



JUDGMENT

**The Attorney General of Trinidad and Tobago
(Appellant) v Carmel Smith (Respondent)**

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

before

**Lord Phillips
Lord Rodger
Lord Walker
Lord Brown
Lord Mance**

JUDGMENT DELIVERED BY

LORD WALKER

ON

14 December 2009

Heard on 13 October 2009

Appellant
James Guthrie QC

(Instructed by Charles Russell
LLP)

Respondent
Sir Fenton Ramsahoye SC
Anand Ramlogan

(Instructed by Bankside
Law)

LORD WALKER:

The issue

1. This appeal turns on a procedural issue, that is the proper party to be defendant to a claim for constitutional redress under section 14 of the Constitution of Trinidad and Tobago. The claim alleges that the Statutory Authorities Service Commission (“SASC”) discriminated against Mrs Carmel Smith (who is the claimant, and the respondent to this appeal) and treated her unequally in violation of her rights under section 4(b) (equality before the law) and (d) (equality of treatment by a public authority).

2. Although the events complained of occurred more than seven years ago, and there have been previous proceedings by way of judicial review, the merits of the claim have still to be investigated. Nothing in this judgment should be taken as expressing any view on the merits. The factual background is sufficiently summarised by recording that from 1996 Mrs Smith was the Acting Director of the National Lotteries Control Board (“NLCB”) which she had joined as Secretary to the Board of Directors in 1989. In 2000 she was formally appointed as Deputy Director but remained as Acting Director. In August 2002 she was on an extended period of vacation when she received a letter from the Chairman telling her to remain on vacation leave because accountants’ reports had provided “evidence of matters of concern, which bear on the performance of your duties.”

3. Shortly afterwards she was told that the matter had been referred to SASC, and on 2 September 2002 an executive officer of SASC wrote to her referring to an allegation of misconduct. The letter stated:

“In accordance with the provisions of Regulation 88(1) and (2) of the Statutory Authorities’ Service Commission Regulations Chapter 24: 01, the Statutory Authorities’ Service Commission has directed that you cease to report for duty with effect from August 5, 2002, until further notice.”

There was then considerable delay (a matter which was ventilated in the judicial review proceedings but is not relevant to this appeal). On 31 March 2004 Mrs Smith received from SASC a formal charge under Regulation 90(6) of the SASC Regulations:

“Statement of Charge;

Misconduct contrary to an implied term in your contract of employment;

Particulars of Charge:

That you, Carmel Smith, Deputy Director, National Lotteries Control Board did an act in breach of an implied term of your contract of employment namely not to exercise your authority unreasonably when during 2000 and 2002 you received a benefit above and beyond your entitlement as acting Director, by accepting and using motor vehicle registration number PBJ 3133 while enjoying an upkeep allowance on your personally owned motor vehicle.”

On 16 April 2004 Mrs Smith wrote formally denying the charge.

4. On 31 March 2006 Mrs Smith issued an originating motion claiming redress under section 14 of the Constitution. Her affidavit in support of the motion referred, in support of her allegation of discrimination, to SASC’s decision not to suspend another (less senior) male employee of NLCB against whom SASC had at the end of 2005 brought seven separate charges of sexual harassment (all these incidents having allegedly occurred in August 2004 and involving a single female employee).

5. The Attorney General of Trinidad and Tobago was made the sole defendant to Mrs Smith’s originating motion. He objected that (although entitled to be given notice of the proceedings, under section 3 of the Supreme Court of Judicature Act, Chapter 4: 01) he could not be made a party without his consent, and that the proper defendant was SASC. This point was heard as a preliminary issue. On 18 February 2008 Moosai J upheld the Attorney General’s objection and gave leave for the amendment of the proceedings, striking out the Attorney General and adding SASC. On 21 July 2008 the Court of Appeal (Hamel-Smith, Kangaloo and Weekes JJA) allowed Mrs Smith’s appeal and struck out the judge’s order, so that the Attorney General again became the sole defendant in place of SASC. The Attorney General appeals to the Board with final leave granted on 2 February 2009.

6. It is a matter for regret that considerable delay and expense has been incurred over this purely procedural point, with the substance of Mrs Smith’s claim being held in suspense. The procedural point is however of some importance to both parties. The Attorney General wishes to have the law clarified, to avoid similar delay and expense

in future proceedings for constitutional redress. Mrs Smith has anxieties (whether or not well-founded) about the recovery of any damages and costs that may eventually be awarded to her, if the Attorney General himself is not a party to the proceedings.

Relevant provisions of the Constitution

7. The Constitution of Trinidad and Tobago came into force on 1 August 1976. Chapter 1 (Recognition and protection of fundamental human rights and freedoms) contains sections 4 and 14, to which reference has already been made. Section 14 (Enforcement of the protective provisions) provides:

“(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating the motion.

