Full Court — [illegible] — Hamma [illegible]
Applicant dismissed from public service — whether rules of natural justice observed — Motion granted
Ridge v Baldwin (1963) 2 All ER 66 (1964) A.C. 40 applied
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Civil Procedure
Remedies

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. 1990/M95

BEFORE: THE HON. MR. JUSTICE LANGRIN
THE HON. MR. JUSTICE CLARKE
THE HON. MR. JUSTICE K. HARRISON (AG.)

IN THE MATTER of an application by ERLIN HALL for Leave to apply for an Order of Certiorari.

AND

IN THE MATTER of Services Commission Memorandum #PB/B 1317 dated the 17th day of September, 1990 and/or Correctional Services letter Ref. No.P.H. 46 dated the 28th day of September, 1990 in respect of the purported dismissal of the Applicant ERLIN HALL.

AND

AND IN THE MATTER of the Public Service Regulations, 1961 as amended.

Mr. A. Kitchin instructed by Gaynor & Fraser for Applicant.

Mr. Lennox Campbell for Respondent instructed by Director of State Proceedings.

HEARD: July 1, 2, 5, 1991 &
September 29, 1993

LANGRIN, J.

On July 5, 1991 when we delivered our judgment in this matter we indicated to Counsel on both sides the reasons for our decision. Then, we thought, that would suffice. Since that time we have come to realize that the point in issue though elementary comes up quite frequently. To ensure that the relevant authorities use their powers in a proper manner we now put our reasons in writing.

These proceedings originated in an application by Erlin Hall for an Order of Certiorari to quash a decision by the Public Service Commission whereby in a letter dated 17th September, 1990 the applicant was dismissed from the Public Service with effect from the 10th September 1989 under Regulation 37(4) of the Public Service Regulations 1961. This was consequent on his absence from duty

without permission for more than five (5) days.

The matter first came before Ellis J. on 12th February, 1991 who granted leave to apply to the Full Court for an order of certiorari.

The grounds upon which the application before this Court was made are stated as follows:-

(a) "That the purported dismissal of the Applicant is unlawful and/or unfair and/or in breach of Public Service Regulations 1961.

(b) That the purported dismissal as aforesaid is in fact null, void, contrary to law and in breach of natural justice.

(c) That the Public Service Commission and/or the Commissioner of Corrections acted without or in excess of jurisdiction and in breach of Public Service Regulations and the principles of Natural Justice, in that the applicant was dismissed from the Department of Correctional Services summarily and arbitrarily and without being accorded a fair trial or any trial at all, nor was the procedure for dismissal as provided by Regulation 43 of the said Regulations instituted. "

The sole issue raised in this application for an Order of Certiorari was whether the Rules of Natural Justice had been observed.

We will now attempt to narrate the story briefly.

Erlin Hall the applicant is a Senior Warder in the Department of Correctional Services having joined the Service on the 10th April, 1969. He was assigned to the General Penitentiary in Kingston and while on duty in September 1969 he was injured by a bullet fired from a rifle in his possession.

As a result of the injury he lost the second toe on his right foot. He continued working until June 1987 when the residual effects of the said injury developed to an extent that he would no longer stand for long periods, suffered back pains and had difficulty in walking properly.

In April 1984 he sought medical treatment for the said complaints and was advised by Dr. Fraser to seek medical treatment in the United States. During 1988 he travelled to the United States on two separate occasions and obtained medical treatment.

In January 1989 the applicant was summoned to attend a meeting at the offices of the Chief Personnel Officer who advised him that he may be placed before a Medical Board to ascertain if he should be discharged from the service on medical grounds and/or in the public interest.

The applicant continued to have his medical certificate endorsed by Dr. Gray, the Correctional Department doctor until August 1989 when upon examination Dr. Gray recommended that the applicant was fit to resume duties.

From the 10th September 1989 to November, 1990 the applicant was medically unfit to resume duties and submitted medical certificates to cover that period. There is a conflict on the evidence as to whether certificates were submitted to cover that period.

Mr. George Martin, Chief Personnel Officer asserted in an affidavit that the applicant was requested to provide a report from his doctor in February, 1989 but no report was offered.

Dr. Alafia Samuels, Chief Medical Officer on the 4th June, 1990 recommended that the applicant should return to work in the absence of a medical report.

A comprehensive medical report prepared by Dr. C.A. Fraser M.D. and dated August 22, 1990 stated that the applicant is medically unfit and suggested that arrangements be made so that he may curtail his professional responsibilities on medical grounds. This report was forwarded to the relevant authorities.

Sometime in July 1990 he received a letter from the Correctional Services Department dated 13th June 1990 requesting him to report to the office at 34 Duke Street, Kingston on June 19, 1990. But when he attended in July 1990 he spoke with one Mr. Roberts who informed him that his matter had been sent to the Services

Commission for a ruling. Mr. Roberts in his affidavit asserted that the applicant did not arrive until July 1990 but was silent as to what he was alleged to have told the applicant. According to Mr. Roberts several notices were sent to Mr. Hall requesting him to report at his office.

On the 20th November, 1990 the applicant received a letter dated 28th September, 1990 purporting to dismiss him from his office.

