Soomatee Gokool & Ors v. Permanent Secretary of the Ministry of Health and Quality of Life & Anor [2008] UKPC 54 (2 December 2008)

Privy Council Appeal No 84 of 2007

Soomatee Gokool and others *Appellants*

v.

(1) Permanent Secretary of the Ministry of Health and Quality of Life

(2) The Public Service Commission *Respondents*

FROM

THE COURT OF APPEAL OF MAURITIUS

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

Delivered the 2nd December 2008

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Present at the hearing:-

Lord Hope of Craighead

Lord Rodger of Earlsferry

Lord Carswell

Lord Mance

Sir Paul Kennedy

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*[Delivered by **Lord Carswell**]*

1. Public sector jobs with security of tenure are much sought after in Mauritius, so much so that when the Ministry of Health and Quality of Life ("the Ministry") published an advertisement in September 2004 inviting applications for appointment to posts as Health Care Assistants (General) ("HCAs"), there were over 14,000 replies. A long process of sifting applications and interviewing followed. Appointments were offered to the leading 388 candidates (the number of posts then available), but withdrawn almost immediately, and then the disappointed candidates were offered one month's pay in lieu of notice. The appellants sought to challenge the validity of the decision to terminate their appointment by judicial review, but the Supreme Court refused them leave, on the ground that the matter was one of private law and judicial review did not lie.

2. The appellants have appealed against this decision by special leave of the Board. By the time the matter came on for hearing the respondents, correctly in their Lordships' view,

did not seek to uphold the reasoning underlying the decision of the Supreme Court, conceding that there was a sufficient public law element. It is agreed now that the case comes within the class referred to by Woolf LJ in *McClaren v Home Office* [1990] ICR 824, 836, as having a sufficient public law element. The Board accordingly gave leave to apply and proceeded to hear argument on the merits of the application for judicial review. It will accordingly be necessary in this judgment to consider the factual background and reach a conclusion on the substance of the application.

3. In September 2004 the Ministry decided to fill vacancies then existing by the appointment of a number of HCAs. At that time the appointment of 222 persons was required to bring the numbers up to establishment level. During the appointment process the number of vacancies increased by another 66 and funding for a further 100 posts was made available in April 2005 when the Government's supply estimates were produced, an increase which it was suggested was not unconnected with the prospect of an early election.

4. The appointment of employees in the public sector is by virtue of section 89(1) of the Constitution to be carried out by the Public Service Commission. On 18 May 1999 the Commission delegated the power of appointment of HCAs (then styled nursing auxiliaries) to the Permanent Secretary of the Ministry.

5. An advertisement was issued on 24 September 2004, inviting applications from persons with specified qualifications, with a view to the appointments being made early in 2005. Replies were received from 14,814 persons, of whom it was adjudged that 8998 fulfilled the specified criteria for appointment. It was decided to invite all 8998 applicants for interview and for that purpose four interview panels, made up of officials of the Ministry, were constituted. Each panel covered a defined geographical area of Mauritius. Each was given the same scheme for the allocation of marks to the interviewees. At the conclusion of the interview process in May 2005 a short list of 450 candidates was drawn up. Police clearance in respect of the shortlisted candidates was sought. In consequence of minor adjustments some 446 candidates remained and a seniority list was prepared, setting them out in order of marks scored, with a second list of the top 388.

6. This was taking place against a background of political uncertainty and change. A member of the National Assembly resigned in September 2004 and speculation developed about the political future. By December 2004 it was widely predicted that a general election would be held. The Government decided that the annual budget would be produced on 4 April 2005, rather than at the customary time in June, which added to the speculation. On 24 April 2005 the National Assembly was dissolved and a few days later a general election was called, the polling day being fixed for 3 July 2005.

