Hilary Term
[2015] UKPC 10
Privy Council Appeal No 0048 of 2013

JUDGMENT

Annissa Webster and others (Appellants) *v* The Attorney General of Trinidad and Tobago (Respondent)

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

before

Lady Hale
Lord Kerr
Lord Wilson
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

9 MARCH 2015

Heard on 10 June 2014

Appellants	*Respondent*
Peter Knox QC Ramesh Lawrence Maharaj SC Robert Strang (Instructed by Sheridans)	Alan Newman QC Tom Richards (Instructed by Charles Russell Speechlys)

LADY HALE:

1. Trinidad and Tobago has two classes of police officer, regular police officers (RPOs) and special reserve police officers (SRPs) (as well as the municipal police force, which is the subject of the Board's decision in *Alleyne v Attorney General* [2015] UKPC 3). The issue is whether, by virtue of section 4(d) of the Constitution of Trinidad and Tobago, present and former SRPs are entitled to equal treatment with RPOs.

The background

2. When these proceedings were begun in 2003, the Regular Police Force was established under the Police Service Act of 1965 and the Police Service Regulations of 1971 made under it (these have since been replaced by the Police Service Act 2006 and Regulations 2007). The Police Service is also recognised in sections 122-123 of the Constitution, under which the power to appoint, promote, discipline and remove RPOs was given to an independent Police Service Commission established under the Constitution (under changes made in 2006, these powers have been transferred to the Police Commissioner, but remain subject to the supervision of the Commission).

3. The Special Reserve Police Force was established in 1946 by the Special Reserve Police Act. SRPs do not enjoy the same constitutional protection as do the RPOs. It is common ground that the Special Reserve Police Force was originally intended to "provide a body of persons, otherwise employed, but who out of civic responsibility was prepared to assist the police by rendering part time service" (affidavit of Superintendent Wayne Richards, para 5). Originally, they could be called out by the Commissioner, Deputy Commissioner or any Superintendent or Assistant Superintendent, in only three situations: "in cases of external aggression or internal disturbance, actual or threatened, or on any special occasion when additional police may be required for the preservation of good order" (1946 Act, section 4(1)).

4. But in 1967 the third of these situations was widened to cover "whenever additional police may be required for the preservation of good order, the protection of persons or property or the performance of any other duty exercisable by members of the Police Service" (1946 Act, section 4(2)). It was also made clear that they could be called out on "full-time, part-time, or temporary service" (1946 Act, section 4(2)). Thereafter, from about 1969, as is also common ground, "due to the increasing demand for manpower in the Trinidad and Tobago Police Service without corresponding increases in its sanctioned strength members of the Special Reserve Police Service were

being called out on what appeared to be a permanent basis instead of on full-time or part-time or temporary service as contemplated by [the Act]" (affidavit of Hetty Mohammed-Libert, Acting Director of Human Resources in the Ministry of National Security, para 5). If called out for service, SRPs have no choice. They can be subject to police discipline (section 5) or to prosecution (section 13) if they fail to obey.

5. The result was that the great bulk of SRPs were employed as police officers on a permanent, full-time basis, rather than on the temporary or ad hoc basis envisaged by the 1946 Act. By 2000, 969 of the 1110 SRPs had been continuously employed on a full time basis for more than two years. They amounted to about one sixth of the total Police strength. While full time SRPs received the same basic pay as RPOs, they were not entitled to the same benefits, in particular to free medical treatment, overtime payments, a housing allowance and a pension.

6. This situation was unjust, not only to the officers themselves but also to the people of Trinidad and Tobago. Police officers, including SRPs, have special powers to enforce the law which are not enjoyed by ordinary citizens. It is important that they are appointed, disciplined and removed by independent authorities who are themselves insulated from political control: see *Endell Thomas v Attorney General* [1982] AC 113, 124, per Lord Diplock. It is one thing for a police force to have "specials" who help out from time to time; it is another thing entirely to have a permanent, full-time cadre of police officers who have the powers but not the constitutional status, or the terms and conditions, enjoyed by the RPOs. Greatly to its credit, the Government decided to do something to rectify the situation.

