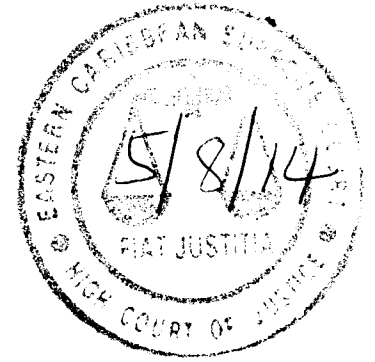


THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV 2009/0367



BETWEEN:

JOSEPH DASILVA

Claimant

AND

THE CHAIRMAN AND MEMBERS OF THE PUBLIC SERVICE BOARD OF APPEAL

Defendant

Appearances: Mr. Joseph Delves for the Claimant
Mr. P.R. Campbell Q.C. for the Defendants

2013: July 22
2014: August 5

JUDGMENT

- [1] **THOM J.:** Saint Vincent and the Grenadines being a multi-island State has a total of five airports, being the ET Joshua Airport on the island of Saint Vincent and airports on the Islands of Bequia, Mustique, Canouan and Union Island.
- [2] On November 19, 2006 a light aircraft J8-VAX with the pilot and one passenger departed the Canouan Airport around 6:30 pm destined for the ET Joshua Airport. The air traffic control officers on duty in the central tower on the 1 pm to 7 pm shift were the Claimant Mr. DaSilva and Ms. Malaika Jones. Mr. James Ollivierre another air traffic controller was scheduled to assume duty from 7 pm to 11 pm.
- [3] The estimated flying time between Canouan and ET Joshua Airport for a light aircraft is approximately 25 minutes. The aircraft did not arrive at ET Joshua at the scheduled time for arrival. None of the three air traffic controllers realized that the aircraft had not arrived until approximately 9 pm. A search and rescue operation was launched but neither the aircraft nor the passengers were found.

- [4] An investigation into the disappearance of the aircraft was conducted. It is common ground that none of the Officers more specifically Mr. DaSilva was responsible or in any way contributed to the disappearance of the aircraft.
- [5] As a result of the incident disciplinary charges were instituted against all three of the officers pursuant to Section 3.27 of the Civil Service Orders which read as follows:
- “3.27 An officer will be liable to disciplinary action for any misconduct including general misconduct to the prejudice of discipline or the proper administration of Government business and contravention of specific rules and regulations.”*
- [6] The charges against Mr. DaSilva read as follows:
- (1) That you Mr. Joseph DaSilva Air Traffic Controller I I on the 19th of November 2006 left the ET Joshua Airport control tower prior to the end of your shift without being relieved leaving an ATC Cadet alone in the tower in Contravention of Chapter 13 (13.3.4.33) of the Air Traffic Services Operations Manual.
 - (2) That you Mr. Joseph DaSilva Air Traffic Controller I I, on the 19th day of November 2006 by leaving the ET Joshua Airport control tower prior to the end of your shift without being relieved and leaving an inappropriately qualified controller as the sole controller on duty with known traffic in the airspace, other than that which was in the traffic circuit compromised the safety of the management of the ET Joshua airspace.
 - (3) That you Mr. Joseph DaSilva, Air Traffic Controller I I, on the 19th November 2006 prior to leaving the ET Joshua Airport control tower failed to correctly hand over the air traffic situation to the controller left in the tower thus compromising the safety of the management of the ET Joshua airspace.
 - (4) That you Mr. Joseph DaSilva Air Traffic Controller I I, on the 19th day of November 2006 failed in your duty to provide the requisite supervision of the ATC Cadet on duty, thereby endangering the safety of flight operations in the ET Joshua airspace.
 - (5) That you Mr. Joseph DaSilva Air Traffic Controller I I, on the 19th day of November 2006 failed in your duty as the active controller to adhere to standard air traffic control separation procedure by failing to sequence aircraft J8-VAX to land thus endangering the safety of flight operations in ET Joshua airspace.
 - (6) That you Mr. Joseph DaSilva Air Traffic Controller I I, on the 19th day of November 2006 failed in your duty, as the active controller to adhere to standard air traffic control separation procedures by providing the required separation and sequencing between aircraft J8-VAX and

aircraft LI 311 thus endangering the safety of flight operations in the ET Joshua airspace.

