

**Javotte & Or v Minister Of Social Affairs and Employment
(2005) SLR 24**

Alexia ANTAO for the Plaintiff
Fiona LAPORTE for the Defendant

Judgment delivered on 25 November 2005 by:

RENAUD J: This is an application for Judicial Review of the decision of the Minister of the then Ministry of Employment and Social Affairs, herein referred to as "MESA".

The Petitioners are seeking the following relief:

- (a) For a writ of certiorari to quash the decision of the Respondent for being ultra vires null and void as it was based on a non-existent provision of the Employment Act 1995.
- (b) For a writ of mandamus to compel the Respondent to order the reinstatement of the Petitioners in their jobs as the termination of their employment was not grounded on any evidence adduced either before the competent officer or before EAB.
- (c) For a compensation order for the prejudice the Petitioners have suffered as a result of the unjustified termination of their employment.
- (d) The grounds advanced by the Petitioners for seeking such relief are as follows:
 - (i) There is sufficient evidence to establish that the Petitioners' termination of employment was ultra vires the Act.
 - (ii) In effecting a termination based on "redundancy" the employer failed to comply with its statutory obligations.

This Court is empowered to hear application by virtue of Article 125(1)(c) of the Constitution and it does so in accordance with the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995 herein referred to as "the Rules".

On 4 April 2003, the Petitioners filed their "Application for the Exercise of Supervisory Jurisdiction under Article 125(c) of the Constitution" and sought leave to proceed. On 24 June 2003 this Court having found that there was a bona fide claim by the Petitioners, granted leave to proceed and directed MESA to forward the record of proceedings to this Court. On 19 July 2003, MESA complied with the order of this Court and forwarded the proceedings as requested.

The case was then fixed for 14 October, 2003 and all parties duly notified. The Attorney-General, acting on behalf of the Respondent, was also served with the Petition upon its request, on 24 September 2003. The Court allowed time to the Respondent to file its response by 13 January 2004. Unfortunately, the Attorney-General representing the Respondent failed to do so. Further time was allowed for filing a response and that was to be 17 February 2004. By that date, the Attorney-General had again not filed its response and sought for further time. The matter was set for 18 May 2004, and again, by that date the Attorney-General had not filed its answer. Further time was allowed up to 21 September, 2004 for that purpose. On 21 September 2004 the Attorney-General duly filed its objection supported by affidavit.

The Petitioners were then allowed time to respond to the objections raised by the Respondent and that was to be by 23 November 2004 but could not do so for technical reasons. Further time was granted up to 29 March 2005, when the response of the Petitioners to the objections raised by the Respondent was duly filed and the matter was fixed for hearing on 15 June 2005.

The Petitioners deponed to an affidavit as follows:

1. We are ex-employees of the Public Utilities Corporation (PUC) and the Respondent is the Minister of the Government of Seychelles responsible for the administration of employment matters and was at all material times acting in his appellate capacity under the Employment Act 1995 (the Act)
2. We have been employed with PUC for a period of two years and a half and twenty-one years respectively and were terminated by letter dated 31 May 2002. Copies of the letter of termination is produced and marked Exhibit P1.
3. On 6 June 2003 we lodged a grievance with the competent officer under the Act for unjustified termination of employment.
4. After reviewing the evidence of the parties at the hearing of the grievances on 31 May 2002, the competent officer determined that although the representative of the Employer provided no reasons for the termination and under normal circumstances the terminations would not be allowed and the employees re-instated but in "this case termination of contracts of employment should be allowed. With payment of all employment benefits". The record of proceedings before the competent officer is produced and marked as Exhibit P2.
5. We appealed against the decision of the competent officer on the 12 June 2002, and the appeal was heard on 1 August 2002 by the Employment Advisory Board (EAB).

6. The EAB found that there was an absence of fact and reasons for the termination of our employment and further on the evidence adduced that the Employer had not complied with its statutory obligations.
7. It was also a finding of the EAB that the competent officer erred in his finding as there was no evidence to suggest that the working relationship between ourselves and the employer had broken down irreparably, and consequently reversed the decision of the competent officer. The record of proceedings before EAB is produced and marked Exhibit P3.
8. In a letter dated 7th of January 2003 we were informed that the Minister in his appellate capacity decided to uphold the determination of the competent officer. The said letter is produced and marked Exhibit P4.
9. In the circumstances, we respectfully move this Honourable Court to exercise its supervisory jurisdiction and grant the relief sought in our Petition.

