Fifita v Minister of Police & Kingdom of Tonga (No.2)

Court of Appeal
Hampton CJ, Tompkins & Neaves JJ
App.4/96

24 & 28 May 1996

Employment - contructive dismissal - rules of natural justice
Judicial review - dismissal - rules of natural justice

The appellant applied to the Supreme Court for judicial review of his constructive dismissal as Assistant Superintendent of Prisons, which he argued was unfair wrongful and unlawful. His claims for reinstatement and damages were dismissed. On appeal.

Held:

1. It was unusual for the Minister of Police and Prisons to use a conference of police officers at which to take disciplinary action against an officer. There was no evidence the appellant was given any notice of the issues to be raised and the circumstances would not give the appellant a reasonable opportunity to respond.
2. The Minister' subsequent letter seeking the appellant's resignation was, in the circumstances, a constructive dismissal.
3. The fact that the Minister was not himself proposing to dismiss the appellant, but rather was threatening to recommend his dismissal to Cabinet did not affect the application to the Minister's own administrative action of the rules of natural justice.
4. The appellant must be informed, fairly and fully, and in a clear and unequivocal way what grounds were advanced in support of the proposed dismissal and he must be given a fair opportunity to be heard in defence, explanation or mitigation by the Minister making the recommendation, before any conclusion is reached on action to be taken.
5. Significant parts of the affidavits filed on behalf of the defendants (respondent here) were hearsay; significant reports referred to in the affidavits were not annexed so that the court could not consider the nature and seriousness of the allegations and whether, and in what manner, particulars of them should have been given to the appellant.
6. There was no evidence that the complaints and allegations in the reports were made available to the appellant or that the appellant was informed of the allegations before the conference or the subsequent letter. There was no evidence that he was given any opportunity to reply to them, to challenge their accuracy, or to explain them.

7. This was a serious breach of the rules of natural justice entitling the appellant to relief. The appeal was allowed, the Supreme Court judgment set aside and the action referred back to that Court to determine damages.

8. NOTE -A portion of the judgment in the Supreme Court appealed from immediate precedes this judgment)

Cases considered : Ridge v Baldwin [1964] AC 40
O'Reilly v Mackman [1983] 2 AC 237

Appellant in person
Counsel for respondents : Mrs Taumoepeau

Judgment

The appellant, who at the relevant time was an Assistant Superintendent of Prisons, registned from the Prison Service on 6 February 1991, in circumstances that he contends amounted to constructive dismissal. He applied to the Supreme Court by way of an application for review, seeking a declaration that his resignation was a constructive dismissal was unfair, wrongful and unlawful. He sought an order for his reinstatement, and unspecified general, special and exemplary damages.

Lewis J, in a judgment delivered on 13th December 1995, dismissed the appellant's application for review. This appeal is against that judgment.

Factual Background

In March 1978 the appellant commenced employment with the Prisons Department. In 1980, the then Superintendent of Prisons, who was the father of the appellant, invited the appellant to take leave without pay to undertake further studies overseas. He did so. He graduated with a Bachelor of Arts degree in Human Services from the University of Hawaii.

He returned to the prison service. On 24 July 1989,he was promoted from Prisons Cadet Officer to Assistant Superintendent of Prisons. At that time he ranked third in the prison hierarchy.

On 12 July 1990 at the Annual Police Officers' Conference, the Minister of Police, in circumstances to which we later refer, gave the appellant the alternative of reforming, a tribunal hearing, or resignation. The appellant agreed to submit a written apology and to reform his behaviour. He did the former. Whether he did the latter became a matter of dispute.

On 4 February 1991 the appellant received a letter from the Minister of Police that, in his submission, amounted to constructive dismissal. He resigned on 6 February. In due course he obtained other employment. At the time of the hearing in the Supreme Court he was aged 36. He was then, and is now, a high school teacher by occupation.

The proceedings were commenced on 6 July 1994. The appellant then, and at all times since, has acted on his own behalf. The respondents filed an application to strike out the proceedings on the grounds of delay, and that the claim had no basis in law. There was a succession of hearings of both the application to strike out, and the application for review, the final hearing being on 1 December 1995. In the course of them, Lewis J extended the time for bringing the application for review until 6 July 1994. The application to strike out was dimissed. Although the respondents did not file their statement of defence until 30 November 1994, the day before the final hearing, an application by the appellant for judgment by default that he had filed on 21 January 1995 was also dismissed by Lewis J in his judgment delivered on 13 December 1995.

