Vidot v The Minister of Employment &
Social Affairs
(2000) SLR 77

Antony Derjacques for the plaintiff
Dora Zatte for the defendant

Judgment delivered on 6 November 2000 by:

PERERA J: The petitioner was employed at the Plantation Club of Seychelles as the "Casino Middle Manager" ("Pit Boss"). Her employment was terminated on 20 September 1997 on the ground of committing a serious disciplinary offence as provided in schedule 2, part II, paragraph (k) of the Employment Act 1995, which is as follows:

> A worker commits a serious disciplinary offence wherever, without a valid reason, the worker causes serious prejudice to the employer or employer's undertaking and more particularly, inter alia where the worker:
>
> (k) Does any act, not necessarily related to the work of the worker, which reflects seriously upon the loyalty or integrity of the worker and causes serious prejudice to the employer's undertaking.

The petitioner hereupon invoked the grievance procedure under the said Act. According to the facts, as disclosed in the competent officer's decision, the applicant was in charge of the gaming floor of the casino under the supervision of the Casino Surveillance Manager and the Casino Manager. On 18 September 1997, she was on night shift and left the hotel at 3.30 a.m. The next day she was questioned by the Human Resources Manager as regards certain foreign currency irregularities in her department. Her duties did not involve handling of foreign currency. However she stated that she knew that foreign currency and IOU cheques were held by the cashier, and that if there was any malpractice in the transactions it was the responsibility of the Night Manager and the Financial Controller to detect them. The respondent's attorney, Mr B. Georges submitted to the competent officer that a fraudulent practice had occurred in her Department and that she had failed to report the matter to the management although she was aware of it. That fraudulent practice was committed by the Casino Manager, who did not bank each day's foreign currency transactions. It was accordingly submitted that her failure to notify the management on the matter constituted a serious disciplinary offence under the Employment Act 1995, as sub paragraph (k), of schedule 2, part III covered acts not necessarily related to the work of the worker, as well. The applicant sought an order declaring the termination to be unjustified and consequently a reinstatement without any loss of earnings. The competent officer made the following decision.

> *1.* Although the Applicant pleaded ignorance of all knowledge of fraud, at least at one given time, she was aware that foreign exchange was being held for a local client.

1. This is contrary to the Foreign Exchange Regulation. It is not a defence to plead ignorance of the law. All the same, assuming that she did not know the existence of such law, it was her duty to report this malpractice to the management. I am of the opinion that although there is no proof to suggest that the applicant was directly implicated in this practice, circumstantial evidence shows that the applicant was guilty of intentionally hiding certain malpractices by her very failure to report the same_to_the management. This absolute breach of good faith has been proved to my satisfaction. In the light of the above, termination of the applicant's contract of employment pursuant to section 61(12)(a)(i) of the Employment Act 1995 was justified. Therefore her claim for reinstatement fails."

In an appeal to the Minister, the Employment Advisory Board heard submissions of both parties. Mr. Georges appearing for the respondent hotel submitted that the applicant had known that the Casino Manager was holding foreign currency, contrary to procedures, and hence she ought to have reported the matter to the Personnel Manager. He however informed the board that "the hotel had no objection to the reinstatement of the appellant in her job." The board held that the applicant's "termination was unjustified and that she should be reinstated to her post without loss of earnings."

The Minister however disregarded the opinion of the Advisory Board, and affirmed the decision of the Competent Officer. This, he was entitled to do as the appellate body is not the Advisory Board, but the Minister.

The present application for a writ of certiorari is based on alleged irrationality or unreasonableness of the decision of the Minister. It is submitted by counsel for the petitioner that although the Competent Officer had decided that the termination of employment was justified and that accordingly the claim for reinstatement must fail, the decision of the Employment Advisory Board that it was unjustified and hence the applicant should be re-instated in her post without loss of earnings was based on the submission of the counsel for the employer that there was no objection to the re-instatement. He therefore contended that the decision of the Minister upholding the decision of the Competent Officer, was in the *Wednesbury* sense, so "unreasonable that no reasonable authority could ever come to it." It has here to be noted that the finding of the Competent Officer, and of the Minister that the petitioner's act fell within the provision of paragraph (k) of schedule 2 of part II of the Act is not being challenged.