In an affidavit in support of the "Notice of Objection to the Petition", the Minister of Employment and Social Affairs inter alia states as follows:

1. That the facts and matters stated in the Petition and deponed are true where the same are within my knowledge and otherwise true to the best of my information and belief being based on information and documents in the possession of the Petitioner.
2. That I admit paragraphs 1, 2, 3, 4, and 5 of the Petition.
3. That in answer to paragraph 6 of the Petition I aver that neither the determination before the competent officer and nor that of the Employment Advisory Board (hereinafter referred to as the Board) were based on "the interest of the organization". The evidence before the competent officer and arguments presented before the Board refer to termination on the ground of redundancy. I further aver that both the former and the latter found that the Petitioners have been unfairly terminated. However, I refused to reinstate the Petitioners for the following reasons:

in view of the fact that termination was made in a redundancy situation the Board finds it is not practicable to recommend reinstatement.

5. That in further answer to the Petition / aver that in the circumstances referred to in paragraph 2 above there could not be evidence to establish that the Petitioners termination of employment was ultra vires the Employment Act, 1995 as amended.

The Petitioner replied to the Respondent's affidavit as follows:

1. That further information has come to light in regard to the allegation that our employment was terminated because a redundancy situation existed. It is hereby produced and exhibited herewith marked as Exhibit P5 copy of the Nation Newspaper dated Saturday 19 July 2003 advertising our jobs.
2. That this explains why the Employer was not in a position to place before the competent officer and the EAB facts in support of their claim that there was a redundancy situation as none existed.
3. That in the premise the Minister based his decision on non-existent facts and is for that reasons, unreasonable and ultra vires the Employment Act as amended.
4. That Leopold Javotte one of the Deponents herein re-applied for his old job post the said advertisement and is currently working in the same post for which he was made "redundant".

A Writ of Certiorari has the effect of quashing a decision which may be done by an excess or abuse of power. The criteria for deciding which acts or decisions are subject to Certiorari was expressed by Lord Atkin in the case of *R v Electricity Commissioners, ex p London Electricity Joint Committee Co* [1920] 1 KB 171 as:

... whenever anybody of persons having legal authority to determine questions affecting the posts of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the following jurisdiction of the King's Bench Division.

Certiorari is also available to quash or nullify actions or decisions that are *ultra vires* or in breach of natural justice or where traditionally there has been an error of law on the face of the record. As Lord Slynn suggested in the case of *Page v Hull University Visitor* [1993] 1 All ER 97 at 114b, the scope of certiorari may be interpreted widely, when he said:

If it is accepted, as I believe it should be accepted, that Certiorari goes not only for such an excess or abuse of power but also for a breach of the rules of natural justice.

The interpretation of the duty to act judicially has been widened considerably since the

case was decided. Since the case of *Ridge v Baldwin* [1964] AC 40, the Courts have interpreted the phrase to include those bodies that have the power to decide and determine matters which affect the citizens. This means that certiorari generally may be available to review all administrative acts.

The formulation of acting judicially commonly used today is that favoured by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 309, that it is enough to show that the body or person has legal authority to determine questions affecting the common law or statutory rights of other persons.

The Order of Mandamus requires the carrying out of a public duty which has been imposed by law. It developed as a means for returning to public office those people who had been wrongfully deprived of such a position. Mandamus, however, will only be issued where the duty is owed and a request to perform it has been refused, for example — requiring a tribunal to determine a case which it had wrongfully claimed was outside its jurisdiction — (*R v Paddington South Rent Tribunal, ex parte Millard* [1958] 1 WLR 348); requiring a body to consider matters according to law where a discretionary power had been fettered by overly rigid adherence to a policy — (*R v London County Council, ex parte Corrie* [1918] 1 KB 68), and requiring a body to exercise a power according to law where the power had been abused — (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). Judicial review deals primarily with the question of law. Lord Widgery CJ in the case of *R v Huntington District Council, ex parte Cowan* [1984] 1 WLR 501, identified a proper case for judicial review:

as being a case where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or made in consequence of an error of law.

I have reviewed the proceedings provided by MESA. It is obvious that the process of terminating the employment of the Petitioners started by a letter emanating from their employer namely, Public Utilities Corporation (PUC) dated 20 May 2002 addressed to MESA, The text of the letter as well as the title of subject matter is reproduced hereunder:

RE. TERMINATION OF APPOINTMENT IN THE INTEREST OF THE ORGANISATION — MESSRS BARRY MATHIOT, MARC JEAN AND LEOPOLD JAVOTTE"

Your urgent approval is sought for the Termination of Appointment, in the interest of the Organisation for the following above mentioned employees.

