[2010] UKPC 29
Privy Council Appeal No 19 of 2010

JUDGMENT

The Public Service Appeal Board *v* Omar Maraj

From the Court of Appeal of Trinidad and Tobago

before

Lord Hope
Lady Hale
Lord Brown
Lord Kerr
Sir John Dyson SCJ

JUDGMENT DELIVERED BY
Lady Hale
ON

17 November 2010

Heard on 5 October 2010

Appellant
Peter Knox QC

(Instructed by Charles Russell LLP)

Respondent
Douglas Mendes SC
H.R. Ian Roach
(Trinidad & Tobago Bar)
(Instructed by Simons, Muirhead and Burton)

LADY HALE

1. The issue in this case is whether a public officer has a right of appeal to the Public Service Appeal Board when he has been dismissed following the summary procedure applicable to officers who have been found guilty of criminal offences in the criminal courts. This is turn depends upon the meaning of the words "any decision of a Service Commission . . . as a result of disciplinary proceedings brought against a public officer" in section 132(1) of the Constitution of Trinidad and Tobago which deals with the jurisdiction of the Appeal Board. The point is short but the answer is not straightforward. It is of considerable importance to all public officers in the Republic.

The facts

2. The respondent joined the public teaching service in January 1980 and taught at Barrackpore Secondary School until his dismissal on 22 October 2004. In 2002, he forged a letter from the Ministry of Education, misstating his qualifications, and submitted it in support of his application to study for a Bachelor of Education degree at the University of the West Indies. He was prosecuted for two offences of forgery, to which he pleaded guilty in June 2003. He was given an absolute discharge under section 71(1)(a) of the Summary Courts Act, which may be some indication of the court's view of the seriousness of his behaviour.

3. In June 2004, the Teaching Service Commission took action against him under the summary procedure provided for by section 129(5) – (7) of the Constitution (see para 7 below). In response to an invitation to submit representations, he argued, with the strong support of his Principal II, that if it were thought necessary to impose any penalty upon him it should be limited to a reprimand. However, the Commission decided to terminate his employment with effect from 22 October 2004.

4. He filed a notice of appeal with the Public Service Appeal Board, but by a judgment dated 27 September 2005, the Board decided that it did not have jurisdiction to hear his appeal. The decision to dismiss him had not been taken as a result of disciplinary proceedings brought against him. The Respondent applied for judicial review of the Board's decision, but was unsuccessful at first instance before Gobin J. She applied a literal construction to the relevant provisions and agreed that the Board did not have jurisdiction. However, he was successful on appeal to the Court of Appeal. They applied a more purposive construction and unanimously decided that the Board did have jurisdiction. The Appeal Board now appeal to this Board.

The law

5. The employment and dismissal of public officers, including teachers, is provided for in the Constitution of Trinidad and Tobago. Chapter 9 is headed "Service Commissions etc". Part I of that Chapter deals with the Public Service, Police Service and Teaching Service Commissions. Section 124 establishes the Teaching Service Commission, which by section 125 is responsible for the appointment, promotion, removal and discipline of teachers in the public service. Part I also contains some General Provisions which are common to all three Service Commissions. Most important for our purposes is section 129.

6. Section 129(1) provides that the Commissions may regulate their own procedure:

> "(1) Subject to subsection (3), a Service Commission may, with the consent of the Prime Minister, by regulation or otherwise regulate its own procedure, including the procedure for consultation with persons with whom it is required by this Constitution to consult, and confer powers and impose duties on any public officer ….. for the purpose of the discharge of its functions."

Subsection (3), which purported to insulate the Commissions from judicial review, was repealed in 2000 (a matter to which we must return): section 3 of the Constitution (Amendment) Act 2000 (Act No 43 of 2000).

7. Subsection (4) provides as follows:

> "(4) No penalty may be imposed on any public officer except as a result of disciplinary proceedings."

However, since amendments made by the Constitution (Amendment) Act in 2000, this is followed by subsections (5) to (7):

> "(5) Notwithstanding subsection (4), where an officer is convicted of a criminal charge in any court and the time allotted for an appeal has elapsed or, if the officer has appealed, the appeal process has been completed or an order has been made in the matter under section 71 of the Summary Courts Act, a Service Commission may consider the

relevant proceedings on such charge and if it is of the opinion that the officer ought to be dismissed or subjected to some lesser punishment in respect of the conduct which led to his conviction on the criminal charge or to the making of the order, the Commission may thereupon dismiss or otherwise punish the officer without the institution of any disciplinary proceedings.