7. On 1 April 2000, the Cabinet decided that the practice of using the services of SRPs on a full time basis for extended periods should be discontinued. Those SRPs who had been continuously employed on a full time basis for two years or more should be absorbed into the regular police service with the rank of constable (whatever their previous rank had been). Because SRPs were not required to have the same entry requirements or undergo the same training as RPOs, special criteria for absorption were devised: a medical examination to establish fitness; a successful drug test; a satisfactory record of good conduct and performance; and a phased induction course. Those SRPs who could not or would not meet these criteria would be terminated with the offer of a "separation package". This decision was put into effect in 2001.

These proceedings

8. The Cabinet decision did not mean that from then on former and remaining SRPs were treated as if they had always been on an equal footing with RPOs. Hence this constitutional motion was brought in December 2003, originally by 592 applicants, but now reduced to 258. They fall into five categories:

(1) By far the largest category (more than 200 of the appellants) consists of those SRPs who became RPOs in 2001 as a result of the Cabinet decision. Although they all started as constables, whatever their previous rank had been, the difference between their previous pay and the maximum pay grade for constables was made up by a taxable allowance. According to the representative affidavit of Ancil Hosanine, they have two complaints. The first is that they were denied equal treatment with RPOs during their years of service as SRPs. The second is that they were told that their years of service as SRPs would be added to their years of service as RPOs (for pension purposes), but they are being required to pay pension contributions for those earlier years as if they had been RPOs (despite not having had the same benefits as RPOs during those years).

(2) 10 appellants were employed as SRPs on a full time, permanent basis at the time of the Cabinet decision in 2000, and despite that decision have continued to be employed on the same basis thereafter. It would appear that most of them were employed in the IT unit, where it would not have been efficient for them to work part time (see the affidavit of Assistant Superintendent Andrews, para 6). Their complaint is that, although they are paid a salary consistent with that of RPOs, they do not have the same entitlements to paid leave, medical benefits and other allowances (the representative affidavit is from Ellen Henry).

(3) Four appellants were employed part time as SRPs in 2000 and have continued to be so employed thereafter. Their complaint is that they are paid lower hourly rates than RPOs and do not receive the benefits and allowances that RPOs receive (the representative affidavit is from Annissa Webster).

(4) Seventeen appellants were retired after the Cabinet decision in 2000, as they were too old to be absorbed into the regular police force, where the retirement age is 55 (compared with 60 for SRPs). Their complaints are, first, that they were denied equal treatment with RPOs

during their years of service as SRPs; and secondly, that they were not entitled to a pension, but received a "separation package" instead.

(5) Ten appellants had already retired, having reached the age of 60, before the Cabinet decision. Their complaint is that nothing at all has been done for them. They did not have the same pay and benefits while they were in service and were given only modest gratuities on retirement (less than those offered to the SRPs in category (4)).

9. It will be seen, therefore, that the complaints fall into two distinct categories: first, that the appellants were not treated in the same way as RPOs before the Cabinet decision of 2000 was implemented; and second, that those who remain as serving police officers, whether as RPOs or as SRPs, are still not being treated equally with other RPOs.

The legal principles

10. By section 4 of the Constitution of Trinidad and Tobago it is recognised and declared that "there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: … (b) the right of the individual to equality before the law and the protection of the law; … (d) the right of the individual to equality of treatment from any public authority in the exercise of its functions".

11. This case was originally brought on the basis of both those rights. It was alleged that the failure to make regulations governing the terms and conditions of SRPs denied them the same protection of the law as was afforded to the RPOs. However, that claim has not been pursued before the Board. The appellants now found their claims exclusively on section 4(d) of the Constitution, the right to equality of treatment from a public authority.

12. It is well-established that this right extends to public officials in their relationship with their state employers: see *Bhagwandeen v Attorney General of Trinidad and Tobago* [2004] UKPC 21. It is also well-established that both section 4(b) and 4(d) are of general application and not limited to discrimination on the grounds of race, origin, colour, religion or sex: see *Smith v Williams* (1981) 32 WIR 395.

13. The content of the section 4(d) right has, however, given rise to some differences of opinion in the courts of Trinidad and Tobago. It has been

considered by the Board in three recent cases: *Bhagwandeen, Public Service Appeal Board v Maraj* [2010] UKPC 29, and *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1, but in none of these was there a comprehensive consideration of what, on any view, is a difficult subject.

