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IN THE COURT OF APPEAL

ANTIGUA:

CIVIL APPEAL NO. 1 of 1975

BETWEEN: PUBLIC SERVICE COMMISSION
AND - Appellants
PERMANENT SECRETARY, MINISTRY
OF TRADE, INDUSTRY & COMMERCE

Vs.

CHARLES EDWARD HUNTE - Respondent

Appearances: Sydney Christian and C.A. Roberts
with him for Appellants

Cosmos Phillips, Q.C. & Vere Bird Jun.
for respondents

1975 Nov. 12, 13; 1976 March 2

J U D G M E N T

ST. BERNARD, C.J. (Ag):

The respondent, a civil servant, was interdicted on the 11th August, 1972, under paragraph 5 of the second schedule to the Public Service Commission Regulations, 1967. Later, disciplinary charges were laid against him and, after a trial which was not attended by the respondent, he was dismissed from the civil service with effect from the 31st August, 1972. The respondent, being dissatisfied with his dismissal contested its validity in the High Court on eight grounds, and was successful in respect of six of those grounds. Five of those grounds dealt with the validity of the trial by the Commission. While grounds 1 and 2 were contested on the basis that the whole proceedings were irregular from its inception. The trial judge found in favour of the appellant in regard to ground 1 and held that the investigation which was to be carried out under paragraph 9 (1) of the Public Service Commission Regulations was a condition precedent to the institution of any disciplinary charges against the respondent, and therefore the whole proceedings were null and void. This appeal is in respect of this ground only. There is also a cross appeal in respect of the

two grounds in which the respondent was unsuccessful in the High Court. One of those grounds was abandoned at the hearing of this appeal. The other ground was to the effect that the request of the Permanent Secretary to the Chief Establishment officer to institute disciplinary proceedings was made on the instructions of the Minister of Trade, Industry and Commerce.

The two issues, therefore, for determination in this appeal are - (a) is the investigation contemplated by regulation 9 (1) a condition precedent to the institution of disciplinary proceedings? and (b) did the trial judge make a proper evaluation of the facts when he held that they were insufficient to conclude that the institution of proceedings against the respondent was at the dictation of the Minister?

The relevant part of regulation 9 (1) reads as follows:-

"Whenever a Permanent Secretary considers it necessary to institute proceedings against a pensionable public officer whose salary exceeds the rate of \$2,000 per annum and who is serving in a department under his supervision on the ground of misconduct which if proved would justify his dismissal from the public service, he shall cause such preliminary investigation to be made, and shall after considering the results of his investigation consult with the Chief Establishment Officer who:-

- (a)
- (b)"

An examination of this regulation shows that it contains some error and on this point both counsel have agreed but differ in regard to what may be omitted or inserted so as to make sense out of it. Counsel for the appellant submitted that the word "such" before the word "preliminary" is the root

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of the problem. He suggested that the word "such" should remain but the words "as he considers necessary" should be inserted after the word "investigation." This he contended would make sense and would bring the reading of the regulation in line with regulation 10(1) of the same Regulations since both regulations contemplate the same type of investigation by the same officer before consultation with the Chief Establishment Officer and before any disciplinary proceedings were instituted. He stated that he was fortified in this view by the fact that the corresponding regulation in the Dominica Public Service Commission Regulations (1973) No. 24 was identical with the one under consideration save that the words "as he considers necessary" were inserted after the word "investigation" and for the word "his" before the word "preliminary" in the penultimate line was the word "the". He urged the court to accept this interpretation and argued that since the Permanent Secretary was not making any final determination on the status of the respondent, and further since such an investigation could not in any manner prejudice the trial of the respondent on proper disciplinary charges the court should hold that the preliminary investigation contemplated by this regulation was not a condition precedent. On the other hand counsel for the respondent stated that he supported the interpretation placed on regulation 9 (1) by the trial judge and submitted that the Regulations contemplated two types of preliminary investigations - one under regulation 9 (1) and a different type under regulation 10 (1). Under regulation 10(1) he stated the Permanent Secretary could set up an investigation without the knowledge of the person concerned and had a discretion as to the manner in which he proceeded but under regulation 9(1) there must be a full investigation by another person even though the facts were within the knowledge of the Permanent Secretary. He contended that the word "such" was a drafting error and the letter "a".....