- [7] The disciplinary charges were referred by the Public Service Commission (the Commission) to a tribunal of inquiry chaired by the Chief Magistrate. At the completion of the inquiry the tribunal submitted a report to the Commission. The Commission having reviewed the tribunal's report imposed no sanction on Mr. James Ollivierre, imposed a fine of \$1,000.00 on Ms. Malaika Jones and ordered the dismissal of Mr. Da Silva.
- [8] Mr. DaSilva appealed to the Public Service Board of Appeal (the Board) on the following grounds:
- (1) No reason was given for his dismissal
 - (2) The Public Service Commission (PSC) appointed a Tribunal to inquire into events surrounding the disappearance of an SVG AIR aircraft on November 19, 2006. The Tribunal conducted its hearing and made a report, yet the PSC opted to ignore that report and findings and in so doing acted unfairly and unjustly.
 - (3) The PSC subjected Mr. DaSilva to disciplinary proceedings under Regulations 54(2) and (3) but yet purported to dismiss him under Regulation 54(4). This procedure is improper, contrary to the principles of natural justice, unreasonable, and an abuse of power.
 - (4) The PSC and or the CPO did not have the power to dismiss Mr. DaSilva under Regulations 54(4) in those circumstances. Further the Commission failed to follow the procedures under Regulation 54(2) and acted outside the scope of its powers.
 - (5) The punishment is unduly harsh and excessive given the circumstances.
- [9] The Board dismissed Mr. DaSilva's appeal. Mr. DaSilva now seeks judicial review of the decision of the Board and seeks several reliefs including an order that he be returned to his post of Air Traffic Controller II, damages and costs.
- [10] The grounds on which the claim for judicial review are based as follows:
- (1) The decision to dismiss was in breach of the Civil Service Orders and contrary to the constitution.
 - (2) The decision was vitiated by breach of natural justice and by unreasonableness.
 - (3) The Board considered extraneous matters in its decision making process.

(4) There was an unjustified breach of Mr. DaSilva's legitimate expectation that his disciplinary proceedings would be conducted under Regulation 54(2) of Booklet 4 of the Public Service Commission Regulations.

(5) There was no factual or evidential basis on which misconduct could be founded and if there were the punishment of dismissal was harsh.

[11] At the hearing of the claim for judicial review Mr. DaSilva did not pursue ground 1.

[12] It is a well established principle of law that in Judicial Review proceedings, the Court does not exercise an appellate jurisdiction but rather the Court is concerned with the decision making process of the Tribunal whose decision is under review. The grounds on which the Court will do so were outlined by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service**¹ as being illegality, irrationality or procedural impropriety. Procedural impropriety is a very broad ground which includes breach of natural justice and unfairness.

SUBMISSIONS

EXTRANEOUS MATTERS

[13] Mr. Delves submitted that the Board took into consideration extraneous matters in arriving at its decision. The extraneous matters to which Mr. Delves referred are the Tribunal's Report and the contents of the personal file of Mr. Da Silva. It is not disputed that prior to the commencement of the hearing of the appeal the Chairman stated that he had examined the personal file of Mr. Da Silva and has had seen some interesting things and he had brought them to the attention of the Members of the Board.

[14] Mr. Delves referred to the case **Marks v Minister of Home Affairs**² and submitted that Mr. DaSilva was entitled to have notice of adverse facts likely to influence the decision of the Board. Mr. Delves also relied on the case of **Wiseman v Boreman**³ and the following statement of Lord Denning in **Kanda v Government of Malaya**⁴

“whoever has to adjudicate must not have evidence or receive representation from one side behind the back of the other. The court will not enquire whether the evidence or representation did work ton his prejudice.

¹ [1984] 3 AER 935 at 950

² [1984] 35 WIR 109

³ [1963] 3 AER 275

⁴ [1962] UKPC 9

Sufficient that they might do so. The court will not go into the unlikelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without knowing.

... The Board finds itself in agreement with the view expressed by Rigby J in these words: In my view the furnishing of the findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges coupled with the fact that no such copy was furnished to the Plaintiff, amounted to a denial of natural justice as to entitle this court to set aside those proceedings on this ground.

- [15] Mr. Delves next submitted that only in rare and exceptional circumstances would a Court countenance nondisclosure of irrelevant material considered by a tribunal as in the case of **Official Solicitor v K et al**⁵, where the nondisclosure concerned a confidential report in a wardship case involving a child. Disclosure would have harmed the child and therefore was not in her best interest. Likewise in **Glenroy Clarke v Commissioner of Police**⁶ the Court held that it was in the interest of national security that the subject report not be disclosed to the party. In Mr. DaSilva's case it is not a situation where the Board considered and then withheld the irrelevant material because of national security or any bonafide reason. Mr. Da Silva was simply not provided with the information. Mr. Delves further submitted that the consequence of the Board taking irrelevant matters into consideration, matters which Mr. DaSilva was not aware of, is that the decision of the Board is a nullity. Mr. Delves relied on the cases of **Barnwell v The Attorney-General**⁷; and **Ridge v Baldwin**⁸.
- [16] Mr. Delves next submitted that the decision being a nullity the Court reviewing it is permitted to substitute its decision for that of the body which first determined the matter in question being Mr. DaSilva's dismissal.
- [17] Mr. P.R. Campbell QC submitted that the remarks of the Chairman were made on the 26th June 2009 when the Board convened on the first occasion. The Board next convened on 17th July 2009 and there is no evidence that Mr. Da Silva sought to ascertain from the Chairman at any stage of the proceedings what he meant by those remarks. The Court therefore cannot speculate as to what matters those words were meant to refer, nor can the Court draw any inference whether favorable or unfavorable to the Claimant. Mr. Campbell Q.C. further referred to Section 87(8) of the Constitution which provides for the Board

⁵ [1963] 3 AER 191

⁶ [1994] 31 JLR 570

⁷ [1993] 49 WIR 88

⁸ [1963] 2 AER 66

to regulate its proceedings notwithstanding any vacancy or absence of any member, and submitted that if the framers of the Constitution have sanctioned the Board to make valid decisions even with the participation in its deliberations of unauthorized persons, the framers did not intend that decisions of the Board should be invalidated by reason of unspecified and unparticularised remarks of the Chairman at a preliminary hearing, also in the absence of any concurrent or subsequent complaint at those proceedings – See **Shermon Mc Nicholls v Judicial and Legal Services Commission**⁹.

