displacement of the general rule. The question now is whether the appellant had a right to be given an opportunity to be heard before he was reverted and a junior officer appointed to act in the post. In this regard the learned authors of **de Smith on Judicial Review of Administrative Action** have this to say:

"Where the right to procedural fairness has a statutory source then substantial guidance as to what should be provided can be obtained usually by construction of the legislation in question"- 5th Edn. para. 9-003

The burden of Mr. Henriques' submission is that once the vacancy arose Regulation 17 became operative in relation to the appellant. The CPO, he argued, was not entitled to revert him to his substantive post before considering his suitability for the post under Regulation 17.

The appellant started to act as Deputy Solicitor General in November 2000. That post became vacant. Mr. Patrick Robinson went on pre-retirement leave in January 2001 and Mr. Campbell was appointed Puisne Judge in August 2001. Accordingly, the appellant as of August 2001, was acting in a clear vacancy. But there is no dispute that at the time he was appointed to act that appointment was made by the CPO pursuant to Regulation 18(2) and that the acting appointment was

made subject to "further orders" – see letter dated November 20, 2000 at page 45 of the Record.

Is Mr. Henriques' contention that in the circumstances the appellant had a legitimate expectation that he would at least be evaluated and would only be reverted if the evaluation proved unsatisfactory, correct? The Regulations do not address this specific issue. Regulation 18(1) addresses the situation where a person is appointed to act as a prelude to a substantive appointment. It does not address the issue of reversion where subsequent to a person's acting appointment the post in which he is acting becomes vacant.

We have seen that Regulation 17 deals with the performance of the functions of the Commission in the selection of officers for promotion. Thus Regulations 17 and 18 make no attempt to prescribe the procedure to be followed or the criteria to be applied in the reversion of an officer who is acting in a post which has become vacant. The appellant's claim that his legitimate expectation is founded in the Regulations is not, in my view, made out.

It seems to me that for the appellant to succeed in his claim that he had a legitimate expectation that he would only be reverted and someone else be given the opportunity to act in his position in the event of an unsatisfactory evaluation, he must show that there was such a practice or that a promise was made to that effect. There is no evidence

of a regular practice that the appellant could reasonably expect to continue. The evidence of the Chairman of the Public Service Commission is that where there is a clear vacancy in a post the policy followed is to consider persons in the service firstly and then, if necessary, to advertise. Seniority is no guarantee.

It is for the appellant to show that there was such a practice and that the practice was so well established by 2001 that it would be unfair or inconsistent with good administration for the Commission or the CPO to depart from the practice in his case. Further, there is no evidence of an express promise or undertaking given by or on behalf of the CPO or the Commission that in the circumstances of his case he would not be reverted unless an evaluation which proved unsatisfactory was undertaken. Indeed, the evidence of the CPO and the chairman of the Public Service Commission is to the contrary.

In the case of ***Attorney General of Hong Kong v Ng Yuen Shiu*** (supra) there was clear evidence of the legitimate expectation. The promise that each case would be treated on its merits was at the root of the applicant's case – see para. 739B. Their Lordships' Board held that the decision makers were bound by the undertaking so long as it was not in conflict with their statutory duty.

In ***Attorney General of N.S.W. v Quinn*** (supra) Mason C. J. said (para. 30):

"It is the presence of a legitimate expectation which conditions the existence of a claimant's right to procedural fairness and the corresponding duty of the decision maker to observe procedural fairness in the treatment of the claimant's case."

After listing some of the circumstances which may create a legitimate expectation the learned Chief Justice said:

"In the absence of such an expectation there is no corresponding duty to accord fairness."

In that case there was clear evidence to establish **Quinn's** legitimate expectation which depended entirely on the history and circumstances of the case.

The case of **Rajkumar v Lalla & Ors** (supra) (Trinidad and Tobago) was analyzed by the learned judge below. Her conclusion that that case could be distinguished from the instant one is in my view, correct.

