

Lackston Robinson

Appellant

v.

- (1) Daisy Coke**
- (2) Michael Fennel**
- (3) Edwin Jones**
- (4) Pauline Findlay**
- (5) George Phillip**
(Members of the Public Service Commission)
- (6) The Attorney General**

Respondent

FROM

**THE COURT OF APPEAL OF
JAMAICA**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 19th March 2009

Present at the hearing:-

Lord Hoffmann
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under- Heywood
Lord Mance

[Delivered by Lord Mance]

1. The appellant, Mr Lackston Robinson, is an attorney-at-law who graduated from the Norman Manley Law School in 1989 and became Crown Counsel in the Attorney General's Department with effect from 13th March 1989. During 1999 and 2000, Mr Patrick Robinson, one of

two Deputy Solicitors General in that Department, was on secondment to the International Criminal Tribunal for the Former Yugoslavia in The Hague, and thereafter, from 29th January 2001 to 8th November 2001, he took pre-retirement leave. While he was on secondment, an acting Deputy Solicitor General was appointed, first, it appears, Mr Douglas Leys from 16th November to 19th February 1999 and then Mr Lennox Campbell from 20th February 1999. At some later date, Mr Campbell began to sit as a High Court judge, initially also on an acting basis.

2. In these circumstances, the then Solicitor General, Dr Kenneth Rattray QC appointed the appellant “to act as Deputy Solicitor General with effect from 1st October 2000 and until further orders vice Mr Patrick Robinson and in place of Mr Campbell, acting in a higher post”. However, with effect from 1st August 2001 Mr Campbell was appointed to the bench on a permanent basis. Mr Michael Hylton QC, who had taken over the office of Solicitor General with effect from 2nd January 2001, was thus faced with a situation where it would shortly become necessary to consider making a permanent appointment to the office of Deputy Solicitor General.

3. Mr Hylton decided, in circumstances where he had inherited the appellant and seen only him in the post, that “it would be appropriate that other persons be allowed an opportunity to act in that capacity before a decision as to whom should be recommended in due course for appointment”, and that he should accordingly recommend that “with effect from 1st December 2001, and for a period of six (6) months, Mr Hugh Salmon act as Deputy Solicitor General” and that “Mr Lackston Robinson would therefore revert on December 1 to his substantive post” (which was by then Divisional Director (LO5)).

4. Under the Constitution of Jamaica, s.125 provides that the “power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices is vested in the Governor-General acting on the advice of the Public Service Commission”. The Public Service Regulations (made under s.81 of the Jamaican (Constitution) Order in Council 1959, preserved by s.2 of the Jamaican (Constitution) Order in Council 1962) establish procedures for appointments, promotions and transfers. Regulations 17 and 18 read:

“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 had 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 Commission may call.

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 appointed shall

- (a) as a general rule be the senior officer in the Ministry or Department eligible for such acting appointment;
- (b) assume and discharge the duties and responsibilities of the post to which he is appointed to act."

5. S.127(1) enables the Governor General, acting on the advice of the Public Service Commission, to direct that the power to make appointments to such offices and the power to remove and exercise disciplinary control over persons holding or acting in such offices, or any of those powers, should be exercisable by one or more members of the

Commission or by such other authority or public officer as may be specified. (S.127(4) goes on to provide that where, by virtue of an instrument under s.127(1), the power to remove or exercise disciplinary control has been so exercised by a person other than the Governor General acting on the advice of the Public Service Commission, the officer in respect of whom it was so exercised may apply for the case to be referred to the Privy Council of Jamaica and thereupon the action of such person shall cease to have effect pending a reference to the Privy Council. But that subsection was not invoked in this case.)

6. By The Delegation of Functions (Public Service) Order 1963 made under s.127(1) on the advice of the Commission, the Governor General directed that "the powers of the Governor-General specified in the Schedule to this Order shall be exercised by the appropriate authority in relation to the respective offices and officers specified in the Schedule". The Schedule lists in its first column an "Officer or Office", in its second various "Powers" (such as "suspension of payment of increment" or "transfer" or "disciplinary control" or, in a further example "Appointment (except as regards telephone operators). Dismissal. Disciplinary Control") and in a third column the "Appropriate Authority". The relevant entry for present purposes is head 10 which reads, under Officer or Office: "Pensionable offices other than those held by Heads of Departments"; under Powers: "Acting appointments under regulation 18(2) of the Public Service Regulations 1961" and under "Appropriate Authority" "Chief Personnel Officer".

