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Can the Court grant
Certiorari against the order
of the Governor?

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
ON 16TH DECEMBER 1987

BEFORE THE HONOURABLE, THE CHIEF JUSTICE

CAUSE NO. 157 of 1987

BETWEEN	AILEAN DILBERT	APPLICANT
AND	THE PUBLIC SERVICE COMMISSION)	
	THE HONOURABLE ATTORNEY GENERAL)	RESPONDENTS
	FOR THE CAYMAN ISLANDS)	
)	

Mr. Norman Hill Q.C. instructed by Mr. Jeremy Jenkins of
Messrs. Truman Bodden & Co. for applicant

Mr. Richard Ground Q.C., Attorney General, for respondent

COLLETT G.J.

JUDGMENT

On 16th July, 1987 a Notice of Motion was filed in this Court on behalf of the Applicant, Ailean Dilbert, pursuant to leave granted by Hull J. on 8th July 1987, seeking orders of Certiorari and Mandamus directed against a postulated decision of the Public Service Commission ordering the dismissal of the Applicant from the Public Service for alleged misconduct. The Court is asked to quash that decision and to direct a re-hearing or, alternatively, the reinstatement of the Applicant. As a further alternative a declaration is sought that proceedings had before a Board of inquiry held on 6th December 1985 to investigate the charges of misconduct was conducted in breach of the rules of natural justice.

The brief history of this matter is that the Applicant had been employed in the Public Service of the Cayman Islands for some 11 years as an Air Traffic Control Assistant in the Civil Aviation Department. Sometime during 1984 she was selected to attend a training course operated by the Air Traffic Control of Barbados at which she encountered unhappy experiences.

Having returned home she wrote a personal letter to a Mr. Archer, the technical director of the School, in terms which appear to have been highly critical of the conduct of the school, its instructors and the applicant's fellow students and which seems to have caused grave exception to be taken by Mr. Archer. As a result the Director of Civil Aviation wrote 19th September 1985 to the Applicant a memorandum calling upon her to show cause under Public Service Commission Regulation No. 54 why she should not be dismissed from the Public Service for (i) Misconduct (ii) Breach of Administrative Regulations 2.8.1. and giving particulars of the charges under each of these two heads.

Regulation 54 is in the following terms:-

"54. (1) Whenever a Head of Department considers it necessary to institute disciplinary proceedings against a pensionable public officer who is of a grade below grade M 10 and is of the opinion that the misconduct alleged is serious enough to warrant dismissal, he shall, after such preliminary investigation as he may consider necessary, frame charges in writing against the officer, after consulting the Attorney General as to the terms of the charge or charges. The charges shall be communicated to the officer in order that he may have a full opportunity of exculpating himself. If he does not avail himself of the opportunity, or if the Head of Department does not consider that the officer has exculpated himself, the case shall be referred to the Chief Secretary who shall appoint a public officer under the provisions of Regulation 44 to hold an inquiry at which the accused officer shall be permitted to be present and shall be allowed to cross-examine the witnesses, if any. The accused officer shall be allowed access to all documentary evidence against him or supplied with copies and shall be allowed to adduce evidence in his defence. A public officer (other than the head of Department) holding the inquiry shall, if so requested, permit the Head of Department or the accused officer to be represented at the inquiry by a public officer or a legal practitioner.

(2) If as a result of an inquiry held in accordance with the provisions of subregulation (1) the Chief Secretary considers it necessary to inflict on the accused officer any punishment, he shall forward a copy of the charges together with his recommendations to the Secretary. The commission after considering the proceedings and recommendations shall advise the Governor what punishment, if any, it considers should be inflicted on the officer. The decision made on each charge preferred against the accused officer shall be communicated to him, but not the reasons for the decision."

In response to this memorandum Ms Dilbert on 29th September, 1985 in turn wrote a long memorandum to the Director in which she did not attempt to deny the sending of her letter to Mr. Archer but she sought to justify or to excuse her conduct in sending it and to minimise its significance. The

Director clearly did not consider that the Applicant had exculpated herself because he referred the case to the Chief Secretary in accordance with Regulation 54 and in due course the Chief Secretary appointed Mr. J. B. Wilkinson, Legal Draftsman of the Attorney General's Chambers, to hold an inquiry into the charges. Mr. Wilkinson wrote to the applicant accordingly on 25th November, 1985 informing her that he proposed to conduct this inquiry on Friday 6th December, 1985 naming the time and place. He went on to say, "please make arrangements to be present and bring with you all your documents and witnesses (if any) that you wish to produce in support of your case". He added, giving his official telephone number, "please telephone me if you require any further information or explanation".