(2) The High Court shall have original jurisdiction

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4),

and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(3) The State Liability and Proceedings Act shall have effect for the purpose of any proceedings under this section.”

The State Liability and Proceedings Act (Chapter 8: 02) is concerned with proceedings by and against the State. The Judicial Committee has considered the effect of section 14(3) in *Durity v Attorney General of Trinidad and Tobago* [2003] 1 AC 405, explaining (para 24 of the judgment delivered by Lord Nicholls):

“On this the first point to note is that the express but general reference to the State Liability and Proceedings Act in section 14(3) of the Constitution cannot be read as meaning that every provision of that Act is incorporated into the Constitution for the purposes of constitutional proceedings ... Thus, section 14(3) of the Constitution has to be read as applying to constitutional proceedings such of the provisions of the State Liability and Proceedings Act as are capable of being applied for this purpose.”

8. Section 76(2) of the Constitution provides for the office of Attorney General:

“The Attorney General shall, subject to section 79 [relating to temporary incapacity], be responsible for the administration of legal affairs in Trinidad and Tobago and legal proceedings for and against the State shall be taken –

(a) in the case of civil proceedings, in the name of the Attorney General;

(b) in the case of criminal proceedings, in the name of the State”.

In the Constitution the expression “the State” is not defined (other than by reference to its geographical extent in section 1(2)). Nor is the expression “civil proceedings” defined; in particular, there is no restrictive definition such as is found in the State Liability and Proceedings Act (para 12 below).

9. There are some other definition provisions in the Constitution that may be relevant, although they were not relied on in counsel’s submissions. In section 3(1) “public office” and “public officer” are defined by reference (directly or indirectly) to the public service, which is defined, subject to subsections (4) and (5), as service in a civil capacity of the Government of Trinidad and Tobago (or of the Tobago House of Assembly). “Service Commission” means the Judicial and Legal Service Commission, the Public Service Commission, the Police Service Commission and the Teaching Service Commission. Section 3(4) provides that a person shall not be considered to hold an office in the public service by reason only that

“(b) he holds the office of –

...

(iii) Ombudsman or member of the Integrity Commission or member of any other Commission established by this Constitution;

...

(v) member of any board, commission, committee or similar body, whether incorporated or not, established by any enactment.”

10. The Constitution provides for the establishment and functioning of a number of Commissions to oversee appointments, promotions, removals and terms of service for those working in the public sector in Trinidad and Tobago. These are the four Service Commissions already mentioned, that is the Judicial and Legal Service Commission (Chapter 7, sections 110-111); and (all in Chapter 9, sections 120-129) the Public Service Commission, the Police Service Commission and the Teaching Service Commission. There are two Commissions with more limited and specialised functions, the Integrity Commission (Chapter 10, sections 138-139) and the Salaries Review Commission (Chapter 11, sections 140-141). There is also a Public Service Appeal Board (Chapter 9, sections 130-137). Some at least of these Commissions had been in existence before the coming into force of the present Constitution in 1976. None of them appears to be a corporate body.

11. Lord Diplock has described the constitutional purpose of these Commissions in an appeal relating to the former (1962) Constitution, *Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113, 124:

“The whole purpose of Chapter VIII of the Constitution which bears the rubric ‘The Public Service’ is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous commissions, although public authorities, are excluded by section 105(4)(c) from forming part of the service of the Crown.”

Section 3(4) of the present Constitution is the counterpart of section 105(4)(c) of the former Constitution.

Other statutory provisions

12. The SASC was established by the State Authorities Act (Chapter 24:01). That Act was enacted in 1966 and came into force on 1 January 1967. It was therefore in existence several years before the present Constitution came into force, but it is not mentioned in the Constitution. The functions of the SASC (tersely set out in section 5) are exercisable in relation to officers (that is, under the definition in section 2, pensionable, monthly paid personnel) of statutory authorities as defined in the same section:

“‘Statutory Authority’ means a local authority and any commission, board, committee, council or body (whether corporate or unincorporated) established by or under an Act other than the Companies Ordinance declared by the President under section 3 to be subject to the provisions of this Act.”

Section 3 gives no further guidance as to the principles on which the President should exercise his power to make such a declaration, but the context (and the word “authority” itself) indicate that statutory authorities are to be statutory bodies operating in the public sector and exercising some degree of control over particular activities (such as the supervision of the national lottery exercised by the NLCB). In short SASC’s functions in relation to statutory authorities are similar to those exercisable by the four Service Commissions in relation to the respective branches of the public sector for which the Constitution gives them responsibility. The SASC, like the other Service Commissions, the Integrity Commission and the Salaries Review Commission, is not established as a corporate body.

