Commodities Board v. Christine 'Uta'atu

Privy Council
Appeal No. 4/1990
27 March, 1 June 1990

Administrative law – dismissal of officer of public body – principles of natural justice applicable

Employment – dismissal of officer of public body – principles of natural justice applicable

Natural justice – applicability to dismissal of officer of public body

The respondent was in 1985 appointed finance manager by the Board for a period of 3 years. Subsequently in October 1988 she was re-appointed for 1 year. In December 1988 the Board gave her 1 month's notice of its intention to terminate her service on ground which she was given no real opportunity to answer. The Supreme Court held that the principles of natural justice applied to her dismissal, and that they had not been complied with, and made a declaration that the dismissal was invalid and awarded damages of $25,000. The Board appealed on the grounds that the principles of natural justice did not apply to her dismissal, and that the damages were excessive.

HELD, dismissing the appeal, except as regards general damages:

1. The dismissal of the respondent was a dismissal from office of a public body to which the principles of natural justice applied;
2. There had been a breach of the principles of natural justice by the Board when dismissing the respondent;
3. The amount of damages awarded was not excessive except for $5,000 awarded as general damages in respect of inconveniences humiliation and distress, since there was no finding of malice by the Board.

Cases considerd:

Ridge v Baldwin [1964] A.C. 40
Malloch v Aberdeen Corporation [1971] 2 All E.R. 1278
R v East Berkshire Health Authority, ex parte Walsh [1984] 3 All E.R. 340
Marlborough Harbour Board v Goulden [1985] 2 N.Z.L.R. 385
Va'inga Teu v Commodities Board Appeal case 7/1988

Counsel for the appellant : Mrs 'A. Taumoepeau
Counsel for the respondent : Dr R.E. Harrison

Judgment of the Privy Council

This is an appeal against the judgment of Martin CJ in which he held that the Appellant Board's purported dismissal of the Respondent as an employee of the Board was invalid and contrary to the principles of natural justice justifying an award of damages which he fixed at $25,000.

The Facts.

Although this purports to be an appeal on the grounds that Martin CJ erred in fact and in law, there was no significant challege to his findings of fact so our statement of them can be brief.

The Respondent is a certified public accountant and a member of the American Institute of Certified Public Accounts. After qualification she practised for some eight years in the United States, which included five years with an internationally known accounting firm where she became audit manager. In 1983 she joined the Peace Corps and came to Tonga. For two years she worked as finance manager at the Tonga Development Bank and at the end of that time married and decided to stay in Tonga. She sought other employment and was appointed finance manager of the Board. Her appointment was by letter of 16 September 1985 from the Director of the Board, Mr Hurrell, for a term of three years from that date on a starting salary of $13,000 per annum. She was responsible for over–all financial management of the Board under the direction of Mr Hurrell. At the end of that three year term the Board and Respondent entered into an "Agreement of Service." It is dated 4 October 1988 and provided for a period of employment of one year from 16 October 1988 at a basic salary of $28,000 per annum. Although the agreement does not specifically provide for renewal at the end of the term the manner in which the payment of salary is expressed (review after one year) indicates that renewal may have been in contemplation. The agreement also stated that the Respondent would be provided with partly furnished living quarters at a rental of $30 a month and a car for both official and person use.

The following are the terms of the agreement relevant to his inquiry:

"8. Without prejudice to the provisions of paragraph 9 of this Agreement, the Board may terminate this Agreement –

(a) by giving the Officer not less than three (3) months' notice in writing of the date upon which the Agreement will be terminated or by giving the Officer one month's salary in lieu of this notice.

(b) in the event of the Officer being certified by a qualified medical officer as medically unfit for service, the Agreement is terminated immediately.

9. The Officer may, after the expiration of three (3) months' service, terminate this Agreement:

(a) By giving the Board not less than three (3) months' notice in writing of the date upon which she proposed to terminate this Agreement.

10. If after due inquiry, the Board is satisfied that the Officer has been guilty of misconduct, negligence or other misdemeanours or a breach of any term of this Agreement the officer may be summarily dismissed and upon such dismissal all rights and advantages received by her under this Agreement shall case."

The Respondent was supposed to have the assistance of an accountant, an internal auditor and a financial analyst but except for a period of six months when

she had the assistance of an unqualified account these posts were never filled with the result that the Respondent had to do all supervisory work herself. During September 1988 irregularities were detected in the accounts of the Construction Division of the Board indicative of systematic fraud resulting in a loss of some $500,000. Martin CJ expressed himself satisfied that it was the Respondent who detected the irregularities.

