[2011] UKPC 27
Privy Council Appeal Nos 0045 and 0074 of 2010

JUDGMENT

Ashford Sankar & Others
(Appellants)
v
Public Services Commission (Respondent)

Hermia Tyson-Cuffie (Appellant)
v
Public Services Commission (Respondent)

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

before

Lord Phillips
Lord Brown
Lord Mance
Lord Kerr
Lord Dyson

JUDGMENT DELIVERED BY
Lord Mance
ON

9 August 2011

Heard on 17-19 May 2011

Appellant	*Respondent*
Sir Fenton Ramsahoye SC	Peter Knox QC
Elton Prescott SC	Miss Carol Hernandez
Tom Richards	Ms Nadine Nabie
Anthony Bullock	
Jodie Blackstock	
Sanjeev Datadin	
Cindy Bhagwandeen	
(Instructed by Bankside Commercial Solicitors)	(Instructed by Charles Russell LLP)

LORD MANCE :

Introduction

1. The seven appellants (Messrs Sankar, Mahabir, Jurawan, Creed and Jackson, Mrs Tyson-Cuffie and Mrs Rutherford) are or were senior public servants of long standing. The respondent ("the Commission") is the body responsible for the appointment and promotion of public servants. It was established in 1950 by the Trinidad and Tobago (Constitution) Order in Council 1950, and its existence was continued by the 1962 Constitution, and then by section 121 of the 1976 Constitution.

2. This appeal concerns the legitimacy of the Commission's use in the years 2003 to 2005 of an Assessment Centre Exercise ("ACE") in the process of determining who to promote to the posts of Deputy Permanent Secretary. The main issue is whether the use of the ACE was consistent with Regulation 18 of the Public Service Commission Regulations. Further issues arise as to whether it involved an illegitimate abrogation or delegation by the Commission of its role and duties and whether it was inconsistent with the appellants' legitimate expectations and/or unfair. The appellants succeeded on these issues before the trial judge, Gobin J, but failed before the Court of Appeal.

The facts

3. The office of Deputy Permanent Secretary was created in 1995, but no full time appointments were made until October 2005. In the meantime the posts of Deputy Permanent Secretary were filled by public servants including the Appellants in an acting (i.e. temporary) capacity.

4. By circular memorandum dated 28 March 2000, applications were invited for the office of Permanent Secretary in the Public Service. All the appellants save Mrs Rutherford and Mrs Hermia Tyson-Cuffie submitted applications, but the applications were not processed until much later.

5. By circular on 13 December 2002, the Director of Personnel Administration at the Commission invited applications by 17 January 2003 for the posts of Deputy Permanent Secretary in various ministries from "suitably qualified officers holding substantive appointments in Range 54D and above". There appear to have been 36 such posts to be filled. The circular specified that applicants must have a minimum experience and training, consisting of "at least five years' experience at a senior

managerial level and training as evidence by the possession of a recognized degree or by possession of other recognized professional qualifications; or any equivalent combination of experience and training"; and it said that "Selection will be made from candidates short-listed using the Assessment Centre type methodology".

6. All seven appellants made applications pursuant to the statute, six within the time stated. Mrs Rutherford, who was on leave at that time, was invited to apply in 2004 and did so then (albeit under protest, maintaining that, as she had acted as Director of Budgets and Permanent Secretary, she should have been relieved of any obligation to apply).

7. The Commission's evidence is that it agreed in principle on 16 May 2003 to select the Public Service Commission of Canada as consultants for the ACE which it proposed to use in the process of appointing Deputy Permanent Secretaries. On 7 August 2003, the Commission informed the appellants (other than Mrs Rutherford, who had yet to apply), indicating also that each of them had been selected as a candidate to undergo the first phase of the exercise. Out of 173 candidates applying for the posts, 108 were accepted as appropriate and invited to undertake the ACE. By further letter dated 10 March 2004, the Commission reported that there had been delay in finalising an agreement with the Canadian Commission, but that it was committed to the exercise.