13. The State Liability and Proceedings Act (originally named the Crown Liability and Proceedings Act) was enacted in 1966 and came into force on 28 September 1968 (so that it too antedates the present Constitution, and the reference to it in section 14(3) has appeared in the Constitution since its inception). Section 2(1) contains some definitions to which reference was made in argument:

“‘agent’ in relation to the State includes an independent contractor employed by the State but does not include a statutory corporation except where the State has entered into an express contract of agency with the corporation;

‘civil proceedings’ includes proceedings in the High Court of Justice or a petty civil court for the recovery of fines or penalties, but does not include proceedings analogous to proceedings on the Crown side of the Queen’s Bench Division in England;

...

‘servant’ in relation to the State, includes an officer who is a member of the public service and any servant of the State, . . . [but does not include] –

...

(f) any officer, employee or servant of a statutory corporation;

...

‘the State’ means the Republic of Trinidad and Tobago.”

The definition of “agent” is relevant mainly to section 4 (liability of the State in tort) and does not assist the resolution of this appeal. Section 2(3) provides:

“Any reference in Parts III or IV to civil proceedings by or against the State, or to civil proceedings to which the State is a party, shall be construed as including a reference to civil proceedings to which the Attorney General is a party; but the State shall not for the purposes of Parts III and IV be deemed to be a party to any proceedings by reason only that they are brought by the Attorney General upon the relation of some other person.”

Parts III and IV of the Act deal with matters such as enforcement, discovery and limitation. Section 2(3) does not therefore amount to a general widening of the concept of proceedings by or against the State, nor is it circular (as it might be if it applied for the purposes of Part II of the Act).

14. Section 19 of the Act is of central importance. Counsel for Mrs Smith based their argument on section 19(2):

“Subject to this Act and to any other written law, proceedings against the State shall be instituted against the Attorney General.”

They contended that SASC's actions are the actions of the State, nonetheless because of its independence from Government control. Against that counsel for the Attorney General relied on section 19(8) and (9), added by amendment in 1998:

“(8) Proceedings against an authority established by the Constitution or a member thereof arising out of or in connection with the exercise of the powers of the authority or the performance of its functions or duties are deemed to be proceedings against the State.

(9) In this section, ‘authority’ means a Service Commission as defined in section 3(1) of the Constitution.”

Counsel for the Attorney General rely on an implicit but clear distinction between the four Service Commissions referred to in section 19(9), on the one hand, and the Integrity Commission, the Salaries Review Commission and the SASC, on the other hand.

15. The Act has one puzzling complication that needs to be noted, but only in order to clear it out of the way. Apart from the definition of “civil proceedings” in section 2 (1) and the special provisions in section 2 (3), section 25 contains further provisions limiting the meaning of “civil proceedings” for the purposes of Part II only (which includes section 19). These provisions are obscure, but their most important practical effect is that judicial review proceedings may still be brought, despite section 19 (8) and (9), against any of the Service Commissions in its own name. But they do not have that effect in relation to a motion for constitutional relief under section 14 of the Constitution.

State responsibility

16. The proper scope and function of the State is a topic which has engaged political philosophers for many centuries. In the context of English law the concept of the State has traditionally been associated with the Crown, and the public service with Crown Service. Although Trinidad and Tobago has been a republic for over 30 years its Constitution still reflects this historical background. The traditional approach has always been that Crown Service is limited to the military or civil service of central government. Those employed in local government or statutory corporations are working in the public sector (a much wider expression) but are not in Crown service. Denning LJ summarised the position in *Tamlin v Hannaford* [1950] 1 KB 18, a case concerned with the British Transport Commission, which took over the British railway industry when it was nationalised by the Transport Act 1947. After referring to the Minister's power to give general policy directions to the Commission, Denning LJ said (at p 24):

“These are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders, or even of a sole shareholder. In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property.”

17. In the last generation the influence of European law has produced new contexts in which a broader concept of state responsibility is called for. The Court of Justice of the European Communities has held that a body such as a statutory hospital authority or a statutory gas corporation is an “emanation of the state” so as to found state responsibility for its shortcomings in compliance with European directives: *Marshall v Southampton and South West Hampshire Area Health Authority* [1986] QB 401; *Foster v British Gas Plc* [1991] 1 QB 405. The same approach of broadening state responsibility for failure to respect human rights underlies the concept of “public authority” in the United Kingdom Human Rights Act 1998. *Marshall* and *Fisher* were referred to in the impressive judgment of Aboud J (Ag) in *Boxhill v Port Authority of Trinidad and Tobago* (2004) on the issue of whether the Port Authority is a public authority within the meaning of section 4(d) of the Constitution. But that is a different and broader issue than the procedural issue now before the Board. The procedural issue is one of statutory construction which depends on the language of the Constitution and the State Liability and Proceedings Act, construed in a purposive and practical way.

