BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 11 of 2008

BETWEEN:

BRADSTON CLARKE ***Appellant***

AND

ATTORNEY GENERAL ***Respondent***

BEFORE: The Hon. Frederick L.A. Waterman, CHB, The Hon. Peter D.H. Williams and The Hon. Sandra Mason, Justices of Appeal.

2009: 8, 9 July

2011: 25 February

Mr. Ralph Thorne Q.C. in association with Mrs. Fedelis St. Hill for the Appellant

Ms. Sharon Deane in association with Mrs. Stephna Greenidge for the Respondent

JUDGMENT

INTRODUCTION

WATERMAN JA: This appeal is against a decision given by ***Kentish J*** on 9 June 2008 in which she dismissed the appellant's application for judicial review.

Summary of the Facts

[2] At all material times the appellant held the post of Deputy Principal of St. Leonard's Boys' School in the public

service of Barbados. He was appointed to that post on 1 January 1992. On 19 March 2007, a delegation of officials comprising Mrs. Atheline Haynes, the Permanent Secretary of the Ministry of Education, the Deputy Permanent Secretary, the two Deputy Chief Education officers and the Chairman of the Board of Management of the school visited the compound of the school and met the appellant in his office.

[3] Mrs. Haynes handed the appellant a letter dated 15 March 2007. The letter informed the appellant of the decision to interdict him from the performance of his duties as Deputy Principal of St. Leonard's Boys' School on full pay with effect from 20 March 2007 in accordance with ***regulation 27(1)*** of the ***Service Commissions (Public Service) Regulations, 1978 (the Regulations)*** pending an investigation into his alleged misconduct.

[4] The letter further advised the appellant that the matter of the portion of his salary to be paid during interdiction had been referred to the Governor-General under ***regulation 27(3)*** of the ***Regulations*** and that he would be advised shortly of the outcome.

[5] When the appellant requested an explanation of his alleged misconduct, Mrs. Haynes informed him that the letter was self-explanatory. As requested, the appellant handed over all keys and documents belonging to the school, vacated the premises that same day and has not reported for duty since. The appellant was not given any particulars relating to the alleged misconduct nor was he provided with an opportunity to be heard before he was interdicted.

[6] By further correspondence dated 10 April 2007, the appellant was informed that the Governor-General had accepted the advice of the Commission that he should be interdicted on half salary with effect from 15 April 2007.

[7] The appellant took the view that the decision of the Commission made on 15 March 2007 to interdict him from the public service was made in breach of the rules of natural justice in that he was not afforded an opportunity to be heard before the decision was made. As a consequence by way of a Notice of Motion filed on 24 May 2007 he sought the following relief under the ***Administrative Justice Act, Cap. 109B (AJA)*** from the court:

a) an order of Certiorari quashing the decision of the First Respondent in interdicting the Applicant from the performance of his duties as Deputy Principal, St. Leonard's Boys' School;

b) an order of Mandamus requiring the First Respondent to set aside the interdiction of the Applicant from the performance of his duties as Deputy Principal, St. Leonard's Boys' School;

c) an order of Prohibition prohibiting the Respondents and any or all of them from carrying out investigations into the matter of the conduct of the Applicant;

d) an order of Prohibition prohibiting the Respondents and any or all of them from instituting disciplinary proceedings against the Applicant;

e) a Declaration that the decision of the First Respondent to interdict the Applicant from the performance of his duties as Deputy Principal, St. Leonard's Boys' School in accordance with Regulation 27(1) of the Service Commissions (Public Service) Regulations, 1978 is invalid and is vitiated by:

i) being unauthorised and contrary to law;

ii) excess of jurisdiction;

iii) failure to satisfy or observe conditions or procedures required by law;

iv) breach of the principles of natural justice;

v) unreasonable or irregular or improper exercise of discretion;

vi) acting on instructions from an unauthorised person;

vii) being in conflict with the policy of an Act of Parliament;

viii) error of law, whether or not apparent on the face of the record;

ix) absence of evidence on which a finding or assumption of fact could reasonably be based; and

x) breach of or omission to perform a duty;

f) an Injunction to cause the Respondents and any or all of them to re-instate the Applicant to his duties as Deputy Principal, St. Leonard's Boys' School;

g) damages;

h) an order that the costs of and occasioned by this motion be paid by the Respondents.