The letter went on and set out the National Identity Number; Address; Occupation; Salary; Date of Employment and the legal benefits that were due to each one of them. On 24 May 2002 the Principal Secretary, Ministry of Administration & Manpower Development wrote to The Executive Chairman, Public Utilities Corporation as follows:

I refer to your letter of 16 May 2002 seeking approval for the termination of appointment of the following employees, in the interests of the organization:

Mr Marc, Daniel Jean NIN 964-0484-1-1-40
Mr Barry, Michel Mathiot NIN 955-0694-1-1-39
Mr Leopold Javotte NIN 961-0171-1-1-12

Approval is hereby conveyed.

By letter dated 28 May 2002 the Principal Secretary of MESA wrote to PUC as follows:

RE, TERMINATION IN THE INTEREST OF THE ORGANISATION –
BARRY MATHIOT, MARC JEAN AND LEOPOLD JAVOTTE.

Your letter dated 20th May 2002 refers.

You are invited to attend a meeting on Friday 31st May at 10.00 a.m
Unity House room 305 without fail.

The three above named workers must also attend the meeting. Please
bring them along.

By letter dated 31 May 2002, MESA wrote to PUC and copied to each of the employees
on their respective home address, as follows:

RE: TERMINATION IN THE INTEREST OF THE ORGANISATION –
BARRY MATHIOT, MARC JEAN AND LEOPOLD JAVOTTE

Further to Negotiation Procedure activated by Public Utilities Corporation,
pursuant to the Employment Act, 1995, please be notified that approval is
conveyed for the contracts of employment of the above-mentioned persons
to be terminated with immediate effect with payments of all legal benefits.

I note from the record of proceedings that a meeting was held and the record of that
meeting is reproduced hereunder:

BEFORE THE COMPETENT OFFICER LESLIE BONIFACE NEGOTIATION
PROCEDURE PUBLIC UTILITIES CORPORATION
REF: TER: 17 APPEARANCES

Marc Jean: Employee
Barry Mathiot. Employee
Leopold Javotte: Employee
Robert Moustache: representative of Employer

INTRODUCTION

The Negotiation Procedure and its purpose under the law was explained to
the meeting. It was explained that the organization would have to give

reason for wanting to terminate the contract of employment of the workers.

ROBERT MOUSTACHE

The above stated as follows:

- that he himself had received instruction to make the necessary formalities to g5o through the procedures to make the three workers redundant but was given no reason as to why and hence could not give any.
- That the only thing that he could say 5was that the organization felt that it cannot continue to employ the workers.

MARK JEAN

The above stated as follows:

That he could not say if he is against the termination or not as no reason has been provided for the same.

That he would like PUC to justify the termination only then would he be in a position to say whether he is in favour or not.

That if he had committed offences he would like to know or if he was being terminated for political reason/she would like to know too.

CONCLUSION

The two other employees advance the same argument as Mr Jean. The representative of PUC on his part maintained that he could provide no reason as he himself was in the dark regarding the reason for the termination.

DETERMINATION

It is not clear as to why the employees concerned were being terminated. The purpose of the consultation under the Negotiation Procedure is to establish the reason/s the organization have for any prospective termination and also to examine ways to avoid, if possible, the termination. The representative of PUC could not however provide any. Under normal circumstances the termination should not be allotted and the employees should be reinstated. However the competent officer is of the opinion M the working relationship between (sic) has broken down and is irreparable. As such ^{it} would not be prudent to determine that the contracts of employment of the employees continue to subsist. The competent officer is of the opinion that the contracts of employment of the employees should be allowed to be terminated with payment of all employment benefits.

Competent officer means a person authorized by the Minister to act in respect of that matter and means also the Minister wherever he thinks it fit to act in person in respect of any matter. In this case the competent officer was a person other than the Minister.

Chief Executive means the person acting or discharging the functions of such office in the Ministry or, as the case may be, the Department responsible for the administration of this Act.

There is a Negotiation Procedure laid down in Part 1 of Schedule 1 of the Employment Act cap 69. This procedure is applicable in 3 specific instances where the competent officer is empowered to make determination, and these are:

- (a) restrictions of termination of contract under Section 47 of the Act;
- (b) lay-offs under Section 48 of the Act; and
- redundancy of workers under section 51 of the Act.

In this matter the issue of "lay-offs" under Section 48 of the Act did not arise.

