23-07-07

Privy Council Appeal No 83 of 2006

Dr Astley McLaughlin *Appellant*

v.

His Excellency the Governor of the Cayman Islands *Respondent*

FROM

THE COURT OF APPEAL OF THE CAYMAN ISLANDS

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

Delivered the 23rd July 2007

Present at the hearing:-

Lord Bingham of Cornhill
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Carswell
Lord Neuberger of Abbotsbury

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*[Delivered by **Lord Bingham of Cornhill**]*

1. The real issue in this appeal concerns the compensation payable to Dr McLaughlin, the appellant, following his dismissal or purported dismissal from the Government service of the Cayman Islands on 31 December 1998. The Governor contended below, and the Court of Appeal held in its decision now subject to appeal, that the dismissal of Dr McLaughlin, although unlawful, was effective in law to determine his engagement, and his only entitlement was to damages, which were to be re-assessed. Dr McLaughlin contends that in law his engagement was never determined, with the result that he remains in the Government

service, entitled to be remunerated as a Government officer despite the lapse of time since his purported dismissal.

2. Dr McLaughlin, a citizen of the Cayman Islands, is a well-qualified scientist. From 1989 onwards he was employed in various scientific posts in the Cayman Government service. From 1996 onwards he held the position and office of Administrative Officer 1 in the Ministry of Agriculture, Environment, Communication and Works. He was remunerated by salary and Government contributions to a public service pension fund.

3. By letter dated 21 December 1998 Dr McLaughlin was officially informed that the Governor, acting on the advice of the Public Service Commission, had approved his retirement on the ground of the abolition of his office. This was to take effect from 1 April 1999. However, he was to be paid three months' salary in lieu of notice and was to cease work on 31 December 1998.

4. By section 55 of the Constitution of the Cayman Islands the Governor was empowered to dismiss a person holding a public office for cause or to require such a person to retire. But the conditions of service of Government officers were regulated by General Orders promulgated in 1987 and revised in 1994. These provided that if an office in a series of offices was to be abolished regulation 28 of the Public Service Commission Regulations was to be followed, and regulation 29 governed the procedure to be followed if a public officer holding a pensionable office was to be called upon to retire in order to facilitate an improvement or economy in his department. The procedure required the officer to be given an opportunity to make representations, which were to be passed to the Public Service Commission. It is unnecessary to consider these provisions in detail, since it is common ground between the parties to this appeal that Dr McLaughlin held a public office and that his dismissal (or purported dismissal) was effected in breach of the rules of natural justice and in breach of regulation 29 and was accordingly unlawful.

5. Dr McLaughlin applied for and on 1 June 2000 obtained leave to move for judicial review of the decision to dismiss him. In grounds annexed to his originating motion issued on 26 June he claimed "(1) a declaration that the decision to dismiss him and the dismissal were void; (2) reinstatement of [Dr McLaughlin] to the office which he held prior to the dismissal, or an alternative suitable office, with full back pay and benefits, including seniority for pension and other purposes; (3) in the alternative, damages for the [Governor's] illegal conduct and breach of duty, consisting of full pay and benefits, including all entitlements based on seniority, from 21st December 1998 to the date of the order granting

the same and beyond; ...". Dr McLaughlin's substantive application was heard by Graham J in the Grand Court on 7 March 2001, and on 9 March the judge dismissed the application. He held that the Governor had been entitled to bring about Dr McLaughlin's retirement and there had been no procedural unfairness: [2001] CILR 249. The order was filed on 25 June 2001, and on 27 June Dr McLaughlin gave notice of appeal, seeking to set aside the judge's order and reinstatement to the office which he held or damages.

6. Dr McLaughlin's appeal was heard by the Court of Appeal (Zacca P, Rowe and Taylor JJA) on 29 and 30 July 2002 and the judgment of the Court was given by Rowe JA on 29 November 2002: [2002] CILR 576. The Court of Appeal was uncertain whether Dr McLaughlin's office had been abolished, or whether there had been an intention to abolish it, but did not need to reach a conclusion since it found that the public service had unfortunately overlooked the protections given to officers by regulation 29 and had effected the compulsory retirement of Dr McLaughlin in breach of the rules of natural justice. In paragraph 37 of the judgment the Court ruled that the judgment of Graham J should be set aside and it made the declaration sought by Dr McLaughlin "that the decision to dismiss him and his dismissal were void."