The grounds upon which the relief was sought were set out in the said Notice of Motion.

[8] The appellant's application was struck out by the trial judge on 9 June 2008 on the grounds, *inter alia*, that the application for judicial review at the interdiction stage was premature. The judge further held that to allow an officer who had been interdicted to file an application for judicial review to challenge the validity of that interdiction would cause the entire statutory framework for taking disciplinary action against officers in the public service to be circumvented and dismantled.

[9] In arriving at her decision the trial judge held at paragraph [26] of her judgment that there was a requirement for three conditions to be fulfilled in order to ground an application for judicial review. First, there must be an administrative act; second, the application must comply with the provisions of the ***AJA*** and rules of court and third, the person must be aggrieved by that administrative act.

[10] The judge found that the Commission's decision to interdict the appellant was an administrative act for the purpose of the ***AJA*** and that the appellant's application was in compliance with the provisions of the ***AJA*** and the ***Judicial Review (Application) Rules, 1983***. However, she found that the third limb had not been established and that the appellant had not been aggrieved by the administrative act of interdiction.

[11] Further, the judge stated at paragraphs [36] to [43]:

> "[36] Interdiction, properly construed, is the first step in the process after the report of misconduct has come to the knowledge of the Permanent Secretary or Department Head. Its object is best explained in the words of Megarry J in ***John v Rees [1969] 2 All ER 274*** at p. **305** cited with approval by Lord Denning in ***Lewis v Heffer and Others [1978] 3 All ER 354*** and referred to in ***Griffith v Commissioner of Police and the Attorney General (1994) 30 Barb. L.R. 416*** at page **429** with some substitution:
>
> > "The [interdiction] in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the [school] is being affected by rumours and suspicion. The others will not [co-operate with] the man. In order to get back to proper work, the man is interdicted..."
>
> [37] So interdiction does not connote in any way guilt on the part of the officer interdicted. It is merely a step taken to allow the department or, in this case, the school to resume or continue normal operations and allow the investigative process to take place in a controlled environment and without any interference.
>
> [38] In para. 12 of his affidavit, Mr. Clarke states that his interdiction was given liberal coverage in the newspaper and in the media and caused him much pain, humiliation and embarrassment.
>
> [39] In para. 13 of his affidavit he states that his professional reputation and integrity have been called into question in the public domain and this has caused injury and loss to his future career prospects.
>
> [40] Two comments on these paragraphs seem appropriate. First, the fact that the public may not appreciate, fully, or at all, the nature and purpose of interdiction is regrettable. Interdiction is not punishment. The interdiction therefore cannot be impugned on the basis of the liberal coverage in the newspaper or the public's misconceptions. In this regard it must be borne in mind that in all the affidavits sworn in opposition to the application, it is denied that either of the deponents informed the media of the interdiction.
>
> Secondly, the allegation in para. 13 of injury and loss to his future career prospects is misconceived since at the stage of the interdiction there is as yet no finding of any misconduct on his part. It is also entirely possible that he could be fully vindicated by the investigation with the result that there should not be any loss to his future career prospects. He would resume his post and be paid all salary lost by virtue of the interdiction.
>
> [41] Moreover, Regulation 39 makes it clear that even when a report of the investigation has been submitted to the Commission, it may at that stage refer the matter back to the investigating officer for amplification or further investigation. Thus, even at this stage where the investigation has been completed and the report of the investigation has been submitted to the Commission, no finding of misconduct has been made against Mr. Clarke in respect of which he can be a person aggrieved by the administrative act of interdiction.
>
> [42] To my mind to allow an officer interdicted to file an application for judicial review challenging the interdiction in the circumstances of this case would be to create a mischief which would strike at the very heart of good administration in the public service.