The submissions of Mr. Georges before the Employment Advisory Board should be considered in the proper perspective. He supported the Competent Officer's finding that the applicant had knowledge of the irregularities in the foreign currency transactions in her department, but failed to report the matter to the Personnel Manager. In these circumstances, his submission that the hotel had no objection to the reinstatement of the applicant was not an admission of the termination being unjustified, but clearly that, if

the Board held it to be so, on the merits, the employer had no objection to an order under Section 62 (2)(a) (iii) being made as regards for re-instatement. Otherwise he would have settled the case without further ado. The decision of the Board was clearly influenced by the submission of Mr Georges is regards re-instatement. There is nothing to indicate that the Advisory Board considered the merits of the Competent Officer's findings, in coming to the conclusion that the termination was unjustified.

The Minister, in his affidavit dated 28 September 1999 avers that:

> 8. I was satisfied upon consideration of all the material placed before me that the petitioner intentionally withheld from the management the malpractice relating to foreign exchange. I am advised that the said intentional failure to report the said malpractice referred to in above amounted to a serious disciplinary offence under schedule 2 part II (k) of the Employment Act 1995 as it reflected seriously upon the loyalty or integrity of the petitioner as it caused serious prejudice to the employer's undertaking as it amounted to serious misconduct in relation to the work of the petitioner.
>
> I was satisfied in the circumstances that the Competent Officer's decision of 7 October 1997 was correct that the termination of the petitioner was justified in terms of section 61(2)(a) of the Employment Act 1995.
>
> 9. I state further that my decision was in accordance with all the evidence

The Employment Act 1995 does not contain a specific provision as the previous Act of 1990 that the decision of the Minister upon an appeal or review shall be final and that is validity or legality could not be challenged by any person on any ground whatsoever. However, even under the 1990 Act, the court preserved its right to quash unlawful orders in the exercise of its powers under supervisory jurisdiction, *Mike Valentine v Beau Vallon Properties* (unreported) civil side 42 of 1992, *Rosette v U.L.C* (unreported) SCA 16 of 1994) and *Amalgamated Tobacco Company v M.E.S.A* (unreported) civil side 33 of 1995.

In exercising its supervisory jurisdiction, this court does not act as an appellate body and hence will not enquire into the merits of the decision of the adjudicating authority. The scope of supervisory jurisdiction is a review of the decision-making process itself. Hence the consideration is whether the petitioner has been treated with justice and fairness. Unlike in an appeal, this court cannot substitute its own decision for that of the sub-ordinate court, tribunal or adjudicating authority. But such a decision can be quashed by a writ of certiorari where such subordinate court, tribunal or authority had acted ultra vires its powers and jurisdiction, or failed to follow rules of national justice, or where there is an error of law on the face of the record, or, as is being relied in the present case, on the ground of unreasonableness.

In the instant case, the petitioner relies on the principle enunciated by Lord Greene MR in the *Associated Provincial Picture Houses v, Wednesbury Corporation* (1948) 1 KB 223, which in administrative law is commonly known as *Wednesbury* unreasonableness. Lord Greene's definition included misdirection on points of law, irrelevance and bad faith. The learned Judge further stated that a conclusion was unreasonable if no reasonable authority could come to it. He also categorized it as something so absurd that nobody could think that it was within the authority's power to act that way. Section 65(4) of the Employment Act 1995 provides that:

> Upon an appeal or review under this section the Minister may consult with the Employment Advisory Board before giving the ruling on such appeal or review.

Hence, the Minister is not bound by the decision or advice of the Advisory Board. The function of the board is to advise the Minister, but the ultimate decision lies with him. However, that decision should inter alia be reasonable within the *Wednesbury* principles.