14. It is difficult because open-ended constitutional guarantees of equal treatment by public authorities, such as that in section 4(d), are few and far between. This limits the help which can be gained from other well-known authorities in the field. Thus in *Matadeen v Pointu* [1999] 1 AC 98, the Board was concerned with section 16 of the Constitution of Mauritius, which prohibits discrimination both by the laws and by public authorities, but only on defined grounds. The Board held that there was no general constitutional right to equal treatment by the law or by the executive. Again, in *Ong An Chuan v Public Prosecutor* [1981] AC 648, the Board was concerned with article 12(1) of the Constitution of Singapore, which provides that "All persons are equal before the law and entitled to the equal protection of the law". It was thus a case about the equivalent of section 4(b) of the Constitution of Trinidad and Tobago and not about section 4(d).

15. There is a clear distinction between the two. The "equal protection of the laws" requires that the laws themselves be equal. But the problem is that the law necessarily has to treat different groups of people differently. The question is whether such distinctions are justified. There is a wealth of jurisprudence on this subject from the United States of America, where since 1868 the 14th Amendment to the Constitution has guaranteed the equal protection of the laws. It is from this jurisprudence that we derive the concept of "suspect" classifications, such as race, which have to be strictly scrutinised and can rarely be justified, while for other classifications all that is required is a rational connection to the purpose of the law.

16. It is worth noting that, in *R (Carson) v Secretary of State for Work and Pensions* [2006] AC 173, Lord Hoffmann drew a similar contrast between those grounds of discrimination "which prima facie appear to offend our notions of the respect due to the individual" and "those which merely require some rational justification". Differences in the latter category "usually depend upon considerations of the general public interest" which in his view "are very much a matter for the democratically elected branches of government" (paras 15 – 16). This was, however, in the context of legislative distinctions drawn in the rules relating to entitlement to retirement pensions and welfare benefits. The same would not necessarily apply to discrimination by public authorities in the exercise of their public functions.

17. Nor can we find an exact equivalent to section 4(d) in comparable international instruments. Article 26 of the International Covenant on Civil and Political Rights provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

It would appear that this does two separate things. First, like section 4(b) of the Constitution of Trinidad and Tobago, it guarantees to all people the equal protection of the law. Second, it requires the law to prohibit discrimination on the enumerated grounds. But it does not provide a free-standing requirement of equal treatment by public authorities equivalent to section 4(d) of the Constitution. The jurisprudence of the Human Rights Committee does however suggest that discrimination, even on the enumerated grounds, is not prohibited if it is based on reasonable and objective criteria.

18. Article 14 of the European Convention on Human Rights does require the equal treatment of individuals, because parties to the Convention are required to secure the enjoyment of the rights contained in the Convention without discrimination on an open-ended list of enumerated grounds. Article 1(1) of the 12th Protocol extends this to the "enjoyment of any right set forth by law"; and article 1(2) of that Protocol provides that "no one shall be discriminated against by any public authority" but once again only on the open-ended list of enumerated grounds. Neither article mentions justification, but very early on the European Court of Human Rights realised that a test of "sameness" is inadequate to secure real equality of treatment. It is almost always possible to find *some* difference between people who have been treated differently. The Court held that "discrimination" entails an *unjustified* difference in treatment. Justification is divided into two questions: does the difference in treatment have a legitimate aim and are the means chosen both suitable to achieve that aim and a proportionate way of doing so?

19. "Sameness" and justification are not rigidly discrete issues. They can merge into one another, as Lord Nicholls helpfully explained in *R (Carson) v Secretary of State for Work and Pensions* [2006] AC 173, para 3:

> "[T]he essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

20. The position is much the same in the law of the European Union. The principle was summarised by the Court of Justice in *Eman v College van burgemeester en wethouders van Den Haag* (Case C-300/04) [2006] ECR I-8055:

> " … the principle of equal treatment or non-discrimination, which is one of the general principles of Community law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified." (para 57)

However, as the Court made clear in *Maruko v Versorgungsanstalt der Deutschen Bühnen* (Case C-267/06) [2008] ECR I-1757, it is not required that the situations be identical, merely that they be comparable. And the assessment of comparability must be carried out in a concrete rather than an abstract manner, in the light of the benefit concerned. So, for example, marriage and civil partnership were comparable although not identical, for the purpose of certain benefits, whereas marriage and simply living together were not. If broad comparability is established, the second question is whether the reason for the difference in treatment is sufficient to justify it.