(6) In furtherance of subsection (5) –

(a) a certificate of conviction issued by the court shall be sufficient evidence of an officer's conviction for an offence;

(b) a certified copy of an order made under section 71 of the Summary Courts Act shall be sufficient evidence of the commission by the officer of the offence for which he was charged.

(7) An officer referred to in subsection (5) shall be entitled to show cause why he should not be dismissed from office."

8. Part II of Chapter 9 deals with the Public Service Appeal Board. Section 130 provides for its establishment and constitution:

"(1) There shall be a Public Service Appeal Board (hereinafter referred to as "the Appeal Board") to which appeals shall lie from such decisions against public officers as are specified in section 132.

(2) The Appeal Board shall consist of a Chairman appointed by the President after consultation with the Chief Justice and two other members appointed by the President after consultation with the Prime Minister and the Leader of the Opposition.

(2A) The Chairman shall be a Judge ...

(3) One member of the Appeal Board shall be a retired public officer."

Section 131 deals with their qualifications and terms of office, which are the same as those of the Service Commissions. But it seems clear from its composition and jurisdiction that the Appeal Board is intended to be independent of the Service Commissions and to exercise a judicial or quasi-judicial function.

9. Section 132 deals with its jurisdiction and powers. This does not cover all the multitude of decisions which a Service Commission may make. According to the side-note, it covers "appeals in disciplinary cases":

> "(1) An appeal shall lie to the Public Service Appeal Board from any decision of a Service Commission, or of any person to whom the powers of the Commission have been delegated, as a result of disciplinary proceedings brought against a public officer.
>
> (2) An appeal under subsection (1) shall lie to the Appeal Board at the instance of the public officer in respect of whom the decision is made.
>
> (3) The Appeal Board may, where it considers it necessary that further evidence be adduced –
>
> > (a) Order such evidence to be adduced either before the Board or by affidavit; or
> >
> > (b) refer the matter back to the relevant Service Commission to take such evidence and –
> >
> > > (i) to adjudicate upon the matter afresh; or
> > >
> > > (ii) to report for the information of the Appeal Board specific findings of fact.
>
> (3A) Where a matter is referred to a Service Commission under paragraph (b) of subsection (3), the matter, so far as may be practicable or necessary, shall be dealt with as if it were being heard at first instance.
>
> (3B) Upon the conclusion of the hearing of an appeal under this section, the Appeal Board may –

(a) affirm, modify or amend the decision appealed against; or

(b) set aside the decision; or

(c) substitute any other decision which the Service Commission could have made.

. . . .

(7) This section and sections 130 and 131 shall be, in addition to and not in derogation of any other provisions for review of the decision of any Service Commission."

This appeal turns on the interpretation of section 132(1) and in particular upon whether the term "disciplinary proceedings" has the same meaning in that subsection as it has in section 129(4) and (5) (para 7 above) and if so what that is.

The literal interpretation

10. Mr Peter Knox QC, who appears for the Appeal Board, understandably relies upon the "natural and ordinary meaning" of these provisions. "Disciplinary proceedings" in section 132(1) must mean the same as "disciplinary proceedings" in section 129. The summary process for dealing with officers convicted or discharged in criminal proceedings, provided for in section 129(5) to (7), is clearly an exception to the general rule in section 129(4) that no penalty can be imposed except as a result of "disciplinary proceedings". Hence, whatever that term may in fact mean, it cannot include the summary process. Therefore, the Board has no jurisdiction in cases where the summary process has been used.

11. At the hearing before this Board, Mr Douglas Mendes SC, for the Respondent, advanced for the first time the proposition that "disciplinary proceedings" in both section 129(4) and section 132(1) covered any kind of disciplinary process adopted by a Service Commission, including the summary process provided for in section 129(5) to (7). He acknowledged that this interpretation made those subsections redundant, because the Commission would have been able to proceed in that way without them. Yet when Parliament introduced those subsections in 2000, it was clearly intending to make an exception to section 129(4). This must, therefore, refer to something other than that process.

