Wrongful Dismissal of a University Lecturer

The case of *Ibrahim Sulaiman v. The PNG University of Technology* (unreported) N610

This case I believe will be of particular interest to all employees (both on citizen and non-citizen contract terms) of the two Universities of Papua New Guinea, and generally others employed by statutory bodies. Many will perhaps be surprised to learn that dismissal of a University employee in breach of the prescribed procedure under his terms of service does not entitle the employee to a court order to reinstate him or nullify the University's decision. His only remedy lies in damages measured in the usual way. This note reviews the judicial reasons and the policy underlying this decision.

The facts of the case were as follows. Ibrahim Sulaiman was an employee of the Papua New Guinea University of Technology under terms which apply to non-citizen employees of the University. It would seem that he was purportedly dismissed under a provision in his contract which empowered the University to dismiss an employee 'in the best interest of the University'. Sulaiman applied to the National Court under Section 155 of the Constitution to inquire and review the proceedings terminating his contract. It was submitted on his behalf that because the terms and conditions under which he was employed created very detailed procedures of termination and hearing of appeals, the University authorities were under obligation to act judicially, and, hence, had to give him a fair hearing prior to his dismissal. Since he claimed that he was denied natural justice he sought a judicial review and nullification of the University's decision. From the judgment it is not clear whether the applicant was seeking a declaratory order and/or specific performance. The two remedies are not, of course, exactly alike though in some situations the practical effect of a declaration may be similar to specific performance. Justice Woods, presiding, seemed to treat the application as one for specific performance. He declined to review the University's decision on the grounds that:

The law is well settled in this regard. The Court will not grant specific performance of a contract of employment. Such a contract is one for personal services and comes within the category of contracts whose execution the court cannot supervise and will not, therefore, enforce under any orders for specific performance.

Woods J., admitted that there had been some exceptions to this rule where the courts in special circumstances had granted a declaration that the contract still subsisted where the employee 'enjoys a special status or office by virtue of a statute'. In the instant case he was not convinced that employment under the terms and conditions of the University created such a special status or office:

We are not in the situation where we have special employment legislation applying or unfair dismissal legislation applying. This is clearly a case where the parties bound by themselves by a contract and it is only to that contract that a Court can look.

The Judge went on to hold that if Sulaiman felt aggrieved by the manner of his dismissal it was up to him to sue for damages under the ordinary laws of contract.

Normally, in the law of contract a repudiation is not effective to terminate a contractual relationship unless accepted by the innocent party. However, the courts apparently treat termination of a contract of employment as an exception to this rule. Dismissal by the employer (or resignation of the employee, as the case may be) irrespective of the manner

it is done is regarded as automatically (or unilaterally) ending the contract The only remedy available to the innocent party being damages [1]

Damages, however, are not always regarded as an adequate remedy for wrongful dismissal Because of the judicial refusal to award other remedies under private contract law, attempts are sometimes made, as in the instant case, to seek these other remedies by invoking the principles of administrative law, especially, the rules of natural justice and the doctrine of *ultra vires* In exceptional circumstances, injunctions or declarations have been awarded by the courts [2] The test whether or not the court will review a case is said to depend upon the relationship between the employer and the employee If t is 'ordinary master and servant' relationship, the courts as a rule will not apply administrative law principles in the event of wrongful dismissal Where, however, the employee enjoys a 'special status' or 'office' then his case is a potential candidate for public law

Unfortunately this test is easier stated than applied to concrete situations In the case of *Malloch v Aberdeen Corporation,* Wilberforce L J , after reviewing cases in which employees had been held entitled to a hearing or observation of natural ustice on the basis of this test, described the position as illogical and even bizarre

A specialist surgeon is denied protection which is given to a hospital doctor a University professor, as a servant has been denied a right to be heard, a dock labourer and an undergraduate have been granted it

Lord Wilberforce attempted to clarify the position He opined that the courts will decline to review a dismissal case

> in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection

On the other hand, if any of these elements exists

> whatever the terminology used, and even though in some inter parties aspects the relationship may be called that of master and servant, there may be essent al procedural requirements to be observed, and failure to observe them may result in a dismissal declared to be void [3]