An independent accountant was appointed to investigate the position and he found significant losses in 1986 and 1987 which had not been detected. The General Manager and Administration Officer of the Construction Division were suspended pending an inquiry which Martin CJ described as having been handled in "an exemplary manner" with those officers being given written notice of the allegations against them and the opportunity to give their explanations, which were considered by the Board.

Then followed an investigation of the Respondent by a special committee of the Board set up for that purpose. There were then meetings of that Committee, the full Restructure sub-committee and the Board as detailed in the judgment of Martin CJ. The result was than on 21 December 1988 the Respondent was given notice that at its meeting on that day the Board had decided to terminate her Agreement of Service by giving one month's notice pursuant to paragraph 8(a) of the agreement. Martin CJ described the report on which the Board decided to terminate the employment as "intemperate, unbalanced, at least partially inaccurate and unfair."

The allegations made against the Respondent at the meetings of Committees and the Board were many and various but she was never given any real opportunity to put her side of the story and indeed, many of the allegations were never put to her at all. These are examples of the latter: that she had used her accounting knowledge to misrepresent information; she had not provided true financial reports to the Board; she knew of and participated in the Construction Division errors; she was incompetent and negligent and responsible for the low morale of staff and staff losses. In some cases explanations she had given were never presented to the Board, which made the final decision.

Martin C.J. concluded that the Respondent had been denied a fair hearing and it followed that the Board had failed to act in accordance with the principles of natural justice. In our opinion it would be hard to find a clearer case of breach of those principles or a more serious case of breach.

Martin CJ also found that the decision of the Board to dismiss the Respondent was invalid in that proper notice of the meeting of the Board had not been given, but he chose not to decide the case on that ground.

The real question was whether the Respondent had a cause of action other than in contract because of the Board's failure to observe the principles of natural justice.

The law on the subject is tolerably clear. It is its application in the circumstances of a particular case which poses the problem.

At comon law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so choses and dismiss him

for any reason or for none. In such a case the servant has no remedy unless the dismissal is in breach of his contract, when his only remedy is damages. And then there is what Lord Reid referred to in *Ridge v Baldwin* [1964] A.C. 40 as the third class of dismissal – namely, dismissal – where there is some statutory or other restriction on the grounds on which it can dismiss him. In such cases an officer cannot be lawfully dismissed without first telling him what is alleged against him and hearing his defence. In the decided cases it is generally dismissal by public authorities where the protection afforded by Lord Reid's "third class" is argued. In *Malloch v Aberdeen Corporation* [1971] 2 All E.R. 1278 Lord Reid said at p. 1282:

"An elected public body is in a very different position from a private employer. Many of its servants in the lower grades are in the same position as servants of a private employer. But many in higher grades or 'offices' are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and, where a statutory form of protection would be less effective if it did not carry with it a right to be heard, I would not find it difficulty to imply this right."

And in *R v East Berkshire Health Authority, ex parte Walsh* [1984] 3 All E. R. 430, Sir John Donaldson MR said at p. 431:

"The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for undari dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employee by directly restricting the freedom of the public authority to dismiss, thus giving the employee 'public law' rights and at least making him a potential candidate for administrative law remedies."

The passages just citied must however be read subject to this passage in Sir John Donaldson's judgement in *The East Berkshire* case at p. 430:

"Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a 'higher grade' or is an 'officer.' This only makes it more likely that there will be special statutory restictions on dismissal or other underpinning or his employment (see per Lord Reid in *Malloch's* case). It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient."

The crux of the matter is whether there were special restrictions on dismissal or other "underpinning" of the Respondent's employment.

The Board is a public body and a creature of statute, namely the Commodities Board Act, with wide powers.

Section 11(1) of the Act provides so far as is relevant:

"The Board may from time to time appoint all such other officers and servants as it thinks necessary to assist in the execution of the provisions of this Act, and may pay such persons such salaries and allowances as it thinks fit. All such persons shall serve in accordance with the regulations laid down by the Board pertaining to the carrying out of their duties."

It is significant that that subsection makes the distinction between "officers" and "servants." Dismissal is not specifically dealt with but a power to appoint must surely include a power to dismiss. There are in fact no regulations "laid down" as envisaged by s 11(1) but we accept Dr Harrison's submission that Parliament must clearly have contemplated that the Board would make regulations governing conditions of employement and dismissal.