8. By letter dated 23 June 2004, the Commission informed those invited to undertake the ACE exercise, that an "In-Basket Exercise" would be conducted on 15 July 2004 "to assist the … Commission in selecting candidates" for the second phase of the assessment exercise. The In-Basket Exercise was explained by a document stating as follows:

> "The 827 In-Basket Exercise provides an assessment of an individual's "Ability to Manage." This assessment tool will be used to identity participants for the next stage in the selection process. No extensive preparation is required for this assessment exercise; more information will be available during an orientation session prior to the assessment to familiarise candidates with this type of assessment tool.
>
> 1. HOW THE IN-BASKET WORKS
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> The 827 In-Basket Exercise simulates certain aspects of a management position within a fictitious organisation. In this exercise, the candidate takes on the role and responsibilities of a manager and has 3 hours to respond to issues, problems and situations within the organisation.

At the time of the assessment, the candidate receives background information on the organisation as well as issues, problems and situations which require a manager's attention. Specifically, the material includes a description of the organisation and its mission, the candidate's role in the organisation, an organisational chart as well as e-mails, letters, and reports that need to be addressed.

2. WHAT IS MEASURED?

The In-basket exercise is assessing the candidate's "Ability to Manage". Specifically, the "Ability to Manage" includes these three components:

A. Planning and Conducting Activities:

- Establishing and assessing operational, organisational, budgetary, and staffing priorities.
- Initiating and then supervising the implementation of effective plans and activities in response to changing requirements or in anticipation of such changes.
- Ensuring that financial resources are used wisely and establishing relevant feedback mechanisms in order to monitor the activities and their costs.

For example, suggesting a meeting and using your calendar to schedule it as well as chairing and/or leading a meeting is evidence of Planning and Conducting activities.

B. Managing the Human Aspect of the Organization:

- Ensuring that human resources are used effectively.
- Taking into account the needs, abilities and responsibilities of each of the staff members and ensuring that tasks are assigned in a fair and optimal manner.
- Guiding staff in their work effectively.

- Facilitating continuous learning.

- Supporting appropriate development in order to promote continuous learning.

For example, Managing the Human Aspect of the Organisation is choosing suitable people, based on goals and expertise, when creating a team to work on a project.

C. Partnership and Quality of Client Service:

- Using their knowledge of the organisation in the best interests of all stakeholders (i.e., all people involved and/or affected).

- Promoting partnership and recognising one of the most important objectives of the organisation: the provision of quality goods and/or services to clients.

For example, Partnership and Quality of Client Service is knowing who from other areas in one's organisation to call on in order to meet one's objectives.

3. RESULTS OF THE IN-BASKET

Evaluation

Each action is evaluated within the context of the particular issue under consideration, the organisational environment, and other actions taken. The judgement of executives and senior managers concerning the appropriateness of decisions/actions taken is the standard against which the responses are evaluated.

Communication of Results

The Personnel Psychology Centre of the Public Service Commission of Canada is responsible for scoring the In-basket Exercise 827. The results are sent to the responsible human resources representative who then

communicates them to you and provides you with information regarding next steps."

9. By the letter dated 23 June 2004, candidates were also invited to attend an optional three and a half hour orientation session two days on 13 July 2004, two days before the In-Basket Exercise. All the appellants except Mr Sankar attended this orientation session. All the appellants took part in the In-Basket Exercise on 15 July 2004. This involved a written exam-type process in which candidates were required to address certain hypothetical situations.

10. On 24 August 2004, the Commission notified all candidates including the appellants of the results of the first stage of the ACE, and that only candidates who had obtained a total of at least 26 out of 50 points would proceed to the second phase of the ACE. 45 of the candidates had on this basis passed. Messrs Sankar, Creed and Jackson and Mrs Tyson-Cuffie, who had obtained less than 26 marks, were thus eliminated. A review which they requested of their scores led to no different result. A letter dated 5 September 2004 written by Mrs Tyson-Cuffie complaining that the In-Basket exercise was in breach of Regulation 18 of the Public Service Commission Regulations and of the Constitution appears to have been unanswered.

11. "Simulation" tests constituting the second stage of the ACE began on 27 September 2004 and were due to finish by 3 November 2004. On 1 October 2004, the Canadian consultants were robbed at gun point in Trinidad and returned to Canada. Local personnel had to be trained to continue the exercise. On 14 March 2005 the ACE recommenced, and candidates who had passed to the second phase (including Mr Mahabir, Mr Jurawan and Mrs Rutherford) attended an information sharing session on 17 March 2005. They were told that the third phase of the ACE would consist of reference checks conducted by the Personnel Psychology Centre of the Public Service Commission of Canada, but that such checks would only be done for candidates who succeeded at the second stage.

