

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 10 OF 1999

**In the Matter of Section 84 of the Commonwealth of Dominica Constitution Order
and
In the Matter of Regulation 50 of the PSC Regulations
and
In the Matter of Order 44 of the Rules of the Supreme Court
and
In the matter of the Application of No. 281 Corporal Philbert Bertrand for an
Order of Certiorari**

BETWEEN:

CORPORAL PHILBERT BERTRAND

Appellant

and

THE SECRETARY, PSC

Respondent

Before:

**The Hon. C.M. Dennis Byron
The Hon. Satrohan Singh
The Hon. Albert Redhead**

**Chief Justice
Justice of Appeal
Justice of Appeal**

Appearances:

Mr. Allick Lawrence for the appellant
Mr. Reginald Winston for the respondent

2000: March 27;

JUDGMENT

- [1] **BYRON, C.J.:** This is an appeal against a decision of Cenac J delivered on 15th July 1999 in which he dismissed the application for a writ of certiorari to quash the decision of the PSC to retire the applicant in the public interest.

The Judgment

- [2] These proceedings were commenced on 26th September 1998 applying for a writ of certiorari to quash the decision of the Police Service Commission [PSC]. On 15th July 1999 the learned trial judge gave written decision dismissing the application, in effect holding that the PSC had complied with its procedural regulations, and had not broken any rule of natural justice. This appeal challenges those findings of the learned trial Judge.

The Appeal

- [3] The appeal challenges the learned trial Judge's conclusions that the process adopted by the Commission complied with its regulations and did not breach the rules of natural justice

Background facts

- [4] On the 26th June 1998 the PSC wrote the appellant a letter which included the following:

"It has been represented to the PSC that you should be retired from the Police Force in the public interest.

The Commission has, in the process, received a full report by the Commissioner of Police covering the last five(5) years of your service in the Police Force.

The Commission of Inquiry recommendation on your general conduct stated "...that Corporal Philbert Bertrand has an enormous propensity for violence and his indiscipline often leads him to deception and other reckless forms of behaviour." Having considered both the recommendations by the Commission of Inquiry and the full report by the Commissioner of Police, the Commission is satisfied that you should be retired in the public interest...

You are hereby required to reply indicating any reason or reasons why you may wish to suggest or offer could have the effect of altering the contemplation of the Commission; such suggestion or offer to reach the Secretary of the PSC within seven (7) days."

- [5] Attached to that letter was the report the commissioner of police has sent to the Commission. It did not, however, contain the report of the Commission of Inquiry, or any parts of it.

- [6] On the same day the appellant responded through legal counsel. In that letter various comments were made on the report supplied by the Commissioner of Police. Of more relevance to these proceedings however are the comments relating to the Commission of Inquiry as follows:

“I note however that you have failed to supply my client with the relevant sections of the report, or a transcript of the evidence on which the commission has based its conclusion.

The most elementary principles of the rules of natural justice, would require at the very least, those sections of the report which relate to him, as well as transcripts of the aforementioned evidence, in order that he may respond appropriately.

This is further compounded by the fact that my client has never been investigated, warned, or punished for deception.

Please be advised that this reply is submitted without prejudice to my client’s entitlements to a fair hearing as provided for by the law.”

- [7] On 22nd September 1998 the PSC wrote the appellant informing him of its decision to retire him in the public interest with effect from 1st October 1998.

The Police Regulations

- [8] The relevant jurisdiction and procedure is set out in regulation 50:

“(1) Where it is represented to the Commission or the Commission considers it desirable in the public interest that any police officer should be required to retire from the Police Service on grounds which cannot be suitably dealt with under any of these regulations, it shall call for a full report on the police officer from the Commissioner and shall take into account the police officer’s previous record during the last preceding five years or where the police officer has less than five years service, the police officer’s record during his period of service.

(2) If, after considering the report and the record and giving the police officer an opportunity of submitting a reply to the grounds on which his retirement is contemplated, and having regard to the condition of the Police Service, the usefulness of the police officer thereto, and all the other circumstances of the case, the Commission is satisfied that it is desirable in the public interest to do so, it shall require the police officer to retire on such date as the Commission shall determine, and he shall be retired accordingly.”

- [9] It is already well settled that in discharging the functions prescribed by this Regulation, the PSC is acting in a judicial capacity. **Thomas V Attorney-General** (1982) 32 W.I.R.375.

The Rules of Natural Justice

- [10] I agree with learned counsel for the appellant that it was wrong for the learned trial judge to have concluded that there was no room to import the rules of natural justice into this process because there was statutory regulation of the procedure. An essential element of any judicial process by any body established to perform adjudicative functions is attention to procedural fairness. This is an intrinsic duty irrespective of the manner in which its rules are detailed. It is well settled that no judicial process could be acceptable if the rules of natural justice were not observed. The point was expressed in **Lloyd v McMahon** (1987) AC 625 at 702

“ ... it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”

Any concept of fairness inevitably includes the principles of natural justice.

