BARBADOS:

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 9 of 1998

BETWEEN:

JUDY LLOYD

Appellant

AND

THE ATTORNEY GENERAL

Respondent

Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice George Moe, and The Honourable Mr. Justice Errol Chase, Justices of Appeal.

2000: April 27th & May 2nd.

Mr. John Connell Q.C. in association with Mr. H. Gollop and Mr. S. Gollop for Appellant.

Ms. B. Gadsby for Respondent.

DECISION

The Administrative Justice Act Cap. 109B is described in its long title as an Act to provide for the improvement of administrative justice in Barbados and for related matters.

Section 2 defines the phrase “administrative act or omission” and section 3 prescribes the manner in which applications to the High Court for relief against an administrative act or omission may be made.

The grounds on which relief may be granted are listed in section 4 and the remedies that the Court may grant by way of relief are set out in section 5.

Section 6 states that relief may be granted to (a) a person whose interests are adversely affected by an administrative act or omission and (b) to any other person if the High Court is satisfied that that person’s application is justifiable in the public interest in the circumstances of the case.

The main issue in this appeal is centred on section 8 which enacts as follows:-

“8. The Court may if it thinks fit, refuse to grant any relief under this Act if it considers that there has been undue delay in making the application for judicial review, and that the grant of the relief sought would cause substantial hardship to, or would substantially prejudice the rights of, any person, or would be detrimental to good administration.”

In less abbreviated language section 8 provides that the Court may if it thinks fit, refuse to grant relief under the Act if it considers that

(a) there has been undue delay in making the application for judicial review and that the grant of the relief sought would cause substantial hardship to any person; or

(b) there has been undue delay in making the application for judicial review and that the grant of the relief sought would substantially prejudice the rights of any person or;

(c) there has been undue delay in making the application for judicial review and that the grant of the relief sought would be detrimental to good administration.

The appeal arises in this way. On June 13, 1996 the applicant/appellant Judy Lloyd filed an originating notice of motion against the Attorney-

General which, as amended, seeks:

(a) a declaration that in the events which have happened, a decision and/or administrative act and/or advice and/or recommendation of the respondent or his duly authorised delegate to suspend the applicant from her duty as a Clerical Officer in the Public Service of Barbados without pay and subsequently to declare her post vacant was and is contrary to law and/or ultra vires and/or void and of no effect.

b) a declaration that in the events which have happened the decision of the respondent or his duly authorised delegate to suspend the applicant from her said post and subsequently to declare her post vacant without documentation of the said suspension was contrary to law and/or ultra vires and/or void and of no effect.

c) A declaration that the applicant is entitled to resume her post in the public service.

d) An order of certiorari to quash the decision and/or administrative act and/or advice and/or recommendation of the respondent to suspend the applicant from her post in the public service and subsequently to declare her post vacant.

e) An order of mandamus directed to the respondent requiring him to reinstate the applicant in her post in the public service.

f) an order for special damages directed to the respondent to cause the applicant to be paid all arrears of salary or emoluments due and owing to her as at the date of judgment in these proceedings and an order for general damages in such sums as may be reasonable.

g) interest on such sums as may be awarded as damages at such rate and for such period as may be just and/or expedient.

The statement filed by the applicant pursuant to the Judicial Review (Application) Rules, 1983 states that the applicant was and is all material times a clerical officer in the public service of Barbados and that the authority of the government of Barbados affected by the proceedings is the Public Service Commission. It is further stated that the grounds upon which the relief is sought are that the decision and/or administrative act and/or advice and/or recommendation to suspend the applicant from duty and pay her no salary during the said suspension is (a) contrary to law (b) an excess of jurisdiction (c) a failure to satisfy or observe conditions or procedures required by law (d) a breach of the principles of natural justice (e) in bad faith (f) based on an absence of evidence on which a finding or assumption of fact could reasonably be based and (g) a breach of or omission to perform a duty. The particulars are here reproduced:-

“(1) The applicant whilst working as a clerical officer at the Ministry of Transport and Works, was on or about the 22nd of July 1985 instructed by the Deputy Permanent Secretary of the said Ministry to apply for her remaining vacation leave. This instruction was given against the background that there was an investigation being carried out into a financial transaction with which the applicant had dealt.

(ii) Vacation leave was granted from July 26, 1985. However when the applicant attempted to return to her post sometime after, she was informed by Mr. Karl King, the Deputy Permanent Secretary, that she had been suspended on half pay until further notice. The applicant has never recovered any pay, neither has she been given any clarification of the situation in writing or otherwise.