The inquiry was duly convened on 6th December as specified in that letter. What transpired there forms the basis of the case which has been advanced on behalf of the Applicant in these proceedings for claiming the relief sought. Evidence has been filed consisting of two affidavits sworn by the Applicant and one by Mr. Wilkinson and I will presently turn to examine the issues of fact which need to be resolved. Before doing so, however, it is necessary to deal with a number of legal issues which have been raised both by Mr. Norman Hill Q.C. on behalf of the Applicant and by learned Attorney General on behalf of the Respondents which go to the root of these proceedings.

The first of these issues is a procedural one arising under rule 3 of The Grand Court (Application for Orders of Mandamus, Prohibition Certiorari and Habeas Corpus) Rules. That rule provides that leave shall not be granted to apply for an order of certiorari unless such application for leave is made not later than six months after the date of the proceeding which it is sought to quash. Since the dismissal of the Applicant took place not later than 31st January, 1966 when she was notified to that effect by the Principal Secretary (Personnel) and leave was not applied for until 23rd June 1987, it was contended on behalf of the Respondents that the application was well out of time and leave should not have been granted to her to bring it.

Whatever the merits of this contention may be, however, I am quite satisfied that I have no jurisdiction in these proceedings either to treat the grant of leave given on 8th July 1987 as a nullity or to revoke it. That grant of leave was a final order pronounced by a judge of the Grand Court in the exercise of a statutory jurisdiction vested in him and it is not open to subsequent reviews by any other judge of the Grand Court. The only way in which a respondent aggrieved by such a grant of leave in contravention of rule 3 could seek redress is by way of appeal against it to the Cayman Islands Court of Appeal. In the meantime and for the purpose of these proceedings before me, I am bound to regard the grant of leave ordered on 8th July 1987 as a valid and effective foundation for the Motion which was argued before me on 16th December, 1987. That being so, the question whether or not the six month time limit was complied with falls away and need not further be addressed or decided.

The next procedural point taken at the hearing concerned the particulars of the relief sought by the issue of the two prerogative orders asked for in this case. According to the Statement of Grounds of Application filed with the Notice of Motion, the decisions which it is sought to have quashed by an order of Certiorari are firstly, a decision given by letter dated 31st January, 1986 dismissing the Applicant from the Public service and, secondly, a subsequent decision of the Governor in Council upholding that first decision. The terms of the letter of 31st January 1986, however, show that it was the Governor acting upon the advice of the Public Service Commission and not the commission itself who had ordered the termination of the applicant's appointment. The effective decision is not shown by the terms of this letter to have been that of the Commission rather than that of the Governor and both would seem to have played a part in it.

Reference must be made in this connection to sections 54 and 55 of The Constitution of the Cayman Islands which provide as follows:-

"54. The Governor, in Her Majesty's name and on Her behalf, may constitute such offices for the Islands as may lawfully be constituted by Her Majesty and, subject to the provisions of any law in force in the Islands, may make appointments (including appointments on promotion and transfer) to any such office; and any

"person so appointed shall, unless it is otherwise provided by any such law, hold office during Her Majesty's pleasure.

55. (1) Subject to the provisions of any law in force in the Islands, the Governor may for cause shown to his satisfaction dismiss or suspend from the exercise of his office any person holding a public office, or take such disciplinary action as may seem to him to be desirable."

(2) The reference in this section to the power to dismiss any person holding a public office shall be construed as including a reference to any power to require or permit a person to retire."

Reference should also be made to section 6 of the Public Service Commission Law which provides that the Governor shall refer to the Commission for their advice on any questions relating to (inter alia) the dismissal or other disciplinary control of public officers. Section 7, which gives power to the Governor in Council to make regulations for giving effect to the provisions of that Law, is also relevant since that section furnishes the legal authority for promulgation of the Public Service Commission Regulations (including regulation 54) as regulations having legislative effect so that the provisions of those regulations for the time being in force form part of the body of statute law of these Islands.