Authors Smith and Wood, describe Lord Wilberforce's dictum as one of the clearest exposition of the phrase 'ordinary master and servant' in the context it is used here [4] Even then the learned Judge's explanation is not without criticism It still leaves vague the meaning of 'offices' which are entitled to protection Subsequent English courts decisions have made it clear that the seniority of the employee *per se* is rot enough to invoke administrative law principles Nor is it enough that the person concerned is

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1 T Smith and J C Wood *Industrial Law* (3rd ed London, Butterworth, 1986), 199 200 This is not a rule of law but practice p 201 202

2 For discussion of these cases see M R Freedland, *The Contract of Employment* (Oxford, 1976), 280 284

3 [1971] 2 All E R 1278 1294

4 *Supra* 205

employed by a public body or that his employment has a 'statutory flavour' [5] Some cases, including *Sulaiman,* seem to fall just short of a requirement that the only situation the courts would intervene is where the employee's office is expressly protected by a statutory provision or subsidiary legislation [6]

Surprisingly, in *Sulaiman* no reference appears to have been made to the Supreme Court decision of *Iambakey Okuk and Another v Fallscheer* [7] In that case the respondent (plaintiff) who was employed as the general manager of the National Airline Commission, a statutory body, was dismissed by the first appellant, the Minister responsible for the Commission, for alleged inefficiency The Minister purported to act under s23 of the *National Airline Act* 1973, which empowered him at any time to terminate the appointment of the general manager on ground, *inter alia,* of inefficiency The National Court granted a declaration that the dismissal was null and void because the respondent had not been given a hearing prior to the purported termination of his employment On appeal to the Supreme Court the decision was unanimously upheld Although the Supreme Court noted that the Act did not expressly provide for a hearing before dismissal of the general manager, it held that this had to be inferred Andrews J, observed that

The nature of the office and position affected, the circumstances in which the Minister is empowered to act and the sanctions which he may impose, appear to me to point quite clearly in favour of a requirement that natural justice be afforded

Justice Andrews continued

The office or position of the respondent is a most significant one and it is his means of livelihood As the sanction imposed, namely dismissal affects that livelihood, this points to the desirability of the power being qualified by the principles of natural justice [8]

All the three learned Supreme Court judges stressed the need and the importance of developing the principles of natural justice as part of the underlying law in the exercise of statutory powers unless excluded They also emphasized that it was not in the public interest that the respondent be dismissed without affording him an opportunity to be heard

Fallscheer and *Sulaiman* cases are similar in that they both involved dismissal of employees of statutory bodies without affording them a fair hearing Secondly, in neither case was there a statutory provision which expressly gave the employees a right to a hearing prior to dismissal However, the two cases are, perhaps, distinguishable on the basis that in *Fallscheer* the grounds upon which employment could be terminated were laid out in the statute This meant that the general manager could only be dismissed for a 'statutory cause', hence, the court was able to infer a duty to give the employee a hearing There are no comparable provisions under the *Papua New Guinea University of Technology Act* The second possible distinction of the two cases is the seniority of the

5 *Regina v East Berkshire Health Authority Ex Parte Walsh* [1984] 1 CR 743, 751

6 For example, *Council of the Civil Service Union v Minister for the Civil Service* [1984] 3 All E R 935, 949 The case was cited with approval by Judge Woods

7 [1980] PNGLR 274

8 *Ibid* 277

two employees In the *Fallscheer* case the Supreme Court emphasized the respondent's status as that of the general manager of a leading statutory body Arguably in the eyes of the public a general manager is held in a higher esteem than a University lecturer, and, therefore, there maybe a greater need to protect his office and status This point, however, should not be over emphasized if only because its application in different cases has been so inconsistent as to lead to what Lord Wilberforce, *supra,* described as an 'illogical and bizarre' situation Besides, there are no strong public policy reasons to justify the different treatment when the results of dismissal might be equally devastating The third possible ground for distinction of the two cases, is the pleading In *Fallscheer* the respondent sought a declaration and damages, while in *Sulaiman* the plaintiff apparently pleaded for an order for reinstatement It is quite possible in the latter case that Justice Wood's reasoning was, at least indirectly influenced by the judiciary's disinclination to order specific performance of employment contracts