(iii) On August 11, 1987 the applicant was arrested by the Police and charged with the offence of larceny of $2,499.00, the property of the Crown in right of its government of Barbados. The offence was allegedly committed on July 18, 1984.

(iv) Hearing of the preliminary inquiry was conducted, but the matter was discontinued by the Director of Public Prosecutions on May 4, 1989.

(v) The applicant has made several attempts to recommence her work as a public officer but has been frustrated in her attempts and no information has been given to her by her employer either in writing or orally whether her dismissal was being contemplated or under what authority was she being denied her right to resume her work.

(vi) The suspension of the applicant from duty without pay was an imposition of a penalty and before such suspension was effected, the respondent or his delegate the Public Service Commission was under a duty to observe the principles of natural justice.

(vii) In any event the applicant’s said suspension from duty was a failure on the part of the respondent or his delegate the Public Service Commission to observe legal procedures and the principles of natural justice.

(viii) The applicant reasonably and legitimately expected that before she could have been suspended she would have been given a fair hearing and that the respondent or his delegate the Public Service Commission would have observed the principles of natural justice.”

The statement also stated and particularised the loss and damage allegedly suffered.

The notice of motion was supported by the affidavit of the applicant filed pursuant to the Judicial Review (Application) Rules 1983 and exhibiting various documents. An affidavit in response by Margaret Haynes, Acting Deputy Chief Personnel Officer of the Civil Service, also exhibited documents. Further affidavits were filed on behalf of both the applicant and the respondent.

The notice of motion came on for hearing before Moore, J. who on April 30, 1998 rejected an in limine objection that the Attorney-General was not the proper party to the proceedings but on a like in limine objection struck out the originating notice of motion under section 8 of the Act on the ground that to allow the application to proceed after such a lapse of time would be detrimental to good administration.

The grounds of appeal are that the learned trial judge

1. erred in law by misconstruing the Administrative Justice Act in determining hardship, prejudice and detriment to good administration without first conducting a substantive hearing;

2. erred in finding delay without evaluating the affidavit evidence filed, especially

a) the averment by the applicant that the wrongful conduct was a continuing one; and

b) the admission by the respondent that they were partially responsible for the delay;

3. erred in that he found delay without ever considering the nature of the delay in question.

4. erred by striking out the applicant's motion without having had the opportunity to test the merits of the applicant's case.

The heading of the originating notice of motion states "In the Matter of Administrative Justice Act Cap 109B And in the Matter of the Service Commissions (Public Service) Regulations 1978 and in the Matter of an Application for Judicial Review by Judy Lorraine Lloyd". It is, and had been treated as, an application under the Administrative Justice Act and it does not appear that any confusion was caused by paragraph 2 of the Statement filed pursuant to the Judicial Review (Application) Rules, 1983 which states, inter alia, that the respondent is sued pursuant to the provisions of the Crown Proceedings Act, Chapter 197. The learned trial judge correctly held that the Attorney General is the proper party, his reasoning following that of the High Court in C.O. Williams Construction Ltd v Blackman and Another (1992) 41 WIR 31 in which there was an application for judicial review and the Court held that section 18 of the Crown Proceedings Act could not be invoked to justify making the Attorney General a defendant in the proceedings because they were not civil proceedings against the Crown within the scope of that Act. The Court went on to hold that the Attorney General had properly been joined as a defendant and said (at p.47):-

"As to the naming of the Attorney General as defendant, I can see no prejudice as likely to result from adopting this procedure which is in keeping with the approach of Wooding CJ and Hyatali JA in Hochoy v National Union of Government Employees ((1964) 7 WIR 174 at 181) .... It is relevant too to refer to Dyson v Attorney General ([1911] 1 KB 410 earlier cited and to the following words of Farwell L.J. at page 423:

".... if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and government officials ....

In the earlier case Deare v Attorney General (1835) 1 Y and C Ex 197 at p. 208, the Lord Chief Baron said:

"It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a court of justice when any real point of difficulty that requires judicial decision has occurred."

Turning to the main issue on the appeal, there is an important difference between section 8 of the Administrative Justice Act and section 31(6) of the Supreme Court Act 1981 of England which enacts

"(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant (a) leave for the making of the application, or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

In England the grant of leave by the Court is necessary before a person may pursue an application for judicial review. A provision to that effect is absent from section 8 of the Administrative Justice Act and it must, we think, be assumed that such a provision was deliberately omitted so as not to impose any fetter on the adjudication by the High Court of complaints by applicants against the administrative acts and omissions of public officials and authorities.