What is the effect of these various provisions considered and interpreted together? It is in my judgment to provide that appointees to offices in the Public Service of the Islands hold office during the pleasure of the Crown and they are subject to dismissal from their offices by the Governor for cause shown to his satisfaction. It follows that the Governor and he alone is the ultimate authority to decide whether or not sufficient cause has been shown in a given case to justify dismissal. Before exercising that authority however, the Governor is enjoined by provisions of law in force to refer each case to the Public Service Commission for their advice and the Public Service Commission Regulations have effect as a provision of law regulating how that advice is to be formulated in a given case. In a case falling within the ambit of regulation 54 for instance, the procedure there set out is legally required to be followed in formulating the advice which the Public Service Commission will consider and forward to the Governor in regard to the question of dismissal of the officer concerned. The Governor

is not bound to act in accordance with the advice which he receives from the Commission but he cannot properly exercise his authority without first receiving and considering it.

Against that analysis of the constitutional position I turn now to consider the Statement of Grounds. It is evidence from that analysis that no decision dismissing the Applicant either was or could validly have been made by the Public Service Commission. That decision was made by His Excellency the Governor after consideration of advice received from the Commission which he was not obliged to follow. It is further evident that no decision was or could have been made by the Governor in Council subsequently to dismiss any appeal from that non-existent decision of the Commission. No appeal in point of law lay from the decision to dismiss and an appeal from the Governor to the Governor would be a legal absurdity. This aspect appears to have been overlooked by those who prepared and lodged such an appeal on the Applicant's behalf in June, 1987 as well as by all those who processed that appeal up to the stage when the Governor rejected it, not on the ground that it was defective procedurally but upon its merits. For the purposes of the present proceedings however the logical conclusion has to be that the orders of certiorari and mandamus sought by the Applicant here cannot be issued by the Court in the form in which it has been asked to issue them.

Alerted to this procedural difficulty Mr. Hill, for the Applicant at the hearing, made a late application for an amendment so as to seek instead the issue of orders directed towards the Governor to quash his decision to dismiss and to direct a re-hearing in accordance with the regulations. It is by no means clear to me that I ought to make any such amendment despite the generous waiver of any objection to that course by the learned Attorney General. This is because there is Commonwealth persuasive authority to the effect that certiorari and mandamus will not issue out of any colonial court directed to the Governor of the territory concerned. This was so held in *Re Benn* (1964) 6 W.I.R. 500, a decision of Luckhoo C. J. Guyana who relied in turn upon the decision of the High Court of Australia in *R v Governor of the State of South Australia* (1907) C.L.R. 1497. Despite a strong criticism of

this line of authority from Professor de Smith in his Judicial Review of Administrative Action 4th Edition, p. 385, I am not prepared in the absence of any countervailing authority to hold that this court is empowered to issue prerogative orders of either prohibition, certiorari or mandamus directed to His Excellency the Governor of the Cayman Islands acting as Her Majesty's representative herein. Instead of so doing however I am prepared to consider making the declaration sought as an alternative remedy by the Notice of Motion, if but only I find myself satisfied, firstly, that the proceedings of the Board of Inquiry are indeed subject to the requirements of the rules of natural justice and, secondly, upon the facts that the Applicant has established a failure on the part of Mr. Wilkinson to observe those rules on 6th December 1985.

The principal argument for suggesting that the proceedings of boards of inquiry constituted under regulation 54 (or other like regulations) of the Public Service Commission Regulations are not subject to the rules of natural justice is the long standing and well known doctrine of Common Law that servants of the Crown both in military and civil employment generally hold office at the pleasure of the Crown and are therefore liable to summary dismissal. No action for wrongful dismissal can therefore generally be maintained against the Crown: see for instance *Dunn v The Queen* (1896) 1 Q.B. 116 and *Terrell v S. of S. for the Colonies* (1953) 2 Q.B. 482. And in *Rodwell v Thomas* (1944) 1 K.B. 596 it was held by Tucker J. that in view of this doctrine an established civil servant could not complain of alleged procedural irregularities leading to his dismissal because to allow such a complaint would be to countenance a clog upon the right of the Crown to dismiss at pleasure.