In the **Rajkumar** case the appellant had acted as Prison Officer II for over 14 years and was given the assurance that he would not have been passed over for promotion. The Trinidad and Tobago Public Service Regulations set out a detailed Code for, inter alia, appointments in the prison service. One of the requirements of that code which is not to be found in our Code, is an annual staff report reflecting an evaluation of the officers' overall performance. That code is far more detailed than that to be found in the Jamaican Public Service Regulations 1961. As Mr. Morrison, Q.C. correctly submitted, this means that "the scope of the

legitimate expectation which the Trinidad and Tobago regulations would naturally generate is far wider than that generated by the Jamaican regulations.

Of importance also is the fact that in the **Rajkumar** case the Commission was dealing with eligibility of officers for promotion unlike the instant case where the CPO was concerned with the reversion of the appellant and the appointment of another person to act in the post. In the instant case the question of permanent appointment had not yet arisen.

I am not able to accept the submissions of Mr. Henriques, Q.C that the learned judge below erred in construing the provisions of the regulations and that her decision that the appellant could be reverted without an evaluation was contrary to the statutory presumptions and his legitimate expectation.

Another complaint of the appellant was that he was at no time informed that the memorandum of the 19th October, 2001 presented to him would be used by the CPO as a basis for assessing his performance and conduct. This memorandum addressed the appellant's "Status and Performance as Deputy Solicitor General (Acting)" The first two paragraphs read:

"At our Executive Committee meeting last evening, you asked me to state in writing my position so that you can take legal advice. I now do so.

I am today writing to the Public Service Commission recommending that effective December 1, 2001, you cease acting as Deputy Solicitor General and revert to your substantive post. As discussed with you and with the Executive Committee, I am doing so on the ground that I would wish to see how other persons perform in that role before making a recommendation as to who should be appointed to fill the post when it becomes vacant. I have not recommended this change primarily on the basis of your performance, because in my view, even if your performance had been exemplary, I could still properly take this course. This is so, in particular, because I 'inherited' you, and was not the person who recommended that you act."

It otherwise contains some specific examples of what the Solicitor General described as 'the serious difficulties' he had with the performance of the appellant. In this memorandum the Solicitor General stated :

"I have repeatedly communicated my concerns to you, both orally and in writing, and it is appropriate to remind you at this time about some of them."

The Solicitor General ended this memorandum with the sentence - "I consider your performance to be unsatisfactory."

The burden of the appellant's complaint is that this memorandum which was sent to the CPO contained allegations which were adverse to him and he was never given an opportunity by the CPO to defend his work and conduct before the decision was taken to revert him. The

Solicitor General explained how this memorandum got to the CPO in paras. 7 and 8 of his affidavit dated 7th May, 2002. He was off the island when he was informed that the Services Commission had requested an evaluation report or other assessment of the appellant's performance. He authorized his secretary to write and advise the CPO that no formal evaluation had yet been prepared and to enclose a copy of his memorandum dated October 19, 2001.

Mrs. Joan Mudahy, the Senior Deputy Chief Personnel Officer who was at the relevant time Acting CPO, in a affidavit sworn to on the 8th May, 2002 stated that on the 22nd October, 2001 she received the letter dated 19th October, 2001 (*supra*) from the Solicitor General recommending the acting appointment of Mr. Salmon in the place of the appellant. She stated in paragraphs 3-5 of the affidavit:

" 3... I considered the recommendation being made by the Solicitor General I agreed with the recommendation and the basis on which it was being made. I believed that the recommendation made by the Solicitor General was a proper one, as it would allow for a determination as to the appropriate person, if any, within the chambers who should eventually be appointed as Deputy Solicitor General. In light of the significance of the Attorney General's chambers and the post concerned I decided to consult with the Public Services Commission as to their views on the matter.