Reference should also be made to a fairly recent English Court of Appeal decision, *Regina v East Berkshire Health Authority Ex Parte Walsh* [9] where a slightly different test was proposed for determining whether or not a dismissal was reviewable by the courts In that case Sir John Donaldson M R , held that an applicant for judicial review had to demonstrate to the court that a public right which he enjoyed had been infringed This could be shown in two alternative ways by statutory provision which expressly restricts the freedom of the public body to dismiss the particular employee or by statute which requires the public body to contract with its employees under specified terms of contract with a view to the employee acquiring a private right In the latter situation, if the authority failed or refused to create contracts with the specified term, the employee would have 'public rights' to compel the body by mandamus so to contract or to declare that he had those rights The Master of the Rolls was emphatic that where the authority incorporated the statutory terms into the employee's contract, a breach of that contract was not a matter of public law and gave rise to no administrative law remedies [10]

One wonders whether the foregoing approach makes the legal position any clearer But it is fairly certain that it does narrow down even further the scope for the judicial review of wrongful dismissal by the English courts The decision was not cited in the case under review, though it is doubted that it would have affected the result The *Papua New Guinea University of Technology Act* under which Ibrahim Sulaiman was employed has no provision which expressly restricts the University's power to dismiss its employees Nor is there such a provision under the University Statutes The Act and the Statutes authorise the University Council to make rules and orders for the terms of service of University employees [11] Since the terms of service the applicant referred to were incorporated in his contract, it follows, on the authority of *Walsh,* that a breach of this contract was not a matter of public law but of private law

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9 *Supra*

10 *Ibid* 752 53

11 *Papua New Guinea University of Technology Act* C170 S20, *Staff Statute* U170 S9, *Staff (non-Citizen)* Statute C170 S4

POLICY JUSTIFICATION

The question which remains to be examined is whether it is justified on policy grounds for the courts to refuse to exercise their review powers in dismissal cases (except in very special circumstances) where an employee, especially of a statutory body, claims denial of natural justice or that the body was otherwise acting *ultra vires*.

There are three common reasons given to justify the judicial attitude. First, it is said that damages are usually an adequate remedy for the disgruntled employee. This, however, may be true in some cases but not in all. Dismissal casts a stigma upon one's employment record which cannot be satisfied by monetary compensation. It also has a demoralizing effect upon the employee, in particular, where he feels that the decision leading to his dismissal was arrived at unfairly. Damages, even if they could be awarded for injured feelings, are unlikely to be a satisfactory remedy in these circumstances. It is this very factor which impels dismissed employees, like the plaintiff in the *PNG University of Technology* case, to seek judicial intervention to review the decision and possibly order their reinstatement.

Secondly, a related point, it is said that courts fear that a review might result in an order for reinstatement.[12] As Justice Woods observed, supra, the courts feel that contracts involving personal services are not amenable to judicial enforcement because of the difficulty in the court's supervising their execution. Though this is a rule of practice and not of law, some Judges, (such as Woods J., in *Sulaiman)* tend to treat it as if it were a rule of law absolutely binding upon them. It is submitted that a blanket refusal to grant specific performance on this ground is unwarranted because there are several personal service contracts which could be enforced by a judicial order without entailing any cumbersome supervision. In the case of *C.H. Giles & Co. Ltd v. Morris,* Megarry J., criticized this Judicial attitude to reinstatement. The learned Judge commented that:

One day, perhaps, the courts will look again at the so-called rule that contracts for personal services or involving the continuous performance of services will not be specifically enforced. Such a rule is plainly not absolute and without exception, nor do I think that it can be based on any narrow consideration such as difficulties of constant superintendent by the court.[13]

The industrial tribunals in Papua New Guinea in appropriate cases have no qualms about making an Award for reinstatement of a wrongfully dismissed employee in public or private employment. Ironically, compliance with this Award may be enforced by the National Court, unless it is in whole or in part clearly unlawful or contrary to the principles of natural justice.[14] This demonstrates that there is really nothing sinister or difficult about ordering the employer to take back an employee whom he unfairly dismissed. The reason is more so where the employer is a public body like the PNG University of Technology.