The Minister has averred inter alia that the petitioner had "intentionally withheld from the management the malpractice relating to foreign exchange." This was a fact which was not in dispute, as the petitioner herself stated before the Competent Officer that although she knew about the malpractice it was not her duty to report. The finding of the Competent Officer on this aspect was as follows:

> I am of opinion that although there is no proof to suggest that the Applicant was directly implicated in this practice, circumstantial evidence shows that the applicant was guilty of intentionally hiding certain malpractices by her very failure to report the same to the management.

In criminal law, "intention is an operation of the will directing an overt Act." However for purposes of schedule 2, part II, paragraph (k) of the Act, could it be said that the petitioner intended to cause serious prejudice to her employer by failing to report the malpractice? In the field of employment, a term will be implied in every contract of employment that the employee will serve loyally and faithfully. Hence the conduct of the employee has to be determined in contract and not under criminal law.

State counsel submitted that the decision of the Advisory Board appears to have been actuated solely by the offer of re-instatement made by the counsel for the employer, and that there is no evidence to show that the issue of whether the petitioner had been aware of the malpractice and yet failed to report it to the management, was considered. Hence it was contended that the Minister avoided the offer of re-instatement as it was irrelevant to the main ground on which the petitioner's services were terminated. The *Wednesbury* principle also involved a consideration whether the finding of the decision making body, was flawed by irrelevance. Lord Greene MR stated that this would be the case where the decision-making body "has taken into account matters which it ought

not to take into account." If indeed, the employer wanted to re-instate the petitioner in employment, they ought to have settled the case before the Advisory Board. Instead their counsel maintained that "if the petitioner knew that a person was holding foreign exchange, and knew it was wrong, she should have reported it to the Personnel Manager."

In these circumstances the Advisory Board could not have advised the Minister that the termination was unjustified unless they considered the offer of re-instatement as an admission of such termination being unjustified.

The Minister who was not obliged to follow the advice of the Advisory Board, was satisfied upon all material placed before him that the Competent Officer's decision was correct. This court has no jurisdiction to consider the merits of that decision. There is no procedural or legal irregularity in that decision. Nor is there any 'unreasonableness' in the *Wednesbury* sense.

Counsel for the petitioner also submitted that the failure of the Minister to give reasons points overwhelmingly in favour of a different decision. He cited the case of *Padfield v. Minister of Agriculture* [1968] AC 997 where it was held that... "if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker who has given no reason cannot complain if the court draws the inference." However, in the Australian case of *Public Service Board of New South Wales v Osmund* (1987) L.R.C. 681 Gibbs CJ stated that:

> Reasons were normally, but not invariably given for judicial decisions, but the exercise of administrative functions was not necessarily subject to the same rules as the exercise of judicial functions. If the requirement of reasons for administrative decisions was desirable as a policy development, it was a change which required action by legislatures, not by the courts.

The Tribunals and Inquiries Act 1992 (U.K) requires the order making authority to supply reasons <u>on request.</u> There is still no statutory requirement to do so. However, as was held in the case of *Regina v Ministry of Defence, Exparte Murray* (1997) Times Law - Reports 17 December 1997, fairness would in particular circumstances of a case, necessitate the giving of reasons for a decision, in that case, the Queen's Bench Divisional Court found that a Court-Martial should have given reasons for rejecting the evidence of a soldier with long and exemplary service that the effects of an anti-malarial drug had caused him to commit an offence of wounding to which he had pleaded guilty, and for sentencing him to imprisonment with consequent obligatory dismissal and reduction in rank.

In that case, the main consideration was that the soldier had presented evidence to show that the act of violence was entirely out of character, and hence an explanation as to why the court thought he had reacted as he did, would have been desirable so that the sentence or imprisonment and the dismissal from service could be properly

understood by him, his family, and his regiment. The sentence of imprisonment and dismissal were challenged on the ground of unreasonableness in the *Wednesbury* sense.

In the instant case however, the decision of the Minister as conveyed by the Principal Secretary in his letter dated 21 April 1998 was that "on the basis of evidence, it has been established that the offence of gross misconduct has been proved." It was further stated that:

> The Minister has therefore decided that the termination of the appellant's contract of employment was justified and the determination of the Competent Officer been upheld.