4. I consulted with the Public Services Commission and was advised that they too agreed with the recommendation being made by the Solicitor General. However, they advised me to request a report on Mr. Robinson's performance.

5. I accepted the advice and requested such a report of the Solicitor General. He provided me with a copy of the Performance Report by letter dated October 30, 2001 which included a Memorandum dated October 19, 2001 and addressed to Mr. Robinson on his status and performance as Deputy Solicitor General. On receipt of the memorandum I was strengthened in my view that the recommendation made by the Solicitor General should be accepted."

Thus the evidence of the CPO is to the effect that she had considered and accepted the recommendation of the Solicitor General before she saw the memo. The memo only confirmed her decision.

Mrs. Daisy Coke, the Chairman of the Public Service Commission, also gave affidavit evidence. At paragraphs 3-6 thereof she swore:

"3. On or about October 26, 2001, I and other members of the commission received by way of circulation of papers, the letter written by the Solicitor General in relation to the acting appointment of Mr. Salmon. He indicated that we agreed with the recommendation; however, we suggested to Mrs. Mudahy that the Solicitor General provide a performance report in relation to Mr. Robinson. We made that suggestion so that we could compare the performance of Mr. Robinson against that of Mr. Salmon so as to determine, at the appropriate time, whether either of them would be fit to be appointed permanently to the post of Deputy Solicitor General.

4. I did not nor did the Commission issue any directions to the Acting Chief Personnel Officer.

5. Although there is clear vacancy in a post the Public Services Commission does not permanently fill it until an appropriate person is found. The policy

followed is to consider persons in the service firstly and if no one is suitable, the post is advertised.

There is therefore no guarantee that seniority or acting in a post entitles a person to be appointed to that post.

6. The post of Deputy Solicitor General is a professional grade of importance requiring that a person of the highest calibre be selected to permanently occupy the post... The Commission felt that the recommendation made by the Solicitor General was proper and equitable as it would allow for the assessment of the suitability of the candidates."

Mr. Ley's affidavit evidence that the CPO stated in her affidavit that she "acted on recommendations of the Solicitor General based solely on his views of the applicant's (now the appellant's) performance" is not accurate. The CPO stated that she accepted the basis on which the recommendation was made. In his letter of October 19, 2001 (*supra*) the Solicitor General stated the basis of his recommendation as follows:

"It would be appropriate, in my view, that other persons be allowed an opportunity to act in that capacity before a decision is made as to who should be recommended in due course for appointment."

In his memo of October 19, 2001 to the appellant the Solicitor General clearly stated that he was making the recommendation "on the ground that I wish to see how other persons perform in that role before making a recommendation as to who should be appointed..."

It is as clear as can be that the Solicitor General's recommendation that the appellant be reverted to his substantive post and that Mr. Salmon be appointed to act as Deputy Solicitor General was not based on the performance of the appellant. Further, on the evidence, the CPO's decision to revert the appellant was not based on the performance memo of October 19, 2001. Accordingly, the complaint in this regard is not substantiated.

The Third Issue

I will, for convenience, restate this issue. It is whether or not the appellant would have had a legitimate expectation pursuant to the Public Service Regulations that a junior officer would not be promoted to act over him without cause being shown why he should be reverted. This expectation is said to be founded on Regulation 18(2). As stated earlier the general rule in favour of seniority in so far as an acting appointment otherwise than as a prelude to a substantive appointment is concerned, may be displaced. The contention of the appellant is that the general rule can only be displaced for cause and that he be given an opportunity to challenge the same. In such an event there would have to be an evaluation and the appellant would have an opportunity to be heard. Reliance was placed on **Attorney General v Quinn** (supra). For

the purposes of this issue it will be assumed, without accepting, that the general rule was displaced in relation to the appellant.