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12. Reinstatement does not necessary follow from a declaration that a purported dismissal was null and void, see *Malloch v. Aberdeen Corp,* supra, 1284.

13. (1972) 1 All E.R. 960, at p.969-70.

14. Re *Peter Condon and the National Airline Commission of Papua New Guinea* (1978/*PNGLR* 1.

Finally, the refusal to review cases is sometimes justified on the ground that the courts might be flooded with applications for review.[15] It is submitted that this is not a strong justification for the judicial refusal to review dismissal cases. In the first place, there is no evidence that it is bound to happen. Secondly, even if the number of applications for review increased, this most likely would be in the short run. Eventually the number is bound to decrease because employers will realise that they cannot get away with dismissal in breach of natural justice. Thirdly, even if the number of applications for review multiplied, provided the cause is justified, so be it.

In England, in the fifties and up to the early seventies, there were some signs of judicial willingness to review cases of dismissal, especially, by public bodies. Actually some writers expressed optimism about the judicial trend in this respect[16] But since the enactment over the years of a body of employment protection legislation, consolidated in the *Employment Protection (Consolidation) Act 1978,* which confered wider powers upon industrial tribunals to deal with most dismissal cases, the trend has been reversed.[17] Part of the reason for this is that the courts feel that the industrial tribunals are better equipped than them to deal with these cases. The courts' attitude is clearly demonstrated in May L.J.'s, judgment in *Ex Parte Walsh.* He observed that:

[N]ot infrequently... [dismissal cases] have political or ideological overtones, or raise what are often described as 'matters of principle'. These are generally best considered not by the Divisional Court but by an industrial tribunal to the members of which, both lay and legally qualified, such overtones or matters of principle are common currency.[18]

Whether or not the learned Judge in *Sulaiman v. The PNG University of Technology,* was mindful of the foregoing policy which underlies, at least, some of the English decisions, is not apparent from his judgement. The Papua New Guinea *Industrial Organizations Act* and the *Industrial Relations Act,*[19] make provision for reference of 'industrial matters' to the industrial tribunals established thereunder. The tribunals have several discretionary powers which include making a reinstatement Award,[20] which, as we have seen, may be enforced by the National Court. Arguably dismissed employees should be encouraged to seek their remedies in industrial tribunals. However, not all allegations of wrongful dismissal fall within the scope of the *Industrial Acts*. Besides, it is submitted that the mere existence of the industrial tribunals should not relieve the courts of their responsibility to ensure that employers, especially statutory bodies such as the University of Technology, comply with the minimum requirements of justice when dealing with their employees. The decision of the Supreme Court in *Fallscheer* is commendable and it would be a pity if the trend it set is reversed. Observance of the rules of natural justice

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15. See for example *Ex P. Walsh,* supra, 753 and 758.

16. See of I. Zair, *The Declaratory Judgment* (London, Sweat and Maxwell, 1962 reprinted 1986), 147-148.

17. Cited *Ex Parte Walsh,* supra, 753.

18. *Ibid.* 757.

19. Chapters 173 and 174.

20. See e.g. Award No. 3/82, Bougainville Mining Workers Union On Behalf of *Luke Peter v. The Employers' Federation of PNG On Behalf of Goodyear International Corporation.*

was regarded as so important that the framers of the Constitution of Papua New Guinea expressly enshrined it in the Constitution.

In the view of the present writer, the National Court should be liberal when dealing with applications for judicial review on grounds of denial of natural justice or that the body which purported to dismiss was otherwise acting *ultra vires*. It should guide itself by broad policy considerations based upon the spirit and intent of the constitutional framers, rather than some narrow verbal distinctions which are responsible for the 'bizarre and illogical' situation in the English case law. It is submitted that, should the injured employee choose to accept his dismissal in breach of natural justice as a repudiation of the contract, the court should award him substantial and punitive damages as a demonstration and warning to statutory bodies of its disapproval of dismissal in violation of natural justice or other violations of the law.

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