21. So what of the law in Trinidad and Tobago? There is a full and helpful exposition of the approach to section 4(b) in the judgment of Jamadar J (as he then was) at first instance in the "Trinity Cross" case, *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v Attorney General of Trinidad and Tobago,* HCA Application No 2065/2004, at pp 50-58. The burden is on the complainant to show both "likeness" and differential treatment, but once this is done, "the burden shifts to the State to show reasonableness, objective purposefulness, justification, accommodation, etc." (p 57). But "Courts will

not readily allow laws to stand, which have the effect of discriminating on the basis of the stated personal characteristics" of race, origin, colour, religion or sex. These are in a special category because such discrimination "undermines the dignity of persons, severely fractures peace and erodes freedom" (p 55). Jamadar J regarded the approach to section 4(b) as relatively settled and clear. By contrast, he observed that "the law as to what is required to prove inequality of treatment or discrimination in the application of laws by administrative action is in a state of uncertainty" (p 59).

22. The reason for this uncertainty is, as the Board pointed out in *Public Service Appeal Board v Maraj* [2010] UKPC 29, that there has been some difference of opinion about whether mala fides is required for a finding that section 4(d) has been violated. In *Attorney General v KC Confectionery Ltd* (1985) 34 WIR 387, the Court of Appeal had taken the view that it was required. But in *Bhagwandeen v Attorney General of Trinidad and Tobago* [2004] UKPC 21 the Board pointed out that mala fides is not usually required in anti-discrimination legislation and by implication invited the courts of Trinidad and Tobago to reconsider the matter. The Court of Appeal did reconsider in *Central Broadcasting Services Ltd v Attorney General,* Civil Appeal No 16 of 2004, where the majority (Hamel-Smith and Warner JJA) held that mala fides was not required. Hamel-Smith JA adopted the approach of Lord Bingham, giving the judgment of the Board in the Mauritian case of *Bishop of Roman Catholic Diocese of Port Louis v Suttyhudeo Tengur* [2004] UKPC 9, para 19:

> "Where apparently discriminatory treatment is shown, it is for the alleged discriminator to justify it as having a legitimate aim and as having a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

The same approach to section 4(d) was followed by Jamadar J in the "Trinity Cross" case.

23. There was no cross appeal on the mala fides point in the *Central Broadcasting Services* case and so the Board declined to rule upon it: [2006] UKPC 35, [2006] 1 WLR 2891, para 20. It was also unnecessary for the Board to decide the point in either *Bhagwandeen* or *Maraj*. There was no reference to a requirement of mala fides in the most recent case of *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1, where the majority of the Board held that there was a violation of section 4(d). Despite pleas, both judicial (by Jamadar J in the "Trinity Cross" case, at p 63) and extra-judicial (by the President of the Caribbean Court of Justice,

Justice Michael de la Bastide TC, in his keynote address to the Inaugural Symposium on "Current Development in Caribbean Community Law", 9 November 2009, para 16), that this Board should settle "this vexing issue", it would appear that the courts in Trinidad and Tobago have regarded the approach of Hamel-Smith JA in the *Central Broadcasting Services* case as settling the matter. Thus Bereaux JA in the instant case said this: "Mala fides does not necessarily have to be proven unless it is specifically alleged" (para 21). If so, the matter has been satisfactorily settled by the courts in Trinidad and Tobago without the need for the Board's assistance.

24. The current approach to section 4(d) of the Constitution of Trinidad and Tobago may therefore be summarised as follows:

(1) The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment.

(2) Once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment.

(3) To be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(4) Weighty reasons will be required to justify differences in treatment based upon the personal characteristics mentioned at the outset of section 4: race, origin, colour, religion or sex.

(5) It is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged).

25. It must, however, be acknowledged that there is a considerable overlap between the "sameness" question at (1) above and the justification question at (3). This is because the question of whether a difference between the two situations is material will to some extent at least depend upon whether it is sufficient to explain and justify the difference in treatment.