The constructive dismissal

We now refer in more detail to the events that led to the appellant's resignation on 6 February 1991.

We have referred to the Annual Police Officers' Conference and the actions that the Minister took at that conference in relation to the appellant. The appellant's account is that when he arrived at the conference, he was told by his immediate superior, Superintendent Uepi, that the Minister intended to insist upon the appellant taking one of three courses of action. The Minister did so. The minutes of the meeting record the following:

"MOP. **'Akau'ola Address the Conference**

(') Expressed dissatisfaction with ASP Fifita's behaviour to his superior officer (Superintendent Uepi) and allowed ASP Fifita to choose between these alternatives.

1. Accept the MOP's advise + reform
2. Tribunal hearing
3. Resign

ASP Fifita accepted MOP's advise and will submit a written apology to Superintendent Uepi plus reform behaviour in the future which will be monitored by the Superintendent of Prison Uepi."

We share Lewis J's view that it was, to put it mildly, unusual for a Minister to use a conference of Police Officers at which to take what appears to have been disciplinary action against an officer. There was no evidence to indicate that the appellant was given any formal notice of the issues to be raised. If the Minister's action was calculated to cause maximum embarrassment to the appellant, we have no doubt it was successful. Further, the circumstances in which the Minister expressed his dissatisfaction would not give the appellant a reasonable opportunity to respond to any criticisms expressed.

On 14 August 1990 Superintendent Uepi reported to the Minister of Police in these terms:

"**INFORMATION REGARDING ASP FIFITA ST.**

Dear Sir,

I write this letter with respect and to convey this information regarding ASP Fifita ST as according to the decision made on his through the mercy of your honour in regarding the one in 3 options that ASP Fifita asked for during the Police and Prisons and Fire Senior Officers' Conference in July, 1990.

Your Honour decided in your serious advice that he write and state his apology and surrender that he won't go through the path of disobedience and that he must keep to the rules of the department and that he be obedient and other things that you warned ASP Fifita on.

After the conference we returned to Hu'atolitoli prison and continued with looking for the escaped prisoner FIONA IKETAU and I told him in my meeting that he go with some of the officers looking for the prisoners and Act/Prison Officer 'Aholelei to go with another class and in carrying out that duty, he went and carried out and he submitted to me his letter of apology shown above and I again told him that he must keep to his words that he prayed to the Minister and that he must obey the decision made by the Minister about him and Fifita keeps to it up to today 14/08/90 and I also told ASP Fifita that he must do according to the decision already received from the Minister of the Ministry and Fifita said that he understand and he will obey and keep to it.

I concluding my letter, I enclose the letter of ASP Fifita regarding all his short comings and that he won't repeat again. And that he has a civil case with a prisoner 'Ikani Latu, after that there will be nothing else concerning him and he will be completely free to carry out his duty to the dept.

This is the nature of the duty carried out by ASP Fifita, it is building

up and have departed from his ways in the post, and now he is paying more attention to his work.

I hope that I have mentioned something regarding ASP Fifita."

The tone of this letter suggests that a little over a month after of Police Officers' Conference, Superintendent Uepi was satisfied with the appellant's conduct. The letter that was enclosed is from the appellant to the Superintendent dated 16 July 1990. It reads,

"RE: APOLOGY

Dear Sir,

I respecfully give my apology to you based on all the short comings in carrying out my duties to the government of Tupou but which is upon your shoulders.

All short comings won't happen again and I feel great love for you and the department. You will understand the repentent heart and true apology at the time of carrying duties.

I pray and hope for forgiveness from you as my boss."

The appellant says that he wrote that letter of apology, not because he considered an apology was called for, but only because of the alternatives in the Minister's direction at the Police Officers' Conference.

On 4 February 1991 the Minister of Police wrote to the plaintiff the letter that resulted in his resignation. It reads,

Dear Sir,

I, with respect want to convey to you, that I have reviewed every part of your work as regarding the serious warning I made to you on the 12 July, 1990 and there has been no progress.

Therefore, I will recommend your dismissal to His Majesty's Cabinet, from the prison's department.

I am giving you now a last chance to write a letter of resignation today, if you want to, so that you will have the chance to seek work at other departments. If you won't accept this, I will then go on to submit my submission to Cabinet as I have mentioned."

The reference to recommending the dismissal to the Cabinet accords with s.21 of the Prisons Act (Cap 36) which provides that the Cabinet, on the recommendation of the Minister of Police or a board of inquiry, may dismiss any prison officer.