The Minister therefore agreed with the reasons given by the Competent Officer. The offences set out in part II of schedule 2 of the Act, categorised as "serious disciplinary offences" constitute the element of misconduct on the part of the employee, which causes serious prejudice to the employer or the employer's undertaking. Where a worker has knowledge of a malpractice which prejudices the employer's undertaking, and he intentionally or negligently does not bring it to the notice of the employer, then, it could be a serious reflection upon his loyalty and integrity. According to the evidence in the case, the petitioner was aware of the malpractice. Hence the term implied in every contract of employment to serve the employer loyally and faithfully was breached. In these circumstances, the Minister's failure to give further reasons cannot be considered as being unfair on the petitioner. The case of *R v Ministry of Defence* (supra) should therefore be distinguished, as in that case fairness required that the Court-Martial should have given reasons why a sentence of imprisonment was imposed with consequent dismissal of the soldier, when he had pleaded guilty to an offence of wounding, with a defence that he acted under the effects of an anti-malaria drug. Whether that defence was accepted or not had to be stated to justify the sentencing. In the present case, the facts are clear, and the offence the petitioner was found to be in breach of, was equally clear. Hence there was no necessity for the Minister to give any reasons.

State counsel has also raised a procedural objection. She submitted that the affidavit, filed with the petition has been sworn before the same attorney who has filed the petition, and that was in violation of rule 2(1) of the Supreme Court (Supervisory Jurisdiction of Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, 1995. Although this objection need not be considered in view of the above findings, I would proceed to consider it as it is being raised for the first time in this court in respect of the Supervisory Jurisdiction Rules. That rule is as follows:

> 2(1) An application to the Supreme Court for the purposes of rule 1(2) shall be made by petition accompanied by an affidavit in support of the averments set out in the petition.

In the case of the *United Opposition v The Attorney General* (unreported) Constitutional Case no 7/95), this same objection was taken in relation to rule 3(1) of the Constitutional Court Rules 1994. That rule is as follows:

> 3(1) An application to the Constitutional Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be made by petition accompanied by an affidavit of the facts in support thereof.

In that case, I ruled that:

> Rule 3(1) requires an affidavit of facts in support of the averments in the petition, not a statement swearing to the truth and correctness of these averments. This requirement cannot be short-circuited. An affidavit of 'facts' is required to obviate the necessity for the court to hear oral evidence.

Rule 2(1) of the Supervisory Jurisdiction Rules and rule 3(1) of the Constitutional Court Rules are distinctly different. The affidavit required under the former, is an affidavit simpliciter, in support of the averments in the petition. A petition under the supervisory jurisdiction is a review of a decision of a subordinate court, tribunal or adjudicating authority. Hence the determination of the court is based on the record of such body, and not on evidence. In constitutional cases however, the accompanying affidavit of facts takes the place of evidence upon which an alleged infringement of a provision of the Constitution is considered. It was in these circumstances that the Constitutional Court interpreted rule 3(1) in the light of order 41, rule 8 of the Supreme Court Rules of U.K. which provides that "no affidavit shall be sufficient if sworn before the solicitor of the party on whose behalf the affidavit is to be used or before any Agent, partner or clerk of the solicitor." The basis of that rule, I presume is the common interest which both the party and the solicitor share in the outcome of the case, and hence the necessity for such "evidence" in the affidavit to have a semblance of independence.

However rule 2(1) under consideration in this case requires an affidavit supporting the bare averments of the petition. Hence, I would not extend the interpretation of rule 3(1) of the Constitutional Court Rules to rule 2(1) of the Supervisory Jurisdiction Rules, as I am of the view that affidavits should be sworn before a different attorney-at-law or any of the persons prescribed in section 171 of the Code of Civil Procedure only when such affidavits are used in court as instruments of evidence.

Hence I see no merit in this objection.

However, on the basis of the findings on merits, the petition is dismissed, but without costs.

Record: Civil Side No 217 of 1998