7. The Permanent Secretary of the Ministry Mrs Rajamanee Veerapen consulted the Minister on 30 June 2005 about whether she should proceed with the appointment of the 388 candidates with the highest marks, bearing in mind that the election was in three days' time and there was already some public disquiet about the making of appointments immediately before it. The Minister instructed her to go ahead with the appointments and

the process was pressed ahead with remarkable celerity. The Chief Personnel Officer was on 30 June diverted from his other duties as a returning officer to sign the appointment letters. The Minister gave instructions for members of staff to be called in on Saturday 2 July to dispatch the letters, although such calling in on a Saturday was ordinarily reserved for exceptional cases where urgent action was required. The letters, bearing date 30 June 2005, accordingly went out to the 388 successful candidates, offering them posts "on a purely temporary month-to-month basis and terminable by one month's notice on either side". After six months' in-service training they would then be considered for permanent appointments. The candidates were asked to reply in writing within one week and if accepting the offer, to report for duty on Friday 8 July 2005.

8. Another appointment exercise for the recruitment of health workers was under way prior to the election. The process had commenced in February 2005 and by the end of June preparations were complete for the appointment of 250 General Workers (male employees) and 243 Hospital Servants (female). Public controversy had become quite acute by then, it being alleged that the appointments were being used as electoral bribery. The Permanent Secretary to the Ministry had received reports of discrepancies in the candidate lists and had formed the view that some letters purporting to be invitations from the Ministry to interview were palpable forgeries. She cautioned the Minister in May against proceeding with the Health Service appointments so close to the election, but he instructed her to proceed and again unusually speedy arrangements were made to have the process completed. On 1 July 2005 Mrs Veerapen brought the anomalies and discrepancies to the Minister's attention and strongly advised that the selection process in respect of General Workers and Hospital Servants should be cancelled. This time she obtained his agreement and went ahead and cancelled this process.

9. When the appointment letters for HCAs went out, there was a veritable storm of controversy. It was alleged that some of the successful candidates had been informed by some means before election day and complaints were already being received that there was an unduly large proportion of appointees from Constituency Number 8, the Minister of Health's constituency.

10. On or about 4 July Mrs Veerapen directed that an analysis be carried out. The result showed that of those originally interviewed 626 or approximately 9 per cent had come from Constituency Number 8, whereas of the 388 successful candidates 101, approximately 26 per cent, lived in that constituency. The total number appointed and percentage of successful candidates were far larger in that constituency than in any other. The discrepancy was such as to give rise to a very strong suspicion that the marking process had been flawed. There was not at that stage any direct evidence of improper solicitation of votes or rewarding of electors, but the Permanent Secretary states that she formed the view that it was not possible to have confidence in the fairness and integrity of the marking system or in the correctness of the outcome of the appointment process. In paragraph 32 of her affidavit of 11 September 2008 Mrs Veerapen set out the concerns which she felt at the time:

> "I also considered the effect on public confidence in the integrity of recruitment to the Health Service. Given the intense controversy and the heightened public mood of distrust, in my view at the time, it was impossible to expect to preserve public confidence in the fairness of the HCA selection process once the news of its disproportionate outcome was confirmed by the Ministry and the figures published. Unaddressed, it would be likely to lead to a very serious loss of public trust in the selection procedures for the Health Service in general. In my view, for the reasons I stated at paragraph 7 of my First Affidavit, there was a compelling public interest in ensuring that the recruitments operated by the Ministry were transparently fair."

11. Mrs Veerapen states that it was these factors which led her to consider terminating the appointments offered by the letters of 30 June 2005. Although aware of the disappointment and possible prejudice which this could cause, she considered that it should be done quickly, before replies were received from all the offerees and before those who accepted started arriving for work, in order to minimise the detriment they might suffer. She also took into account the temporary nature of the employment offered, the fact that the disappointed offerees could re-apply in a renewed appointment process and the problems to which delay could have given rise.

12. On 7 July she informed the Secretary to the Cabinet and Head of the Civil Service of her decision to terminate the appointments. On his advice she consulted the Solicitor-General about the implementation of the decision. He advised her that the power to terminate would have to be obtained from the Public Service Commission. She therefore made an urgent request for such authority and received by a letter dated 7 July 2005 formal delegation to her as Responsible Officer of the Ministry, pursuant to section 89(2) of the Constitution, of

> "the power to remove from office any person appointed in pursuance of the power of appointment, confirmation, promotion and transfer previously delegated to you in respect of the grade of Health Care Assistant (General) in your Ministry."

Letters dated 7 July were then dispatched to all 388 successful candidates, stating that the offer of employment "is being withdrawn".