The undisputed evidence is that the appellant was informed of the Solicitor General's intention to recommend that he be reverted and someone else appointed in his place. He was also given the reason for this. Indeed in his affidavit in support of the Originating Summons he stated:

"13. On or about the 17th October, 2001 the Solicitor General visited my office. He informed me that since he assumed duties as Solicitor General he has seen me acting in the post of Deputy Solicitor General and that it was his intention to allow Mr. Hugh Salmon to act as Deputy Solicitor General for a period after which he would decide who should be appointed in the post. I told the Solicitor General inter alia, that in my opinion he could not properly adopt that course.

14. On the 18th day of October, 2001 the Solicitor General convened a meeting of the Deputy Solicitor General and Divisional Directors (known in the department as the Executive Committee) to discuss the matter. The Solicitor General declared that he intended to recommend to the Public Service Commission that Mr. Hugh Salmon act in the post of Deputy Solicitor General for a period of six months. He stated that the only reason for his intended action was that since he joined the Department he has seen one person acting in the said post for which there is a clear vacancy. He therefore wanted to see another person acting in the post so that he would determine which of the two should be appointed..."

(The Solicitor General in his letter to the Chief Personal Officer referred to "other persons" as opposed to "another person" and in his affidavit denied telling the appellant that it was his intention to determine which of the two persons to recommend for permanent appointment).

The appellant further stated in his affidavit that at the Executive Committee meeting the proposed action of the Solicitor General was discussed. He said that he and Mr. Leys expressed their disagreement. It is not in dispute that at the meeting the appellant asked the Solicitor General to state in writing his position so that the appellant could take legal advice. On the 19th October, 2001 the Solicitor General sent the appellant a memo informing him that further to their recent discussions he was recommending the temporary appointment of Mr. Salmon. Thus the appellant knew that the said recommendation was made to the Chief Personnel Officer and was aware of the basis for such recommendation.

It seems to me that the appellant cannot justifiably complain that he was reverted without a reasonable ground being established and that he was not given an opportunity to challenge the same. The Solicitor General, without doubt, acted with procedural fairness towards the appellant. I cannot agree with learned Queen's Counsel for the appellant that the reason given for the recommendation was not enough. Furthermore, in my view, there is nothing in the Regulations

which mandates an evaluation of a person in relation to a post which becomes vacant while he is acting in that position, before that person may be reverted.

The learned judge below was correct when she held that:

"Where it is proposed to make an acting appointment the Regulations do not place an obligation on the Chief Personnel Officer to determine the suitability of an officer for permanent appointment to a post before any other person can be appointed to act... The Chief Personnel Officer was not under any duty to have enquired into the plaintiff's suitability for appointment to the substantive post before arriving at a decision to appoint someone to act. There is nothing unlawful in the method adopted by the Chief Personnel Officer in granting approval for the acting appointment of a junior officer to the post."

Accordingly, in my judgment, the appellant's claim of legitimate expectation generated by the Regulations cannot succeed.

The Fourth Issue

Whether or not the appellant had been denied procedural fairness in relation to the decision which had been made adverse to his interest both professional and economical.

As I understand it, the contention of Mr. Henriques, Q.C here is that the CPO received a memo on request for an evaluation without affording the appellant the opportunity to respond thereto and further that the CPO relied on the said memo to support her decision to revert the appellant. In doing so, learned Queen's Counsel argued, the legitimate expectation of the appellant who had acted in the post for over one year

with an increase in salary and emoluments was cast aside as a decision was made by the CPO adverse to his professional status and economic interest. In this regard counsel for the appellant referred to the evidence of Miss Mudahy that on receipt of this memo she was strengthened in her view that the recommendation made by the Solicitor General should be accepted.

Mr. Morrison, Q.C. agreed that in the interest of good administration it was desirable for the Solicitor General to tell the appellant that he was sending the memo to the Chief Personnel Officer response to her request. However, counsel for the respondents contended that the memo having been sent to the appellant by the Solicitor General and there being no evidence of any attempts to address the issues raised at any time, the appellant's complaint of having no opportunity to respond to the accusations therein, was not sustainable.

