

In the Supreme Court

The Full Court

Before: Smith, C.J., Malcolm and Gordon, JJ.

Suit No. M. 05 of 1984

R. v. The National Water Commission

Ex parte Desmond Alexander Reid

Alton Rose for Applicant

Berthan Macaulay, Q.C., B.J. Scott, Q.C. and
Norman Harrison for Respondent.

3 April, 1984

Smith, C.J. :

By the National Water Authority (Change of Name and Amendment) Act, 1980 (Act 26 of 1980), all the property, powers, rights, liabilities and staff of the Water Commission, established by the Kingston and St. Andrew (Water Commission) Act, were transferred to the National Water Commission on the repeal of the latter Act. The applicant was an employee of the Water Commission who was so transferred. He had been appointed in February 1978 as an assistant mechanic.

The applicant was notified by the Managing Director of the National Water Commission (the NWC) by letter dated 19 October 1983 that he was suspended from his duties with effect from 20 October 1983 "pending an investigation of allegations of breach of discipline on (his) part." The allegations were enumerated in the letter. A formal charge was preferred against him in a letter dated 16 November 1983 and he was required to elect either to have the charge dealt with on the basis of a written reply to it (which he was required in the letter to give) or to have an oral enquiry before a tribunal.

In an affidavit dated 25 January 1984, the applicant has stated that he did not make an election and on or about 10 December 1983 he was requested to attend at an oral enquiry into the charge. On attendance with his attorney-at-law at the enquiry (the date of which is not stated in the record) the tribunal which sat to hold the enquiry was seen to consist of the chairman, vice-chairman and a director of the NWC.

/

The applicant's attorney-at-law objected to the holding of the enquiry on the ground that, as constituted, the tribunal had no jurisdiction, The chairman over-ruled the objection and decided that the hearing should proceed. An application for the hearing to be adjourned, on the ground that the applicant's attorney-at-law was not ready, was granted and on 26 January 1984 Bingham, J. gave the applicant leave to apply for an order of prohibition.

Section 5 of the repealed Act empowered the Water Commission to appoint and dismiss its employees. In March 1974 the Commission, by resolution, adopted elaborate procedures for the settlement of grievances with, and for the maintenance of discipline among, its employees. These were neatly placed in booklet form. The "disciplinary procedures" made provisions inter alia for interdiction, penalties which may be imposed, summary dismissal, proceedings for dismissal (including the holding of enquiries) and appeals to the Board of the Commission. There is also a disciplinary code of offences and penalties.

The Act of 1980 (No. 26, made saving and transitional provisions consequent on the repeal of the Kingston and St. Andrew (Water Commission) Act. These provisions are contained in a second schedule which was added to the National Water Commission Act. Paragraph 7 of that schedule provides as follows :

" Unless and until other arrangements are made with the approval of the Minister, and subject to the provisions of this Schedule, all officers and servants holding office or serving under the Water Commission at the 13th day of October, 1980, shall, from and after that date, hold under the National Water Commission the like respective offices or employments and by the same tenure and upon the same terms as before the 13th day of October, 1980, they hold those offices under the Water Commission. "

Before us, it was submitted that the tribunal which sat to hold the enquiry into the charge against the applicant had no jurisdiction to do so as its members were not persons who fell within the terms of paragraph 17(1) of the disciplinary procedures of 1974, which are as follows :

/

" An oral enquiry shall be held by the Head of the Department (.....) or by another senior officer in The Water Commission appointed by the Head of the Department for the purpose. "

It was conceded by counsel for the NWC that the members of the tribunal did not fall within these provisions.

For the NWC, it was submitted by Mr. Macaulay that by virtue of s. 5(2) of the repealed Act and the transitional provisions in the Act of 1980, either the NWC itself or its chairman has unfettered powers to dismiss a weekly employee, as the applicant is, provided the rules of natural justice are observed. Further, that the disciplinary procedures of 1974 were neither incorporated in the applicant's letter of appointment nor were they approved by the Minister as rules under the provisions of s. 5(5) of the repealed Act. So, it was said, they are merely administrative internal rules and guidelines and do not bind the NWC. Alternatively, it was submitted that a body which delegates powers still retains them and can at any time assert and exercise the powers delegated.