13. The election having resulted in a change of government, the new Minister of Health was sworn in on 7 July and arrived at the Ministry's offices on the morning of 8 July. The Permanent Secretary briefed him on the actions which she had taken. She states in paragraph 38 of her affidavit of 11 September 2008:

> "He approved the decision that I had reached. Thereafter, he began to supervise the arrangements to be made for the termination of the appointments and withdrawal of the offers."

14. After receiving protests from some of the candidates, Mrs Veerapen sought further advice from the Solicitor-General's Office on 11 July. On receipt of their advice, she decided to send a further letter to each candidate. Those letters, dated 13 July 2005 and signed on behalf of the Permanent Secretary, read as follows:

> "Please disregard the previous letter (MH/01/1/2/l) of this Ministry dated 7 July, 2005.
>
> 2. I am directed to inform you that by virtue of paragraph 3 of the letter of employment dated 30 June, 2005 and issued to you by post on 2 July, 2005, the employment offered to you was stated to be on a purely temporary month-to-month basis and liable to termination by one month's notice on either side.
>
> 3. You are hereby informed that the employment offered to you has been terminated with effect from 8 July,2005, and that one month salary in lieu of notice of termination will be paid to you."

Each recipient subsequently was paid one month's salary.

15. On 19 August 2005 the appellants, together with other successful candidates, sought leave to apply for judicial review of the Permanent Secretary's decision contained in the letters of 13 July 2005 to terminate their employment. The application was heard by the Supreme Court (Pillay CJ and Caunhye J) on 21 February 2006 and leave was refused in a written judgment given on 23 February 2006. The court held that the applicants had not shown an arguable case, since they were employed on a monthly basis and the respondent was legally justified in terminating it on payment of one month's salary in lieu of notice. The Board gave the appellants special leave to appeal against this decision, indicating that if it held that leave should have been granted it would proceed to consider the substantive issues in the application for judicial review. The parties therefore argued the substantive issues before the Board.

16. The appellants attacked the decision under review on a number of grounds, but the main thrust was a challenge to the validity of the respondents' case that the decision to terminate the HCAs' employment was taken by the Permanent Secretary, as she averred. They suggested that it was not in reality a decision made by her, but a politically driven decision on the part of the incoming government, which distrusted the allegiance of those appointed. It accordingly was not taken by the Permanent Secretary as the public officer to whom the Public Service Commission had delegated the power of termination. The Minister was not a public officer within the meaning of sections 111 and 112 of the Constitution and the power of termination could not validly be delegated to him. In consequence, it was claimed, the exercise of the delegated power, having been carried out in reality by the Minister, was invalid.

17. Their Lordships do not accept this submission. In their opinion the evidence satisfactorily establishes that the decision was taken, as she avers, by Mrs Veerapen. They do not agree that it was unlikely, as Mr Guthrie QC, counsel for the appellants, suggested, that she would take the decision herself in the interregnum between governments. On the

contrary, the evidence establishes that she went to the Public Service Commission to obtain a delegation of the power to terminate the appointments, and must have been very clearly conscious that the power and responsibility to make the decision rested upon her. She informed the Secretary to the Cabinet of her intention, but this was an understandable and natural course for her to take in a matter of some importance, which had attracted considerable publicity. It does not mean that she placed the responsibility for deciding upon the Secretary to the Cabinet. Likewise, she obtained the approval of the incoming Minister on the morning of 8 July and he lent his support to the process of implementing the decision. It does not follow that it was in reality his decision, even though he and his party may have been strongly in agreement with it and it may have afforded him material which he could use as political capital. On the contrary, the evidence supports the respondents' case that the appointments were terminated the day before he took up office. Mr Guthrie placed some emphasis on the fact that before the Supreme Court the respondents did not make this case or mention the factors upon which they relied before the Board. This is understandable, since at that stage they were relying wholly, if mistakenly, on the argument that the matter was one of private law and not subject to judicial review.