The applicant asserts that from the 5th September 1988 to the 4th April 1991 he had been on sick leave and he was never instructed at any time to resume his duty. When he saw Mr. Roberts in July, 1990 he showed him copies of the said medical certificates and the report of Dr. Fraser.

There are two important matters revealed in the affidavits. First, there was contradicted evidence that notices were delivered to the applicant to report for duty. Second, there was a significant absence of evidence that the applicant was told what was alleged against him and hearing his defence or explanation.

The second of these adverse factors was dealt with by Mr. Campbell when he submitted that the applicant ought to have been aware of his absence from duty. But here again the evidence renders the submission unclear since the applicant says he was on sick leave and never received any notice to resume duty.

We must now turn to the statutory provision. Regulation 37(4) of the Public Service Regulations 1961 as amended by the Public Service (Amendment) Regulation 1988 reads as follows:-

> "The absence of an officer from duty for a period of five days or more without permission renders him liable to summary dismissal with effect from the first day of such absence."

It is plain from the wording of the regulation that the power to dispense with the services of an officer is to be exercised only after consideration and determination of:-

(a) that the officer was absent from duty for a period of at least five days and

(b) that he was absent without permission for that period.

It is not a power which must be exercised arbitrarily.

It is abundantly clear from the evidence and the submission of Mr. Kitchin that the Public Service Commission had made up its mind to dispense with the applicant's services on the basis of the report made to it and the applicant was given no chance to say anything by way of denial of the facts alleged in the report or in mitigation of them.

The Regulation did not give an absolute discretion to anyone to dispense with the services of the applicant. In our view the discretion, althouth wide is not absolute. The Commission should have directed its mind to the criteria laid down in the regulation in accordance with the principles of natural justice. This was not done and we think it was precisely because the Commission was advised that its discretion was absolute which led to the way the applicant's case was treated.

Mr. Lennox Campbell, Counsel for the Respondent Commission submitted that the applicant adopted a code of behaviour from which the Court ought to find that he was aware that he was away from his place of employment on leave without permission. Additionally, the Public Service Commission which is appointed under the Constitution of Jamaica had jurisdiction to dismiss the applicant and properly assumed that jurisdiction. The Court may not then enquire into the validity of the discharge of that function. However, Mr. Campbell was more than candid in his concluding submission when he said he could not place an interpretation on 'summary dismissal' which excluded the right to be heard.

It cannot be gainsaid that in the absence of an allegation that the Commission had acted outside its jurisdiction or had contravened the right of an individual to a fair hearing secured by Section 20(2) of the Constitution, section 136 of the Constitution excluded a Court from inquiring into whether the Commission had validly performed its function. See Endell Thomas v. Attorney General of Trinidad and Tobago (1982) A.C. 113. We wish to emphasize that

the only matter which we are deciding is that the process by which the Public Service Commission reached its decision in this case was unfair in this respect, that the applicant was never told the reasons why his dismissal was being considered, and that he was given no opportunity of making an explanation about the matters of complaint against him.

We are far from saying that if the procedure had been fair, the respondent Commission would not have been entitled to reach the decision that it did. Whether the decision itself was fair and reasonable is not a matter that can be raised in the present proceedings.

We must make certain observations on the law as we understand it. The locus classicus in this area of the law is the decision of the House of Lords in Ridge v. Baldwin (1963) 2 AER 66 (1964) A.C. 40 where we find useful guidance on the proper approach to this type of case. Lord Reid in delivering his judgment said there is an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation. We regard this rule as fundamental in cases of this kind when deprivation of office is in question. A fortiori when the officer has served for over 20 years.

A formal hearing may well be unnecessary but an enquiry on the facts should be carried out and common prudence should dictate that the report or at least its substance should be shown to the officer and an opportunity afforded him to comment on it before the final decision was taken by the respondent. There must have been a particular date on which the Commission considered and arrived at its decision, yet there is no evidence before us that this date was notified to the applicant. Indeed, there is not one thread of evidence that any attempt was made by the respondent to invite the applicant to attend at an informal hearing of the charge which had such disastrous results.

We do not doubt the good faith of the Commission but in the end it seems to us that largely as a result of a mistaken notion of the law the Rules of Natural Justice were breached.

The proper approach to this type of case was that the Commission was bound to act fairly in exercising its statutory power under Regulation 37(4). The decision which was reached did not accord with the standard of fairness because the applicant was not given an opportunity to answer the accusation which led the Commission to the conclusion which was reached.

We now turn to the question of remedy. Since we were concerned not with the decision but the decision-making process we are content with quashing the decision thereby enabling the Commission to have the wrong put right. The order that Certiorari should go was in effect one which would require the respondent to deal with the matter de novo.

Nothing that we did on July 5, 1991 reinstated the applicant in his former position as a Senior Warder.

Accordingly for the above reasons we would grant the motion with costs to the applicant to be agreed or taxed.

Cases referred to

(1) Endell Thomas v Attorney General for Trinidad and Tobago (1982) A.C. 113

(2) Ridge v Baldwin (1963) 2 All E.R. 66 (1964) A.C. 40