[43] In essence, this application, if successful would allow the entire statutory framework for taking disciplinary action against officers in the public service to be wholly circumvented and dismantled."

The judge's decision sparked these appellate proceedings.

The Appeal

[12] The appellant's grounds of appeal are:

(1) that the learned trial judge erred in law in finding on an 'in limine' submission on behalf of the respondents that the appellant's application for judicial review was premature;

(2) that the learned trial judge erred in law in finding that the appellant did not establish that he was aggrieved;

(3) that the learned trial judge erred in finding that the appellant was not aggrieved in fact;

(4) that the learned trial judge erred in law in making findings based on the entire proceedings and the Affidavits although there was an argument only on an 'in limine' submission and which said submission was made without regard to the content of all the Affidavits filed in the matter;

(5) that the learned trial judge erred in making findings on matters that were not established;

(6) that the learned trial judge erred in law in the application of the ***Administrative Justice Act, Cap 109B*** and the ***Service Commissions (Public Service) Regulations, 1978***;

(7) that the learned trial judge erred in law in making a finding as to the appellant's right to seek judicial review under the ***Administrative Justice Act, Cap 109B****;*

(8) that the learned trial judge erred in law in failing to hear the entire matter and ought to have rejected the respondents' 'in limine' submission; and

(9) that the learned trial judge erred in failing to consider the entire matter and ought to have considered all of the grounds in support of the appellant's application for judicial review.

[13] At the outset of the hearing of the appeal, Counsel for both parties conceded that the effect of the local case of ***Judy Lloyd v Attorney General, Civil Appeal No. 9 of 1998, unreported decision of 2 May 2000***, was that the grant or refusal of relief under the ***AJA*** should not be determined at the preliminary stage of a trial, as was done in the instant case, but the appropriate relief in cases involving judicial review should be decided only after a substantive hearing of the issues. As ***Sir Denys Williams CJ*** stated at page 9 of the judgment of ***Judy Lloyd***:

"The language of section 8 has to be unreasonably and excessively strained in order to support a construction of the section as enabling a court to strike out in limine an application for review under the Act. The grant or refusal of relief is not a matter that falls to be determined at the initial or

preliminary stage of a trial. The appropriate relief in a particular case is decided upon after a substantive hearing."

[14] In the circumstances, the Court with the concurrence of both Counsel, agreed to hear and determine the appeal as well as the appellant's application to the High Court together, rather than to remit the matter to the High Court for the application to be heard and determined.

The Appellant's Case

[15] Mr. Ralph Thorne QC, Counsel for the appellant, argued before the Court that the proper procedures for interdiction established by the ***Service Commissions (Public Service) Regulations*** were not followed. He contended that the judge erred by construing the sequential sections, namely, ***regulations 22*** to ***4 0*** of the ***Regulations,*** as establishing a procedural chronology of events empowering the Crown to act according to the specified stages. He contended forcefully that the appellant should have been informed of the offences for which he was being charged and that an investigation into those allegations of misconduct should have preceded his interdiction. He maintained that the power to interdict contained in ***regulation 27(1)*** and ***(2)*** should be exercised only in crisis situations or in exceptional circumstances. He submitted further that the failure or refusal of the Commission to afford the appellant an opportunity to be heard prior to interdiction was contrary to the rules of natural justice and therefore unlawful. He submitted that the interdiction would have had adverse effects on the appellant. He claimed further that the appellant did in fact suffer as a result of the administrative act, in that he suffered emotional stress, personal embarrassment and humiliation from the newspaper articles as well as the effects of being deprived of half of his normal salary. In support of his arguments Counsel referred the Court to a line of authorities including ***Griffith v Commissioner of Police and the Attorney General [1994] (supra); Police Service Commission v Rodwell Murray, C.A. of Trinidad & Tobago No. 143 of 1994; John v Rees (supra)*** and ***Sandiford et al v Public Service Commission et al BB 1998 HC 7***.