12. Mr Mahabir, Mr Jurawan and Mrs Rutherford undertook the second stage of the ACE on 5, 14 and 7 April 2005 respectively, and did not pass it. No further steps were accordingly taken in respect of them.

13. On 21 October 2005, the Commission appointed 27 Deputy Permanent Secretaries from those who had passed all stages of the ACE. On the next day, four of those so appointed were promoted to Permanent Secretary. On 24 October 2005, the Commission informed the appellants of the completion of the ACE process and of the appointments made on 21 and 22 October 2005. (On 25 October 2005 the appellants were in fact appointed to act, on a temporary basis until 31 May 2006, as Deputy Permanent Secretaries.)

14. Proceedings were begun by Messrs Sankar, Mahabir, Jurawan, Creed and Jackson and Mrs Rutherford on 25 November 2005, seeking declarations that the Commission was wrong to use the ACE as a basis for shortlisting, and that it was obliged to consider all candidates pursuant to the criteria set out in Regulation 18, irrespective of whether or not they passed the ACE. In proceedings issued on 20 January 2006, Mrs Tyson-Cuffie put her case more widely. She claimed declarations that the whole ACE exercise was "illegal, ultra vires, null and void and of no effect", that the procedure adopted by the Commission was unfair, unreasonable and irrational and/or deprived her of her legitimate expectation and that the Commission had acted unreasonably and irrationally in bypassing her for promotion. All the appellants also sought orders for reconsideration by the Commission of their applications and/or further or other relief.

The role and duties of the Commission

15. Section 121 of the 1976 Constitution states that:

> "(1) Subject to the provisions of this Constitution, power to appoint persons to hold or act in offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary authority over persons holding or acting in such offices shall vest in the Public Service Commission. …."

16. The Public Service Commission Regulations provide:

> "13. (4) The Director shall, from time to time by circular memorandum or by publication in the *Gazette*, give notice of vacancies which exist in the particular service and any officer may make application for appointment to any such vacancy. Such applications shall be forwarded through the appropriate Permanent Secretary or Head of Department to the Director, but the failure to apply shall not prejudice the consideration of the claims of all eligible officers.
>
> (5) Notwithstanding subregulation (4), a Permanent Secretary or Head of Department may with the consent of the Public Service Commission ….. give notice of vacancies which exist in offices specific to the particular Ministry or Department to which any eligible officer may apply.
>
> …..

(7) The failure of an eligible officer to apply for a vacancy as advertised pursuant to subregulation (5) shall not prejudice the Commission's consideration of the claims by that officer.

14. Whenever in the opinion of the Commission it is possible to do so and it is in the best interest of the particular service within the public service, appointment shall be made from within the particular service by competition, subject to any Regulations limiting the number of appointments that may be made to any specific office in the particular service.

15. Where the Commission considers either that there is no suitable candidate already in the particular service available for the filling of any vacancy or that having regard to qualifications, experience and merit, it would be advantageous and in the best interest of the particular service that the services of a person not already in that service be secured, the Commission may authorise the advertisement of such vacancy.

16. (1) The Commission may from time to time appoint one or more Selection Boards to assist in the selection of candidates for appointment to the public service and the composition of any such Board and the form in which its report are to be submitted shall be in the discretion of the Commission.

(2) On consideration of any report of a Selection Board, the Commission may, in its discretion, summon for interview any of the candidates recommended by such Board. ….

17. (1) All examinations to be held under these Regulations shall be set and the papers marked by such Examination Board as may be appointed for the purpose.

(2) The Director shall be responsible for the conduct of examinations set under subregulation (1).

18. (1) In considering the eligibility of officers for promotion, the Commission shall take into account the seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such officers, and in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy.

(2) The Commission, in considering the eligibility of officers under subregulation (1) for an appointment on promotion, shall attach greater weight to –

(a) seniority, where promotion is to an office that involves work of a routine nature, or

(b) merit and ability, where promotion is to an office that involves work of progressively greater and higher responsibility and initiative than is required for an office specified in paragraph (a).

