Ibrahim Sulaiman v. Papua New Guinea University of Technology

National Court of Justice
Woods J.
20 August 1987

Administrative law – principles of natural justice – application for judicial review of dismissal from employment of the university – whether employee able to apply for judicial review under section 155(3) and (4) of the Constitution (Ch. No. 1).

The plaintiff was dismissed by the defendant pursuant to the terms and conditions determined by the defendant university to apply to its non-citizen employees. Plaintiff then applied under section 155(3) and (4) of the Constitution seeking judicial review, alleging that the decision was made contrary to the principles of natural justice.

HELD: Dismissing the application:

That as the plaintiff had an alternative remedy to sue for damages for wrongful dismissal under his terms and conditions of employment, judicial review under section 155(3) and (4) of the Constitution was not available to him. As a general rule, the Court will not grant specific performance of a contract of employment. Such a contract is one for personal service and comes within the category of contracts whose execution the court cannot supervise and will not, therefore, enforce under any orders for specific performance. However, if the employee enjoys a special status or office by virtue of a statute and if one party purports to terminate a contract of employment the Court can grant a declaration that the contract still subsists. As the employment of the plaintiff in the university in this case did not create any special status or office, the Court could only look to the contract: *ll.* 70, 170 and 200. *Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532; [1967] 1 All E.R. 767, *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935; [1985] L.R.C. (Const.) 948, per Lord Diplock, followed

Other cases mentioned in judgment:

Francis v. *Municipal Councillors of Kuala Lumpur* [1962] 1 W.L.R. 1411; [1962] 3 All E.R. 633 (P.C.)

Kanda v. *Government of the Federation of Malaya* [1962] A.C. 322; [1962] 2 W.L.R. 1153 (P.C.)

Vine v. *National Dock Labour Board* [1956] 1 Q.B. 658; [1956] 2 W.L.R. 311; [1956] 1 All. E.R. 1; [1957] A.C. 488; [1957] 2 W.L.R. 106; [1956] 3 All E.R. 939 (H.L.)

Legislation referred to in judgment:
Constitution of Papua New Guinea, Ch. 1 of the Revised Laws National Court Rules, Order 16

Other sources referred to in judgment:
Chitty on Contracts, vol. 1

T. Doherty for the plaintiff
N. Diacos for the defendant

WOODS J.

Judgment:

This is an application to, in effect, inquire into and review the proceedings and decision of the Papua New Guinea University of Technology in terminating a person employed under the terms and conditions determined by the Papua New Guinea University of Technology to apply to non-citizen employees of the University. This application is made under section 155 of the Constitution and the procedures are those set down in Order 16 of the Rules of the Court.

The right to seek judicial review has been granted where an injustice has been done and there is no other remedy. For example, where a decision by a tribunal or public authority is final and the applicant has and will suffer some damage. However, in this case before me, the applicant, if he has suffered some wrong, clearly has some other remedy. He has a remedy to sue for damages for wrongful dismissal under his Terms and Conditions of Employment.

It is therefore submitted by counsel for the university that he has a remedy and judicial review under section 155 cannot apply. However, the applicant argues that he is entitled to have his termination looked into as the manner in which it was effected was contrary to the rules of natural justice and he is seeking an order that his termination is void.

The law is well settled in this regard. The Court will not grant specific performance of a contract of employment. Such a contract is one for personal services and comes within the category of contracts whose execution the Court cannot supervise and will not, therefore, enforce under any orders for specific performance. For a statement of this principle see *Chitty on Contracts,* vol. 1, para. 1639. There have been some exceptions to this rule and if one party has purported to terminate a contract of employment, the Court has in special circumstances granted a declaration that the contract still subsists where the employed person enjoys a special status or office by virtue of a statute. See *Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532; [1967] 1 All E.R. 767, where special considerations applied. At pp. 551-553 (W.L.R.); p. 777 (All E.R.) there is a clear analysis of the principles that apply where the employment is dependent on the normal rules of contract and also where special considerations apply:

> What should be the consequence of my conclusion that the hearing was against the rules of natural justice? Here it is particularly important to bear in mind the two aspects involved in rejection of the plaintiff's appeal and his dismissal: his position as servant of the union and his position as a member disabled in some respects by the grounds of dismissal.

If the person dismissed has not a mere contract of service but has a status or can be dismissed only by specified procedure which alone confers the power to dismiss him, then the employment is not effectively terminated by wrongful dismissal. Such was the position in *Vine* v. *National Dock Labour Board* [1956] 1 Q.B. 658, C.A.; [1957] A.C. 488, H.L., where a registered dock worker in the registered pool of dock workers enjoyed a status conferred by statute, and in *Kanda* v. *Government of the Federation of Malaya* [1962] A.C. 322, where, under the articles of the Constitution of Malaya, the authority to dismiss an inspector of police was vested in the Police Service Commission, and the Commissioner of Police, who had no power at all to do so, purported to dismiss an inspector.

On the other hand, in *Vine* v. *National Dock Labour Board,* Jenkins, L.J., in a judgment with which Lords Morton and Somervell agreed, thus stated the position about wrongful dismissal of a servant.