Court's Analysis

- [18] Section 87 (6) of the Constitution makes provision for the Board to make Regulations for the procedure to be followed in appeals. The only regulations in effect are the Public Service Board of Appeal (Notification) Regulations. These regulations provide that appeals to the Board are to be made in writing within twenty (28) days from the date that the decision is addressed to the Officer and must be addressed to the Chairman of the Board. The application must state the decision appealed against and the grounds of the appeal.
- [19] No regulations have been made in relation to the procedure for the hearing of appeals.
- [20] It is a well settled principle of law that tribunals such as the Board must observe the principles of natural justice. The Board must act fairly.
- [21] It is also a well settled principle of law that where a tribunal takes into account matters in its decision making process of which the party affected was not aware this would render the decision a nullity – **Marks v Minister of Home Affairs** and **Kanda v Gouvernement of Malaya**. In **Marks v Minister of Home Affairs** one of the reasons for the Court quashing the Minister's decision to refuse the renewal of the Appellant's work permit was that although the Minister was not required to give reasons for his decision he had a duty to act fairly and since he had considered facts adverse to the renewal of the work permit which had not been disclosed to the Appellant and the Appellant had not been given an opportunity to make representations in response, the Court found that the Minister had not acted fairly and that his decision was a nullity.
- [22] In **Kanda** the issue before the Privy Council was whether the adjudicating officer having had in his possession the Report of the Board of Inquiry which was not provided to the Appellant Kanda rendered the decision to dismiss the Appellant a nullity. The Court in finding that the dismissal was a nullity opined that:
- “If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and

⁹ [2010] UKPC 6

what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L.C. in **Board of Education v Rice** [1911] A.C. at P. 182 down to the decision of their Lordship's Board in **Ceylon University v Fernando** [1960] 1 WLR 223. It follows of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing."

- [23] I agree that where an allegation of consideration of extraneous matters is made, the onus is on the party so alleging to identify the material which should not have been considered. The party cannot simply without more suggest that the decision is a nullity because it was reached with the consideration of unspecified irrelevant material. This principle is illustrated in the case of **R v Lancashire County Council ex parte Huddleston**¹⁰; and **Cammack Chase v DC v Kelly**¹¹. In **Cammack Chase v DC** the Court refused to grant relief to prospective student who was refused a discretionary maintenance award. The student had an excellent academic and personal record so she could not understand why she was unsuccessful. She was suspicious that something extraneous may have influenced the Council's decision but she was unable to specify what it might have been.
- [24] The case at bar can be distinguished from **Cammack** in that Mr. Da Silva has specified the material which the Board had before it and which was not in his possession.
- [25] It also does not matter whether the comment was made by the Chairman at a preliminary hearing of the matter or during the hearing of the matter. I agree that on hearing the statement of the Chairman Mr. Da Silva through his Counsel could have made a request for the material to be provided. What is critical is that the Chairman and Members had in their possession material which was considered by them and that material was not made available to Mr. Da Silva or his Counsel. The Board being required to act fairly had a duty to provide Mr. Da Silva with material which the Board had before it, and permit Mr. Da Silva to respond to the information if he found it necessary to do so. Moreso it is not disputed that the personal file of Mr. Da Silva contained adverse reports in relation to other matters.

¹⁰ [1986] 2 AER 941

¹¹ [1978] 1 WLR 1

[26] The appeal having been conducted in circumstances where the Board had material before it which was not in the possession of Mr. Da Silva or his Counsel and to which Mr. Da Silva could not respond, rendered the hearing of the appeal unfair and this amounted to a procedural impropriety. On this basis Mr. Da Silva's claim for judicial review succeeds. Having so found it is not necessary for me to consider the other grounds raised by Mr. Da Silva.

[27] In conclusion I find that the decision of the Board was unfair and a nullity and that there should be a rehearing of the appeal before a differently constituted Board with all material before the Board presented to Mr. Da Silva or access to such material be granted to him at least one month before the hearing save and except any privileged material. I have taken judicial notice that the Board is now differently constituted than the Board which heard Mr. Da Silva's appeal save and except the Chairman. I have also taken into consideration the provisions of Section 86 of the Constitution which makes provision for an acting appointment to be made where for any reason a member is unable to exercise the functions of the office.

ORDER

- (i) Judgment is entered for the Claimant.
- (ii) Certiorari is granted and the decision of the Public Service Board of Appeal is quashed.
- (iii) The matter is remitted for a rehearing of the appeal de novo before a differently constituted Board of Appeal. The rehearing shall take place within 3 months.
- (iv) The Defendant shall pay the Claimant costs in the sum of \$7000.


.....
Gertel Thom
High Court Judge