(3) In the performance of its functions under subregulations (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) any special qualifications;

(d) any special courses of training that he may gave undergone (whether at the expense of Government or otherwise);

(e) the evaluation of his overall performance as reflected in annual staff reports by any Permanent Secretary, Head of Department or other senior officer under whom the officer worked during his service;

(f) any letter of commendation or special reports in respect of any special work done by the officer;

(g) the duties of which he has had knowledge;

(h) the duties of the office for which he is a candidate;

(i) any specific recommendation of the Permanent Secretary for filling the particular office;

(j) any previous employment of his in the public service, or otherwise;

(k) any special reports for which the Commission may call;

(l) his devotion to duty.

(4) In additional to the requirements prescribed in subregulations (1), (2) and (3), the Commission shall consider any specifications that may be required from time to time for appointment to the particular office."

17. The relationship between these various Regulations is not straightforward. Regulation 14 contemplates a process of "competition" for appointments being made from within the service. Regulations 15 and 16 both appear to be confined to first appointments to the public service. Regulations 17 and 19 contemplate an examination process for certain appointments from within the service. Regulation 18 sets out criteria for "considering the eligibility of officers for promotion", again therefore within the service. In the courts below, the Commission made submissions to the effect that Regulation 14 operated independently of Regulation 18, and that the ACE procedure could be justified simply on the basis that it was a form of competition. Before the Board, Mr Peter Knox QC made the more limited submission that both Regulations are relevant to the present case, but that Regulation 18 only applies to the initial decision to accept a candidate for consideration for promotion, not to the ultimate decision whether or not actually to promote him or her. He based this submission on the presence in Regulation 18 of the word "eligibility".

18. It is true that this word can have the threshold meaning assigned to it by Mr Knox's submission (as the word "eligible" in Regulation 13(4), (5) and (7) appears to). But in the context of Regulation 18 the Board has no doubt that the word "eligibility" is the equivalent of "suitability", and relates to the final decision whether or not to promote. Otherwise, the Regulations would contain no criteria at all regarding the basis for final decisions whether or not to promote. The Board therefore agrees with the Court of Appeal that Regulations 14 and 18 must be read together. Where a promotion is to be made from within the public service, it should be by competition, but the decision which of the competitors to promote should be made taking into account the criteria set out in Regulation 18.

The issues – (a) illegitimate abrogation or delegation by the Commission of its duties

19. It is appropriate to start with this issue, because it goes to the basis of the Commission's use of the ACE. The appellants' submission is that the use of ACE was determined by the executive and that the Commission "rather than robustly defending its sphere of exclusive responsibility from such interference, …. simply acceded to the Government's initiative". The appellants invoke the reasoning and decision in *Cooper & Anor v. Director of Personnel Administration & Anor* [2006] UKPC 37, a case concerning the Police Service Commission which is under section 122 of the Constitution invested in its sphere of activity with a similarly defined role to that of the Public Service Commission. In *Cooper* the Police Service Commission had required candidates to sit an examination set by the Public Service Examination Board and had then, in response to a complaint about delays in the issue of results, issued a media release disclaiming any responsibility for the conduct of the examinations and containing the following statements:

> "The Police Service Commission informs that the sole responsibility for the conduct of examinations falls under the purview of the Public Service Examinations Board, which is a Cabinet appointed body, the management of which is the responsibility of the employer. The Board is not a part of the Police Service Commission nor for that matter any of the other Service Commissions."

20. The appellants sought judicial review on the ground that the setting of the examinations by the Public Service Examinations Board was in these circumstances unconstitutional. Giving the judgment of the Judicial Committee Lord Hope said:

> "28. The Constitution requires that the powers which it has given to the Public Service Commissions, and to the Police Service Commission in particular, to appoint persons to hold or act in public offices and to make appointments on promotion must be exercised free from inference or influence of any kind by the executive. There is room in this system for the taking of some initiatives by the Cabinet. A distinction can be drawn between acts that dictate to the Commissions what they can or cannot do, and the provision of a facility that the Commissions are free to use or not to use as they think fit. The appointment of a Public Service Examination Board by the Cabinet for the Commissions to use if they choose to do so is not in itself objectionable. The advantages of using such a centralised body are obvious, and in practice the Commissions may well be content to continue to make use of them. The objection which has given rise to these proceedings lies in the misapprehension as to where the responsibility for choosing that system lies. In their Lordships' opinion the proposition in the media release of 8 July 2002

that the sole responsibility for the conduct of examinations falls under the Public Service Examination Board's purview was based on a profound misunderstanding of where the line must be drawn between the functions of the Commissions and those of the executive.