Relevant parts of the negotiation procedure applicable in cases of "restrictions of termination of contract under Section 47 of the Act" and "redundancy of workers under Section 51 of the Act" is reproduced hereunder:

Section 1.(1) Where an Employer wishes to terminate a contract of employment otherwise than under section 57, he shall, not less than 42 days before he intends to give notice of termination to any worker, notify the, Union and the Chief Executive. The period of 42 days referred to in sub-paragraph (1) may, in exceptional circumstances and at the discretion of the Chief Executive, be reduced.

Section 1.(3) The notification under sub-paragraph (1) shall specify:

- (a) the reason for the proposed termination;
- (b) the number of workers concerned,-
- (c) the names, ages, occupation, date of engagement and wages of the workers concerned,-
- (d) whether the proposed termination relates to an activity in a particular sector of the business or to the business as a whole;
- (e) the criteria used for selecting the workers whose contracts are to be terminated.

Section 1.(4) The employer shall also furnish any further information which the

competent officer may request.

Section 2. Upon receipt of the notification and of any additional information requested under paragraph 1(4), the competent officer registers the notification and issues to the employer a certificate of registration.

Section 3. (1) As soon as possible after the date of registration of the notification and in any case not later than 7 days therefrom, the competent officer shall invite the Union, the employer or the employer's organization to which he may belong, for consultation with a view to exploring and agreeing on how the proposed terminations may be avoided or their effects minimized.

Section 3 (2) Notwithstanding sub-paragraph (1), where the reason for the proposed termination of a contract is a personal one in the sense that it relates to the character, competence, loyalty or other attribute of the worker, the competent officer shall invite the worker's participation to consultations in pursuance of sub-paragraph (1).

Section 4. (1) The competent officer shall keep a record of the statements made during the consultations held pursuant to paragraph 3, and shall file all documents and evidence produced by the parties and any written submission they may make.

Section 4.(2) Following the conclusion of consultations the competent officer considers the case and makes his determination of the officer.

Section 4.(3) A determination by the competent officer under sub-paragraph (2) shall be made within 14 days after the date of registration of the notification.

Section 5. The worker, the Union or, the employer may, not later than 14 days after service of a determination made under paragraph 4(3), appeal to the Minister against that determination.

Section 6 No action shall be taken by the employer in connection with the proposed termination (including giving notice to a worker of termination) until 21 days has elapsed following a determination under 4(2) or until the result of an appeal or review, as the case may be, or unless the competent officer fails to make a determination within the time allotted under paragraph 4(3).

Section 7. This procedure is also subject to Part III of this Schedule.

In this case, the whole matter was activated by the employer, namely PUC, by letter dated 20 May 2002, as reproduced above. The employer sought the approval of MESA to terminate the employment of Messrs. Barry Mathiot, Marc Jean and Leopold Javotte,

in the interest of the organization. That letter, was supposed to be the notification required by Section 1(1) of Part 1 Schedule 1. It was addressed to the Principal Secretary, Ministry of Social Affairs and Employment, who is the Chief Executive of the Ministry responsible for the administration of the Employment Act. However, the reason for such termination was given as "in the interest of the organization".

The employer, in seeming compliance with the law, provided certain information called for under Section 1(3) of Schedule 1, in cases where and when redundancy is proposed, but it failed to provide the information required by Section 1(3)(d) and Section 1(3)(e). It is noted that the law requires that the employer "shall" specify this information, thus making it mandatory to do so.

There is no evidence of compliance by MESA with the provision of Section 2 of Schedule 1 as the record does not show that a certificate of registration was issued.

I am satisfied however, that the case was registered as there is a case reference number: TER/17. I believe that it is reasonable to assume that the registration took place on the day following the date of the letter from PUC, that is, 21 May 2002.

The competent officer, by letter dated 28 May 2002, invited the employer to attend a meeting on Friday 31 May 2002 at 10.00am. In that same letter the employer was informed that the three workers must also attend the meeting and the employer was called upon to bring them along. Such notice was issued within 7 days after registration of the notification in accordance with Section 3(1) of the Schedule. There is no evidence that the competent officer invited the Union for consultation as the law requires.

The competent officer, following the consultation, by letter dated the same day conveyed his decision to the employer copied to the 3 workers, "that approval is conveyed for the contracts of employment of the above-named persons to be terminated with immediate effect with payments of all legal benefits".

The above stated decision apparently emanated from the determination of the competent officer. The proceeding of the negotiation meeting is reproduced above, A question that now arises is whether the competent officer, having come to the conclusion that "Under normal circumstances the termination should not be allowed and the employees should be reinstated", has the power to go further and state "However, the competent officer is of the opinion that the working relationship between (sic) has broken down and is irreparable" in the absence of any evidence. I believe that this is an area of serious concern that needs to be determined in this review.