7. S.35 of the Interpretation Act applies under the Constitution to the interpretation of the Constitution itself. It provides that:

"Where a power to make any appointment is conferred, then, unless the contrary intention appears, the authority having power to make the appointment shall also have power to remove, suspend, reappoint or reinstate any person appointed in exercise of the power".

It has been and is common ground that the effect of The Delegation of Functions (Public Service) Order 1963 read so far as necessary with s.35 of the Interpretation Act was to include the power to remove within the power under Regulation 18(2) delegated to the Chief Personnel Officer by head 10 of the Schedule to the 1963 Order in Council. The Board in deciding this appeal is content to proceed on that basis without further examination.

8. Mr Hylton's decision that Mr Salmon should succeed the appellant as Deputy for a period of six months was communicated to the appellant orally on 17th October and discussed at a meeting of senior departmental

officers on 18th October 2001. The appellant on each occasion objected to the permissibility of such a course under Regulation 18, and on the second asked Mr Hylton to put his decision in writing as he intended to take legal advice. There is an issue or difference in emphasis (into which it is unnecessary to go further) as to the extent to which Mr Hylton expressed dissatisfaction on 18th October 2001 about the appellant's performance, but it is common ground that Mr Hylton made clear, in one way or another, that the only ground upon which he proposed to make or justify his recommendation was that indicated in paragraph 3 above.

9. Mr Hylton proceeded accordingly, sending to the Chief Personnel Officer on 19th October 2001 a signed letter or memorandum (it neither commenced "Dear" nor concluded "Yours") in these 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."

10. However, on the same day he also sent to the appellant as requested a detailed memorandum reading as follows:

"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.

In the course of the meeting, however, I indicated that I did have serious difficulties with your performance over the past nine (9) months. 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.

I have been concerned about your performance in every area – your legal work, your contribution (or lack thereof) to the administrative needs of the office and your attitude. The following are some specific examples.”

There followed a detailed account over four pages of concerns under the headings “legal work”, “administrative” issues and “approach and attitude”, culminating with a statement that “These are merely examples of what has taken place over the last nine months. I consider your performance unsatisfactory”.

11. During the relevant period, Miss Joan Mudahy was acting as Chief Personnel Officer. Her evidence is that, when she saw Mr Hylton’s letter dated 19th October 2001, she agreed with the recommendation and the basis on which it was being made, but that, in the light of the significance of the Attorney General’s Chambers and the post concerned, she decided to consult with the Public Service Commission as to their views on the matter. When she did this, the Commission advised her that they too agreed with the recommendation, but also advised her to request a report on the appellant’s performance. The first respondent Mrs Daisy Coke’s evidence is to like effect. She and other members of the Commission received the letter of 19th October 2001 by way of circulation of papers, indicated their agreement with the recommendation, but suggested that the Solicitor General obtain a performance report. Mrs Coke explains that this suggestion was made “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”.

12. Miss Mudahy records that on receipt of the Commission’s response she accepted the advice and (by telephone) requested an evaluation report from Mr Hylton. Mr Hylton arranged for her to be sent a copy of his memorandum of 19th October, with the comment: “No formal evaluation report has yet been prepared, but I enclose a copy of my memorandum dated October 19, 2001, to Mr Robinson, which speaks for itself”. Miss Mudahy records that “On receipt of the Memorandum I was strengthened in my view that the recommendation made by the Solicitor General

should be accepted”, and on 7th November 2001 she wrote to Mr Hylton, saying:

“Solicitor General

With reference to your memorandum dated the 19th October, 2001, I am directed to inform you that in the circumstances outlined, approval has been given for Mr. Hugh Salmon, Divisional Director (LO 5), Attorney General’s Department, to act as Deputy Solicitor General (LO 6) with effect from the 1st December, 2001 and until further orders, in a vacant post consequent upon the retirement of Mr. Patrick Robinson and in place of Mr. Lackston Robinson.