In this regard the learned judge below said:

" The plaintiff was privy to the contents of the document as it had been given to him by the Solicitor General on October 19, 2001 after he indicated that he proposed to seek legal advice. Even if this document were to be construed as an Assessment of his performance, he was well aware of its contents before it was submitted to the Chief Personnel Officer, yet he elected not to respond to it. His complaint that he was not given an opportunity to respond to it was devoid of merit."

It seems to me that (as the Solicitor General said in his memo to the appellant advising him of the recommendation he was about to make) even if the appellant's performance was exemplary the Solicitor General could still properly recommend that he be reverted on the ground which he gave.

The CPO and the chairman of the Public Services Commission expressed the view that the recommendation made by the Solicitor General was "proper and equitable". Thus even if the appellant could successfully answer the adverse comments made in the memo of October 19, 2001, that would not have affected the decision to revert him on the aforementioned ground.

It seems to me that it is easy to confuse the contents of the legitimate expectations, with the resulting right to procedural fairness. The formulation of this (the fourth) issue seems to suggest that there could be a duty to accord procedural fairness without such duty being referable to a legitimate expectation. This tendency was referred to by the High Court of Australia in **Quinn's** case – paras. 30-32. Merely to assert that a claimant has a right to procedural fairness or good administration is not helpful. It is necessary to identify the relevant legitimate expectation. Of course that legitimate expectation may take the form of an expectation of a substantive right, privilege or benefit or of a procedural right, advantage or opportunity - see **C.C.S.U** at p. 408 and **Quinn** at paras.

30-32. Its existence is determined by reference to legal principles. And, as already stated, it may be created by the giving of an assurance, the satisfaction of statutory conditions, a promise or undertaking, an established practice and so on.

On the evidence before the Court, I am unable to say that the appellant has established on the balance of probabilities the existence of a legitimate expectation. Further, such an expectation is not, in my view, generated by the Regulations.

Costs

Although this matter was started by Originating Summons, it was a public law matter in essence and should have been started as such – see ***O'Reilly v Mackman*** [1983] 2 A.C. 237 H.L. This decision of the House has been much criticized. Lord Diplock in that case set out the general rule “... it would be contrary to public policy and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities...” (The Jamaican equivalent to Order 53 is Rule 56 of the Civil Procedure Rules, 2002)

It was stated that this general rule was to be the subject of exceptions which were to be decided on a case-by-case basis (ibidem at pp248-5). It is not clear whether or not the parties contest the appropriateness of the procedure adopted in the court below. However, it should be observed that in ***Clark v University of Lincolnshire and Humerside*** [2000] 3 All ER 752 it was stated that the Court should be active in preventing a party from adopting a procedure which is in effect an abuse of its process.

It seems to me that the appellant, having chosen to adopt the procedure applicable to private law instead of going by way of judicial review, cannot now seek to have the issue of costs decided on principles applicable to public law. As Mr. Morrison, Q.C. puts it, he is in effect protesting against his being hoisted by his own petard .

I am not persuaded that there is any basis to interfere with the judge's award for costs.

Conclusion

Accordingly, the appeal is dismissed and the orders made below affirmed with costs to the respondents.

K. HARRISON J.A:

1. The issues in this appeal have been adequately dealt with by my brother Smith J.A in his judgment and I entirely agree with his reasons and conclusion arrived at for dismissing the appeal. I do wish however to make a few comments on some of the issues raised.

The rotation system implemented by the Solicitor General

2. In my judgment, it would be fair to say that while seniority is the major factor for consideration where an acting appointment is made pursuant to Regulation 18(2) of the 1961 Public Service Regulations, the language used in Regulation 18(2)(a) would suggest that the rule regarding seniority may be displaced.

3. There is nothing in the language of Regulation 18(2) which restricts the Solicitor General from implementing a system whereby officers can be rotated when an acting appointment is recommended.

