16-11-98

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 462/98

In the matter of an application by Patricia Ebanks for Judicial Review .

BETWEEN : PATRICIA EBANKS APPLICANT/PLAINTIFF

AND: HIS EXCELLENCY THE GOVERNOR RESPONDENT/DEFENDANT

BEFORE MURPHY, J.
SITTING IN COURT

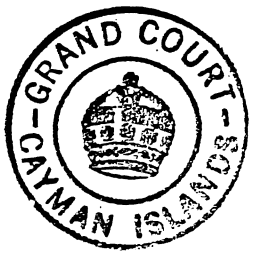
16 November, 1998

REASONS FOR DECISION

APPEARANCES:

C. Allen for plaintiff/applicant

D. Nicol for defendant/respondent



This is an application for judicial review arising out of the termination of the applicant's employment with the Department of Human Resources, after what purported to be disciplinary proceedings pursuant to s. 47 of the Public Service Commission Regulations 1985.

On 11 August, 1998 I granted leave to the applicant to bring judicial review proceedings. The applicant's material was served upon the Crown almost immediately, on 13 August, 1998.

An application by the Crown today for an adjournment was dismissed.

The relief sought herein was, effectively, a declaration that the decision to dismiss the applicant was made contrary to the principles of natural justice and the provisions of the Public Service Commission Regulations 1985. In the applicant's view, declaratory relief was the only form of judicial review available to her because of the decision of this Court in Dilbert v. Public Service Commission [1988 - 89] C.I. L. R. 33. There it was held by Collett, C.J. (as he then was) that once a recommendation in favour of dismissal has already been acted upon by the Governor at the time the proceedings are commenced the Governor's decision cannot be questioned by judicial review in the courts of the Cayman Islands because prerogative orders will not lie against the Governor as the Crown's representative in the Islands: Re Benn (1964), 6 W. I. R. 500; R. v. South Australia (Governor), (1907) 4 C. L. R. 1497.

I gave oral reasons for granting the application for declaratory relief. I amplify them somewhat now in written form.

The applicant's notice of motion also sought damages, though the claim in this regard was not particularised. Both counsel agree with me that this aspect of the application must proceed by way of a trial of an issue pursuant to the directions I will give. This in my view gives meaning to the provisions of O. 53, rule 7 (1) (b) , though I would think the process could be expedited somewhat.

Of course, the declaratory relief granted herein merely speaks to the judicial review aspects of the application. That is conceptually different from a damage award. In this context the liability of Government has yet to be established, just as would be the case if a disciplinary tribunal's decision against an employee had been quashed, the matter remitted to the tribunal which then observed the rules of procedural fairness, and considered the matter afresh, perhaps coming to the same result on the merits.

In this case the applicant was employed as a Senior Labour Inspector. Prior to her dismissal the applicant had worked for Government for over 15 years, 10 of which had been in the labour area.

The applicant was formerly charged following an exchange of correspondence between her and the head of her department, Mr. Dale Banks. The matter was referred to the Chief Secretary. By letter dated 26 February, 1997

the Chief Secretary invited the applicant to respond to charges of misconduct justifying dismissal. These allegations included misleading employers, misuse of telephone, tardiness, absence, and various complaints by employers. The applicant did not receive this letter until 11 June, 1997. She replied to the charges by way of a letter from her attorneys dated 11 July, 1997.

On 12 January 1998 a tribunal was convened to hear the matter pursuant to s. 47 (2) of the Public Service Commission Regulations 1985. The chairman was an attorney in the Attorney - General's chambers. It appears that the "prosecutor" with the responsibility of proving the charges was the same Dale Banks referred to above. For the reasons outlined below, no evidence was led, and no actual inquiry was carried out.

The following passages are taken from the "Report of the Tribunal of Enquiry".