"a" should be substituted therefor; and for the word "his" there should be the word "this." He submitted further that the failure of the Permanent Secretary to carry out a preliminary investigation vitiated everything done thereafter.

The question of the error in the regulation was brought to the attention of the trial judge and this Court was told that similar arguments were placed before him. In his judgment, although the trial judge held that the preliminary investigation contemplated was a condition precedent, it does not appear that he dealt with the error which was brought to his attention. The Permanent Secretary, he stated had filed an affidavit, in which he alleged that all the facts were within his own knowledge and that there was no need for any further preliminary investigation, but this was insufficient as the law laid down that he should cause such investigation to be made. In my view in order to determine whether or not the preliminary investigation contemplated by regulation 9(1) was a condition precedent or not an attempt at the correct interpretation of the regulation should first be made as if the words "as he considers necessary" were to be inserted and the word "his" before the word "preliminary" was to remain these would give a different interpretation to the regulation. Indeed counsel for the respondent conceded that as the words "as he considers necessary" were inserted after the word "investigation" in regulation 10(1) the Permanent Secretary had a discretion and could carry out his investigation without the knowledge of the person investigated.

In my opinion the purpose of the preliminary investigation contemplated both by regulation 9(1) and 10(1) of the Public Service Commission Regulations is the same. It is for the purpose of determining whether or not there is sufficient evidence for instituting disciplinary proceedings against public officers whose salary exceeds \$2,000 per annum and whether those

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proceedings should be for dismissal from the Service or not. In both cases after the preliminary investigation he consults with the Chief Establishment Officer, who in turn if he considers that charges should be laid must consult with the Attorney General. Such an investigation would seem to be one in which the Permanent Secretary must have a discretion. The regulation would not contemplate his own knowledge of the facts in every case in his department and therefore he must cause an investigation to be made as he considers necessary. He cannot lay any charges and must consult the Chief Establishment Officer. In my view it would be premature and in error to hold an investigation and call upon the person intended to be charged for a statement as suggested by counsel for the respondent. The corresponding regulation in the Dominica Public Service Commission Regulations lends support to this view and I would hold that the words "as he considers necessary" were unfortunately omitted from regulation 9(1), and if these words were inserted the construction placed upon the regulation would not be such as to construe such an investigation as a condition precedent, the non compliance with which will render all proceedings taken thereafter null and void. In my view the proceedings were not irregular and the respondent was not prejudiced in any manner whatever. I would allow the appeal.

In respect of the cross appeal counsel for the respondent submitted that the trial judge did not evaluate properly the evidence relating to the question whether or not the proceedings were instituted on the instructions of the Minister responsible for Trade, Industry and Commerce. He stated that the part the Minister played must be looked at and reasonable inference drawn therefrom. He cited the case of *Camacho & Sons Ltd. v. Collector of Customs* 13 W.I.R. 159 in support of his argument as an instance where it was held that a public officer acting on the dictation of the Minister in refusing a licence

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to import certain goods was acting in contravention of the constitution.

Counsel for the appellant pointed out that there was a great difference between Camacho's case and this one. In Camacho's case the officer concerned admitted that he acted on the dictation of the Minister whereas in this case paragraph 5 of the affidavit of the Permanent Secretary at page 99 of the record clearly stated that at no time did he act at the dictation of the Minister or any one else. He submitted that the Permanent Secretary was present at the trial for the purpose of cross-examination but Counsel did not see fit to do so. He should not now be allowed to challenge that affidavit at this stage. This issue is a question of fact, and in my view the judge drew the proper inferences from the evidence placed before him. I would not interfere with his findings.

I would allow the appeal and dismiss the cross appeal with costs.

(E.L. ST. BERNARD)
ACTING CHIEF JUSTICE

/ I have.....

(S. L. ST. BERNARD)

ACTING CHIEF JUSTICE

I have had the opportunity of reading the Judgment delivered beforehand. I agree with the reasons stated therein and the conclusions arrived at, and there is nothing further that I can usefully add.

(W. PETERKIN)

JUSTICE OF APPEAL

I have read the judgment of the Learned President and I am in agreement with his findings and the reasons given for them. I do not wish to add anything.

(J. C. BISHOP)

ACTING JUSTICE OF APPEAL