4. The learned trial judge was therefore correct in her judgment when she said that the circumstances described by the Solicitor General were sufficient to displace the general rule set out in Regulation 18(2).

Procedural fairness

5. Learned Queen's Counsel for the Appellant had submitted that Regulations 17 and 18 are inextricably intertwined so, Regulation 18 cannot operate independently of Regulation 17. He contended that the Chief Personnel Officer (the CPO) could not arrogate unto herself any greater function or power than the Public Service Commission ("the Commission") and that her powers are circumscribed by the limits set out in Regulations 17 and 18. He submitted that Regulation 18(2)(a) created a presumption the appellant would not be reverted unless for cause and to rebut this presumption one must apply the statutory provisions laid down in Regulation 17(3). It means, he said, that once a vacancy arose, Regulation 17 became operative.

6. Now, Regulation 17(3)(a) through to (k) prescribes the necessary criteria for a public officer to be appointed to a substantive post. The Commission is required to take into account, inter alia, the officer's general fitness, seniority, experience, educational qualifications, courses undergone, reports by the Permanent Secretary or other senior officer under whom the officer worked and special reports.

7. It is provided in Regulation 18(1) that:

"The procedure for making a recommendation in relation to an acting appointment as a prelude to a substantive appointment shall be the same as that prescribed in regulation 17 in relation to a promotion".

8. Regulation 18(2) on the other hand, states as follows:

"18. - (2) 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".

9. It is readily seen that Regulation 18(1) expressly refers to Regulation 17 but no such reference appears in Regulation 18(2). The general rule therefore is, that seniority is considered under 18(2) when an acting appointment otherwise than as a prelude to a substantive appointment is made. Special reports on the officer are therefore not necessary and the CPO is not obliged to consider the performance of the Appellant before he is reverted to his substantive position.

10. The situation under 18(1) however, is different. Seniority is not the sole determinative factor that is considered when a recommendation is made in relation to an acting appointment as a prelude to a substantive appointment. The procedure to be followed "shall be the same as that prescribed in Regulation 17 in relation to a promotion".

11. The question whether the Solicitor General's memorandum submitted to the CPO had any bearing on the reversion of the appellant was also another pertinent issue to be determined. In her affidavit sworn to on May 8, 2002, the CPO stated inter alia,

"on receipt of the memorandum from the Solicitor General I was strengthened in my view that the

recommendation made by the Solicitor General should be accepted'.

(Emphasis supplied)

12. The CPO was advised by the Solicitor General in a memorandum dated October 19, 2001 as follows:

"As you know, Mr. Lackston Robinson has been acting as Deputy Solicitor General, vice Mr. Patrick Robinson who is on pre-retirement leave.

It would be appropriate, in my view that other persons be allowed an opportunity to act in that capacity before a decision is made as to who should be recommended in due course for appointment.

I therefore recommend that with effect from December 1, 2001, and for a period of six (6) months, Mr. Hugh Salmon act as Deputy Solicitor General. Mr. Lackston Robinson would therefore revert on December 1 to his substantive post as Senior Assistant Attorney General".

13. The CPO seems to be saying that she had formed an initial view on receipt of the above memorandum sent to her but her views were strengthened when she perused the memorandum dated October 19, 2001 that was delivered to the Appellant.

14. I respectfully disagree with Mr. Henriques, Q.C., therefore when he submitted that the CPO had relied on the memorandum of the Solicitor General to "support her unlawful action".

15. I am also satisfied that the learned trial judge was correct in concluding that the defendant had been given an opportunity to respond to the Solicitor General's memorandum but he had failed to take advantage of that opportunity. He ought not to complain therefore, that there was any procedural unfairness meted out to him.

16. It is also my view that the learned Solicitor General had acted with procedural fairness towards the appellant when he stated that he wished to see how other persons perform in the role of acting Deputy Solicitor General before he recommended who should fill the post when it became vacant.