Different statutory schemes

26. The State has relied on three differences between the situations of SRPs and of RPOs as justifying the difference in treatment between them: (1) the difference in the statutory regimes governing their appointment and service; (2) the difference in their entry qualifications and training; and (3) the difference in the duties which they generally performed.

27. It is apparent that both the courts below regarded (1) as a conclusive answer to all the claims. Moosai J summarised his conclusion thus: "members of the Police Service cannot be true comparators with members of the Special Reserve Police as the legislature has clearly created two distinct classes of officers, with members of the Special Reserve Police being assigned duties of significantly lesser responsibility" (para 3). He did, however, go on to consider the evidence from each side and conclude that he preferred that of the State to that of the applicants, although there had been no cross-examination on either side. In the Court of Appeal, as Bereaux JA explained, "Given the legislative differentiation between both classes of police officers the judge's decision need not have depended on any evidence at all, far less any necessity to choose between the appellants' and respondent's evidence" (para 29).

28. It is, of course, the case that the legislative schemes are different. It may very well be that difference between them could be justified for the purposes of a claim under section 4(b). The appellants originally claimed that the failure to make regulations equivalent to the Police Service Regulations denied them the equal protection of the law, but they no longer make that claim. We are concerned with whether the actual treatment of these officers by the public authority in charge of them is a violation of section 4(d).

29. There is nothing in the statutory scheme which *requires* the SRPs to be treated so very differently from the RPOs. It is common ground between the parties that many of these officers were being treated in a way which was not contemplated by the statutory scheme, in that they were being required to work on a permanent full-time basis. They could have been given the same benefits as the RPOs. If the legislative scheme permitted them to be used in this way, it is hard to see how in itself it could justify the many differences in the terms and conditions of the officers involved. It is not necessary to stigmatise the practice as an "abuse" in order to reach this conclusion. In the absence of some other justification, it would be enough that the officers were in fact being required to do the same sort of work, for the same amount of time, as the RPOs were required to do.

30. If regulations had been made to deal with their terms and conditions of service, there would have been nothing to prevent those regulations making provision for them equivalent to that for RPOs. Indeed, it would appear that the difficulty of making different regulations was one of the reasons why the Cabinet decided instead to absorb the permanent SRPs into the regular force. This point is reinforced by the fact that such a high proportion of them were absorbed into the regular police force following the Cabinet decision. Furthermore, any subsequent inequality in treatment of those officers who have been absorbed cannot be justified on this basis. They are now subject to the statutory regime applicable to other regular officers.

31. In the conclusion of the Board, therefore, the principal reason relied upon both by the High Court and by the Court of Appeal to justify the difference in treatment is not sufficient to do so. There would, however, be no point in remitting the case to the High Court for further consideration if it were clear that there were other reasons sufficient to justify the difference in treatment of each of these appellants.

Different qualifications and training

32. SRPs were and are not required to have the same educational qualifications as RPOs, nor do they undergo the same lengthy training. They do not have to complete a two year period of probationary service or to pass a written examination before their appointment is confirmed. It was for this reason that special arrangements had to be made for those SRPs who were absorbed into the regular force. They had to undergo a medical examination, including a psychological evaluation, to demonstrate their fitness for service; pass a drug test; and have a satisfactory record of good conduct and performance. They were also required to undergo a special training programme.

33. The question remains, however, whether the differences in qualifications and training were relevant to the actual work which they were and are being required to do. If in fact the former SRPs were perfectly well qualified to do the same work which they were doing alongside their regular colleagues, it is difficult to see just how the differences in qualifications and training could of themselves justify the very substantial differences in treatment. There are many skilled jobs (and no-one can doubt that police work is a skilled job) where people are paid the rate of pay appropriate to the job they are currently doing, and the effectiveness with which they are doing it, rather than by reference to their historic qualifications.

Different duties

34. This is the nub of the matter. Where a complaint is made of differences in terms and conditions of employment, the principal criterion of "sameness" must be whether the appellants and their comparators were doing the same work or work which was not materially different.

35. The evidence on this matter on both sides is very far from satisfactory and there was no cross-examination of the witnesses on either side. Furthermore, the courts below expressed their preference for the State's evidence in ignorance of the fact that, in an earlier case, the State had conceded that SRPs and RPOs were appropriate comparators for the purpose of a claim under section 4(d) of the Constitution.