In this case the application was struck out by the Court acting under section 8 on what counsel referred to as an in limine objection. The Court construed the section as giving the Court a discretion to strike out an application but in the cases to which I have been referred in which section 31(6) of the English Act came under consideration, the provision of that subsection corresponding to section 8 of the Administrative Justice Act was construed as enabling the Court to refuse relief on the hearing of the substantive application.

Thus the words of Ackner L.J, delivering the judgment of the Court of Appeal in England in R v Stratford-on-Avon District Council and another, ex parte Jackson [1985] 3 All E.R. 769 at 774:

"However applying the objective test which we have indicated as being the correct one, we accept that there has been undue delay in the present case within the meaning of s31(6) and so hold. We therefore emphasise that on the hearing of the substantive application the respondents will have liberty to argue that, even though we have found that there was good reason for the failure to act promptly, the Court should still refuse to grant the relief sought on the hearing on the grounds referred to in s31(6); the discretion to refuse relief conferred on the judge by that subsection will not be fettered in any way by our decision."

And in Caswell and Another v Dairy Produce Quota Tribunal for England and Wales [1990] 2 A.C. 738 at 747 Lord Goff said:

"Section 31(6) simply contains particular grounds for refusing leave or substantive relief, not referred to in rule 4(1), to which the court is bound to give effect, independently of any rule of court."

The textbook, Principles of Judicial Review by de Smith, Woolf and Jowell, 1999 at 15-047 is to the same effect:

"Delay is distinct from the other grounds upon which the court may withhold a remedy in that it is expressly recognised in section 31(6) of the Supreme Court Act 1981 which provides that where there has been undue delay in making an application for judicial review:

‘the court may refuse to grant leave [i.e. per mission] for making the application or (b) any relief sought on the application if it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantial prejudice to the rights of any person or would be detrimental to good administration.

. Order 53, r 4(1) states that applications for permission must be made promptly and in any event within three months from the date when grounds for the application first arose.’ Delay is thus relevant both at the permission stage and in relation to the grant of relief after the court had determined the merits of the applicant’s case.”

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. To strike out in limine such an application is in effect to reinsert in the section a provision requiring leave to make the application which Parliament must be taken to have deliberately excluded. In striking out the notice of motion the learned judge said:

“Where public officials take a decision it is not in the interest of good administration for those officials and third parties to be left in suspense as to whether the legal validity of that decision will be challenged several years later by a person who thinks himself aggrieved by the decision. There must be a point at which public officials can act with the assurance that a decision is final.

In my opinion that is precisely the sort of mischief that Parliament was minded to exclude when it enacted the provision in section 8 of the Administrative Justice Act relating to the detriment to good administration.

It is my opinion that to allow this application to proceed after such a lapse of time would be detrimental to good administration.”

These considerations may have weight when the substantive matter is heard and the Court has to decide whether to grant relief. But the fact is that section 8 makes no provision for the Court to take such considerations into account before it is called upon to decide the question of substantive relief.

In any case, in the opinion of this Court, whether the grant of relief sought would cause substantially hardship to, or would substantially prejudice the rights of, any person, or would be detrimental to good administrations are questions that are more appropriately decided after a full hearing. As Bingham L.J. said in R v Chief Constable of the Thames Valley Police ex parte Cotton [1999] 1RLR 345 at 352 , unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.

Miss Gadsby for the respondent sought valiantly to interpret what took place before the judge as the trial of a separate issue. However that was not the application made by counsel for the respondent nor did the appellant or the judge regard or treat it as such. It is pertinent to refer to paragraph 483 of Halsbury’s Laws of England, Fourth Edition, Volume 37 relating to the trial of separate issues:-

“Single trial of all issues. The characteristic mode of trial takes the form of one continuous episode in which all the matters in dispute between the parties will be completed and finally determined, and all multiplicity of legal proceedings with respect to any of these matters will be avoided. Accordingly, the beneficial object of the law that all disputes should be tried together should be the normal practice of the Court, and therefore an order for the separate trial of separate issues should be regarded as a departure from the norm, and generally speaking such an order should only be made in exceptional circumstances or on special grounds. Whether such an order should be made depends upon convenience and the saving of expense.”

In the result the appeal must be allowed because the appellant did not have the benefit of a full hearing of her application. The order of the judge is set aside and the case is remitted to the High Court for the application to be determined. The trial Judge’s order for costs is set aside and the appellant is to have her costs in this Court and in the Court below to be agreed or taxed. Certificate for two counsel.

Chief Justice.

Justice of Appeal. Justice of Appeal.