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IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

ACTION NO. 818 OF 1982

Between:

SATENDRA PRATAP NANDAN
s/o Shiu NandanPLAINTIFF

- and -

THE UNIVERSITY OF THE SOUTH
PACIFIC.DEFENDANT

Sir Vijoy Singh and
Mr. H.M. Patel for the plaintiff.
Mr. D.C. Maharaj for the defendant.

J U D G M E N T

The facts in this case are not in dispute.

The plaintiff is a Fiji citizen. He is an academic holding the degrees of Bachelor of Arts (Honours) and Bachelor of Education from the University of New Delhi. He is also a Master of Arts in Linguistics and English language conferred on him by the University of Leeds. He is also a Doctor of Philosophy in English conferred on him by the Australian National University of Canberra Australia.

In August 1972 the plaintiff was offered and accepted appointment to the academic staff of the University of the South Pacific, which I shall hereinafter refer to as "the University". The position was that of Lecturer (Preliminary) in English.

The letter dated the 21st August 1972 offering him the position referred to "Terms of Service" which were general terms of service current at that time entitled "Terms of Service for Academic and Comparable Administrative and Library Staff". A copy of this document was enclosed with the letter addressed to the plaintiff.

One issue in this case is whether the plaintiff was appointed to the permanent staff or was appointed on "contract terms".

So far as this first appointment was concerned, there can be no doubt that the appointment was intended to be to the permanent staff.

There is in the letter reference to paragraph 5(2) of the "Terms of Service" which provides as follows :

"(2) An appointee to the permanent staff, other than a professor or an appointee of comparable status to the administrative or library staff, will be required to serve a probationary period of 2 years, after which if the Council so approves he will be confirmed in his appointment."

The letter mentions that because the plaintiff had completed one year's service at the University prior to his

period of study in the United Kingdom, the probation period was reduced to one year.

The letter also stated :

"As the appointment is not on contract terms, it does not attract gratuity."

On the 3rd December, 1973, the plaintiff was offered the appointment as Lecturer in Education (English Methods) with effect from 1st January, 1974. This letter from the University also referred to the general terms of service and enclosed a copy of the printed terms which I have already mentioned when the plaintiff was offered his first appointment. The letter drew attention to two additional subclauses 8 and 9 to clause 6 of those terms.

Clause 6 is the clause covering "termination of appointment". The two additional subclauses provided for notice in respect of contract appointments and acceptance of renewal. They are not relevant in this action and do not have to be considered.

Of relevance however is the following sentence in the letter :

"As you have already taught at the University as a Lecturer (Preliminary) in English on a full time basis the probationary period mentioned in clause 5(2) of the terms of service will be waived".

Since a person who was a "contract appointment" did not have to serve a probationary period there can be no doubt that this second appointment which the plaintiff accepted was to the permanent staff. If further written confirmation is required it can be found in the Registrar's

letter to the plaintiff dated 12th October 1976 which informed the plaintiff that "permanent staff of the University" after acceptance by the Executive Council of a recommendation of the Vice Chancellor, were to receive an increment on their then salary scale effective 1st January, 1976. The letter informed the plaintiff that his salary from that date would be \$F7685.

With that letter was forwarded a copy of the improved terms of service which the Council had approved. The plaintiff was asked to complete the attached form indicating his acceptance of the new terms of service.

The plaintiff signed and returned the form. Apparently not all staff accepted the new terms.

Dr. T.L. Baba the Registrar of the University in evidence stated that the plaintiff's appointment was confirmed.

The defendant's argument is that by accepting the new terms of service his existing contract was terminated and he accepted a new appointment which under clause 5(1) of the new terms was initially for a contract period of three years. Clause 5(1) provides :

"All appointments will be made initially for a contract period of three years. A contract may be renewed for further terms of three years by mutual agreement."

Mr. Maharaj argues that, since the plaintiff admits his contract was not renewed, he must be deemed to have been on monthly terms after 1979 and that his services could in any event be terminated on one month's notice.

There is no merit in this argument. The new terms of service were amended terms of service which the Registrar described as "improved terms of service". Acceptance of those terms operated merely as a variation of the plaintiff's contract of service and did not terminate that contract and involve a new appointment.

I hold as a fact that at all relevant times the plaintiff was a member of the permanent staff of the University.