In pointed contrast to this line of authority, Mr. Hill cited the Guyana Court of Appeal case of *Gerriah Sarran* (1969) 14 W.I.R. 361 in which a writ of certiorari was issued to quash the dismissal of a wardmaid employed in the Ministry of Health thereupon the grounds that the power to dismiss had been improperly sub-delegated by the Permanent Secretary of that Ministry to a subordinate officer. Mr. Ground sought to distinguish that case from the

present as being one of fundamental lack of jurisdiction but it is difficult to see why, if judicial review will lie at all to impeach the dismissal of a public officer, it should not lie equally well upon the basis of a failure to observe applicable rules of natural justice in the procedure followed as upon the basis that the authority purporting to take the decision for dismissal had no legal authority to take it at all. Certainly no hint of any such distinction is apparent from the judgments delivered in Sarran's case. Again in *R v Commissioner of Police ex parte Tennant* (1977) 26 W.I.R. 457 the full court of the Supreme Court of Jamaica quashed the dismissal of a special constable upon the ground of a breach of the rules of natural justice in that he was never informed of the allegations made against him before the Commissioner of Police purported to dismiss him.

Because of the clear divergence of these two lines of authority, it is incumbent upon this Court to enquire whether there is any true principle upon which they can be reconciled. I believe that there is and that is to be found in the legal basis of the power to dismiss conferred upon the relevant authority in each case. That power in Sarran's case was vested in the Public Service Commission of Guyana by Article 96 of that country's Constitution. It was therefore a statutory power that was under consideration there rather than a prerogative power of dismissal. Likewise in Tennant's case the power to dismiss a special constable was vested in the Commissioner of Police by specific regulations made pursuant to a Jamaican Statute. By contrast the plaintiff in Dennis case had been both appointed and dismissed by an agent of the Crown exercising prerogative powers in the Niger Protectorate and Terrell was appointed by the Secretary of State and subsequently dismissed by him in exercise of similar powers. In *Rodwell v Thomas* the procedural defects upon which the plaintiff sought unsuccessfully to rely were alleged to be failures to follow the terms of a Treasury circular which had been issued administratively for the purpose of regulating disciplinary control: the Treasury circular did not partake of the force of law. It was similar to old style Colonial Regulations.

In the Cayman Islands nowadays we have sections 54 and 55 of the Constitution, coupled with sections 6 and 7 of the Public Service Commission Law and the Regulations, give statutory legal force to the

scheme whereby boards of inquiry such as was constituted under Reg. 54 in the Applicant's case are required to follow the designated procedure. They are required to report to the Commission who in turn formulates and tenders its advice to the Governor as the ultimate authority invested with power to dismiss. No question of the exercise of prerogative powers arises. It follows that there is no reason why this Court should not inquire into whether or not the requisite statutory procedure has been followed and if it finds upon the evidence that it has not been, it has the jurisdiction to intervene and to issue the appropriate prerogative order or declaration to assert the rights of the affected subject. I so hold.

There can be little doubt that the procedure enjoined in detail by regulation 54 of the Public Service Commission Regulations is intended in practice to ensure that the rules of natural justice are followed so that an accused officer will have the right to know what is alleged against him/her and a reasonable opportunity to challenge and refute those allegations at a hearing before an unbiased tribunal. Bearing in mind the serious consequences to any officer accused of misconduct said to warrant his dismissal from the service, it would be surprising if this were not the purpose. Applying that line of authority which stems from *Ridge v Baldwin* (1964) A.C. 40, I have no difficulty in holding that the rules of natural justice are applicable to boards of inquiry such as the one presided over by Mr. Wilkinson on 6th December 1985. It remains to consider whether those rules were or were not observed by him in this Applicant's case.

In her first affidavits, Ms. Dilbert asserted that when she attended the hearing on that date Mr. Wilkinson informed her that she did not need to be represented at that stage and that she would have an opportunity to be represented and call witnesses at a subsequent occasion. Although this conversation was strenuously denied by Mr. Wilkinson in his affidavit in reply, Ms. Dilbert persisted in that allegation in her second affidavit. Another sharp conflict of testimony occurs over Ms. Dilbert's allegation that she was never invited to cross-examine anyone and specifically the Director of Civil Aviation who was the sole witness against her.