The Respondent's Case

[16] Ms. Sharon Deane, Counsel for the respondent, submitted that the ***Regulations*** had been properly interpreted and applied by the judge in the appellant's case. She contended that ***regulation 27(1)*** had been correctly and properly used to interdict the appellant and that there was no requirement at the interdiction stage that the officer would be entitled to a hearing, or be informed as to the particulars of the misconduct or the various charges that were likely to be brought against him. She argued that once the Commission received a report of misconduct, then the power of interdiction could be used to allow investigations to continue devoid of any possible interference or interruption. She further argued that counsel for the appellant had erred in his contention that exceptional circumstances must exist in order for an interdiction to occur. She maintained that the appellant did not suffer stress, embarrassment or humiliation by the newspaper articles, nor was he adversely affected by the administrative decision to interdict him, since interdiction was a precautionary step taken, pending the hearing and determination of disciplinary proceedings and not a penalty or punishment.

[17] Counsel contended that at the time of the appellant's application for judicial review, the Commission was at that stage ready to provide the appellant with the necessary information required under ***regulation 38.*** The appellant's application pre-empted that information being provided to him. In support of her contentions, Counsel relied, inter alia, on the cases of ***Joel Cumberbatch et al v John Nurse, the Public Service Commission and the Attorney-General (unreported) H.C. Suit No. 587 of 2002; Furnell v Whangarei High Schools Board [1973] 1 AC 660; Griffith v Commissioner of Police and the Attorney-General (supra)*** and ***Police Service Commission v Rodwell Murray (supra).***

Discussion

[18] The determination of this matter is dependent on an analysis of the relevant provisions of the ***Service Commissions (Public Service) Regulations 1978*** which set out a comprehensive statutory framework that is to be followed whenever a Permanent Secretary or Head of Department becomes aware of misconduct by a public officer. ***Regulation 24(1)*** provides:

"The Permanent Secretary or Head of Department shall within 7 days of becoming aware of misconduct on the part of an officer, make a report of the misconduct to the Chief Personnel Officer and such report shall be dealt with as soon as possible thereafter."

Regulation 27 states:

"(1) Where a report against a public officer for misconduct is being investigated, or criminal proceedings have been or are about to be instituted against that officer, and the Commission is of the opinion that the public interest requires that the officer should forthwith cease to perform the functions of his office, the Commission may recommend his interdiction.

(2) Where it is considered essential that an officer should be interdicted before a decision by the Commission can be obtained, the power exercisable by the Commission under paragraph (1) may be exercisable by a Permanent Secretary or Head of Department, and in any such case the interdiction shall be immediately reported to the Commission through the Chief Personnel Officer, and the Commission may confirm or set aside such interdiction.

(3) Subject to regulation 31, an officer interdicted pursuant to this regulation shall be paid such portion of the salary of his office, not being less than one-half, as the Commission may recommend to the Governor-General, but the officer shall not be entitled to any other emoluments.

(4) If the investigation results in the officer's exculpation, he shall be entitled to the full amount of the emoluments which he would have received had he not been interdicted, but if the investigation results in any disciplinary action other than removal from office the officer shall be allowed such emoluments as the Commission may in the circumstances recommend to the Governor-General."

Regulation 36 provides:

"(1) Where it is represented to the Commission that an officer has been guilty of misconduct, the Commission shall cause an investigation to be made into the matter in such manner as it thinks proper.

(2) An investigation carried out pursuant to paragraph (1) may take the form of an oral enquiry or such other form as the Commission determines, and regulation 40 shall apply where the investigation takes the form of an oral enquiry."

Regulation 37 states:

"(1) Where a report of misconduct on the part of an officer is made to the Commission, the Commission may request the officer's Head of Department to investigate the matter, and the Head of Department shall investigate the matter, and, not later than three weeks after the date of such request, submit to the Commission a written report of his investigation containing his findings and recommendations, and a copy of all evidence and material documents relating to the matter."