29. There is no doubt that the Police Service Commission Regulations envisage the existence of an Examination Board. Regulation 15(5) requires that the interview of a police officer who is successful in the promotion examination for promotion to any office in the Service must be conducted jointly by, among others, the chairman of the Examination Board. So the appointment of an Examination Board is an essential part of the whole process. The Constitution, for its part, does not permit the executive to impose an Examination Board on the Commission of the executive's own choosing. It is for the Commission to exercise its own initiative in this matter, free from influence or interference by the executive. It may, if it likes, make use of a Public Service Examination Board appointed by the Cabinet. There may be advantages in its doing so. This no doubt is a service that must be paid for somehow. Where resources are scarce the Commission cannot be criticised if it chooses to make use of an existing facility. On the other hand it cannot be criticised if it chooses not to do so. The Constitution requires that it must have the freedom to exercise its own judgment. It must be free to decline to use the services of the Public Service Examination Board if it suspects that the executive is seeking to use the Board as a means of influencing or interfering, whether directly or indirectly, with appointments to or promotions within the Police Service. Those are matters that lie exclusively within the responsibility of the Police Service Commission.

Conclusion

30. The media release of 8 July 2003 was wrong to say that the sole responsibility for the conduct of examinations for appointment to and promotion within the Police Service lay with the Public Service Examination Board, the management of which was the responsibility of the employer – that is to say, of the executive. Section 123 of the Constitution declares that the power of appointment of persons to hold office in the Police Service, including appointments on promotion and transfer, is vested in the Police Service Commission. Sole responsibility for the conduct of examinations for the appointment and promotion of police officers lies with the Commission.

31. How the Commission discharges that responsibility is a matter for the Commission itself to determine, in the exercise of its powers under

> the Police Service Commission Regulations. Regulation 19(1) provides that all examinations in the Police Service shall be set and marked by such Examination Board as may be appointed for this purpose. The regulation does not state in terms by whom that appointment is to be made. But, in the context of the regulations as a whole, and in the light of Part 9 of the Constitution in particular, it must be understood as reserving the power to do make the appointment to the Commission and not to the executive. …..
>
> 32. Their Lordships will therefore allow the appeal. They will declare that it is the sole responsibility of the Police Service Commission to appoint the Examination Board referred to in regulation 19(2) of the Police Service Commission Regulations and that the setting and marking of the papers by the Examination Board is subject to the ultimate control of the Police Service Commission"

21. In the present case, the material on which the appellants rely derives from documentation disclosed pursuant to a request made by Mr Sankar under the Freedom of Information Act 1999 and annexed (without comment) by Mr Sankar to an affidavit in the present proceedings sworn on 22 August 2006. From that documentation, Gobin J drew conclusions that the Cabinet had on 17 June 1999 decided on a study to determine the feasibility of establishing assessment centres; that by an agreement between the Ministry of Public Administration and Information ("MPAI") and the United Nations Development Programme ("UNDP") on 25 September 2000 UNDP had agreed to provide project management services to improve efficiency and new mechanisms for career management, including for the evaluation of personnel selection and promotion, in the public service; that the Commission, although it had lamented the absence of succession planning in the public service was either unaware of or played no part in the 2000 agreement; that the 2000 agreement contemplated use of consultants, who were to have expertise in inter alia ACE and to be under the direct supervision of the MPIA; that in August 2004 effect was given to the 2000 agreement by a revision dated 17 August 2004, focusing on assessment procedures for Deputy Permanent Secretaries, and by a sub-contract dated 14 June 2004 and amendments thereto dated 24 August 2004 and 25 February 2005, whereby UNDP engaged the Public Service Commission of Canada Personnel Psychology Centre ("PPC") to design an ACE for the selection of candidates for Deputy Permanent Secretary posts and to apply it to such candidates.