36. In *Brown and Weekes v Attorney General, Minister of National Security and Commissioner of Police* (HCA No 470 of 2000), the applicants complained that although as SRPs they performed the same functions as RPOs, their terms and condition were grossly inferior, and the failure of the State to make regulations providing for equitable terms and conditions amounted to a breach of section 4(d). On 3 January 2001, the State consented to an order (made by Archie J as he then was) which stated that its failure to make such regulations contravened the applicants' "fundamental human rights in relation to equality of treatment from a public authority in the exercise of its functions under section 4(d) of the Constitution of Trinidad and Tobago". This, it will be noted, was after the Cabinet decision of April 2000 but before it had been put into effect.

37. The State cannot complain that the *Brown* case has been raised so late in the day, as it was party to the case whereas the appellants were not. It is, of course, correct that no question of issue estoppel arises. It is also correct that the order does not recite that RPOs were appropriate comparators for the two individual SRPs who were applicants in that case. But there could be no other basis for the State's consent to the order, which also provided for damages to be assessed. The courts below might have found it helpful to know about this case when considering the evidence before them.

38. The absorbed appellants (group (1)) claim that they were deployed for the same periods of time, on the same duties, and facing the same risks, as their regular counterparts. Details comparing the job descriptions and duties of RPOs and SRPs are contained in the first affidavit of Crompton Pearson. He is an absorbed officer but he speaks of the duties of SRPs in the present tense. It would appear that he is talking of the duties of SRPs both before and after

absorption. No doubt some of those details can be challenged: he speaks, for example, of the SRPs having the same training and examination process as RPOs (para 4) when it is common ground that they did not. But one important point made in the joint affidavit of Crompton Pearson and John Victory is that, having been absorbed into the regular force as a result of the Cabinet decision, they continued to perform thereafter as RPOs the same duties that they had previously performed as SRPs, alongside their regular colleagues who were doing the same jobs.

39. The evidence of Superintendent Richards, on the other hand, is that "Members of the SRP perform basic police duties, such as traffic, guard, driving, data-entry and basic clerical duties and not usually involved in matters requiring crime detection and investigation techniques" (para 19). Earlier, he says that "A member of the SRP may assist in the charge room but is not normally in control of it. … Members of the SRP do not usually take up heavy responsibility even when they are attached to special units. Members of the SRP do not head any major enquiries. They assist police officers." (para 14) Assistant Superintendent Andrews amplified this, explaining that "it must be appreciated that whilst SRP Officers do perform many of the adumbrated functions performed by Officers in the Police Service, they perform these functions at a lower level, in terms of scope, complexity and concomitant risk". (paras 21)

40. There are two problems with this evidence. The first is that in both affidavits, the account of the duties of SRPs follows an account of a more recent (and for our purposes irrelevant) decision to recruit a new class of SRPs, and their accounts of the duties of SRPs are mostly in the present tense. It is not, therefore, entirely clear whether they are talking of the *current* duties of those who continue to be employed as SRPs despite the Cabinet decision of 2000, or whether they are talking of the duties of *former* SRPs before their absorption into the regular police force. The second problem is that their evidence is replete with words such as "normally", "usually", and "in general"; they do not deny that there were some SRPs who performed the same duties as some of their RPO colleagues or that the absorbed officers continued to perform the same duties as they had before absorption. Nor do they deny the evidence of Crompton Pearson that RPOs and SRPs were governed by the same job descriptions contained in the Police Appraisal Manual (para 12) and that the draft risk appraisal for 1998 gave the same risks for both RPOs and SRPs (para 15).

41. However, the main problem with all the evidence relating to the time before the Cabinet decision was implemented is that the Government itself clearly concluded that the work being done by the great majority of SRPs was sufficiently equivalent to that being done by RPOs to justify, indeed to

require, their absorption into the regular police service. Only a small proportion were not absorbed and those who were absorbed carried on doing the same work as before.

42. Ellen Henry, who (despite the decision that the practice would be discontinued) is still employed on a full time permanent basis as an SRP (group (2)), says that she performs the duties and functions exercisable by regular members of the Police Service, frequently having to work longer than her regular work hours of eight hours a day, but without financial compensation (paras 3 and 6). She works in the Information Technology Department. Assistant Superintendent Andrews explains that, although originally recruited on a part time basis, the officers "were later given full time duties in recognition of the peculiar nature of the work they perform … it would not be administratively efficient for these officers to work on a part time basis" (para 6). He does not deny that there are RPOs working alongside them doing the same work.