17. Overall, no grounds had been established on the evidence before the learned judge constituting procedural unfairness or impropriety warranting the interference of this Court.

The Costs issue

18. No ground of appeal had been filed in respect of this issue but Learned Queen's Counsel applied to this Court and was granted an amendment of the original grounds to add the following ground:

"The learned trial judge should not have awarded costs in this matter unless she was of the view that the applicant had acted unreasonably in making the application or in the conduct of the matter".

19. No objection was taken by Mr. Morrison Q.C., in respect of the application to amend.

20. Learned Queen's Counsel, Mr. Henriques, argued that the matter had begun as an Originating Summons but it was in essence a public law matter and should have been so instituted. He submitted that the courts do not usually award costs against the unsuccessful party in these circumstances unless that party acted unreasonably in bringing the action.

21. Mr. Morrison, Q.C., submitted on the other hand, that the Appellant could not have it both ways. He had chosen to proceed by way of Originating Summons so once he is unsuccessful he ought to be condemned in costs.

22. A good starting point for the contention urged by Mr. Henriques, Q.C., is ***O'Reilly v Mackman*** [1982] 3 All ER 1124. There the claimants, instead of seeking judicial review of some prison adjudications, had proceeded by action for declaratory relief. This had avoided, among other procedural constraints, the narrow time limit for judicial review. In particular, the passage in the speech of Lord Diplock is quite instructive.

He stated at 1134:

"... it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Ord 53 for the protection of such authorities".

See Rule 56 of the Civil Procedure Rules (2002) for the corresponding provision in this jurisdiction.

23. Since ***O'Reilly v Mackman*** (supra) was decided, occasional issues have arisen which could legitimately be pursued either by judicial review or by action and the rigidity of the rule has accordingly been relaxed: See ***Wandsworth LBC v Winder*** [1985] AC 461; ***Roy v Kensington and Chelsea FPC*** [1992] 1 AC 624; ***Steed v Secretary of State for the Home Department*** [2000] 3 All ER 226 and ***Clark v University of Lincolnshire and Humberside*** [2000] 3 All ER 752.

24. In the ***Steed*** case (supra) Lord Slynn of Hadley said:

"...there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons".

25. In ***Roy v Kensington and Chelsea FPC*** (supra) it was accepted that a claim for private rights could be made by action even if it involved a challenge to a 'public law act or decision'. Lord Bridge said at page 628:

"It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him".

26. Lord Slynn of Hadley in ***Mercury Communications Ltd v Director General of Telecommunications*** [1996] 1 All ER 575 at 581, said:

"The recognition by Lord Diplock that exceptions exist to the general rule may introduce some uncertainty, but it is a small price to pay to avoid the over-rigid demarcation between procedures reminiscent of earlier disputes as to the forms of action, and of disputes as to the competence of jurisdictions apparently encountered in civil law countries where a distinction between public and private law has been recognized. The experience of other countries seems to show that the working out of this distinction is not always an easy matter. In the absence of a single procedure allowing all remedies - quashing, injunctive and declaratory relief, damages - some flexibility as to the use of different procedures is necessary. It has to be borne in mind that the overriding question is whether the proceedings constitute an abuse of the process of the court".

27. In my judgment, the fundamental principle enunciated in ***Mackman*** (supra) remains intact, and I see no reason at present why it should not apply to a case such as the instant matter before this Court. I do agree with the submissions made by Mr. Morrison, Q.C., that the appellant cannot have it both ways. He had opted to proceed by private law initiating the proceedings by way of Originating Summons. He cannot now assert that it was in essence a public law matter and that it should have been so instituted. The Respondents having succeeded would in my view, be entitled to their costs against the Appellant both before this Court and in the Court below.

FORTE, P.

ORDER

1. The Appeal is dismissed
2. The orders made below affirmed, with costs to the Respondents to be agreed or taxed.