At a meeting of the University Council held on the 9th, 10th, and 11th December 1980, the Council considered the subject of "Staff members and service on City Councils and National Assemblies".

Apparently this subject had been discussed at the 1979 Council meeting because the minutes of the 1980 meeting confirmed the 1979 minutes "subject to amendment of minute 318.5 to be read as follows".

"Staff Members and Service on City Councils and National Assemblies:

The Council:

- (i) CONSIDERED Paper C11/5/5 on staff service on City Councils and National Assemblies.
- (ii) NOTED that while the University had no declared policy regarding staff who offer themselves as candidates for election to public office, public servants in Fiji were debarred from serving on such bodies by legal enactment and this appeared to be the position in other countries of the Region.
- (iii) AGREED, after a lengthy discussion, that where a staff member offered himself as a candidate for election to a city or town council he should take all accrued leave, and if necessary leave without pay to cover his 'campaign' up to the day of election. If elected he should undertake not to let his membership of a city or town council adversely affect his obligations to the University.

- (iv) FURTHER AGREED that where a staff member offered himself as a candidate for election to a national assembly he should take all accrued leave, and if necessary leave without pay to cover his 'campaign' up to the day of election and if elected should resign immediately from the University.

There was, however, to be no such requirement in respect of a staff member nominated to public office as this did not carry any constituency responsibilities."

A circular No. R4/81 dated 17 February 1981 was circulated to all University staff advising them of the Council's decision. Only paragraphs (iii) and (iv) of the minutes were repeated in the circular.

The plaintiff says he did not see this memorandum because he was overseas on study leave at the time it was circulated. It is immaterial whether he saw it at the time because he was certainly aware of the policy when he decided to stand as a candidate for election as a National Federation Party Candidate to contest the Nausori/Vunidawa Indian Communal seat in July 1982.

The plaintiff filed his nomination for the said seat on the 21st May, 1982, and on the 28th May, 1981, the Registrar Dr. Baba, drew the plaintiff's attention to the Council's policy and informed the plaintiff that in accordance with that decision he was considered as being on leave as from 21st May, 1982.

On the 18th July, 1982, the plaintiff was elected to the seat and his success was promptly followed by a further letter from Dr. Baba dated the 21st July, 1982, again referring to the Council's policy decision

and calling on the plaintiff to resign with effect from the 18th July, 1982, the date he was declared elected by the Returning Officer.

In between nomination and election there were apparently discussions between the acting interim Vice Chancellor and the plaintiff. In the Vice Chancellor's letter to the plaintiff of the 9th June 1982 mention is made of leave and housing and other matters and ends with the following paragraph :

"I hope you will find the above terms and conditions fully acceptable to you. They are, if not further than we should go, at least as far as the University can go, in meeting your situation, and I am happy to do this. I would also ask and I am sure you will understand that you keep the University and its Campus free as far as possible from any activity which could be regarded as political."

The plaintiff did not accept the Council's policy and was not prepared to resign. He replied to Dr. Baba's letter of 21st July 1982 in the following terms:

"I acknowledge receipt of your letter of July 21, 1982, requesting me to resign from the University in compliance with the resolution of the University Council relating to members of the staff elected to a national assembly. May I also thank you for sending me a copy of the Council's policy on 27th July.

In view of the implications of the University Council's resolution, and the precedent that I would be setting, I deemed it proper to seek advice on this matter.

I am advised that my appointment as a tenured (i.e. permanent) staff of the University is governed by the agreement between the USP and myself signed on October 26, 1976 and that these terms and conditions cannot be unilaterally amended or superseded by

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resolution of the University Council. The correctness of the decision to place me on leave from June 11, 1982 is questioned, too.

I appreciate the difficulty that you and the Vice Chancellor face in view of the fact that the validity of the University Council's resolution, on the basis of which you have sought my resignation, is itself being questioned, and suggest that the University consider seeking a clarification on this issue from the Supreme Court.

The facts are not in dispute, and I shall cooperate in any reasonable and fair step that may be taken to resolve the matter."

Dr. Baba replied to this letter on the 18th August, 1982, purporting to terminate the plaintiff's services forthwith. The letter was in the following terms :

"In my letter to you of 21 July, 1982, I asked for your resignation in accordance with the terms of a resolution of the Twelfth Meeting of Council, 1980, regarding election of staff to national assemblies.