Audi Alteram Partem

- [11] The first rule of natural justice is the *audi alteram partem* rule which requires that each party be heard by the adjudicating authority. I think that this is too universally known and accepted to require more than its statement. However, it seems clear from this case that three essential elements of the rule require restatement. One is the duty to disclose the information on which judgment is likely to be based in order to give an opportunity to controvert, correct and comment on it. Another is the necessity to give particulars of the charges on which judgment will be based. The Third is the elementary and obvious imperative that judgment should not be reached until the parties have had an opportunity to be heard.

The Duty to disclose

- [12] The right to be heard requires the disclosure of the reports and evidence in the possession of the deciding authority. The point is succinctly made in **de Smith, Judicial Review of Administrative Action** (5th edition) pp 441 and 442.

“If prejudicial allegations are to be made against a person, he must normally, as we have seen, be given particulars of them before the hearing so that he can prepare his answers. In order to protect his interests he must also be enabled to controvert, correct, or comment on other evidence or information that may be relevant to the decision”

“If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing.”

- [13] In the case of **Kanda v Government of Malaya** (1962) 2 WLR 1153 a similar point was decided by the Privy Council. An inspector of police was dismissed on the ground that at an inquiry he had been found guilty on a charge of failing to disclose evidence at a criminal trial. The report which contained matter highly prejudicial to him had been sent to the adjudicating officer who had read it before he sat to adjudicate on the charge. No copy had been sent to the Inspector. The Privy Council held that this amounted to a denial of a reasonable opportunity of being heard. **Lord Denning** said at 1161:

“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 what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.... It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive material 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 that he has been fairly treated if the other side has had access to the judge without his knowing. ...

Applying these principles, their Lordships are of the opinion that inspector Kanda was not in this case, given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J in these words: “In my view, the furnishings of a copy 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 such a denial of natural justice as to entitle this court to set aside these proceedings on this ground. It amounted in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which

resulted in his dismissal.” The mistake of the police authorities was no doubt made in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.”

[14] Learned counsel also cited in support of the same proposition the cases of **Board of Education v Rice** (1911) AC 179 and **Rex v City of Westminster** (1941)KB 53.

[15] In this case my perusal of the police report, which did not contain serious indictments against the officer, indicated that the PSC must have been affected by the serious allegation in the report of the commission of inquiry to which it referred in its letter in which the appellant was alleged to be guilty of excessive violence, deception and other forms of reckless behaviour. If he was to have a fair hearing, it was necessary for him to know the information on which those charges were based in order to controvert, correct or comment on it. He could not adduce any evidence in rebuttal if he did not see the report or the evidence on which the conclusions were drawn. The failure to provide that information made it impossible for him to have a fair hearing. I think, therefore, that the omission to allow the appellant to have access to the report of the commission of enquiry or the evidence on which its conclusions were drawn, even made in good faith, is such a denial of natural justice as to require the court to set aside the decision of the Commission.

The duty not to pre-judge

[16] In the letter of 26th June 1998 which commenced the process leading to the retirement, the PSC indicated that it was already “satisfied that you should be retired in the public interest”. The appellant was invited to indicate reasons “that could have the effect of altering the contemplation of the Commission”. This could only mean that the decision had already been taken before hearing from the appellant. Such a course is inconsistent with the Regulation 50 under which the commission purported to act. Let us however first examine the Regulation 50(1). This is the provision which requires the PSC to launch and official investigation of the issue. 50(2) specifically states that the police officer under

investigation must be given an opportunity to be heard. The section makes this a pre-requisite to drawing a final conclusion on the desirability of requiring the police officer to retire in the public interest. Even if the argument could have been made that the language did not really mean what it said, the subsequent events of the letter from the appellant's counsel requesting disclosure, immediately followed by the communication of the decision to retire him was conduct which unequivocally denied him any opportunity of being heard before the decision was taken. In my view therefore the Commission did not follow its own procedural regulations in that regard.

- [17] This conduct is also inconsistent with the rules of natural justice. I think that the error is so obvious that it requires nothing more than statement. No one could consider that is fair to take a decision of this nature without giving the appellant an opportunity to be heard.

The duty to give particulars of the charges

- [18] In this case the appellant was left to deduce the charges against him. I think that it is an essential element in any adjudicative process that there is an accurate statement of the charges that are being investigated to enable a reasonable opportunity to answer them. It is obvious that one cannot undertake any steps to protect one's interest in proceedings if it is not known what are the charges that have to be answered.

Conclusion

- [19] In the premises the failure of the respondent
- a. to specify the charges against the appellant,
 - b. to supply the appellant with a copy of the report of the commission of inquiry which contained matters highly prejudicial to him and which had been read by the respondent before it communicated with the appellant, and
 - c. not to prejudge the issue,

amounted to a failure to afford the appellant a reasonable opportunity of being heard and to a denial of natural justice. The court therefore must cause the decision taken in those circumstances to be set aside.

Order

[20] I would therefore order that the judgment of the trial court be set aside and the appellant be at liberty to enter judgment for an order of certiorari quashing the decision of the respondent requiring him to retire from the Police Service in the public interest with costs. I would also order that the appellant have his costs in this court.

DENNIS BYRON
Chief Justice

I Concur

SATROHAN SINGH
Justice of Appeal

I Concur

ALBERT REDHEAD
Justice of Appeal