This letter amounted to a constructive dismissal. That is apparent from its terms. This conclusion is not affected by the appellant adopting what was the only course open to him of resignation. Had he not done so, the Minister would have made the recommendation to Cabinet that he be dismissed. There is no reason to doubt that that recommendation would have been adopted. Significantly, the letter does not suggest that, if the Minister made the threatened recommendation, the appellant would be given an opportunity to defend himself before the Cabinet.

Was there a breach of the rules of natural justice?

Although the appellant in his affidavits and submissions referred to a number of issues, the essence of his case is that both on the first occasion at the Annual Police Officers' Conference on 12 July 1990 and, more importantly, in respect to the Minister's letter of 4 February 1991, the Minister failed to observe the rules of natural justice, in that the nature of the charges or complaints were not put clearly to him, and he was not given an adequate opportunity to defend himself against those charges or complaints.

The legal principles applicable are beyond doubt. The landmark decision in this area is that of the House of Lords in *Ridge v Baldwin* [1964] AC 40. The Chief Constable of Brighton Watch Committee was dismissed without having been given any notice or offered any hearing. Despite a later hearing at which the Committee confirmed their decision, and an appeal to the Home Secretary, the House of Lords held that the dismissal was null and void. Lord Reid at page 66 referred to:

> " ... an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation".

The importance of this principle was emphasised by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at 276, where he said the right of a man to be given

> "... a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilized legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement".

The principle is not affected by the fact that the Minister was not himself proposing to dismiss the appellant, but was rather threatening to recommend his dismissal to the Cabinet. A decision to make such a recommendation was itself an administrative action that affected the appellant's rights.

The first issue therefore is whether, in the circumstances of this case, the appellant was fairly and fully informed of what was alleged against him. It is not sufficient for the appellant to have some general understanding of the broad nature of the complaints. Before such an important decision of recommending dismissal can properly by made by the Minister, the appellant must be informed in a clear and unequivocal way just what are the grounds advanced in support of the proposed dismissal. Then he must be given a fair opportunity to be heard in defence, explanation, or mitigation by the person responsible for making the recommedation, in this case the Minister, before he comes to any conclusion on the action to be taken.

To apply this principle to the circumstances of this case, it is necessary to refer to the evidence in more detail.

There was filed on behalf of the respondents an affidavit by Superintendent Tapueluelu who, at the time the affidavit was sworn on 28 February 1995, was the Superintendent of Prisons. That affidavit was unsatisfactory. It should not have been accepted and acted upon by the court for two reasons.

First, significant parts of the affidavit are hearsay. It refers to events that, it is clear from the affidavit, are not within the personal knowledge of the deponent. It recites events in 1989 and 1990 leading up to the Minister's reprimand of the appellant at the Annual Police Officers' Conference on 12 July 1990, when the deponent was not the Superintendent. It refers to complaints made by certain persons to persons other than the deponent. For example, it contains allegations by the appellant's wife concerning the appellant's conduct. It refers to complaints by the prison's chaplain to Superintendent Tepi regarding the appellant's behaviour. If the respondents considered that evidence of this conduct should properly be placed before the court, that should have been done by deponents who had personal knowledge of that conduct.

Secondly, and more importantly, the affidavit refers to a number of reports. On 23 May 1990 Superintendent Tapueluelu, then the Deputy Superintendent, submitted to the

then Superintendent Uepi, a report regarding the appellant's alleged affair with the wife of a prisoner. On 11 June 1990 he against submitted a report regarding the appellant's performance in taking sick leave without a certificate. No doubt it was these reports that contributed to the Minister taking the action he did on 12 July 1990. Not only is there no evidence that copies of these reports were made available to the appellant to make him aware of the complaints against him, they were not annexed to the affidavit to enable the court to consider the nature and seriousness of the allegations.

The affidavit states that on 6 November 1990 the deponent submitted a full report to Superintendent Uepi concerning another warder's misbehaviour, but apparently containing an allegation that the appellant failed to do his duty and had deliberately covered up the offence. Perhaps most notably of all, the affidavit states that on 18 January 1991 Superintendent Uepi submitted a report to the Minister of Police that the appellant had continued to default in his duties and wished to recommend that the appellant "be released" - apparently a reference to his dismissal. There is no affidavit from the Minister. In the absence of evidence from the Minister to the contrary, it is a reasonable inference that it was this report that led the Minister to write the letter of 4 February 1991.