18. When the new Constitution was being drafted and considered the Service Commissions were already in existence, carrying out the important functions described by Lord Diplock in *Thomas v Attorney General of Trinidad and Tobago*. SASC was already in existence carrying out similar functions in relation to statutory authorities. The fact that the former but not the latter were given constitutional status may reflect Parliament’s view that the functions of the Service Commissions are closer to what are sometimes called “core functions”. That view would tend to be confirmed by the amendments to section 19 of the State Liability and Proceedings Act made by Parliament in 1998. But whether or not that is correct (and whether or not the amendments were inspired by the Judicial Committee’s decision in *Rees v Crane* [1994] 2 AC 173) it is inconceivable that Parliament did not have it well in mind, in making the amendments, that they were making an important procedural distinction between the four Service Commissions, on the one hand, and the Integrity Commission, the Salaries Review Commission, and the SASC, on the other hand.

Lack of incorporation

19. In his spirited address following his leader, Mr Ramlogan placed great emphasis on the fact that SASC is an unincorporated body. This point seems not to have been taken below (indeed the judge recorded in paragraph 20 of his judgment, “it is common ground that the SASC is a legal entity capable of being sued”). Nevertheless it must be considered to see whether it has any merit.

20. In the Board’s opinion the point has no merit. An unincorporated body (by definition) has no legal personality, and can sue or be sued only through one or more natural persons representing it. But this happens as a matter of course both in private law (where partners, clubs, trustees and personal representatives are often parties to litigation) and in public law (where unincorporated authorities of all sorts, including tribunals, school governors, and visitors to educational charities) are often parties to judicial review or other proceedings. A striking example is the well-known case of *R v Panel on Take-overs and Mergers ex parte Datafin Plc* [1987] 1 QB 815, in which Sir John Donaldson observed at the beginning of his judgment (at pp 824-825):

“The Panel is an unincorporated association without legal personality and, so far as can be seen, has only about 12 members. [The members were then identified] It has no statutory, prerogative or common law powers and it is not in contractual relationship with the financial market or with those who deal in that market.”

Nevertheless the Panel was amenable to judicial review.

21. It should perhaps be added, for completeness, that if an unincorporated body has only a shadowy existence that may be a reason for the Court to refuse to allow it to be represented, either in judicial review or any other proceedings. As Mr Ockleton said when sitting as a deputy High Court judge in *Proud v Buckingham Pub Watch Scheme* [2008] EWHC 224 (Admin), quoted in *R (Boyle) v Haverhill Pub Watch* [2009] EWHC 2441 (Admin), para 38:

“It seems to me in the highest degree unlikely that an entity which has . . . no constitution, no finances, no fixed membership, no rules and whose decisions are binding on its members only to the extent that they treat them as binding, on which again there are no rules – that an entity of that sort can be amenable to judicial review or can be a person exercising public functions under section 6 of the Human Rights Act.”

But that has no application to this case. SASC is a statutory body with functions, powers and responsibilities clearly defined by Parliament.

Capacity to pay

22. Mr Ramlogan also relied on the practicalities of the matter. He submitted that even if SASC was to be reinstated as a defendant, the Attorney General should remain as a party in order to ensure that Mrs Smith, if ultimately successful, would be able to recover any damages and costs awarded to her. He drew attention to the decision of the Judicial Committee in *Jhagroo v Teaching Service Commission* [2002] UKPC 63, in which (para 45) it was accepted by both sides that any damages awarded would be payable by the Government of Trinidad and Tobago, rather than the Teaching Service Commission.

23. Mr Guthrie QC (for the Attorney General) did not quarrel with the suggestion that lawyers in his department might continue to be involved in the case in any event, and indicated that any damages and costs awarded were *likely* (Mr Guthrie went no further than that) to be met through his department. It may be that individual members of SASC (as well as Mrs Smith) will want to take that matter further with the Attorney General's Department. These considerations cannot however carry weight in the determination of the issue of statutory construction, as against the scheme and language of the State Liability and Proceedings Act.

Conclusion

24. In the Board's opinion the scheme and language are clear. The Attorney General is to represent the State (in effect, Central Government). The Attorney General is also to represent (except in judicial review proceedings) statutory bodies which (presumably because of their core functions) are deemed by section 19(8) and (9) to be part of the State. Other statutory bodies, even if public authorities amenable to constitutional redress proceedings under section 14 of the Constitution, are not part of the State, and are not deemed to be part of the State.

25. The Board will therefore allow the appeal and reinstate the order of Moosai J. The parties have 14 days in which to submit written submissions as to costs.