> But in the ordinary case of master and servant the repudiation or the wrongful dismissal puts an end to the contract, and the contract having been wrongfully put an end to a claim for damage arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more. In the present case we are concerned with a statutory scheme which has given a number of rights and imposed a number of obligations going far beyond any ordinary contract of service.

And Lord Kilmuir, in the same case in the House of Lords, said:

> . . . if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract.

In *Francis* v. *Municipal Councillors of Kuala Lumpur* [1962] 1 W.L.R. 1411 it was decided by the Privy Council, in a case where the order constituting the municipality had provided that the president of the council had the power of removing a clerk, that a clerk wrongfully removed, not by the president of the council, but by the council who were his employers, was entitled to damages only and not to a declaration that his contract of service still subsisted, in the absence of special circumstances such as, for example, would, in the absence of a declaration, preclude him from working at all as a clerk. The Privy Council stated:

> Accepting, however, the decision of the Court of Appeal, which, as has been pointed out, has not been the subject of any cross appeal, the position on October 1 was that the removal of the appellant was a removal by the council and not by the president. The council were his employers, but having regard to the provisions of the Ordinance their termination of his service constituted wrongful dismissal. Their Lordships consider that it is beyond doubt that on October 1, 1957, there was de facto a dismissal of the appellant by his employers, the respondents. On that date he was excluded from the council's premises. Since then he has not done any work for the council. In all these circumstances it seems to their Lordships that the appellant must be treated as having been wrongly dismissed on October 1,

> 1957, and that his remedy lies in a claim for damages. It would be wholly unreal to accede to the contention that since October 1, 1957, he had continued to be, and that he still continues to be, in the employment of the respondents;

and later:

> In their Lordships' view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court. In their Lordships' view there are no circumstances in the present case which would make it either just or proper to make such a declaration.

Then there is a reference to *Vine* v. *National Dock Labour Board,* where, it is said:

> Ormerod, J., had in his discretion made such a declaration and the House of Lords, adopting the view expressed in his dissenting judgment in the Court of Appeal by Jenkins, L.J., were of opinion that the declaration had been rightly made. In that case, however, the circumstances were very special."

and then a little later it is said:

> In the circumstances of that case it was held to be right that the plaintiff – whose dismissal was shown to have been without proper authority – should have the benefit of a declaration that he was still in the employment of the National Board, since, unless he was, he would be disabled from carrying on at all his chosen trade of a dock labourer.

These principles apply to any mere contract of service. In this case the plaintiff was under a contract of employment with the union, and in my view as a servant on the terms of the rules and liable to dismissal by the executive council at its will and pleasure. He did in fact obtain other employment with a government department and has now been in that employment for years. In the words employed in the *Francis* case, it would be "wholly unreal" to make a declaration to the effect that he has continued to be in the employment of the union. But his disabilities as a member by reason of the wrongful dismissal are a very different matter. It affects very seriously his position as a member and his prospects of a future career in the union, and here he should have the protection of a declaration, and to such a declaration I understand the union (on the assumption, of course, that the decision on wrongful dismissal is against them) takes no objection.

I am not satisfied that employment under the Terms and Conditions with the university in this case creates any special status or office. We are not in the situation where we have special employment legislation applying or unfair dismissal legislation applying. This is clearly a case where the parties bound themselves by a contract and it is only to that contract that a Court can look. If a party breaks that contract, then it is open to the party who has suffered because of the breach of that contract, to sue in the appropriate way in contract law.

However, the applicant further submits that because these Terms and Conditions create very detailed provisions for termination, for the hearing of complaints, for aggrieved employees to appeal, this type of contract is requiring the Council or Officers of the University to act in a judicial manner, and therefore such actions must, under the Constitution of Papua New Guinea, be opened to judicial review.

The applicant says that he has the right to have these procedures and the final decision made in accordance with the principles of natural justice. If these principles are not followed, then he can seek review by the Court, instead of being made to just merely accept termination and whatever damages that he may claim.

I note the words of Lord Diplock in *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374, 409; [1984] 3 W.L.R. 1174, 1194-1195; [1984] 3 All E.R. 935, 949 [1985] L.R.C. (Const.) 948, 1025:

> For a decision to be susceptible to Judicial Review the decision maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that if validly made, would lead to administrative action or abstention from action by an authority endowed by law with executive powers. . . . The ultimate source of a decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute.

Where courts have interfered by way of review in the process of dismissal because of the failure to observe the rules of natural justice, it has been where there is a statutory power or procedure being exercised, not a contractual power and I refer again to *Taylor* v. *National Union of Seamen* above. The applicant here is trying to make the position of the university under its Terms and Conditions, a position of special status. I am not satisfied the employee here has a special status which would enable this Court to interfere in this way in a contract of employment. The relationship between the parties is governed by contract and the applicant must afford himself of whatever remedies are available for the alleged breach of that contract. This Court will not enforce through these procedures or interfere in this manner in the process whereby that contract may have been terminated or broken. The applicant is not without a remedy. He has a remedy in damages for wrongful dismissal. He has a remedy under a contract law. I therefore dismiss the application.

Reported by: L.K.