12. Without more, therefore, the argument advanced by Mr Knox has much to commend it. However, there is more. There is good reason to think that Parliament did not intend that result and it is a result which is inconsistent with the fundamental rights and freedoms protected by the Constitution itself.

The legislative history

13. Both parties have prayed the legislative history in aid. The story is complicated and in some places obscure but it is instructive, in particular as to the intentions of Parliament when making the 2000 amendments.

14. The history goes back to the original independence Constitution of 1962: Schedule 2 to the Trinidad and Tobago (Constitution) Order in Council 1962 (SI 1962/1875). Chapter VIII dealt with the Public Service. It established the Public Service and Police Service Commissions but there was no Part II establishing a Public Service Appeal Board. The equivalent of section 129(1), allowing the Commissions to regulate their own procedure by regulations or otherwise, appeared in Chapter IX, "Miscellaneous", as section 102(1). Section 102(2) expressly permitted the Commissions to provide in Regulations for the review of their decisions. Section 102(4) is of interest because it was an ouster clause purporting to provide that no court could inquire into the validity of the actions of the Commissions, their members and delegates. There was no equivalent to section 129(4) or to the qualification in section 129(5) to (7). In other words, the Commissions were free to decide how to go about disciplining their officers, subject of course to the requirements of fairness; there was no provision for independent external appeals; and they were protected from judicial review.

15. Initially, teachers were part of the public service, but in 1966 the Education Act created a separate teaching service and the Constitution was amended in 1968 to establish the Teaching Service Commission. Instead of making its own rules of procedure, however, the new Commission simply adopted the Public Service Regulations which the Public Service Commission had made in 1966. (These Regulations remained in force, with amendments, at the material time in this case.)

16. Chapter VI of those Regulations dealt with resignation, retirement and termination of appointments. Reg 50 listed the reasons for which an officer's services could be terminated, beginning in para (a) with when he had been dismissed or removed in consequence of disciplinary proceedings (although some of the other reasons also had a disciplinary flavour). In their original form, Chapter VII dealt with Conduct, providing that certain specific breaches should amount to misconduct, but also giving a long and detailed definition of misconduct in reg 83. This included, at reg 83(2)(j), being convicted of any criminal charge involving dishonesty, fraud,

moral turpitude or resulting in a prison sentence. Chapter VIII dealt with Discipline. By reg 84, an officer alleged to be guilty of misconduct or indiscipline was liable to disciplinary proceedings in accordance with the procedure prescribed in the Regulations. These then laid down an elaborate process; this began with an investigation and report; if a charge was laid, and the officer did not admit it, it continued with a tribunal hearing; the tribunal then reported to the Commission; it was for the Commission to decide, in the light of the tribunal's findings or the officer's admissions, what if any penalty to impose.

17. Regulations 111 to 114, however, dealt with officers against whom criminal proceedings were brought. No disciplinary proceedings on grounds arising out of the criminal charge could be brought until the criminal proceedings were over (reg 111). If the officer was acquitted, he could not be dismissed or punished in respect of the same subject matter as the charge (reg 112). If he was convicted of an offence which might be misconduct within reg 83(2)(j), he was to receive no pay until the Commission had decided what to do about it (reg 114). Most important for our purposes was regulation 113:

> "If an officer is convicted in any Court of a criminal charge, the Commission may consider the relevant proceedings on such charge and if it is of opinion that the officer ought to be dismissed or subjected to some lesser punishment in respect of the offence of which he has been convicted the Commission may thereupon dismiss or otherwise punish the officer without the institution of any disciplinary proceedings under these Regulations."

This was obviously designed for a purpose similar to that of section 129(5) of the Constitution today: to allow the Commissions to proceed to consider whether the conviction amounted to misconduct, and if so what should be done about it, without having to go through the elaborate process of deciding whether or not he had been guilty of the conduct in question.