Mr. Wilkinson's assertion that he asked her if she wished to question the Director is not accepted by the applicant. Then, again, in reply to Ms. Dilbert's assertion that she was not given an opportunity to be legally represented (as she was entitled to be under the regulation) Mr. Wilkinson asserts that she did not ask for legal representation at all and denies that he told her she need not be represented at that stage. Ms. Dilbert in her second affidavit agrees that she never requested to be legally represented but still maintained that she was told she could be legally represented at a later stage. Finally there is a further sharp conflict as to whether Ms. Dilbert asked if she could call a Ms. Farrington as a witness at the inquiry. Mr. Wilkinson says he specifically asked her whether she wished to call that lady as a witness and was told she did not whereas she herself says she wished to call her which would have required a telephone call but was told she would have an opportunity to call her on a subsequent occasion.

It is not easy task for any court to resolve conflict of testimony when the evidence is solely in affidavit form. Respective credibility cannot be assessed by reference to the demeanour of the witness and one is forced to fall back upon the inherent probabilities alone.

It seems clear that Ms. Dilbert, by the time she received her letter of dismissal at the end of January 1986, was under a firm misapprehension that she would have been summoned to a further hearing - by whom held she does not relate - at which she would be entitled to be legally represented to cross-examine witnesses and to put her case again. This much emerges from the common ground between the conflicting deponents, both of whom agree that she telephoned Mr. Wilkinson after receiving the letter to complain that she had not had her subsequent hearing. I find it impossible to believe, however, that this misapprehension was formed as she asserts, because Mr. Wilkinson told her so. He is a trained lawyer familiar with statutory provisions. Regulation 54 manifestly does not confer upon an accused officer any such rights. It passes the bounds of credibility to suppose that he would have invented them and told Ms. Dilbert a falsehood.

A far more likely explanation is that she in her own mind misunderstood the explanation which he quite correctly gave to her that his inquiry was purely and simply to determine her guilt or innocence of the charges and that her future in the service would be decided elsewhere. I do not think this was at all a reasonable misapprehension on her part or that Mr. Wilkinson could have reasonably anticipated it. Moreover, on the basis of inherent probabilities, I also prefer his account on the question of calling witnesses and upon the question of cross-examination of the Director to hers. On all points of conflict, therefore, I accept Mr. Wilkinson's account of what occurred as the true one.

Upon this resolution of the factual conflict we are left with but one feature which could be asserted as a possible breach of the *audi alteram partem* rule. Ms. Dilbert asserts and Mr. Wilkinson agrees that she probably was not told that she could be legally represented if she wished at the hearing before him. Clearly she did not ask to be.

Regulation 54 itself casts no burden upon the officer holding a board of inquiry under its provisions to inform an accused officer of the right to be so represented. No case has been cited to me in which it has been held or even suggested that the rules of natural justice demand any such action on the part of the person presiding over a domestic or statutory tribunal. The nearest comes *Pett v Greyhound Racing Association* (1969) 1 Q.B. 125 where the English Court of Appeal held that a domestic tribunal exercising powers affecting persons' livelihood could not validly refuse to allow legal representation. But that comes far short of imposing a legal duty to promote it. For my own part I would think it advisable, whenever future Boards of inquiry are to be held of this type, for the presiding officer selected to include in his memorandum and ^{notifying} / the accused officer and the Head of Department concerned of the date and place a reminder that each party is entitled to be represented if they so desire. Further than this it does not go and I find no sufficient reason to hold that the proceedings held on 6th December 1985, were conducted in breach of the rules of natural justice merely upon account of the omission to furnish this one piece of

information to the Applicant.

I have already indicated that, if I had found otherwise, I would have been prepared to grant an appropriate declaration. Furthermore, in a future case in which a breach of the rules of natural justice is alleged in respect of the conduct of such a disciplinary board of inquiry, it will be open to an aggrieved applicant to seek prerogative orders from this Court of prohibition, certiorari and/or mandamus as appropriate provided that these are applied before and not after the Governor has acted upon the advice of the Public Service Commission and announced his determination. Once that point is reached, the alternative remedy of a declaration is the only one open to the applicant concerned.

For the reasons just recorded, this application fails and it is accordingly dismissed.



G. Collett

Handed down on Thursday the 7th day of January 1988.