Mr. Scott, following for the NWC, submitted that in sitting to hold the enquiry the tribunal was exercising a power expressly conferred by a resolution of the NWC passed on 31 October 1983 under powers contained in paragraph 3(2) of the first schedule to the National Water Commission Act, which provides that :

" The Commission may by instrument in writing direct that subject to such conditions as may be specified in that instrument, such of the functions of the Commission as may be so specified shall (.....) be performed by the Chairman. "

After reciting the above provisions, the resolution of 31 October 1983

is as follows :

" BE IT RESOLVED that the functions vested in the National Water Commission shall, subject to the National Water Commission Act, be **exercisable** (without prejudice to the performance of those functions by the National Water Commission) by the Chairman of the National Water Commission in accordance with the provisions of the National Water Commission Act ;

AND without prejudice to the generality of the foregoing the Chairman may, with or without the assistance of one or more members of the National Water Commission, deal with disciplinary proceedings against officers and servants of the National Water Commission by causing investigations to be made into the matter in such a manner as he may think proper, and the Chairman of the National Water Commission having heard the evidence in support of the charges and the evidence in rebuttal of the charges shall determine the issues and thereafter furnish to the Board of the National Water Commission a report of his findings and decisions."

In my opinion, the validity of the disciplinary procedures of 1974 is not affected by the provisions of s. 5(5) of the repealed Act. Those provisions empowered the Water Commission, with the approval of the Minister, "to make rules for governing and regulating the transactions and procedure of the Commission, for defining the duties, and for the control and superintendence, of all persons employed by the Commission;" In my judgment, the words "control and superintendence" cannot properly be interpreted to include provisions relating to disciplinary control. They are used in a context in which, obviously, they mean directing, checking, inspecting etc. employees in the performance of their duties.

The Water Commission was a statutory corporation established for public purposes. Having adopted and published procedures to be followed in the exercise of its powers of disciplinary control over its employees, it was, in my judgment, bound thenceforward by the principles of administrative law to follow those procedures until they were validly altered. Thus, if an employee was dismissed in breach of the procedural requirements he would have a right to challenge the decision by seeking a judicial declaration or an order of certiorari, as appropriate. The employees to whom the disciplinary procedures applied, therefore, held their employment subject to the observance of those procedures in relation to them without the necessity for their express formal incorporation into their terms of employment. By virtue of the transitional provisions contained in paragraph 7 of the second schedule, quoted above, the NWC acquired these employees with the observance of the procedural requirements as a condition of their employment. This was recognized in the case of the applicant as he was interdicted by the letter of 19 October 1983 in accordance with paragraph 9 of the disciplinary procedures of 1974 and the provisions of paragraph 15 were observed exactly in the letter to the applicant dated 16 November 1983 preferring the charge. Perhaps the fact that the resolution of 31 October 1983 was passed between the time of the applicant's interdiction and the delivery of the charge is not without significance.

The resolution of 31 October 1983 must now be examined in order to decide whether it validly altered the disciplinary procedures of 1974. Looked at by itself, it seems doubtful whether the second part of the resolution is intra vires as it authorises the chairman and one ^{or} more members of the NWC to "deal with disciplinary proceedings" whereas paragraph 3(2) of the first schedule to the National Water Commission Act authorises delegation of functions to the chairman only. This apart, there are, in my opinion, two reasons why the resolution does not alter the disciplinary procedures. Firstly, the transitional provisions contained in paragraph 7 of the second schedule require the approval of the Minister before the tenure and the terms of employment of former Water Commission employees can be altered and there is no evidence that the resolution had the Minister's approval. Secondly, and more fundamentally, paragraph 12 of the first schedule expressly stipulates the means whereby the NWC may make provisions for exercising disciplinary control over its employees. This is by means of regulations approved by the Minister. Though not compelled to make such provisions, if the NWC elects to make them, it must, in my judgment, do so by regulations. The provisions contained in the second part of the resolution are, therefore, ultra vires and void, having been made without legal authority.

In my judgment, the objection made by counsel for the applicant before the tribunal was well founded. It is for these reasons that I agreed that the application for an order of prohibition should succeed.

Malcolm, J.

I concur.

Gordon, J.

I agree.