> " At the outset of the hearing the Tribunal expressed some concern at the manner in which the charges had been framed, and whether in their present form they were unfair and prejudicial to Ms. Ebanks.
>
> In particular, the Tribunal noted the following points of concern:
>
> Charge 1. The language of the charge is vague and uninformative, with no allegation that the conduct was contrary to any official directive or specified provisions of law.
>
> Charge 2. There is no allegation in the charge that the calls were contrary to any official directive or supervision, or specified provisions of law.

Charge 3. There is no specification in the charge of dates and times of tardiness, so that the charge can be informatively answered.

Charge 4. Absence for a genuine medical emergency does not appear to be capable of amounting to a charge of misconduct.

Charge 5. The complaints in the charge consist of hearsay only, and also are duplicitous as 8 complaints appear to be duplicated as a single charge. It is absolutely critical that the prospective complainants appear in person to give evidence before the Tribunal, but this has not happened.

...

Having carefully considered both the submissions of Mr. Dale Banks and Mr. Allen, and having had due regard to the principles of law which are earlier set out in this report, we have concluded that the charges are inadequate and defective. In forming this conclusion we confirm that we rely upon those points of concern stated by us at the outset of the hearing.

In accordance with Regulation 47 (7), we accordingly forward to the Chief Secretary this report of our enquiry.

In view of the Tribunal 's finding, we consider that it would be inappropriate to enquire into evidence or to invite evidence to be led, and we therefore decline to do so.

...

One other matter has caused this Tribunal some anxiety. We note that Mr Banks is without legal representation in circumstances where it would have been entirely appropriate for him to have an attorney-at-law. It would seem to us that there is scope for potential conflict and unfairness in having a Chairman appointed from the Legal Department when that results in the Labour Department not then being represented at all, because the Legal Department would normally represent the Labour Department. Had Mr Banks been legally represented at an earlier stage of this matter, perhaps the present difficulties could have been diminished or avoided.

In the conclusion to which the Tribunal has come, our decision is unanimous".

No other formal steps took place in this process until, quite shockingly, the applicant received a letter of 4 May, 1998 from the Acting Permanent Secretary (Personnel) to the effect that His Excellency the Governor, acting on the advice of the Public Service Commission, had terminated her appointment. No decision on any charge was ever communicated to the applicant.

I regard what happened in this disciplinary process as a "dog's breakfast" of procedural error. It would form an admirable basis for a law school examination question on basic administrative law.

Having regard to the tribunal's disposition of the matter and the views it expressed, the applicant was led to believe that the inquiry had merely been adjourned. That is the position at best. One could also perfectly properly have concluded that no hearing on the merits had ever taken place. At worst, one could well conclude that the tribunal had recommended that it would be improper to proceed further with the charges as framed.

Having regard to the whole process, I have no doubt that the applicant was denied her basic right to be heard. I also adopt in this regard the comments of Chief Justice Collett in Dilbert (at 43) to the effect that :

> " [Tribunals] are required to report to the Commission, which in turn formulates and tenders its advice to the Governor as the ultimate authority vested 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 make no specific conclusions in respect of the tribunal chairman's unease about "conflict and unfairness" - only because there is no need to do so in view of my conclusions on audi alterem partem, and compliance with statutory requirements, which are sufficient for the disposition of the application. These latter suggestions do, however, disturb me as they apparently disturbed the tribunal chairman.

Crown counsel did not consent to, but did not oppose, the application for judicial review. It is extremely unfortunate that a proceeding for judicial review that quite obviously was never going to be opposed has lingered for three months.

I make a declaration that the proceedings leading to the termination of the applicant's employment were conducted in breach of the Public Service Commission Regulations and of the rules of natural justice . I direct a trial of an issue as to the liability, if any, of the Government as a result of this termination, and damages. I direct that the plaintiff deliver a statement of claim within 10 days, the Attorney - General a defence within 10 days, and the plaintiff a reply within 7 days. The parties shall deliver lists of documents within 10 days, and witness statements within 14 days, of the close of pleadings. The parties may seek

an expedited trial date for the first available one-day slot after 1 January, 1999.

Costs of proceedings to date, to the applicant.

16 November, 1998

J. D. Murphy
Judge of the Grand Court