As with all the other reports referred to, this report was not annexed to the affidavit. All these reports should have been before the court, not to enable the court to judge the merits of the allegations and complaints, but to enable the court to be informed of the nature of the allegations and complaints as relevant to whether, and in what manner, particulars of them should have been given to the appellant.

Mrs. Taumoepeau was unable to produce these reports. At the hearing on 1 December 1995, the appellant's personal confidential ministry file was placed before the court. We have examined this file and invited Mrs. Taumoepeau to do so. These reports are not even on the appellant's personal file.

There was no evidence to indicate that the complaints and allegations contained in the reports were made available to the appellant either by providing him with copies of the reports or in any other way.

Superintendent Uepi was called to give evidence by the appellant at the hearing on 1 December 1995. He was cross-examined by Mrs. Taumoepeau. She asked him about the details of the allegations. The full transcript of his evidence is not available but the court has the notes of that evidence made by Lewis J. The following are some of the exchanges as recorded, but with abbreviations expanded to the full words.

"Q. What was the attire, or what wearing at the conference?

A. I can't remember his clothing but his hair was not cut, he appeared different.

Q. Was he also warned at conference and in your presence as to his disobedience to head of department?

A. (None recorded)

Q. To your knowledge at conference was Fifita clearly told that if he continued things ... warned about appearance, disobedience to superiors and things he was warned about?

A. At the time as Superintendent of Prisons my feelings were that if someone like this do these things I would dismiss from work.

After a reference to the letter of 14 August, 1990:

Q. So to your knowledge of your letter you say you told him of the things he should stop doing?

A. Yes.
Q. What did he say?
A. He said he understood.
Q. After that he did not reform and continued doing things what was done?
A. I remember some things and I thought I'd bring them to Minister afterwards.
Q. Because he was not reforming an carrying out duties what did the Minister do to him?
A. He wrote a letter can't remember exact a words (gives his recall)"

The evidence then refers to the letter of 14 August and to divorce proceedings involving the appellant.

There is nothing in this passage or elsewhere in Superintendent Uepi's evidence that establishes that the appellant was informed of the allegations and complaints against him before the events of 12 July 1990 or the decision of the Minister conveyed in the letter of 4 February 1991.

Even if the appellant did understand the nature of these complaints and allegations, there was no evidence that he was given any opportunity to reply to them, to challenge their accuracy, or to explain them. In the absence of any affidavit from the Minister, we infer that the Minister made the decision recorded in his letter of 4 February 1991 to recommend dismissal if the appellant did not resign, in reliance at least on the report of 18 January 1991 from Superintendent Uepi, and probably in reliance on some or all of the other reports to which we have referred, without any reference to the appellant of the nature of the allegations and complaints in these reports, and without giving the appellant an opportunity to reply, challenge, or explain them.

This was a serious breach of the rules of natural justice entitling the appellant to relief.

The relief to be granted.

The appeal is allowed. The judgment of the Supreme Court dismissing the appellant's claim is set aside.

There will be a declaration that the plaintiff's resignation following the letter of 4 February 1991 was a constructive dismissal and that that constructive dismissal was contrary to the rules of natural justice and therefore null and void. It is set aside.

We are not prepared to accede to the appellant's request for an order requiring the respondents to reinstate the appellant to his previous position in the Prisons Service. We exercise our discretion against doing so for these reasons.

Over 5 years has gone by since the constructive dismissal. That delay renders reinstatement inappropriate. Although in certain cases, the court will order the reinstatement of an employee unjustifiably dismissed, the general approach is that it is unsatisfactory to make orders in the nature of specific performance of a contract of service. Damages is the preferable remedy.

Further, the result of this decision is that the Minister's constructive dismissal has been set aside. This court makes no judgment on the merits of the allegations and complaints against the appellant. If the appellant were to be reinstated, there would be nothing to prevent the Minister proceeding with the dismissal procedure, after giving full notice to the appellant of the allegations and complaints against him and giving him an opportunity to be heard in his defence, possible by means of a court of inquiry constituted under s.15 of the Prisons Act. We do not consider it to be in the interest of any of the parties

to have all these issues reopened so long after the events.

It will be for the appellant to determine what, if any, action he should take to seek compensation. The action is referred back to the Supreme Court. The appellant can take such further steps in the present action, or otherwise, as he thinks fit.

As the appellant appeared on his own behalf, there will be no order for costs.