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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 11 of 1972

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

THE GOVERNMENT OF THE FEDERATION
OF MALAYSIA

Appellant

- and -

CALISTER LIONEL

Respondent

CASE FOR THE RESPONDENT

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10 1. This is an Appeal from an Order of the Federal Court of Malaysia (Ong C.J. Gill F.J. and Ali F.J.) dated the ninth day of July 1971 allowing an Appeal by the Respondent from a judgment of the High Court of Malaya (Syed Othman J.)

20 2. The Respondent was at all material times a member of the general public service of the Federation of Malaysia being employed by the Appellant as a temporary clerk/interpreter. In such capacity the Respondent was attached first to the Kelantan Police Contingent and thereafter to Contingent Police Headquarters, Johore Bahru. By letter dated the 29th of May 1962 the Chief Police Officer, Johore Bahru, purported to remove the Respondent from his said office with effect from the 1st June 1962.

3. The question raised by this Appeal concerns the validity of such removal and the short issues outstanding upon Appeal are:

30 (a) Whether the Respondent was required to leave the Appellant's service in circumstances amounting to a "dismissal" within the meaning of Article 135 (1) of the Federal Constitution of Malaysia;

(b) Whether the Chief Police Officer was

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28 MAY 1974
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empowered to terminate the Respondent's service with the Appellant.

If the Respondent was dismissed in the sense of Article 135 or if the Chief Police Officer was for any other reason lacking in power to remove the Respondent from his post, whether upon notice or otherwise, such removal was and is void against the Appellant.

4. The Respondent's status is determined and his rights are governed by the Federal Constitution of Malaysia which came into force on Merdeka Day, 31st August, 1967, and by the General Orders from time to time applicable to the public services: 10

(a) By Article 132(1)(c) of the Constitution the public services are defined as including the general public service of the Federation. The Respondent was employed in such general public service and no distinction is drawn between temporary and permanent membership thereof. 20

(b) Article 139(1) of the Constitution provides for a Public Services Commission having jurisdiction over, inter alia, persons in the general public service.

(c) By Article 144(1) of the Constitution it is the duty of the appropriate Commission, inter alia, to appoint and exercise disciplinary control over members of the service or services to which its jurisdiction extends. Such duty may, by virtue of Article 144(6), be delegated by the appropriate Commission to the persons and subject to the conditions therein set out. 30

(d) By Article 135(1) of the Constitution it is provided, inter alia, that no member of the general public service shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank. 40

(e) By Chapter D 31 of the General Orders the

appropriate Commission, as specified in the Constitution, is declared to be the Disciplinary Authority in relation to any officer of a service falling within its jurisdiction. A proviso is added with regard to delegation of the exercise of disciplinary control under Article 144(6) of the Constitution.

10 (f) Regulation 32 of Chapter D of the General Orders deals with action by the Disciplinary Authority in respect of an officer in Division 3 or 4 of the public service. The Respondent was such an officer. The Regulation provides that before the Disciplinary Authority imposes any penalty upon that officer he must be given an adequate opportunity to exculpate himself. The fact of dismissal of that officer must be reported in every case to the Secretariat concerned.

20 (g) By Regulation 36 of Chapter D of the General Orders it is provided that, notwithstanding Regulation 32 the Government may dispense with the services of any officer or employee not on the pensionable establishment by giving due notice in accordance with the terms of his appointment.

30 5. The Respondent entered the general public service on 1st October 1953. His appointment was made before the Public Services Commission or any other Commission now referred to in the Constitution had been established. The terms of his appointment were set out in a letter dated 28th of September 1953, addressed to him by his prospective Head of Department. Such terms included a provision that his engagement would be terminable at one month's notice or on payment of one month's salary in lieu of notice. By letter dated 30th April 1962 addressed to the Respondent by the Chief Police Officer, Johore Bahru, the Chief Police Officer informed the Respondent that disciplinary action such as might lead to the Respondent's dismissal was being taken against the Respondent pursuant to Regulation 32 of Chapter D of the General Orders. Particulars of the alleged acts of indiscipline were given in the said letter and the Respondent was required to exculpate himself in writing within fourteen days of the receipt thereof. On 8th
40 May 1962 the Respondent exculpated or attempted to exculpate himself by letter to the Chief Police Officer but on 29th May 1962 the Chief Police Officer replied in the terms:

"With reference to my letter to you (S.R.) P.F./ 3596 dated 30 April 1962, and to your reply thereto dated 8th May 1962, I have to inform you that, after careful consideration of your representations, I have decided that you have failed to exculpate yourself. I have, therefore, decided to terminate your services as a Temporary Clerk with effect from 1st June 1962, on payment to you of one month's salary plus cost of living allowance in lieu of notice."

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The Respondent thereafter on 10th June 1962 appealed to the Public Services Commission which said appeal was rejected by letter dated the 7th of September, 1962.

6. The Hearing before Syed Othman J. took place on 13 August 1969 at Johore Bahru. It was agreed between the parties that the action should be determined without oral evidence and upon the agreed facts shown on the face of the pleadings and other documents before the Court. The Appellant contended as a preliminary point, that the acts complained of were done by the Chief Police Officer in execution of his public duty and that the action was thereby statute barred since proceedings were not instituted within twelve months from the date when the cause of action accrued. Reliance was placed on s.2 of the Public Authorities Protection Ordinance, 1948. In his judgment given on 19th January 1971 the learned Judge referred to the Respondent's allegation in the Statement of Claim that the Chief Police Officer had acted outside the scope of his authority and said that, since the matter was in dispute, he would make no finding on this point. He then defined the issues which he was called upon to decide:

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"For the purpose of this action I need only determine whether the action of the Chief Police Officer was a termination of service or a dismissal, and, if it was a dismissal, whether he had the authority".