Furthermore, clause 1(b) of the Fourth Schedule to the Act, which deals with the powers of the Director of the Board reads:

"To take action on all questions relating to personnel administration. (Issues raised in connection with the most Senior Officers of other than a routine nature will be referred to the Board)."

The effect of the foregoing is that "officers," and the Respondent was clearly a senior officer, are given a status by statute beyond that of an ordinary employee.

The law in this field appears to have developed to a point, particullarly in New Zealand, where Courts do not take an unduly strict view of the circumstances when determing whether public law applies. For example in *Marlborough Harbour Board v Goulden* [1985] 2 N.Z.L.R. 385 Cooke P said at p. 383:

"Turning to the application to this case of principles to be found in the modern authorites, we think that the position has probably been reached in New Zealand where there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever. Very clear statutory or contractual language would be necessary to exclude this elementary duty."

And Lord Wilberforce in *Malloch* at p. 1294:

"The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found, in one form or another, in reported cases. There are two reasons behind it. The first is that, in master and servant cases, one is normally in the field of the common law of contract inter partes, so that principles of adminstrative law, including those of natural justice, have no part to play. The second relates to the remedy: it is that in pure master and servant cases, the most that can be obtained is damages, if the dismissal is wrongful; no order for reinstatement can be made, so no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void. I think there is validity in both of these arguments, but they, particularly the first, must be carefully used. It involves the risk of a compartmental approach which, although convenient as a solvent, amy lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre."

and further on the page:

"One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases,' which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of

an office or a status which is capable of protection. If anyu of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void."

We therefore agree with Martin CJ that there was here the necessary "underpinning" and that the Respondent's dismissal was invalid because of the Board's breach of natural justice.

That is enough to dispose of the first ground of appeal but we think we should refer to Mrs Taumoepeau's submission that Martin CJ's decision was contrary to the decision of this Council in *Va'inga Teu v Commodities Board* (Appeal 7/1988). Teu's case was conducted on the footing that he had been dismissed in breach of his contract with the Board. It was simply a master and servant case, or at least that was how it was presented, and the question whether administrative law applied to the case was never raised.

The next ground of appeal concerned the damages awarded, it being alleged that they were excessive having regard for the fact that the Respondent was dismissed pursuant to Clause 8(a) of the Agreement of Service.

A similar situation arose in the *Goulden* case referred to earlier. At p. 384 Cooke P said:

"When a dismissal follows on an inquiry into allegations against the officer, as her, and there as been a lack of fairness in the inquiry, it can be no answer to say that he has been given some contractual period of notice rather than being dismissed summarily for alleged misconduct or the like. The link between the dismissal and the unfair procedure is obvious. Putting it another way, there has never been the fair procedure to which the officer is entitled."

That is what the Board did in the present case. However, the Board had elected to proceed under Clause 10 of the Agreement and it it its failure to act fairly with the result that the dismissal was invalid which is relevant to the question of damages. The Respondent was never validly dismissed and as she did not seek reinstatement, which we agree would have been an impossible situation for her, Martin CJ determined damages on the basis of what she would have been entitled to had her employment continued, less any earnings from an outside source during that period. Mrs Taumoepeau submitted that the Chief Justice had erred in stating that "most of the special damages were agreed, subject to liability, at $18,329." She said there was no such agreement. We think what the Chief Justice meant by that passage was that as a matter of arithmetic the figure had been agreed upon, not that the Board agreed to pay that sum if it was found liable. The assessment of damages in adminstrative law cases poses problems but in this case the award does no more that put the Respondent in the position she would have been if her employment had continued and we see no fault in the Chief Justice's approach.

The final point made by Mrs Taumoepeau concerned the award of $5,000 general damages for "inconvenience, humiliation and distress." Dr Harrison submitted that such an award was available in the present case if the pleaded allegation of malice was established against the Board. He further submitted that

it was implicit in the judgment of the Chief Justice that malice had been established and that he awarded the general damages on that basis.

300 There is no express finding of malice in the Judgment and in our opinion no basis for implying such a finding. There may have been something approaching malice by some employees of the Board but that was not what was pleaded. It was really a matter of the Board being ill-served by its employees.

We therefore allow the appeal to the extent that the award of $5,000 as general damages is set aside. In all other respects the judgement of the Chief Justice is confirmed.

The Respondent is to have costs a fixed by the Registrar which should reflect the Appellant's partial success.