During the period of his acting appointment Mr Salmon should be paid an acting allowance in accordance with the provisions of Staff Order 4.13 and the allowances attached to the post.”

The reference here to “your memorandum dated the 19th October, 2001” must, the Board considers, have been to Mr Hylton’s signed note of that date, because Miss Mudahy was responding to its contents and recommendation and it was in memorandum form.

13. Thus it came about that the appellant ceased to act as Deputy Solicitor General and reverted to his permanent status, with consequent reduction in salary, while Mr Salmon assumed the acting post for six months. No suggestion was or is made that Mr Salmon was not otherwise eligible to be appointed to act as Deputy Solicitor General, but he was (although he apparently qualified as an advocate prior to the appellant) junior to the appellant in substantive status. In fact, at the end of the six months for which Mr Salmon acted, neither the appellant nor Mr Salmon was appointed as Deputy Solicitor General and a Miss Ingrid Mangatal was appointed to act for six months from 1st June 2001. The Board has no information about and is not concerned with the circumstances in which this occurred.

14. The appellant challenges the legitimacy of the decision whereby he ceased, and Mr Salmon commenced, to act as Deputy Solicitor General from the end of November 2001. He seeks a declaration that he was entitled to continue to act as Deputy Solicitor General and compensation for loss of acting salary and emoluments from 1st December 2001, as well as a “proper assessment” of his performance and conduct in that office and remission to the Commission to review his suitability for permanent appointment to it. Both Harris J at first instance and the Court of Appeal dismissed his claim.

15. The appellant’s appointment was an acting or temporary appointment “until further orders” (see paragraph 2 above), but the appellant submits, rightly, that the power to remove him from such an

appointment “must be understood as meaning ‘for reasonable cause’”. This is clear from the Board’s judgment in *Thomas v. Attorney-General of Trinidad and Tobago* [1982] AC 113, 126, where however Lord Diplock was careful to add the words “of which the Commission is the sole judge”. See also the reiteration of the principle in the Board’s recent decision in *Panday v. The Judicial and Legal Services Commission* [2008] UKPC 33, para. 15.

16. The appellant’s case is that no such reasonable cause existed. In his submission, regulation 18(2), under which the acting Chief Personnel Officer purported to act, required that he, as the senior departmental officer, be appointed and continue to act as Deputy Solicitor General, provided that he was eligible. Eligibility should, he submits, be judged by reference to like criteria to those specified in Regulation 17(1). By the same token, he submits, he had a legitimate expectation of continuing to act as Deputy Solicitor General, unless he ceased to be eligible. As to these submissions, the respondents do not seek to justify the decision taken on the basis that the appellant was ineligible under either the criteria in Regulation 17(2) or any other criteria which might be applicable under Regulation 18(2). But the appellant’s submissions ignore the express provision in regulation 18(2) that an acting appointment made otherwise than as a prelude to a substantive appointment should “as a general rule” be made of the senior eligible officer. That is the only right or expectation to which the appellant could lay claim; and it does not involve an absolute obligation to appoint the most senior eligible officer to act.

17. The appellant next submits that, if the “general rule” permitted appointment in any circumstances of anyone other than the most senior eligible officer, it could only be where positive misconduct or malperformance was substantiated. The Board does not accept that the concept of reasonable cause in relation to the removal of an acting officer can or should be circumscribed in this way.

18. Then it is submitted that considerations of malperformance in fact played a part in the decision to remove the appellant and to appoint Mr Salmon for six months in his stead; and that the appellant was a victim of procedural unfairness, in that he had not been made the subject of any disciplinary complaint and was not invited by the Chief Personnel Officer to address Mr Hylton’s detailed memorandum dated 19th October 2001, as sent by Mr Hylton to Miss Mudahy (indeed knew nothing of its sending until after commencing these proceedings). However, Mr Hylton’s recommendation to Miss Mudahy was not based on any suggestion of malperformance, and the evidence of Miss Mudahy and Mrs Coke establishes that the decision to accept the recommendation was

independent of the detailed memorandum. Mrs Coke says that she suggested that this should be obtained not as bearing on the decision, but only as relevant to the permanent appointment which would have to be made at some future date. Miss Mudahy says that the sight of it “strengthened” her pre-existing view (which the Commission had endorsed without seeing the memorandum) that the recommendation should be accepted. It seems clear that the decision would have been taken (with or without the immediate availability or any sight of the detailed memorandum) on its own merits as they were explained in the Solicitor General’s note to the Chief Personnel Officer dated 19th October 2001.