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In the event the learned Judge determined both of these issues in favour of the Appellant.

7. Distinguishing a termination from a dismissal and finding that the Respondent's service was lawfully terminated he said :

10 "On the wording of the Chief Police Officer's letter of 29th May 1962, I am satisfied that the decision was a termination and not a dismissal. If it was a dismissal in accordance with G.O.D. 32 the Plaintiff would not have been entitled to anything. Here he was given one month's salary plus cost of living allowance, a clear indication of termination in accordance with paragraph 4 of his conditions of appointment. Under this condition there is nothing to prevent his services being terminated whether or not he had misconducted himself. The Plaintiff could have been properly dismissed and should have been dismissed since he failed to exculpate himself. The decision taken by the Chief Police Officer was probably to save him from the ignominy of a dismissal".

20 8. The learned Judge went on to consider the validity of the Chief Police Officer's actions if, contrary to his finding, the same constituted a dismissal. He referred to Regulation 31 of Chapter D of the General Orders and Article 144 (1) and (6) of the Constitution and concluded:

30 "In this case, it is a fact that the appeal of the Plaintiff to the Public Services Commission against the decision of the Chief Police Officer was dismissed. On this very fact, the only inference to be drawn is that the Public Services Commission must have delegated to the Chief Police Officer its power to exercise disciplinary control in respect of the grade of service to which the Plaintiff belonged".

Accordingly the learned Judge held that if there was a dismissal the same was valid.

9. The Respondent appealed to the Federal Court of Malaysia (appellate jurisdiction) by Notice of Appeal dated 19th January 1971 which appeal was heard by Ong C.J., Gill F.J. and Ali F.J. on 22nd May 1971. In the course of argument it was conceded on behalf of the Appellant:

- 40 (a) That the Respondent's claim was not barred by s.2 of the Public Authorities Protection Ordinance, 1948.
- (b) That there was no evidence on the record that the Public Services Commission had delegated

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its power of dismissal to the Chief Police Officer and that the Chief Police Officer was not otherwise empowered to dismiss.

The Appellant's case thereafter proceeded on the basis that the Respondent's employment had been lawfully terminated by contractual notice.

10. The unanimous judgment of the Court was delivered by Ong C.J. on 9th July 1971. The learned Chief Justice, dealing with the learned Judge's finding that the Respondent's employment had been lawfully terminated by the Chief Police Officer's letter of 29th May 1962, said:

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"With respect I think it only right to say that the wording of the Chief Police Officer's letter should not be the deciding factor. Calling a spade a pickaxe does not alter the character of that agricultural implement. Even in the same letter it was stated that the decision taken was because the Appellant had failed to exculpate himself".

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The learned Chief Justice thereafter referred to Article 139 (1) and Article 135 (1) of the Constitution and held that the purported dismissal of the Respondent by the Chief Police Officer was contrary to the Constitution and therefore void. The Respondent's appeal was accordingly allowed.

11. The Respondent submits that having regard to the terms of the Chief Police Officer's letter dated 30th April 1962 and in particular the express invocation of Regulation 32 of Chapter D of the General Orders and having regard further to the use of the exculpation procedure and the reliance placed in the letter of 29th May 1962 upon the Respondent's failure to exculpate himself the Chief Police Officer intended to and did exercise disciplinary control over the Respondent by dismissing him. For such purpose the Chief Police Officer was not the appropriate Disciplinary Authority within Regulation 31 of Chapter D of the General Orders: by such Regulation and by virtue of Articles 144 (1) and 135 of the Constitution the power of dismissal was reserved to the General Service Commission. The payment to the Respondent of one month's salary in accordance with the terms of his engagement did not affect the quality of the power which the Chief

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Police Officer purported to exercise.

12. Alternatively and upon the true construction of Article 135 (1) of the Constitution a termination of the Respondent's service upon notice was equally a dismissal and was not competent to be effected by any authority subordinate to that which, on 29th May 1962, had power to appoint the Respondent, namely the General Service Commission.

10 13. In the further alternative the Chief Police Officer having conducted himself in express reliance on Regulation 32 of Chapter D of the General Orders and having wrongly arrogated to himself the role and power of Disciplinary Authority purported to impose upon the Respondent a penalty short of dismissal by terminating his service on the ground of unsatisfactory work or conduct. Upon termination of his service on such ground the Respondent was made ineligible for re-employment by the Appellant save in special and exceptional circumstances by virtue of Regulation 6
20 or Chapter A of the General Orders.

14. In the further alternative and upon the true construction of Regulation 36 of Chapter D of the General Orders the termination of the Respondent's service upon notice by "the Government" was competent to be effected by the Government acting through the General Service Commission or a superior but not a subordinate authority.

15. In the result the purported removal of the Respondent from office was void and of no effect.

30 16. The Respondent will humbly submit that the Order of the Federal Court of Malaysia (Appellate Division) was right and should be affirmed for the following amongst other

R E A S O N S

- (1) BECAUSE the Respondent was subject to disciplinary control and was dismissed, alternatively his service was terminated, without lawful authority
- (2) BECAUSE the judgment of the High Court of Malaya was wrong and the judgment of the Federal Court of Malaysia (Appellate Division) was correct.
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R. Neville Thomas.

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BETWEEN:

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Appellant

- and -

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Respondent

CASE FOR THE RESPONDENT

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