22. Gobin J recited evidence put in by the Commission from Mrs Edwards-Joseph, its Deputy Director of Personnel Administration, by an affidavit which Gobin J said was dated 9 March 2006:

> "At its meeting on the 22nd November 2002 the Public Service Commission agreed to employ assessment centre techniques to assist it by way of competition in determining merit and ability for the office of the Deputy Permanent and Permanent Secretary.
>
> To this end the Service Commissions Department contacted international consulting organizations for proposals for the conduct of assessment centre activities.
>
> On the 16th May 2003 the Public Service Commission agreed that the Canadian Public Service Commission ("PSC-Canada") should be selected as the Consultants for the Assessment Centre exercise to assist the Public Service Commission by way of competition in determining the merit and ability for the office of Deputy Permanent Secretary and Permanent Secretary. The Public Service Commission decided that only the officers who hold a substantive office in Range 54D and above and satisfy the academic and experience requirements for the office of Deputy Permanent should be considered for the Assessment Centre exercise."

The affidavit from which these quotations come was in fact dated 6 December 2005 and filed on 9 March 2006 in separate proceedings brought by Mr Winston Gibson, but materially similar passages appear in Mrs Edwards-Joseph's affidavit dated and filed 8 February 2006 in the present proceedings.

23. Gobin J commented that Mrs Edwards-Joseph's affidavit evidence

> "sought without more to give the impression that the respondent was instrumental in taking the decision to introduce ACE as well as in selecting the agency which conducted the exercises, the Canadian PPC. ….. The disclosed documents however tell a different story."

24. Based on the material before her, Gobin J asked herself whether it was the Commission who decided to use ACE, and, in answer, said that her assessment was "that in this case the Cabinet went beyond the 'taking of initiatives'", that the disclosed documents "point to the robust involvement of the executive, to the exclusion of the [Commission], for the greater part of a project which clearly aimed at interfering with or reforming the promotion functions of the [Commission]" and that "There is little to persuade me that the decision to introduce ACE was other than that of the Cabinet, executed by the MPIA" (para 58). She went on to say that "Against

that background and in particular the chronology of events, the bald statement of the [Commission] that it decided to adopt ACE is not sufficient to dispel the suspicion that this course was mapped out by the executive, executed by the MPIA and the UNDP and imposed upon the [Commission] which had no real choice in the matter" and that "In pursuing a project to implement new mechanisms for those processes [viz. appointment and promotion of public servants] to the exclusion of the [Commission], the executive embarked on a collision course with the constitution and the regulations"(para 59) .

25. A conclusion that the Commission's affidavit evidence was "not sufficient to dispel [a] suspicion" is an unpromising foundation for a positive finding of breach of the Constitution or Regulations. The Board agrees with the Court of Appeal (para 18) that there is no evidence that the Cabinet or the Executive imposed its will on the Commission. As the Court of Appeal observed, the decision in *Cooper* distinguishes between acts that dictate and acts which provide a facility which the Commission is free to use. The suggestion of a breach of the Constitution or Regulations first appears in the appellants' closing written submissions before Gobin J filed 20 October 2006, accompanied by suggestions that the Commission had failed to disclose a full or accurate picture. This was nearly a month after oral evidence, including that of Mrs Edwards-Joseph, had been heard on 28th September 2006. No such suggestions were put to Mrs Edwards-Joseph in cross-examination. None had been raised earlier in the case, and the bald statements that the Commission's use of the ACE was unlawful cannot be read as covering them. The Commission responded to the suggestions of breach of the Constitution or Regulations in its closing written submissions filed 30 October 2006, by simply referring to Mrs Edwards-Joseph's unchallenged affidavit evidence of 8 February 2006. The respondents now submit that Gobin J should not have entertained the suggestion of executive interference at all. But, even if this suggestion is accepted as having entered the arena, Mrs Edwards' Joseph's unchallenged evidence must in the circumstances be taken at face value, and there is, as the Court of Appeal said, no basis for any other view.