Regulation 38 provides:

"(1) An officer in respect of whom an investigation is being carried out under regulation 37-

(a) shall be informed in writing of the charges against him;

(b) shall be informed in writing-

(i) that he is entitled to be represented by an attorney-at-law, a friend, or a representative of an accredited Trade Union;

(ii) that a written reply to the charges and any observations he may wish to make thereon must be received by the investigating officer within such period, being not less than twenty one days, as may be permitted by the investigating officer;

(iii) that he may attach to his written reply statements from witnesses;

(c) shall, if he so requests, be supplied with copies of the statements of all witnesses and other evidence given during the course of the investigation."

[19] It is a principle of natural justice that a public officer may not be found guilty in disciplinary proceedings without being given prior notice of the charges against him as well as the opportunity to defend himself. However, the complaint must first be investigated. At the heart of this appeal is whether the rules of natural justice are applicable at the commencement of the investigative process, particularly at the stage of interdiction. Simply put, did natural justice principles apply when the Commission interdicted the appellant under ***regulation 27***?

[20] In ***regulation 27,*** there is no express provision dealing with the rules of natural justice which the Commission is obliged to consider before taking a decision to interdict. It is a discretion given to the Commission to interdict the officer once it is of the opinion that it is in the public interest to do so. In the circumstances, whether or not interdicting the officer is in the public interest is not a matter for the Court to enquire into. It is a matter for the Commission.

[21] In the case of ***Griffith v Commissioner of Police and the Attorney General*** (*supra*) the Court held that the scheme of the ***Service Commissions (Police Service) Regulations, 1964*** did not envisage a right to be heard prior to the Commission taking a decision to recommend to the Governor-General to suspend a police officer under ***regulation 17(1) (b).*** That the officer's suspension was done in the interest of good administration and was not done to punish him but was merely a holding operation until the Commission determined whether or not disciplinary charges ought to be instituted. The Court further held that there was no need to imply a right to be heard at the stage before a recommendation was made by the Commission to suspend the applicant as there was no unfairness at that stage. There was also no unfairness when the Commissioner formed his opinion. The

principles of natural justice do not generally require a complainant to be heard at the suspension stage, but only at the tribunal stage: see ***Wiseman v Borneman [1971] AC 297*** and ***Furnell v Whangarei High Schools Board (supra)***.

[22] In the case of ***John v Rees (supra)***, ***Megarry J at*** page **305** said:

> "In my judgment the rules of natural justice apply to suspension in the same way that they apply to expulsion."

Lord Denning MR in ***Lewis v Heffer and Others (supra)*** at page **364** by way of comment on the above dicta said:

> "Those words apply, no doubt, to suspensions which are inflicted by way of punishment, as for instance when a member of the Bar is suspended from practice for six months, or when a solicitor is suspended from practice. But they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself, and so forth... At that stage the rules of natural justice do not apply."

[23] The requirements of the principles of natural justice were considered recently by the Privy Council in ***Rees v Crane [1994] 2 WLR 476***. The following statement by ***Lord Slynn of Hadley*** at page **487** constitutes binding authority on this court:

> "It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at a particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the enquiry without observing the audi alteram partem maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and reply at the earlier stage."

[24] In ***Ridge v Baldwin 1964 AC 140, Lord Devlin*** said at page **141** "whether or not they [the principles of natural justice] are to be applied to any statutory procedure depends upon the implication to be drawn from the statute itself".

[25] In the context of this jurisdiction, it is clear from a reading of the ***Regulations*** that interdiction in accordance with ***regulation 27(1)*** is conducted to facilitate the investigative process. It removes the officer from the work environment, albeit temporarily, to allow the investigation to take place free from external influence or interference. Interdiction is not meant to be a form of punishment, nor does it connote guilt on the part of the officer. It is intended merely to be a holding operation in the interest of good administration until the Commission can determine, based on the findings of the investigation, whether or not disciplinary charges ought to be instituted against the public officer. There is nothing in ***regulation 27*** which would suggest that by the exercise of its power to interdict an officer without affording the officer an opportunity to be heard amounts to a breach of the rules of natural justice.