Since I have not received such resignation, I am obliged to terminate your official links with the University with immediate effect. You are to vacate your Office by Friday, August 27, 1982, and cease using University facilities to which staff members are normally entitled as members of University staff. In accordance with my letter of July 21, 1982 you may remain in your University accommodation until 21 October, 1982, or until you find your own accommodation off Campus, whichever is the earlier.

The University will meet all monies owing to you in terms of my letter of 21 July, 1982, and settle such other arrangements as for FSSU as may be necessary.

On behalf of the University, I wish you well in your new career."

The plaintiff then instituted this action.

I turn now to consider the legal issues. The plaintiff at all material times was a permanent member of the University staff and his contract of employment is evidenced by the offer of appointment dated the 3rd December, 1973, accepted by the plaintiff, incorporating general terms of service which by later agreement are the terms he signed on 26th October, 1976.

Clause 7 of the general terms of service provide what I consider to be exhaustive provisions regarding termination of appointment. There are four means of terminating an appointment namely.

- (1) Resignation
- (2) Retirement
- (3) Illness and
- (4) Removal for good cause.

The first three have no application in the instant case and, if the plaintiff's dismissal was legal, it can only have been under the fourth category - removal for good cause which could cover a multitude of sins.

I will be referring to this fourth category later. It is sufficient to state at this stage that clause 7 provides a procedure which must be followed before a member of the staff can be removed. In the instant case no part of that procedure was followed.

The University is a Body Corporate established by Royal Charter. There are also what are termed "Statutes of the University". The Charter and Statutes have been given statutory recognition and effect and appear as Caput 266 in the 1978 Volume XIV of the Revised Laws of Fiji.

Statute 19 (which would in other acts be termed clause 19) has specific provision regarding removal of officers and members. It covers only the equivalent of "Removal for good cause" in paragraph 7(5) of the general terms of service. It is in the following terms :

"Removal of Officers and Members

"19.-(1) Any member of the Council (other than an ex-officio member) may be removed from office by the Council for good cause. No person shall be removed from office by the Council under this paragraph unless he has been given a reasonable opportunity of being heard by the Council.

(2) Subject to the terms and conditions of their appointments, the Pro-Chancellor, the Vice-Chancellor, the Deputy Vice-Chancellor, the Registrar, the members of the academic staff, and the holders of any other posts specified for this purpose by the Council from time to time, after consultation with the Senate, may be removed from office by the Council for good cause: provided that no such person shall be so removed from office except pursuant to the following procedure: - The Resolution for such removal shall have been passed by a majority of not less than three-quarters of those present and voting at a meeting attended by not less than three-quarters of the members. The Council may, and if so requested by the person concerned or by any three members of the Council shall, before coming to a final decision on a case before it under this paragraph, appoint a Joint Committee of the Council and the Senate to examine the case and report to the Council thereon. No person shall be removed from office by the Council under this paragraph unless he shall have been given a reasonable opportunity to be heard by the Council, which opportunity shall include the right to be represented at such a hearing, to call and to question witnesses and to have reasons assigned (if

asked for) for any decision that may be taken by the Council leading to his removal from office.

(3) No person may be removed from office under this Statute by a Resolution under paragraph (2) of Statute 15.

(4) "Good cause" when used in reference to removal from office means :-

- (a) conviction of any offence which the Council considers to be such as to render the person concerned unfit for the execution of the duties of his office; or
- (b) any physical or mental incapacity which the Council considers to be such as to render the person concerned unfit to continue to hold his office; or
- (c) conduct of a nature which the Council considers to be such as to render the person concerned unfit to continue to hold his office; or
- (d) conduct which the Council considers to be such as to constitute failure or inability of the person concerned to perform the duties of his office or to comply with the conditions of tenure of his office."

Paragraph 2 of Statute 19 makes it mandatory to follow the procedure specified before removing a member from office. That procedure was not followed in the present case.

While paragraph 2 is made subject to the terms and conditions of a member's appointment, I do not consider there is any conflict between this provision and the provisions of paragraph 4 to 7 inclusive of clause 7 of the general terms of service. The latter provisions are more extensive than the statutory provisions and contain provisions for suspension and for an enquiry and a report which do not appear in the Statute. Both provisions have one provision in common and that is to the effect that no

member of the staff shall be removed by the Council unless he has been given a reasonable opportunity of presenting his case to the Council.

