Privy Council Appeal No. 35 of 1965

M. Vasudevan Pillai and Another – – – – *Appellants*

v.

The City Council of Singapore – – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD APRIL 1968

Present at the Hearing:

VISCOUNT DILHORNE
LORD HODSON
LORD UPJOHN

[*Delivered by* LORD UPJOHN]

This is an appeal from the judgment of the Federal Court of Malaysia delivered on 22nd February 1965 dismissing the appellants' appeal from the judgment of Tan Ah Tah J. given on 22nd November 1963 in the High Court in Singapore dismissing the appellants' claim for wrongful dismissal from their employment with the respondent Council.

The appellants as to the first from 1952 and as to the second from 1956 were in the employment of the respondent Council as daily rated unskilled labourers employed in sweeping out drains and such like duties in connection with the respondent Council's Pasir Panjang Power Station.

On 23rd May 1957 the appellants were ordered by a serang one Ishak on behalf of the respondent Council to clean certain air heaters and ducts used in connection with the boilers in the Power Station. They refused to do so claiming that this work fell outside the scope of their employment and they were not obliged to perform it; they said it should be done by boiler erectors and cleaners paid at a higher rate. For this refusal to work they were dismissed without due notice on 27th May 1957.

By Writ issued on 4th December 1957 the appellants brought this action and by their Statement of Claim alleged that the defendant Council were not entitled to compel them to perform the work they were ordered to do, that therefore the respondent Council were not entitled to determine their employment which was alleged to be of a permanent nature. They claimed that they remained in the employment of the respondent Council and entitled to work and wages or alternatively they were entitled to damages for wrongful dismissal. During the trial Tan Ah Tah J. inspected the Power Station and examined the nature of the work which the appellants were ordered to do; he reached the conclusion that no skill was required for the cleaning of the air heaters and ducts and that it was work well within the capabilities of the ordinary labourer and indeed work which the second appellant himself and other daily rated unskilled labourers had done before. The action as originally constituted therefore failed; the trial judge was upheld on this issue by the Federal Court and there has been no appeal on that issue to their Lordships' Board.

Although the action began in 1957 it did not come to trial before the learned judge until 22nd July 1963 and on that day some of the Rules formulated by the respondent Council with regard to the Recruitment Engagement and Discipline of the staff were, by consent, put in evidence. Thereupon counsel for the appellants took the point which was further developed in argument on the following day that the appellants were entitled to an inquiry before being dismissed for misconduct; that the inquiry must be conducted in accordance with the rules of natural justice and there had been a failure to do so and accordingly the appellants were entitled to claim that they were wrongfully dismissed on this alternative ground. By leave the appellants amended their Statement of Claim to raise these issues on 23rd July and these are the issues before their Lordships' Board.

As their Lordships will have to review the relevant Rules (hereinafter called the Rules) it will be convenient to set them out now:

"SECTION IV

Discipline

1. The maintenance of discipline is essential and since proof of misconduct or dereliction of duty will be required before an employee can be dismissed, it is necessary for departments to pay particular attention to the question of disciplinary enquiries and the correct procedure to be adopted in disciplinary cases. Broadly speaking, there are two types of cases which may call for action by departments:

A. Misconduct which warrants a warning such as absence without permission, minor disobedience, late arrival, poor work.

B. Misconduct which the Head of Department considers warrants dismissal or other disciplinary action such as wilful disobedience to specified orders, theft of property, serious insubordination."

"3. *Misconduct which the Head of Department considers merits dismissal*

(O.M. 31.10.52; Cir. 219/52; 0.151/52)

(*a*) Suspension with a view to dismissal and dismissal must be authorised by the President or Deputy President.

(*b*) When the conduct of an employee is being considered with a view to his dismissal or punishment, the following procedure must be followed:

(i) The Head of Department should first send a memo. to or speak to the President or the Deputy President outlining the case as it is then known to him. In the case of gross misconduct, this should be done immediately. If the President or Deputy President considers that the employee should be suspended pending an enquiry, he will authorise it.

(ii) The Head of Department will then hold or cause to be held an enquiry at which a Welfare Officer must be present. There should be no delay in the holding and completing of this enquiry and the record should be available for consideration by the President or Deputy President within two or three days of the matter first being reported.

(iii) It is not part of the Welfare Officer's duty to conduct the enquiry. The enquiry must be conducted by a responsible officer from the department concerned.

(iv) The President or Deputy President will then consider the full record of the enquiry and may cause such further supplementary enquiries to be held as he may deem necessary.

(v) The President or Deputy President will then make his decision which will be conveyed to the Head of Department in writing and the Head of Department will cause the employee to be informed in writing.