18. Chapter IX of the 1966 Regulations provided, as expressly permitted by section 102(2) of the 1962 Constitution, for reviews of the Commission's decisions by a review board. There was some confusion before us as to whether an officer dealt with under reg 113 could apply for a review and it is not necessary for us finally to decide the point. However, the position seems to have been this. The procedure laid down in reg 115 applied only to officers aggrieved as a result of disciplinary proceedings, and reg 116(1) made it clear that reg 115 did not give a right of review to an officer aggrieved only because he thought the penalty too severe; but reg 116(2) provided that "An officer who is aggrieved on the grounds specified in paragraph (1) may apply for a review of the penalty to the Commission . . . ". It looks, therefore, as if the right of review by the Review Board in reg 115 was designed for officers who wished to

challenge the findings of a disciplinary tribunal, whereas the right of review by the Commission in reg 116 was designed for *all* officers who had been subjected to penalties, whether by disciplinary proceedings or under reg 113 (or indeed in any other way). This makes complete sense. The officer disciplined under reg 113 could not complain that he had not done the thing which he had been convicted of but he could complain that it did not amount to misconduct or deserve the penalty imposed.

19. Be that as it may, that was how matters stood until the enactment of the new Constitution in 1976 (Act No 4 of 1976). This preserved the powers of the Service Commissions to regulate their own procedure, now contained in section 129(1), and the purported ouster of judicial review, then contained in section 129(3). But it differed from the 1962 Constitution in two important respects. First, it provided in section 129(4) that no penalty could be imposed upon a public officer except as a result of disciplinary proceedings. Secondly, it established the independent Public Service Appeal Board and gave it jurisdiction over appeals from any decision of a service Commission as a result of disciplinary proceedings brought against an officer. The result, had it been appreciated at the time, was that the full disciplinary process (whatever it was) had to be gone through again, even though the officer had been convicted in a criminal court, and that the officer could appeal against both the finding of misconduct and the penalty imposed.

20. It may well be that this consequence was not appreciated for some time, because the 1966 Regulations remained in force and were not immediately amended to take account of these Constitutional changes. Nevertheless, at some time before 1991, it was appreciated that the Regulations were inconsistent with section 129(4) of the Constitution. In 1991, therefore, regulations 111 to 113 were repealed: regulation 2 of the Public Service Commission (Amendment) Regulations 1990 (Legal Notice No 28 of 1991). From then on it was clear to all that the Commission's disciplinary procedure applied to all and that all had the right of appeal.

21. Not surprisingly, this gave rise to difficulties. It led to delays and unnecessary duplication of effort within the Commissions. Accordingly, by section 3 of the Constitution (Amendment) Act 2000, sections 129(5) to (7) were inserted into the Constitution to reinstate the possibility of a summary process for dealing with officers convicted of a criminal offence (or discharged as a result of one). As the Court of Appeal found, the mischief at which the amendments were aimed was undoubtedly the difficulties caused within the Service Commissions by the invalidity and repeal of reg 113.

22. No change was made to section 132(1). But there is absolutely no reason to think that Parliament intended to deprive those who were dealt with under the new summary process of the right of appeal which all had enjoyed hitherto. If we are right in our view of the effect of reg 116(2) of the regulations, officers convicted in the

criminal courts had had a right to have the Commission review their penalty before 1976. After 1976 they had undoubtedly had a right of appeal because no-one could be disciplined without disciplinary proceedings. This right was enshrined in the Constitution itself. Clear words are required before citizens can be deprived of their Constitutional rights. There are no such clear words. (For what it is worth, there is no reference to section 132(1) in the Parliamentary debates leading to the 2000 amendments but there is a clear statement by the Attorney General that the rights of the individual were not being taken away: Hansard, 14 July 2000, pp 481, 483.)

23. Furthermore, it makes no sense to deny these people a right of appeal. Take three officers who have been guilty of exactly the same criminal conduct. One is prosecuted, found guilty by the criminal court and dismissed under the summary procedure. On the appellant's construction he does not have a right of appeal. Another is prosecuted, found guilty by the criminal court, and dismissed after disciplinary proceedings have been brought against him. He does have a right of appeal. The third is not prosecuted at all, but is dismissed after being found guilty in disciplinary proceedings. He too has the right of appeal.

24. Parliament cannot have intended these arbitrary and irrational results. There is no reason at all to think that it did. There is no definition of "disciplinary proceedings" in the Constitution. After the 2000 amendments, therefore, "disciplinary proceedings" in section 132(1) is apt to cover all those subject either to "disciplinary proceedings" within the meaning of section 129(4) or to the summary proceeding provided for in section 129(5) to (7).

The Constitutional Right to Equal Treatment

25. There is a further reason to reach that conclusion. Section 4 of the 1976 Constitution says this:

> "It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely –
>
> . . .
>
> (b) the right of the individual to equality before the law and the protection of the law;

. . .