Mr. D.C. Maharaj, for the University, admitted that the question of the plaintiff's dismissal never went before the Council so it is obvious he was not given any hearing.

There is clearly on the facts, if Dr. Baba's dismissal letter is accepted as being written on behalf of the University, not only a breach by the University of the contract of service but also of the statutory provisions governing termination of the plaintiff's appointment.

The fact that the Council did not consider the plaintiff's dismissal, however, indicates that the University did not in fact terminate the plaintiff's employment. Both under the Statutes of the University and the terms of service it is the Council and only the Council which is empowered to remove a member from the office.

The Council has under Statute 14(4) very wide powers to delegate any of its powers. I do not however consider the Council could delegate its powers to remove a member of the staff from office where Statute 19(2) requires that a resolution of the Council for such removal shall be passed by a majority of not less than three quarters of those present and voting at a meeting attended by not less than three quarters of the members.

The Registrar's letter of 18th August, 1982, purporting to terminate the plaintiff's "official links

with the University with immediate effect" was on the face of it summary dismissal by the Registrar who had no power to terminate the plaintiff's contract of service.

The question of delegation of the Council's powers to the Registrar or anyone else to terminate the plaintiff's services was not raised at the hearing.

Since the plaintiff has not in his pleadings specifically raised this issue and has pleaded that the University purported to terminate his services on the 18th August, 1982, I have to consider whether the letter written by the Registrar was an effective notice to terminate the plaintiff's services.

The plaintiff claims that the policy decision taken by the University Council in December 1980 was in breach of "Article 22" of the Royal Charter which is in the following terms :

"22. No religious, ethnic or political test shall be imposed upon any person in order to entitle him to be admitted as a member, professor, teacher or student of the University or to hold office therein, or to graduate thereat or to hold any advantage or privilege thereof."

I do not consider the policy decision is contrary to Article 22.

It would appear from the Acting Interim Vice-Chancellor's letter to the plaintiff of the 9th June, 1982, an extract of which I quoted earlier in this judgment, that it was his view that the Campus should be free as far as possible from any activity which could

be regarded as political.

Students being what they are, it is a pious hope that a university can be kept free of all political activity. There is however some substance in the defence which pleads that the policy decision is in line with paragraph 3(3) of the terms of service which states :

"3. (3). Except as may otherwise be specified in his letter of appointment, a member of the staff of the University shall regard his service to the University as whole-time employment, and shall not, without the permission of the Vice-Chancellor, undertake other work that might encroach upon the time expected to be devoted to University duties."

What appears to have been overlooked by all concerned is that the policy decision is in terms which clearly indicate that the Council did not at the time it was framed intend the publication of the policy to be more than notice of the Council's views which the Council no doubt hoped would be followed. Had it been the Council's intention that the policy was to be treated as a new term of service directions would no doubt have been given to seek variation of the terms of service and have staff accept such variation. No such directions appear to have been given.

The decision in my view was merely an expression of the Council's views and not in that form enforceable.

Minutes 350 and 351 noted that the University had no declared policy regarding staff who offered themselves as candidates to election to public office whereas public servants were debarred from serving on

such bodies by legal enactment.

It was open to the Council to either obtain staff agreement to vary the general terms of service or to vary them so as to cover new appointments.

The use of language as "he should take leave" "and if elected should resign" (underlining is mine) by a Council of academics is clear recognition by that body that the minutes expressed the Council's views and it was not seeking to lay down any new rule or term of service.

There is no mention in the policy statement as to what would be done if a member acted contrary to the Council's expressed views. The Registrar however took the view entirely without legal justification, that if the plaintiff did not resign immediately he was subject to immediate dismissal.

The plaintiff considers that he can faithfully perform, his duties as a lecturer as well as his duties as an elected member of the House of Representatives.

If he is wrong in this view and his work suffers it would be open to the University to take action against the plaintiff to terminate his appointment for "good cause". The good cause being not only breach of his contract but specifically "good cause" as defined in paragraph 7(d) of the General Terms of Service which corresponds to Statute 19(4)(d).