(vi) If the decision is to dismiss the employee, a formal letter of dismissal will be signed by the President or Deputy President and conveyed to the employee by the Head of Department. At the same time the employee will be informed that if he wishes to appeal he may give notice to the Secretary of the Establishments Committee within seven days, and that if he gives such notice of appeal the substance of his appeal should be conveyed in writing within fourteen days.

(vii) If the employee wishes to appear before the Establishments Committee, then the officer of his department concerned with the subject matter of the enquiry should also be present at the same time.

(viii) For the information of departments, a breach of any of the following might be held to be misconduct:

(1) failure to obey all orders that are lawful and within the scope of the service undertaken;

(2) failure to exercise the skill which by engagement in a certain employment an employee warrants himself to possess and to exercise reasonable care in and about his service;

(3) failure to serve his employer with good faith and to consult his employer's interests;

(4) failure to account for and deliver up all property entrusted to him by his employer;

(5) incapacitating himself from due and faithful service."

The appellants must rely on the Rules to establish their case for the general rule as between employer and employee is perfectly clear and has been recently stated by Lord Reid in the case of *Ridge v. Baldwin* [1964] A.C. 40 at p. 65:

> "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them."

So that the appellants contend first that the Rules were expressly or by implication part of the terms of employment or secondly were so made by the operation of a statute or some statutory instrument having the like effect, alternatively, they were entitled to the benefit of the statutory instrument and entitled to sue for its breach. Secondly that upon the true construction of the Rules before they are dismissed they are entitled to an enquiry to which the rules of natural justice apply. Thirdly that those rules of natural justice have not been observed.

It is quite clear on the evidence that the Rules were not expressly or by implication incorporated into the contract of service of the appellants or either of them and the contrary was scarcely argued before their Lordships; the real issue was whether by virtue of section 17 of the Municipal Ordinance the Rules had statutory force and the appellants were entitled at law to their benefit.

Section 17 is in these terms:

> "(1) The Commissioners may from time to time make, and when made, amend, add to or rescind, rules for the purpose of maintaining good conduct and discipline among municipal officers and servants, and may impose any one or more of the following punishments upon any such officer or servant who, in the opinion of the President, is guilty of misconduct or breach of duty in the exercise of his official functions but does not merit dismissal:
>
> (*a*) remove him to an office of lower rank;
>
> (*b*) require him to serve in his original office at a reduced salary, either permanently or for a stated period; or
>
> (*c*) deduct a portion of salary due, or about to become due, to him.
>
> (2) The Commissioners may suspend from duty any municipal officer or servant who is accused of misconduct or breach of duty in the exercise of his official functions, and if such officer or servant while so suspended is removed from office there shall be paid to him in respect of the period of his suspension such portion only of the salary of his office not being less than one-half as the Commissioners may think fit."

The Commissioners referred to in the section are now the respondent Council.

As the Rules were put in evidence by consent there was no evidence as to the authority by which they were made but according to the note of the learned trial judge counsel for the respondent Council said:

> "It is suggested that Chapter II of P 2 [the Rules] forms part of the contract of service. In fact Chapter II is a systematic compilation of circulars issued by the Labour Sub-Committee which is an off-shoot of the Finance Committee. These circulars were issued from time to time. In 1955 the Sub-Committee instructed that the circulars be put together. The result was Chapter II. The tenor of Chapter II is a directive from the Sub-Committee to various Departments containing instructions as to matters that arise in connection with the employment of daily rated labourers."

Such a compilation of committees or sub-committees of the respondent Council clearly would not qualify as rules made under section 17 by the respondent Council; such rules could only be made by formal resolution of the Council itself; for it is clear that the Council could not have delegated their rule-making power under section 17 to a subsidiary body, see section 383 of the Ordinance. The onus of establishing that the Rules were made under and by virtue of section 17 lay upon the appellants but they never attempted to discharge that onus. This matter was not fully explored in the Courts below fundamental though it was. Before the trial judge it seems to have been assumed that the appellants were entitled to rely on the Rules and the learned judge held that there were certain defects in the proceedings (with which their Lordships must deal later) but they were cured by the procedure on appeal. But in the Federal Court it seems to their Lordships implicit in the judgment of Wee Chong Jin C. J. that the appellants could not rely upon the Rules as made pursuant to section 17 for though he was of opinion that the appellants were wrongfully dismissed under the Rules yet he went on to hold that the respondent Council could summarily dismiss the appellants.

The Lord President put it rather differently basing his decision on the doctrine of frustration a doctrine which their Lordships think is somewhat remote in its application to the facts of the present case but ultimately

he held that the appellants could not rely upon the absence of an inquiry conducted in accordance with the rules of natural justice.