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions ..."

26. By section 5(1) of the Constitution, no law may abrogate, abridge or infringe any of these rights and freedoms, unless certain requirements are complied with. As, by section 3, "law" includes any enactment, this includes the Constitution itself. The requirements for abrogating fundamental rights were not complied with in the Constitution (Amendment) Act 2000. As the Court of Appeal pointed out, it must be assumed that Parliament did not intend to violate those rights. So far as possible, therefore, the law must be interpreted so as to be consistent, rather than inconsistent, with them.

27. The rights laid down in section 4 are free-standing rights, which exist irrespective of any discrimination on the enumerated grounds. Thus, for example, the right to life, liberty and security of the person (paragraph (a)) and the freedom of the press (paragraph (k)) obviously exist irrespective of any discrimination. The same must be true of all the other rights in the list, including the right to equal treatment either by the law itself or by public authorities.

28. There is some difference of opinion within the Court of Appeal of Trinidad and Tobago as to whether mala fides is required for a finding that section 4(d) has been violated. The Board expressed some reservations about this in *Bhagwandeen v Attorney General of Trinidad and Tobago* [2004] UKPC 21, but did not need to decide the issue; nor did it need to do so in *Central Broadcasting Services Ltd v Attorney General of Trinidad and Tobago* [2006] UKPC 35, [2006] 1 WLR 2891, but it noted that there was a majority in the Court of Appeal holding that mala fides was not required (and no appeal against that): paras 18-19. The Court of Appeal in this case held that the right to equal treatment would be infringed on the appellant's construction of the law without mentioning any requirement of mala fides. In reality, the inequality in question here is an inequality in the law itself and thus, as Lord Mance pointed out in *Central Broadcasting*, at para 20, apt to be dealt with under section 4(b) of the Constitution than under section 4(d). There cannot be a requirement of mala fides when the question is whether Parliament itself has legislated in a way which violates the constitutional right to the equal protection of the laws.

29. In any event, what is in question here is, not whether a constitutional right has been violated, but whether an enactment should be construed in such a way as to avoid such a violation. The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional: see *Grant v The Queen* [2006] UKPC 2, [2007] 1 AC 1, para 15. On the other hand, the Constitution must be given a broad and

purposive construction: see *Minister of Home Affairs v Fisher* [1980] AC 319, 328. In short, in interpreting these provisions, the Board should presume that Parliament intended to legislate for a purpose which is consistent with the fundamental rights and not in violation of them.

30. Mr Knox tried to argue that there was no relevant inequality here. The repeal of the ouster clause in section 129(3), which was also contained in the 2000 amendments, meant that an officer who was dealt with under the summary process could seek a judicial review of the Service Commission's decisions. But he had to accept that, when it comes to questions of discipline and punishment, judicial review is no substitute for a proper appeal on the merits. Thus, if his interpretation were right, three people who had behaved in exactly the same way would be treated unequally, not in accordance with their just deserts, but depending entirely upon the procedures which the prosecutors and, more importantly, the Service Commission in question had decided to follow. The Board shares the view of the Court of Appeal that this is a clear inequality of treatment.

31. But of course these rights are not absolute. As the Board observed in *Panday v Gordon* [2006] 1 AC 427, para 22, when rejecting the submission that section 4(e) of the Constitution conferred an unqualified right to express political views:

> "It is for the courts to decide, in a principled and rational way, how the fundamental rights and freedoms listed in the Constitution are to be applied in the multitude of different sets of circumstances which arise in practice. It is for the courts to decide what is the extent of the protection afforded by these constitutional guarantees."

To the same effect is the Board's statement in *Surratt v Attorney General of Trinidad and Tobago* [2008] AC 655, para 58:

> "It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it."

32. Legislation frequently has to draw distinctions between different classes of people. Such distinctions may well be justified. Some distinctions are easier to justify than others. But at the very least they must serve a legitimate aim and be rationally

connected to that aim. Mr Knox was understandably unable to advance any justification for a difference in rights of appeal (as opposed to the difference in procedures within the Commissions). As has already been demonstrated, it is not clear what purpose they could rationally serve.

33. For all these reasons, and in agreement with the Court of Appeal, this appeal must be dismissed with costs.