The University was premature in purporting to dismiss the plaintiff and should have waited to see whether

he could, as he claims, function both as an opposition member in Parliament and as a lecturer at the University.

The defendant pleaded that the plaintiff had acquiesced in the University policy decision by agreeing to take leave and vacate his house and is now estopped from challenging the validity of the decision.

There is no merit in that argument. There is no evidence of his acquiescence and alleged agreement. On the contrary the plaintiff made it clear in his letter of 30th July, 1982, that he did not accept the Council's resolution was valid. He refused to resign.

The plaintiff seeks two declarations regarding the Council's policy decision neither of which I am prepared to grant.

The decision taken by the Council was neither void nor illegal but it is completely devoid of any legal effect as I have endeavoured to point out.

The plaintiff also seeks a declaration that the notice of 18th August, 1982, is void, illegal and of no effect and following on this he seeks an order that he has been wrongfully dismissed. He also seeks an injunction restraining the University from terminating his employment and an order for his reinstatement.

Granting a declaration that the letter of 18th August, 1982, is void, illegal and of no effect would have the effect of an order for specific performance of the contract resulting in the plaintiff's reinstatement.

The authorities on this issue disclose an unusual situation as it would appear that the House of Lords views, if the views expressed by Lord Wilberforce in Malloch v. Aberdeen Corporation [1971] 2 All E.R. p. 1278 reflect that august body's views, appear not to be in accord with the views expressed by the Privy Council in Vidyodaya University of Ceylon v. Silva [1964] 3 All E.R.

865. Unless I can distinguish the present case I must perforce be bound by the decisions of the Privy Council, which is Fiji's highest appellate Court, and not follow the House of Lords' decisions.

There are two Privy Council and three House of Lords decisions which I have to consider. I commence with a Privy Council case which concerned a University and a Professor who was dismissed which bears some resemblance on the facts to the instant case. It is the case of Vidyodaya University of Ceylon & Others v. Silva which I referred to briefly a little earlier in this judgment.

The Vidyodaya University was established and regulated by statute and the University through its executive council had power to dismiss "any officer or teacher on the grounds of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council renders him unfit to be an officer or teacher of the University". The Statute did not, as the Fiji legislation does, give any right to be heard nor did it give any right to appeal.

The respondent in that case was summarily dismissed without being given an opportunity to be heard in his own defence.

The respondent sought a writ of certiorari to quash the Council's order dismissing him which was granted by the Court. On appeal to the Privy Council it was held that although the University was established and regulated by statute that did not involve that contracts of employment were other than ordinary contracts between master and servant and that since the respondent was not shown to have any other status than that of a servant, and that since procedure by certiorari was not available where a master summarily terminated a contract, certiorari had been wrongly granted.

Lord Morris of Borth-Y-Gest at p. 867 quoted a statement of the principle involved made by Lord Reid in the case of Ridge v. Baldwin [1963] 2 All E.R. 66 at p. 71.

"The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of anyone else."

Lord Morris also referred to the remarks of Viscount Kilmuir L.C. and Lord Keith of Avonholm in Vine v. National Dock Labour Board [1956] 3 All ER

one of the House of Lords cases I will be later considering.

Viscount Kilmuir L.C. at p. 944 said :

"This is an entirely different situation from the ordinary master and servant case. There, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him. It is, therefore, right that, with the background of this scheme, the court should declare his rights."

Lord Keith at p. 948 said :

"This is not a straightforward relationship of master and servant. Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

It was not in dispute that more than two-thirds of the members of the Council had concurred in the decision reached by the Council.

Lord Morris without deciding whether the respondent had any special status said that the case depended on ascertaining the status of the respondent but the respondent had invoked a procedure which was not available where a master summarily terminates a servant's employment. The Privy Council did not consider the respondent had shown he was in any special position or to be other than a servant.

In the second Privy Council case Francis v. Municipal Councillors of Kuala Lumpur [1962] 3 All ER 633 the Privy Council had in this earlier case stated that a declaration that termination of employment was unlawful and that the employee was entitled to continue in employment would rarely be made and would not be made in the absence of special circumstances because of the principle that the Courts would not grant specific performance of contracts of service.

The appellant in that case was on the permanent staff. Under the relevant Act the President had power to dismiss him. The appellant was dismissed but there was an irregularity and the dismissal was technically a wrongful one.