7. The Court went on to address the second head of relief claimed by Dr McLaughlin in his pleading, for reinstatement to the office which he held prior to the dismissal or an alternative suitable office. In paragraph 38 of the judgment, on which the Governor very strongly relies, the Court continued:

> "38. The appellant has sought relief that he be reinstated in the office which he held at the time of his retirement. Mr Hall-Jones submitted that courts in judicial review proceedings are loath to order the reinstatement of employees, as such an order borders on the usurpation of the powers of the decision maker, and because of the practical problems which such an order would present. For this proposition he relied on Lewis, *Judicial Remedies in Public Law*, 2nd ed., para 11-021, (2000). The appellant has not been in the public service for approximately four years. We have no knowledge of the state of the requirements of the public service for personnel and in what capacities, and, for no other reason, we do not consider reinstatement as an appropriate remedy."

The Court held that Dr McLaughlin's remedy lay in damages, and it therefore remitted the case to the Grand Court for the damages to be assessed. The Court of Appeal's order was that the appeal be allowed and the judgment below set aside, that there be a declaration that the decision to dismiss Dr McLaughlin and his dismissal were void and that the case be remitted to the Grand Court for assessment of damages.

8. On remission of the case to the Grand Court there were two hearings (26-28 July 2005 and 5-7 September 2005) and two rulings (22 August and 14 September 2005). In the first ruling the Hon Anthony Smellie CJ examined the applicable principles, "explaining the meaning and effect of the Court of Appeal's decision of 29 November 2002". In the second he applied these principles to assess the quantum of damages.

9. In his first ruling the Chief Justice summarised (para 1) the parties' respective cases, on the one side that Dr McLaughlin remained a public officer entitled to remuneration as such, on the other that his employment had been effectively terminated, entitling him only to a limited amount of damages. He found (para 8) an apparent tension between the Court of Appeal's declaration that the decision to dismiss Dr McLaughlin, and the dismissal of him, were void, and its refusal of reinstatement to his particular post and statement that the appropriate remedy was damages. But this apparent tension (para 9) was the result of the operation of settled principles. It was settled law that a decision declared by a court to be void is a nullity and of no effect: *Ridge v Baldwin* [1964] AC 40, 80. Thus it seemed that no question of reinstatement arose, since Dr McLaughlin's status could not have been affected by the decision notified to him by the letter of 21 December 1998. Similarly, the notion of Dr McLaughlin's remedy sounding only in damages while the status of employment continued to subsist was seemingly at odds with the declaration of nullity. The Chief Justice's task, he said (para 10), was to decide what was intended by the Court of Appeal's order, since (para 11) very different consequences could follow depending on how it was understood.

10. The Chief Justice rehearsed the parties' competing submissions at some length, considering academic and judicial authority on which reliance was placed, including Wade and Forsyth, *Administrative Law* (9th ed, 2004), *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, *Jhagroo v Teaching Service Commission* [2002] UKPC 63, (2002) 61 W1R 510, *Ridge v Baldwin*, above, *Vine v National Dock Labour Board* [1957] AC 488, *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 and *Zainal bin Hashim v Government of Malaysia* [1980] AC 734. The Chief Justice expressed his understanding of the effect of this authority in paragraph 56:

> "56. By virtue of the foregoing analysis, I conclude as follows as to the effect of the Court of Appeal's decision in this case:
>
> (i) the decision to dismiss [Dr McLaughlin] and his dismissal were null and void and of no effect;
>
> (ii) accordingly, while he was not to be ordered to be reinstated to his former particular post, he remained a public and pensionable officer subject in all respects to the statutory regulatory scheme governing his employment;
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> (iii) this meant that he continued to be entitled to salary so long as he continued to be available for service and for so long as no other steps were taken to determine his service;
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> (iv) the extraordinary and perhaps censurable result, is that this state of affairs has been allowed to persist for nearly seven years now and nearly three years after the Court of Appeal's decision. That state of affairs, however, is nothing to detract from the principle and, subject to further findings below to be expressed in relation to the question of repudiation and acceptance of repudiation since the date of the Court of Appeal's decision, will form the basis for the assessment of damages here;
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> (v) As to the measure of damages, I do not accept that the Court of Appeal had in mind any basis apart from salary and such pensionable entitlements as would arise in the event there was not to be reinstatement, and as would be commensurate with [Dr McLaughlin's] position."