19. The judge at first instance and K. Harrison JA in the Court of Appeal also gave as another ground for rejecting the appellant’s complaint of procedural unfairness that he had had, but had failed to take advantage of, the opportunity of responding to the detailed memorandum dated 19th October 2001. It appears that the appellant did not object or respond to its contents at any time before the commencement of these proceedings some six months later on 5th April 2002. The Board agrees that that is surprising in relation to Mr Hylton. But, in relation to the Commission or Chief Personnel Officer, Mr Hylton had made clear orally on 17th and 18th October 2001 that he only intended to make and justify his recommendation on the ground indicated in the note dated 19th October 2001 by which he actually made it. The appellant had stated in response that he considered that such a recommendation would be illegitimate in view of the terms of regulation 18(2). So it can be said that, without knowledge that the detailed memorandum would be sent to the Chief Personnel Officer, the appellant had no particular reason to write either to Mr Hylton (with a request that he forward the letter to the Commission or Chief Personnel Officer) or direct to the Chief Personnel Officer to take issue with the contents of the detailed memorandum in the context of Mr Hylton’s recommendation of 19th October 2001.

20. Having regard to what Mr Hylton had said orally on 17th and 18th October 2001, the Board does not think that his use of the word “primarily” in the detailed memorandum constituted any sufficient reason for the appellant to think that Mr Hylton would after all be relying vis-à-vis the Chief Personnel Officer on malperformance to justify his recommendation. Nor, as the Board has pointed out, did Mr Hylton ever purport, vis-à-vis the Chief Personnel Officer, to justify it on this basis, and it has not been sought to be justified on any such basis before the Board.

21. The Board comes back therefore to the central issue. Was there reasonable cause for the recommendation which Mr Hylton made and the

decision which the Chief Personnel Officer took to accept it? The situation was a specific one. The reasonable cause relied upon was the wish of Mr Hylton after nine months in his office to see another officer act and perform as his Deputy for a limited period of months in order to be better placed for the forthcoming decision on a permanent appointment. Whether there was reasonable cause was, Lord Diplock said in *Thomas* (cited above), a matter of which the Commission (in that case) was "constituted the sole judge". Here the decision was delegated to the Chief Personnel Officer and it was she who was "constituted the sole judge". If no-one had been acting as Deputy Solicitor General, the Board would have thought it fairly clear that Mr Hylton could reasonably have taken the view, if there were two fairly equally matched possible candidates for a permanent position, that he should, notwithstanding seniority, see each in turn for a period. Here, Mr Hylton had, as he put it, 'inherited' the appellant, but wanted to see another possible candidate act and perform, in order the better to compare and decide which he preferred. The Chief Personnel Officer accepted his corresponding recommendation, and both courts below, with their knowledge of local conditions, have concluded that the recommendation and the Chief Personnel Officer's decision cannot be impugned as based on inadmissible factors or as outside the range of the reasonable. The Board sees no basis on which it could or should differ from any of their assessments.

22. A separate point is raised by the appellant on costs. Both at first instance and in the Court of Appeal orders for costs were made against the appellant. The appellant now submits that, although the present proceedings were in form private proceedings commenced by originating summons, they were in substance administrative law proceedings, and that Part 56.15(4) of the Civil Procedure Rules 2002 (in force from 1st January 2003) should have been taken as a guide. According to that provision "The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application".

23. The Board observes that this point appears to be raised for the first time before it, that the proceedings were not in fact administrative law proceedings, that the rule relied on is not in any event directed to the appellate aspect of proceedings and that the respondents have (as the Board was told at the outset of the appeal) also agreed not to press for costs before the Board even if successful before the Board. In all these circumstances, the Board considers that there is no basis upon which it should reconsider the orders for costs made against the appellant in the courts below.

24. The Board will therefore humbly advise Her Majesty that the appeal should be dismissed. In the light of what the Board was told, there will be no order for costs before the Board.