(b) The Regulations

26. The Board turns to the issue at the heart of this appeal - whether the Commission was entitled to use ACE to short-list candidates, and so exclude candidates like the appellants who had been accepted as appropriate to enter the ACE, but who failed during it. No issue is taken regarding the process by which the 173 applicants were reduced to 108 candidates invited to undertake the ACE. This is in any event irrelevant to the appellants, all of whom were invited to undertake the ACE. But, so far as appears, the reduction derived from a consideration of the applicants' qualifications and from conclusions that they did not meet the requirements for applications stated in the circular, that is "holding substantive appointments in Range 54D and above" and having "at least five years' experience at a senior managerial level and training as evidence by the possession of a recognized degree or by

possession of other recognized professional qualifications; or any equivalent combination of experience and training". These requirements, determined by the Director of Personnel Administration, can be regarded as "specifications …. required …. for appointment to the particular office" within Regulation 18(4).

27. The questions which arise under the Regulations are, first, whether the ACE itself took into account all the criteria mentioned in Regulation 18 and so satisfied that Regulation, and, second, if it did not, whether this invalidated the use of the ACE to short-list. As to the first question, many of the criteria would be covered by a combination of the specified requirements for applications and the nature of the ACE tests. But some would not, in particular criteria (e) (performance evaluation reflected in annual staff reports), (f) (any letters of commendation or special reports), (i) (any specific recommendation of the Permanent Secretary) and, probably, (l) (devotion to duty). Thus, Mrs Edwards-Joseph said in her affidavit of 8 February 2006 that the Commission considered performance appraisal reports, but made clear in cross-examination that this was not the case with candidates who failed to pass the ACE. Reference checks (which could at least overlap with some of these criteria) were also only undertaken at the third stage of the ACE in respect of candidates who had passed the second stage. The Court of Appeal said (para 23) that the purpose of short-listing by the ACE "implies that some further consideration would have to be given to the respective merits of the candidates. That could only properly refer to the application of Regulation 18 criteria".

28. The second, and crucial, question is therefore whether it was legitimate to use the ACE as a short-listing procedure, bearing in mind that it could only cover some of the desired criteria. The Court of Appeal thought that it was, on the basis that passing the ACE could be regarded as a further specification required for appointment to the particular office, within Regulation 18(4). The Court of Appeal raised this possibility itself, and concluded that a specification within Regulation 18(4) need not be required by the employer (the Minister or Ministry) but could be required by the Commission itself. The Board doubts whether this analysis is sustainable. Regulation 18(4) directs the Commission to consider any specification that may be required from time to time for appointment; it does not authorise the Commission itself to introduce specifications.

29. However, the Court of Appeal also used more general reasoning, when it said (para 32) that all the criteria set out in Regulation 18(3) were relevant in making appointments on promotion, "whether or not [the Commission] choose[s] to attach no weight to any criterion", but added that:

> "if it is accepted that the criteria do not have to be applied in any particular order, then no persuasive argument has been advanced …. why it cannot logically and lawfully employ a process that progressively

> eliminates applicants along the way. The Commission ought not to be required to apply all criteria to all applicants if it appears at an early stage that some will be unsuitable for the requirements of the particular office"

30. The Board considers that this reasoning is applicable under Regulation 18(3), although the Commission cannot also invoke Regulation 18(4). Regulation 18(3) is concerned with appointments for promotion. It is open to the Commission, considering the criteria contained in Regulation 18(3), to conclude that a candidate must satisfy certain of them to a minimum standard before the others can be of any relevance. The ACE was a process designed to test core skills which any appointee to the senior posts of Deputy Permanent Secretary should have. It has not been suggested that it involved or required skills lying outside those which would be covered by the general criteria of merit and ability referred to in Regulation 18(1) and (2). In the Court of Appeal's words, the ACE "reflected a new ideology aimed at selecting the best candidate", against a background that included "the notorious fact that [staff reports] had become largely meaningless over the years" (para 28), as a result of the development of "a culture …. in the Public Service in which there was a marked reluctance on the part of supervisory officers to record negative observations in writing and ultimately to issue negative staff reports" (para 29). It follows that the Board agrees with the Court of Appeal's answer to the second, main issue, although not with every aspect of its reasoning. It was legitimate to use the ACE as a tool to short-list.