The distinction between damages for wrongful dismissal in breach of contract and an award of salary in cases such as this were not, the Chief Justice held (para 57), elided by holding that damages were to be awarded and assessed simply by reference to salary and pension lost. But although (para 58) Dr McLaughlin's engagement was governed by the statutory regime, the Chief Justice did not think it realistic or right to regard the relationship as one entirely untrammelled by common law principles relating to contracts of employment. Otherwise (para 59) a public officer in the position of Dr McLaughlin could indefinitely sit idly back, rendering no services to the public but drawing his salary. That was an extraordinary proposition (para 60) leading to a result the Court of Appeal could not have intended. The Chief Justice expressed his conclusions in paras 61-64 of his judgment:

> "61. After the passage of that reasonable time, which in this case I would regard, for reasons below, as at greatest, a year, a reasonable plaintiff not having had any indication of any intention to reinstate him and having taken no steps to invoke the machinery of reinstatement, must be regarded as having perceived yet a further repudiation of his contract of employment and as having accepted that repudiation.
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> 62 This view of [Dr McLaughlin's] position is not to be confused with a finding of a duty in him to mitigate his losses as would have arisen had this been an employer/employee contractual relationship. While his status as a public officer subsisted, he would have been under no such duty and he would have been under no obligation to seek or accept other employment. Rather, the view I take is that the further repudiation of his engagement and his acceptance by his conduct are to be regarded as having brought that status to an end in all the circumstances of the case.
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> 63. For the first six months after the Court of Appeal's decision, I think [Dr McLaughlin] is entitled to be regarded as having been naturally reticent to invoke the machinery of reinstatement for fear of being dismissed on some other basis. He is thus to be afforded that *locus poenitentiae* at which the law allows a party who perceives himself to be in the weaker position '*to let sleeping dogs lie*'. The second period of six months must notionally however, be regarded as all the time necessary for the resolution of his position, he then being no longer entitled as a matter of fairness, simply to do nothing.
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> 64. Accordingly, I regard [Dr McLaughlin's] entitlement to damages by way of salary as having come to an end one year after the Court of Appeal's decision. His entitlement to pension must also be assessed on the basis that salary would have stopped at that time."

In his ruling on quantum the Chief Justice awarded Dr McLaughlin CI $409,624.31 and ordered the Governor to pay pension contributions amounting to CI $37,197. The Governor appealed, complaining of the Chief Justice's interpretation of the Court of Appeal decision as meaning that Dr McLaughlin had continued to be a public officer until 30 November 2003. Dr McLaughlin cross-appealed, complaining of the Chief Justice's decision that he had ceased to be a public officer on 30 November 2003 or any later date.

11. When this case returned to the Court of Appeal in 2006 the Court was constituted as it had been on the earlier occasion, save that Mottley JA, who on 8 August 2006 gave the leading judgment on the second appeal, took the place of Rowe JA who had given the judgment of the Court on the first. Having introduced the issues and summarised some of the history, Mottley JA observed (para 6) that nothing was to be gained by seeking to define what was meant by "void". The Court preferred to approach the matter on the basis that what the Court had declared in its earlier judgment was that the decision to dismiss Dr McLaughlin was unlawful. That, he went on to hold, was what had been said by Lord Hailsham of St Marylebone LC in *Evans*, above, p 1162, by Laws LJ in *Palacegate Properties Ltd v Camden London Borough Council* [2000] 4 PLR 59, 80, and by Lord Browne-Wilkinson in *R v Hull University Visitor, Ex p Page* [1993] AC 682, 701, and *Boddington v British Transport Police* [1999] 2 AC 143, 164. It was his view (para 10) that when the Court of Appeal declared the decision to dismiss Dr McLaughlin and his dismissal as void it was saying no more than that it was unlawful. Paragraphs 37 and 38 of the earlier judgment (see paras 6 and 7 above) were cited, and Mottley JA drew attention (para 12) to the Court's refusal to order reinstatement, against which Dr McLaughlin had not appealed as would have been expected had he sought a declaration that he was still a public officer. In concluding that Dr McLaughlin remained a public officer in the absence of an order for reinstatement, the Chief Justice had misunderstood what the Court of Appeal had said (para 15). Mottley JA reviewed the decisions of the House of Lords in *Malloch*, above, and *Vine*, above, and observed (para 24) with reference to *Ridge*, above, "that while the decision of the Watch Committee in *Ridge's* case was held to be null and void, at no stage was it suggested that he remained employed as chief constable". The decisions of the House of Lords in *Evans*, above, and *Jhagroo*, above, were then considered, leading to the conclusion (para 37) that it was a question of discretion whether a person unlawfully dismissed should be granted an order of reinstatement, and that if Dr McLaughlin wished to challenge the Court of Appeal's exercise of discretion (para 38) he should have appealed. Thus, in the upshot, the dismissal of Dr McLaughlin, although declared to be void, was effective to determine his tenure of office, and it was unnecessary to consider his cross-appeal. The case was again remitted to the Grand Court for assessment of damages on this basis. Zacca P agreed, and Taylor JA gave a short concurring judgment, observing (para 45) that in its first decision the court had held Dr McLaughlin's retirement to be unlawful.