Accordingly in their Lordships' view the appellants fail to establish any ground upon which they can pray in aid the relevant provisions of the Rules to support their case that the principles of natural justice apply before they can be validly dismissed. That alone is sufficient to dispose of the appeal but their Lordships propose to deal with the other issues raised and argued before them. In the Courts below it seems to have been assumed that if the Rules applied to the contract of employment the appellants were entitled to an inquiry to which the principles of natural justice applied from paragraph 3 (*b*) (ii) onwards. It was then conceded by counsel on behalf of the respondent Council that those principles had not been observed. In their Case on appeal before their Lordships the respondent Council asked leave to withdraw that concession and after full argument on each side their Lordships thought fit to grant that leave.

The matter stands thus. Assuming that contrary to their Lordships' opinion the appellants can rely upon the Rules either as part of the contract of employment or as a Statutory Instrument on which they are entitled to rely how far does this assist them?

Their Lordships have already pointed out that the relationship of Master and Servant or Employer and Employee gives rise to no application of the principle of *audi alteram partem* on dismissal. Therefore the Court, in construing the Rules (for it is purely a matter of construction) must consider in the first place whether those Rules were introduced to give rights to the employee or only to provide a scheme or code for the general administration by the staff of the respondent Council and their officers and to provide guidance for the heads of departments. Even the second construction would no doubt provide substantial protection for the employees in the security of their employment particularly against possibly petty-minded immediate superiors who might otherwise take an ill advised and presumptuous course to discipline or even dismiss their immediate inferiors, but would not necessarily give them any rights under the Rules.

Their Lordships can feel no doubt that the latter view is the correct one down to the conclusion of paragraph 3 (*b*) (v). Disciplinary action can only be taken upon the initiative of the Head of the Department and action with a view to dismissal only by the President or Deputy President. In the latter case however the President of the Council or his Deputy neither of whom is likely to have first-hand knowledge of the matter will require to have a factual report upon the matter so in the first place even the Head of the Department must report to him; paragraph 3 (*b*) (i). Then an inquiry must be held for the information of the President at which for the protection of the employee the Welfare Officer must be present, see paragraph 3 (*b*) (ii), but there is no hint at this stage that the employee himself is entitled to receive notice of the inquiry or to be present and their Lordships can see no reason why in a case between Employer and Employee any such right should be implied. Then in 3 (*b*) (iv) the President or his Deputy quite reasonably reserves the right for his own information to cause further supplementary inquiries to be made into the matter.

If the President or his Deputy decides that some punishment short of dismissal should be imposed then that is meted out and in such circumstances counsel for the appellants disclaimed any argument that the employee would have any ground to complain that he had not been heard.

In their Lordships' view it is only if the President or his Deputy reaches the conclusion that the circumstances warrant a decision to dismiss and that decision is conveyed to the employee under paragraph 3 (*b*) (vi) that the principles of natural justice start to be applicable for it is only at that stage that any rights are conferred upon the employee namely a right of appeal to the Establishments Committee.

The appellants' case however depends upon the submission that the failure to observe the rules of natural justice occurred at an earlier stage. After the Head of the Department carried out the inquiry under Rule 3 (*b*) (ii) at which the appellants were either present or represented the Deputy President put three questions in writing to the Head of the Department to which he received written answers. Neither questions nor answers were disclosed to the appellants. That, it was said, was a defect in the respondent Council's procedure and so Tan Ah Tah J. held, though he held it was cured by what followed. This however does not help the appellants for the reason already given by their Lordships that at that stage the rules of natural justice had no application. Had their Lordships been of a contrary opinion their Lordships would have agreed with Tan Ah Tah J. that this procedure was defective though for the reasons now to be mentioned they agree with him that what followed, cured that defect.

The appellants appealed; and in accordance with Rules 3 (*b*) (vi) and (vii) there was a hearing before a sub-committee of the Establishments Committee which was in the nature of a rehearing and evidence was called *de novo*. No attack upon the propriety of those proceedings (or that it was only a sub-committee) has been made.

Their Lordships were referred to the case of *Walter Annamunthodo v. Oilfields Workers' Trade Union* [1961] A.C. 945 and to the observations of Lord Denning at p. 956. It was there held that the accused was entitled to complain that a new charge against him not made before the hearing Tribunal but for the first time before the appellate Tribunal could properly form a ground of appeal to the Courts on the principle that the rules of natural justice had not been observed. Their Lordships agree.

But the complaint here was that certain evidence was wrongly received by the Tribunal at first instance, in the absence of the employee, a serious complaint. But when on appeal there is a rehearing by way of evidence *de novo* from the witnesses it seems to their Lordships that different considerations apply. The Establishments Committee heard evidence *de novo* in the presence of the appellants or their representatives. Upon that evidence only the Committee held that the appellants were rightly dismissed. That cured the alleged defect at an earlier stage and is in itself conclusive against the appellants as the proceedings before the Establishments Committee are not attacked.

For these reasons their Lordships will dismiss this appeal. The appellants must pay the costs of the appeal.

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DELIVERED BY

LORD UPJOHN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1968