43. Annissa Webster, who is employed part time as an SRP (group (3)), says that she works the same four hour tour or beat and patrol duty which is customary for RPOs (para 3). She does not give any details of her actual duties, but neither does the police evidence engage with her claim or with those of the other three part time SRPs.

44. The problem faced by the Board is that, despite these difficulties, both Moosai J and the Court of Appeal found as a fact that the SRPs performed "duties of significantly lesser responsibility" (Moosai J at para 55) than did RPOs. Although the Court of Appeal did not regard it as necessary to dispose of the case, Bereaux JA correctly commented that the appellants' evidence was "characterised by imprecision" and considered that the judge's acceptance of the respondent's evidence was "plainly right" (para 30). The opportunity was not taken, on either side, to engage with the details of the evidence on this crucial issue. The judge was entitled to rely on the assessment in the evidence of the senior officers, which was not challenged at trial. It would have been open to the appellants to take the point in cross-examination that the comparisons made by that evidence were unsound or misdirected. That not having been done, it is now too late. It may well be that the reason for this lack of focus is that the claim originally relied on section 4(b) as well as section 4(d). But the only way in which matters could now be satisfactorily resolved would be to send the case back with directions for a complete retrial and the filing of fresh evidence to address the issues identified above in more detail.

45. There is no warrant for allowing the appellants a second opportunity to present their case. The Board therefore sees no sufficient reason for departing from its normal practice, which is not to go behind the concurrent findings of fact in the courts below.

A cut off point?

46. There would be a further difficulty if the case were to be sent back for a retrial. There is no statutory time limit for bringing a constitutional motion. However, constitutional relief is discretionary and the lapse of time since the events in question is a relevant factor in the exercise of that discretion: see *Durity v Attorney General of Trinidad and Tobago* [2003] 1 AC 405. The respondents did raise the issue of delay before Moosai J, who commented that "given the extraordinary sanctity of our fundamental human rights and freedoms, the courts are reluctant to shut out a deserving applicant on the ground of mere delay. However, where the delay is inordinate, then, failing a cogent explanation, a court may deny an applicant relief. Everything must depend upon the circumstances …" (para 26).

47. It does not seem to be seriously suggested that the claims which relate to periods of service after the Cabinet decision in April 2000 should be barred by reason of delay. Rather, the question is whether the claims which relate to periods before that decision was implemented should now be seen as "water under the bridge". There are attractions in taking the Cabinet decision as a cut-off point: there were no legal challenges by the current appellants to the previous practice; the Cabinet had to balance the various interests involved; and if one goes back before its decision, it is hard to see why there should be any bar to claims going back to the expansion of the SRP scheme in 1969.

48. On the other hand, there was obviously considerable pressure being put on the Cabinet to put matters right before it made its decision. (This may include the *Brown and Weekes* claim, which was issued in February 2000). The decision to put matters right demonstrates that there was something which needed to be put right. It is understandable that SRPs should seek to have the matter voluntarily rectified by the Government rather than by bringing a constitutional motion before the court. Their complaint now is that matters were not put right enough.

49. There would be attractions in permitting the claims of those appellants who remain serving police officers (that is, groups (1), (2) and (3)) to proceed, but not those of the officers who retired before the absorption took place (groups (4) and (5)). But this would face two difficulties. First, the complaints of

group (1) relate to their pension arrangements which, as the Court of Appeal rightly observed, are not explained with any clarity; while the complaints of groups (2) and (3) relate to the actual duties which they perform alongside their RPO colleagues, and these again are not explained in any detail. Secondly, if their complaints are permitted to proceed, it is difficult to see a logical basis for not also permitting the complaints of groups (4) and (5) to proceed. That would raise the issue of how for the government was obliged to provide unlimited retrospective relief for individual officers who made no complaint at the time.

Conclusion

50. It follows that these appeals must be dismissed. The Board has not reached this conclusion without some hesitation because it is not inconceivable that, had the evidence been properly directed and examined, a different conclusion might have been reached on the facts. But it is simply not right now to afford the appellants a second bite at the cherry.