[26] We are fortified in this view by the fact that under ***regulation 27(4),*** if the investigation results in the officer's exculpation, that officer is entitled to the full amount of emoluments which he would have received had he not been interdicted.

[27] The appellant's dissatisfaction related primarily to the decision of the Commission to interdict him by the letter dated 15 March 2007. His application for judicial review followed that interdiction. We are of the view that the appellant was not removed from the school as a punitive measure, but was interdicted in the interest of good administration to allow the investigative procedure to take place. His application for judicial review at the interdiction stage was, we feel, premature, since the interdiction itself does not represent a punitive measure taken against the appellant by the Commission, but rather a preliminary step to allow the investigative process into the allegation of misconduct against him to commence.

[28] We agree with the findings of the trial judge at paragraph [36] of her judgment quoted at paragraph [11] above.

[29] Contrary to the submissions of Counsel for the appellant that the appellant should have been informed of the details of the charges against him prior to his interdiction, it appears from the evidence that at the time of the interdiction, the investigation and drafting of charges still had to be carried out in accordance with the ***Regulations***. The reason for the interdiction was to allow the investigation to take place in the absence of the public officer from the workplace.

[30] An examination of ***regulation 27*** shows that the power of interdiction ought to be exercised only after careful consideration of all the circumstances. The power is to be exercised where (a) a report against a public officer is being investigated or (b) criminal proceedings have been or are about to be instituted against an officer. But, before recommending that the officer cease to perform the functions of his office, the Commission must form the opinion that it is in the public interest so to do. Once the decision to interdict is made, ***regulation 27(3)*** requires that the officer be paid such portion of his salary, not being less than one-half, as the Commission may recommend to the Governor-General. In the instant case the officer was interdicted on one-half salary.

[31] We do not see any injustice being done to the appellant by the Commission's failure to afford him a right to be heard prior to interdiction. One would expect that the procedure for the conduct of investigations contained in ***Part B*** of the ***Regulations*** will in due course be put into effect and the appellant will be afforded the opportunity to be heard. To import into ***regulation*** 27 the right to be heard prior to interdiction would frustrate the scheme of the ***Regulations.***

[32] We find that the interdiction of the applicant was not subject to judicial review, and that the respondent was fully within its right to exercise the power of interdiction under ***regulation 27(1),*** since the interdiction was a preparatory step to the investigation of misconduct against the appellant.

[33] The filing of the application for judicial review challenging the appellant's interdiction was perhaps the principal factor that contributed to the cessation of the disciplinary proceedings under the ***Regulations***. There has been an undue delay of over three years since the date of interdiction. The appellant presently is on half-pay, unsure of his status as a public officer. However, it must be stated that in no small measure, the appellant's recourse to legal action as a first resort contributed significantly to the present state of affairs. The Commission faithfully followed the ***Regulations*** in its interdiction of the appellant, but was prohibited from continuing its investigation of the allegations of misconduct against the appellant by his commencement of legal proceedings challenging the interdiction itself.

[34] However, in light of all the circumstances of the case, particularly the delay of over three years, which has undoubtedly caused financial hardship to the appellant, it is fair and reasonable that the appellant be paid, with all due dispatch the full amount of salary which he would have received had he not been interdicted until the disciplinary or other proceedings (if any) against him are completed.

Disposal

[35] In the result, the appeal is dismissed and the Court orders as follows:

(1) that the respondent pay the appellant the full amount of the salary which he would have received if he had not been interdicted until disciplinary or other proceedings against him are completed; and

(1) that there be no order as to costs.

Justice of Appeal

Justice of Appeal Justice of Appeal