The argument

12. On behalf of Dr McLaughlin, Mr Barnes QC founded his argument on the Court of Appeal's declaration made on 29 November 2002 that the

decision to dismiss and the dismissal were void. That meant, and could only mean, that they were without legal effect. Such a declaration is ordinarily the appropriate relief where a public authority (such as the Governor) is held to have acted beyond his powers, in breach of natural justice, or unlawfully. Because they lacked legal effect the decision and the dismissal could not bring Dr McLaughlin's tenure of office in the public service to an end. He remained a public officer entitled to remuneration as such. He had no need for an order that he be reinstated in the public service since one cannot be reinstated in a service of which one remains a member and from which one has not been removed. The Court of Appeal's refusal to order reinstatement must be understood as a refusal to reinstate him in the specific job he had been doing some years earlier in December 1998. The Court of Appeal's order concerning damages should be read as an order that the back-pay and pension contributions due to and payable in respect of Dr McLaughlin from 1 April 1999 to the present should be calculated. It was legally unsound to seek to import contractual notions of repudiation and acceptance of repudiation, however apt in the private law field of wrongful dismissal, into the legally distinct field of unlawful dismissal from public office.

13. Mr Lynch QC, for the Governor, submitted that "void" was not a term with a clear and precise meaning. Several distinguished judges had expressed unease at its use. It was preferable, as the second Court of Appeal had done, to use the term "unlawful". But an act which was unlawful was not necessarily without legal effect. It could be effective to bring the tenure of a public office to an end, even if (as was the case here) it entitled the office-holder to recover damages analogous to damages for wrongful dismissal as from the date of dismissal. This is what the first Court of Appeal had intended here. It had not envisaged or intended that Dr McLaughlin remained in the public service. He had been effectively, although unlawfully, dismissed. Consistently with this view the Court had declined to order his reinstatement but had ordered that damages be assessed. Authority showed that the courts did not treat continuation in office as an invariable consequence of finding that a dismissal was unlawful, and the Court of Appeal had ruled against continuation, justifiably, in this case.

Conclusions

14. It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready,

willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal. These propositions are vouched by a large body of high authority which includes *Wood v Woad* (1874) 9 Ex 190, at 198 (Kelly CB) and 204 (Amphlett B); *Vine v National Dock Labour Board* [1956] 1 QB 658 at 675-676 (Jenkins LJ) and [1957] AC 488 at 500 (Viscount Kilmuir LC), 503-504 (Lord Morton of Henryton), 506-507 (Lord Cohen); *Ridge v Baldwin* [1964] AC 40, 80-81 (Lord Reid), 139-140 (Lord Devlin); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 170-171 (Lord Reid), 195-196 (Lord Pearce), 207 (Lord Wilberforce); *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1584 (Lord Reid), 1598-1599 (Lord Wilberforce); *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 365 (Lord Diplock); *Calvin v Carr* [1980] AC 574, 589-590 (Lord Wilberforce for the Board); *Zainal bin Hashim v Government of Malaysia* [1980] AC 734, 740 (Viscount Dilhorne for the Board); *Boddington v British Transport Police* [1999] 2 AC 143, 154-156 (Lord Irvine of Lairg LC); Wade and Forsyth, *Administrative Law*, 9th ed (2004), pp 300-301.