In the light of the foregoing, I believe that the competent officer in the first instance is not empowered by law to receive a notification when the ground of termination is "in the interest of the organization". There is no such provision in the law and by analogy there is no cause of action so to speak. If it was found necessary for such a ground to be included in the law, that would fall within the province of legislators and indeed is not open to the competent officer to add any other ground for termination of an employee

other than those contained in the law. For that reason only, a writ of certiorari may be issued as the action of the competent officer is ultra vires the law.

Secondly, assuming that the competent officer had in mind that it was a notification of redundancy, then the mandatory requirement for the employer to provide all the information required by the law is lacking. The competent officer should have not proceeded with the hearing unless and until all the mandatory information required under Sections 1(3)(e) and 1(3)(d) of Schedule had been supplied by the employer.

Thirdly, the Union was not invited to participate as called for under Section 3(1) of Part 1 of Schedule 1. I note that neither were the workers informed of their right to be represented by their Union.

Fourthly, the rule of natural justice requires that the workers should have been informed of the case against them. This came out clearly at the hearing and the employer could not provide them with any proper ground and as such the workers were not aware as to what defence if any they had to advance and they indeed could not advance any because of that serious anomaly. They were called in apparently to negotiate termination of their employment in the interest of the organization but midstream the hearing seemed to have been approached as if it was a redundancy situation, yet the procedures for redundancy were not followed by the employer, as I have stated above. Judicial review is applicable in cases where the rule of natural justice has not been followed and for that reason a writ of Certiorari may be issued.

Fifthly, after hearing the case the competent officer made the finding that:

It is not clear as to why the employees concerned were being terminated. The purpose of the consultation under the Negotiation Procedure is to establish the reason/s the organization have for any prospective termination and also to examine ways to avoid, if possible, the termination. The representative of PUC could not however provide any. Under normal circumstances the termination should not be allowed and the employees should be reinstated.

This finding in my view would have been correct if "redundancy" was the reason for termination.

But unfortunately the whole process went awry, in my view, when the competent officer went further and imported his own opinion as the concluding determination:

However the competent officer is of the opinion that the working relationship between (sic) has broken down and is irreparable. As such it would not be prudent to determine that the contracts of employment of the employees continue to subsist. The competent officer is of the opinion that the contracts of employment of the employees should be allowed to be terminated with payment of all employment benefits.

I find that there is no basis or evidence on which the competent officer formed that opinion. Worst still, it was not an issue that came up or was considered at all at the hearing. The workers were not called upon at all to address that point, that is the working relationship between (sic) has broken down and is irreparable". I find that the competent officer exceeded his judicial powers in the circumstances and his final determination is ultra vires the law. Again, for that reason a writ of certiorari may be issued.

The matter did not end there; it went on appeal to the Minister and the Employment Advisory Board (EAB) heard the appeal and conveyed its advice to the Minister. The EAB concluded that:

We are of the view that the competent officer erred in his finding as there is no evidence to suggest that the working relationship between Appellants and Respondent had broken down irreparably. The competent officer had not addressed the issues before him correctly. He took a very simplistic approach and his decision to allow the termination on those grounds that he did was unfair in the circumstances.

I totally agree with the conclusion reached by the EAB on that score.

The whole matter was concluded by the decision of the Minister after the Appeal was heard. His decision simply upheld the determination of the competent officer. He did not make any other determination of his own. In that case if the determination of the competent officer fails then it would follow the Minister's final determination would also fail.

For reasons stated earlier, I issue a writ of Certiorari on the grounds that the competent officer received and heard a matter that did not fall within the ambit of the applicable law; his determination was ultra vires the law applicable in that the competent officer exceeded his judicial powers and came to a conclusion which is not supported by evidence and further that he failed to uphold the rule of natural justice when hearing the matter.

The 3 workers were public employees and as such they are entitled to a writ of mandamus. I hereby issue an order of mandamus ordering the return of these 3 public officers who had been wrongfully deprived of such a position back to their original position with PUC.

The Petitioners may have suffered prejudice but the writ and order made herein would in the ultimate place the Petitioners in the position as if their respective employment was never terminated. Their employer has to pay them their salaries and benefits from the time they were made to cease working to date, of course deducting whatever the employer has hitherto paid them as compensation etc based on the decision of the competent officer. In respect of the one who was re-employed he would have to be

similarly considered and be reimbursed for any period that he did not receive his salary. In the circumstances and for these reasons, I do not make any other compensation order.

Record: Civil Side No 91 of 2003