The Court of Appeal held that removal of the appellant was by the Council and not the President who had statutory power to dismiss him. The Privy Council mentioned that the appellant was excluded from the Council's premises from which time he had done no work and the Privy Council considered that he must be treated as having been wrongly dismissed and that his remedy lay in damages.

The Privy Council in this case appears to have been influenced by the fact that, if there were special circumstances which justified the granting of a declaration as was done in Vine's case, the president could nevertheless at any time in exercise of his statutory power have terminated the contract notwithstanding the declaration.

The judgment does however acknowledge that a declaratory judgment can be given in an appropriate case.

I now pass to the three House of Lords cases which I will consider in order of dates.

The first in time is Vine v. National Dock Labour Board [1956] 3 All ER 939.

The plaintiff was a registered dock worker employed by the defendant Board under a scheme set up by the Dock Workers (Regulation of Employment) Order 1947. By clause 3(3) of the scheme the Board had the duty of delegating as many as possible of their functions to local boards. By clause 16(2)(i) local boards were given power to give 7 days notice of termination to any registered dock worker who failed to comply with any provision of the scheme. The plaintiff failed to obey a valid order and the local board gave him 7 days notice terminating his employment. The Board's decision was upheld by the appeal tribunal.

The plaintiff successfully claimed damages for wrongful dismissal and a declaration that his purported dismissal was illegal, ultra vires and invalid. On appeal by the Board the Court of Appeal struck out the declaration and there was an appeal and cross appeal to the House of Lords.

It was held that the plaintiff's purported dismissal was a nullity since the local board had no power to delegate its disciplinary powers as it had in fact done. It was also held that the granting of a

declaration was discretionary and, as damages would not be an adequate remedy the declaration granted by the trial judge was properly made.

The second case is McLelland v. Northern Ireland General Health Services Board /1957/ 2 All ER 129. The majority of the House of Lords held that the appellant's employment had not been validly terminated by the board because it could be terminated only as provided in the September conditions which were exhaustive in that respect and, accordingly, a power to terminate her employment by reasonable notice would not be implied.

The facts of this case are also similar in many respects to the facts in the instant case.

The appellant was appointed by the respondent, a statutory corporation, to a post which "subject to a probationary period.....will be permanent and pensionable". Conditions of service known as the "September Conditions" were approved in September 1948. The appellant accepted those conditions. Her employment was confirmed.

Under clause 12 of those conditions the Board could dismiss any officer for gross misconduct or who was proved to be inefficient and unfit to merit continued employment. Except in the case of gross misconduct the Board had to give at least one month's notice of their intention to exercise their powers of dismissal.

In 1957 the Board sought to terminate the appellant's employment on the grounds of redundancy and gave her 6 months notice. She successfully contended that her employment had not been validly terminated and was not subject to termination on reasonable notice.

The decision in this case turned on the effect of clause 12 of the September Conditions which

governed the appellant's conditions of service after she was confirmed in the post.

The last and latest case is Malloch v. Aberdeen Corporation [1971] 2 All ER 1278 which I referred to earlier. This was a case where a public authority dismissed an employee. The appellant was an unregistered teacher and was required to register. He refused to register and was dismissed. Section 3 of the Public Schools (Scotland) Teachers Act 1882 provided (inter alia) that no resolution of a school board for the dismissal of a certificated teacher was to be valid unless the teacher received three week notice prior to the meeting of the intention to dismiss him. He was not given a hearing.

One of the findings of the House of Lords has application to the facts in the instant case. It was held that where an employer failed to take the preliminary steps which the law regarded as essential, he had no power to dismiss and any purported dismissal was a nullity.

Lord Reid at p. 1284 said :

"If, then, the respondents were in breach of duty in denying the appellant a hearing, what is his remedy? It was argued that it would not be right to reduce the resolution of dismissal because that would involve the reinstatement of the appellant - in effect granting specific implement of his contract of employment which the law does not permit. But that would not be the effect. There would be no reinstatement. The result would be to hold that the appellant's contract of employment had never been terminated and it would be open to the respondents at any time hereafter to dismiss him if they chose to do so and did so in a lawful manner. Unless they chose to do that the appellant's contract of employment would continue.