Issues (c) and (d) legitimate expectation and fairness

31. These issues to some extent overlap, and it is convenient to take them together. The Board did not call on Mr Knox for the Commission to respond to the appeal on either. In support of a legitimate expectation, reliance is placed on two documents: a circular from the Director of Personnel Administration dated 11 April 2000, and the Commission's report for the year 2002, laid before Parliament on 25 February 2005. The circular recorded the Commission's decision that "persons with two (2) years or more service in an advertised office should be considered for appointment to that office on the basis of their work performance and conduct". The report expressed the Commission's concern about the number of officers holding temporary appointments for extended periods in vacant offices. It reported that the Commission had decided in 2002: first, that "it would consider recommendations from Permanent Secretaries and Heads of Departments for the appointment/promotion of officers who have served for long periods in a temporary capacity. The Commission was mindful that such persons had expectations of permanent appointment"; second, that "officers who were acting in positions for two years or more with good performance, should be promoted. Only qualified 'first time' applicants or persons who served for a shorter duration should go through the interviewing process"; and, third, that "in the absence of any adverse reports on an officer's performance and if no other officer was being passed over, it

would consider recommendations for the promotion of officers to fill vacancies provided they had served in the office for one year or more".

32. Accordingly, the appellants submit that they should have been considered for promotion and indeed promoted without being required to undergo, and without regard to the results of, any ACE. It is not easy to reconcile the appellants' reliance on these statements or decisions as giving rise to a legitimate expectation on their part with their case that appointments for promotion could and should only be made under the Regulations taking into account the elements of seniority, experience, educational qualifications, merit and ability mentioned in Regulation 18(1) and the more specific criteria mentioned in Regulation 18(4). The ACE was a means of testing ability and merit, prime considerations under Regulation 18(2) in respect of the senior posts for which the appellants were applying. Apart from that, however, there is in the Board's view no reason to read any of such statements or decisions as expressing a policy which would necessarily continue in, or was intended to commit the Commission for, the future. Further, if any legitimate expectation may otherwise have been induced, it was capable of being withdrawn by appropriate notice. In the present case, the appellants had ample warning from 13 December 2002 onwards of the new ACE process which was going to be used and which was only implemented some 18 months later: see paras 5 et seq above.

33. Many of the points relied upon as showing unfairness overlap with and have already been covered under issues, including legitimate expectation, already considered. Gobin J gave only two reasons for concluding that it was unfair to introduce what she described as "a change so fundamental and alien to the public service culture as a mode of selection for promotion" (para 41): that it contravened or circumvented the detailed code in the Regulations and that it breached representations made through the Regulations. Both reasons assume that the ACE was inconsistent with the Regulations and so add nothing to the appellants' case in that regard which the Board has already rejected. On one reading of her judgment, Gobin J may, independently of these two reasons, also have thought that "the decision to introduce ACE given the limited opportunity that candidates had to familiarise themselves with the method, was procedurally unfair" (para 41), and the appellants in their submissions to the Board also relied in this connection upon her earlier statements that "the first exercise was gruelling, even traumatic and I would expect, humiliating to participants such as claimants" (para 20). The Court of Appeal here too drew attention to the length of notice which the appellants had regarding the process to be adopted. The course of events which the Board has summarised above (paras 5 to 13) involved a carefully prepared and presented process. The appellants complain that they were given no or no adequate time to prepare, but the ACE was designed to test existing skills in a manner requiring no such preparation. Although the judge used the word "gruelling, even traumatic" and speculated that it was also "humiliating", the appellants' affidavits initiating these proceedings refer to it only as "rigorous" or, in the case of Mrs Tyson-Cuffie, "very rigorous". Mrs Tyson-Cuffie also said that she felt "very traumatised and depressed" on leaving the Trinidad Hilton where the first

ACE stage (which she did not in the event pass) was held. Without, the Board hopes, being unsympathetic, the Board regards such evidence as wholly incapable of sustaining a suggestion that the ACE was unfair to the point where it or any decisions based on it should be regarded as invalid.

Conclusions

34. In the result, the Board dismisses these appeals on the main issue of principle, the legitimacy of the Commission's use of the ACE to short-list candidates having regard to the requirements of Regulation 18, as well as on all other issues. It is unnecessary in these circumstances to consider what, if any, relief might have been appropriate if the appeals had succeeded on any aspect, or whether the appellants' delay in seeking relief in respect of their elimination from the ACE process until November 2005 (or, in Mrs Tyson-Cuffie's case, February 2006) might have operated to make any relief inappropriate in any event.