18. The second major plank of the appellants' case was that the decision, if truly made by Mrs Veerapen, was invalid as being irrational and taken in a procedurally unfair manner. Mr Guthrie suggested in argument a number of steps which the Permanent Secretary could have taken when faced with the situation which had arisen by 7 July 2005. Proper reasons could have been given to the disappointed candidates and an explanation to the general public, an inquiry could have been held to ascertain whether the voting pattern was skewed by the recruitment of the candidates in constituency Number 8, or representations from the candidates could have been received and considered. The appointments could have been left undisturbed to meet the obvious need for HCAs in the Health Service, or they could at least have been put on hold until the outcome of further inquiry was known. In hindsight it is not difficult to make such criticisms of the course adopted and even without hindsight it is possible to conclude that the process of terminating the appointments could have been handled differently and perhaps better. But that does not necessarily mean that they were irrational. The burden of establishing that a decision was unreasonable in the *Wednesbury* sense is notoriously heavy and their Lordships do not consider that the appellants have discharged it. In their view the decision was within the range of responses which a reasonable decision-maker might have made in the circumstances. The situation required speedy action, as Mrs Veerapen has demonstrated in her evidence, and it was obviously impracticable to take some of the steps suggested by the appellants. The individual cases could not be investigated in a short time and it was necessary both to terminate the appointments and to restore public confidence in the integrity of the Ministry and its appointing process. The Ministry did not then have evidence which might have tended to establish culpable behaviour on the part of any individual candidate, so it was not a necessary ingredient of a fair process to give the candidates an opportunity to make representations before the appointments were terminated. Their Lordships accordingly reject this head of argument.

19. The appellants also argued that the termination was unlawful on the ground that it was carried out in breach of the Public Service Commission Regulations, which applied to their appointment and employment. They submitted, first, that the disciplinary process laid down in Part IV of the Regulations was not observed. Their Lordships do not consider that this Part applied to the case. It was not one of disciplining individual candidates – on the contrary, the respondents did not have any evidence of wrongdoing on their part and did not seek to attribute any to them. Secondly, it was submitted in the alternative that if this was not a case of disciplinary action, it was not covered by the Regulations and required instructions to be obtained from the Commission, in accordance with the requirements of Regulation 51. It is common case that Mrs Veerapen did not obtain instructions from the Commission, but instead sought from it delegation of the power of termination of appointments. The delegation made pursuant to section 89(2) of the Constitution was in their Lordships' view sufficient to entrust the power of termination wholly to the Permanent Secretary. She was in command of the process and so was not subject to the obligation in Regulation 51 to obtain instructions from the Commission. This point must accordingly fail.

20. The final argument put forward on behalf of the appellants was that the decision to terminate their appointments deprived them of a legitimate expectation that they would be permitted to commence work as HCAs and obtain the opportunity of a permanent post with the Ministry. It appears questionable whether they can properly be said to have had any such expectation, in view of the clear statement in paragraph 3 of the appointment letter of 30 June 2005 that the employment was to be liable to termination by one month's notice. But even if they could be said to have had the expectation which they claim, it would not in their Lordships' view be possible for them to establish a case.

21. The basis of the jurisdiction is abuse of power and unfairness to the citizen on the part of a public authority: see *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, 251, para 82. On this basis it has been held that two factors tend to show that there has not been an abuse of power. One is whether the claimant has relied on the promise or representation, in particular whether he has thereby suffered any detriment, as to which see *R v Secretary of State for Education and Employment, ex parte Begbie* [1999] EWCA Civ 2100, [2000] 1 WLR 1115, 1130-1 and *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237, 246, where the court adopted at para 29 the statement in Craig, *Administrative Law*, 4th ed, p 619 that "detrimental reliance will normally be required". The second is when the authority changes its policy on sufficient public grounds. If there is an overriding public interest behind its change of policy, it will not be an abuse of power: *Coughlan*, para 57. If it could be said that the appellants had a legitimate expectation, and even if any of them could show that he suffered sufficient detriment, the latitude permissible to a public authority faced with a change of circumstances would mean that its action was not an abuse of power and that the appellants are not entitled to a remedy.

22. The appellants have accordingly failed to make out a sufficient case for relief in their claim for judicial review. The Board will dismiss their appeal, though on different grounds from those adopted by the Supreme Court, on the basis that they should have

been given leave to apply for judicial review, but that the application itself is not well founded.