15. Mr Lynch pointed out that distinguished judges had expressed unease at the use of terms such as "void", "voidable", "null" and "nullity" in this context and had recognised problems arising in the period between an invalid act and a declaration of invalidity, particularly where steps have been taken and third party rights acquired during this period. This is so. Examples may be found in *Hoffmann-La Roche*, above, 366 (Lord Diplock); *Calvin v Carr*, above, 589 (Lord Wilberforce); *Percy v Hall* [1997] QB 924, 950-952 (Schiemann LJ); *Boddington*, above, 157-158 (Lord Irvine) and 164 (Lord Browne-Wilkinson); *Palacegate Properties Ltd v Camden London Borough Council* (2000) 4 PLR 59, 80 (Laws LJ). There is, however, no decision which throws doubt on the correctness of the authorities cited in the last paragraph; different modes of expression do not indicate differences of opinion as to the substantial outcome; and in the present case no problem of interim validity pending the decision of the court arises.

16. Mr Lynch also pointed out that even where a dismissal is invalid the court does not necessarily hold that the officer has remained in office throughout. This again is so. Examples are found in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 and *Jhagroo v Teaching Service Commission* (2002) 61 W1R 510, authorities on which Mr Lynch particularly relied. Since public law remedies are, for the most part, discretionary, it necessarily follows that a claimant may be disabled from obtaining the full relief he seeks whether on grounds of lack of standing, delay or his own conduct, or grounds pertaining to the facts of the particular case. In *Evans*, the House was unwilling to treat the

claimant, a probationary police constable who elected, under pressure, to resign as remaining in the police. In *Jhagroo*, the Board was unwilling to treat the claimant as remaining in office, he being physically disabled (para 42) and regarding his employment as effectively terminated (para 43).

17. When giving its first judgment in November 2002 the Court of Appeal was gravely handicapped since it was not, it seems, referred to any of the relevant authority, no doubt because the focus of the argument was on the lawfulness of the Governor's action. But in declaring the decision to dismiss Dr McLaughlin and his dismissal to be void the Court granted the relief which authority required and to which Dr McLaughlin remains entitled. It is indeed lamentable that so many years have passed since 1998 during which Dr McLaughlin has, in fact, rendered no service to the Government. But the Governor acted unlawfully in purporting to dismiss him. He applied for judicial review with reasonable promptitude. He was initially refused relief, wrongly, and appealed. He obtained employment in the United States pending the first decision of the Court of Appeal and is willing to give credit for the salary earned. Since that decision he has been ready, willing and able to serve the Government if and when permitted to do so. Further delay has, regrettably, been caused by doubt about the effect of that decision, explored in some detail by the Chief Justice. It is said that Dr McLaughlin should have appealed to the Board against that decision. But he had obtained the first head of relief he sought, and the Governor had quite as much reason to appeal. On the assessment of damages, the Chief Justice recognised the effect of the authorities but, shrinking from the financial consequences of holding Dr McLaughlin still to be in the Government service, devised a solution for which neither party had contended and which neither has sought to sustain. In its judgment under appeal the Court of Appeal sought to re-write its first judgment by, in effect, substituting "unlawful" for "void". But the expression "void" was apt and in no way doubtful in its meaning, and the change of language does not alter the legal result: whether described as "void" or "unlawful" the decision to dismiss and the dismissal were without legal effect. There is no analogy with wrongful dismissal, where a dismissal may be unlawful but nonetheless effective. The judgment of the second Court of Appeal is wrong in law and cannot be supported.

18. It was reasonable for the first Court of Appeal to decline to order that Dr McLaughlin be restored, after a delay of nearly four years, to the specific office he had held in December 1998. It is not entirely clear whether the Court, in refusing to order reinstatement, meant more than this. It was never, unfortunately, clarified at the time. But if the Court did mean that Dr McLaughlin was no longer an officer in the Government

service, it was failing to recognise the legal effect of the declaration granted, an error from which reference to authority would have saved it.

19. The first Court of Appeal's order for assessment of damages was not accurately expressed, and may again have betrayed a failure to recognise the effect of the declaration. Dr McLaughlin felt entitled to claim his full arrears of salary, but this may not be what the first Court of Appeal intended. If so, the Court again fell into understandable error.

20. Dr McLaughlin's appeal must be allowed and the Court of Appeal's order of 27 April 2006 set aside. The Board declares (1) that the purported dismissal of Dr McLaughlin as from 31 December 1998 was ineffective in law to determine his tenure of office, and (2) that Dr McLaughlin is entitled to recover arrears of salary since 1 April 1999, and to the payment of pension contributions on his behalf, making allowance for his earnings in the United States, until he resigns or his tenure of office lawfully comes to an end. The matter will be remitted to the Grand Court for the computation of what is due to Dr McLaughlin, including interest, unless this can be agreed. The parties are invited to make written submissions on costs within 21 days.