Then it was said that the proper remedy would be damages. But in my view if an employer fails to take the preliminary steps which the law regards as essential he has no power to dismiss and any purported dismissal is a nullity. We were not referred to any case where a dismissal after failure to afford a hearing which the law required to be afforded was held to be anything but null and void."

"The appellant's challenge to the action taken by the respondents raises a question, in my opinion, of administrative law. The respondents are a public authority, the appellant holds a public position fortified by statute. The considerations which determine whether he has been validly removed from that position go beyond the mere contract of employment, though no doubt including it. They are, in my opinion, to be tested broadly on arguments of public policy and not to be resolved on narrow verbal distinctions. The appellant is entitled to complain if, whether in procedure or in substance, essential requirements, appropriate to his situation in the public service under the respondents, have not been observed and, in case of non-observance, to come to the courts for redress."

He also said at p. 1295 and 1296 :

"In Ridge v. Baldwin my noble and learned friend Lord Reid said 'It has always been held, I think rightly, that such an officer (sc one holding at pleasure) has no right to be heard before being dismissed'. As a general principle, I respectfully agree; and I think it important not to weaken a principle which, for reasons of public policy, applies, at least as a starting point, to so wide a range of the public service. The difficulty arises when, as here, there are other incidents of the employment laid down by statute, or regulations, or code of employment or agreement. The rigour of the principle is often, in modern practice, mitigated for it has come to be perceived that the very possibility of dismissal without reason being given - action which may vitally affect a man's career or his pension - makes it all the more important for him, in suitable circumstances, to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void. So, while the courts will necessarily respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred on him expressly or by necessary implication, and how far these extend."

He went on at p. 1295 to refer to the Vidyodaya University of Ceylon v. Silva case which he labelled as one of the cases "where the distinction has been lost sight of, and where the mere allocation of a label-master and servant has been thought decisive against an administrative law remedy".

I consider the Privy Council cases can be distinguished from the instant case.

In the Vidyodaya University case the professor was in fact dismissed by the University in the manner envisaged by the relevant act albeit the dismissal was in breach of contract. The act did not provide for any right to be heard or any right of appeal.

The Professor did not sign the form of agreement governing his appointment. On the facts presented by the respondent the Privy Council considered he had not shown he was in any special position or to be other than a servant.

In the instant case the plaintiff did enter into a contract with the University and specifically signed what may be termed "the October Conditions" corresponding to the situation in McLelland's case where her contract was governed by "the September Conditions".

In the instant case also there are specific and exhaustive provisions regarding termination of appointment in the contract and in particular a mandatory statutory provision that no person shall be removed from office except pursuant to the procedure detailed.

The instant case cannot in the circumstances be treated as the ordinary master and servant case. The University was bound to follow the rules and the statutory provisions and did not do so.

Francis's case is also distinguishable. The President had statutory power to dismiss him. The President was a member of the Council which purported to dismiss him and on the facts the Privy Council considered that he must be treated as wrongly dismissed. The judgment

does indicate however that the Privy Council acknowledged that there were cases which justified the granting of a declaration instead of damages.

I consider the House of Lords cases I have referred to are authorities I should follow.

Relying on Vine's case, I would hold that the purported dismissal was irregular and damages in the instant case would not be an adequate remedy since the plaintiff is a specialist lecturer and academically over-qualified for an ordinary teaching position at primary or secondary level. He was on the permanent staff and could look forward to promotion and employment until he was 60 years of age. He would also lose the benefits of the University Superannuation Fund.

I am, however of the view that the purported dismissal by the Registrar was a complete nullity. On the facts before me it was prohibited by statute. Relying on McLelland's case, I hold on the facts that the appellant's employment was not validly terminated by the University and the University had in any event no power to dismiss since it had failed to take any of the preliminary steps required by Statute 19 or indeed the contract of employment.

I hold as a fact that the purported dismissal is a nullity

I grant the relief claimed in slightly amended form and declare that the notice of the 18th August, 1982, purporting to terminate the plaintiff with the University is void and of no legal effect.

No order for reinstatement is necessary as I have declared the termination notice to be a nullity and it follows that the plaintiff is legally still in the employment of the University.

The plaintiff is to have the costs of this action.

R. G. Kermode
(R.G. KERMODE)

J U D G E

S U V A,

21 OCTOBER, 1982.