The Court of Appeal for Bermuda

CIVIL APPEAL No. 5 of 2019

B E T W E E N:

DIRECTOR FOR PUBLIC PROSECUTIONS

Appellant

v

CINDY CLARKE

Respondent

Before: **Kay, JA**
Bell, JA
Smellie, JA

Appearances: Ben Adamson, Conyers Dill & Pearman Ltd., for the Appellant; Mark Pettingill and Victoria Greening, Chancery Legal Ltd., for the Respondent

Date of Hearing: **Wednesday, 19 June 2019**
Date of Judgment: **Friday, 21 June 2019**

JUDGMENT

Disciplinary proceedings – apparent bias – content of requirement of fairness in context – non-delegable duty – doctrine of necessity.

KAY JA:

Introduction

1. In this unfortunate litigation, the opposing parties are the Director of Public Prosecutions and the Deputy Director of Public Prosecutions (hereinafter referred to as "the Director" and "the Deputy"). The dispute relates to the disciplinary proceedings initiated by the Director against the Deputy. The allegations are set out in a Statement of Alleged Disciplinary Offences dated 12

April 2019. They assert gross misconduct. The details are not our concern; this appeal concerns procedural and not substantive matters.

2. The Deputy commenced proceedings in the Supreme Court by way of an application for judicial review of the Director's conduct of the disciplinary proceedings. In part, she based her claim on apparent bias. To that extent, she succeeded in the Supreme Court. On 17 May 2019, Assistant Justice Riihiluoma found that there was apparent bias on the part of the Director, and he remitted the next stage of the disciplinary proceedings to the Permanent Secretary of the Ministry of Legal Affairs ("the Permanent Secretary"). The Director now appeals against that decision.

3. Before turning to the substantive appeal, I must first refer to a hearing which took place in this Court on 3 June 2019, when we considered an application by the Deputy for an Order that the hearings in this Court be subject to anonymisation and *in camera* restrictions. We refused that application and I now provide the reasons for that decision.

Anonymity and Privacy

4. The hearings in the Supreme Court took place under conditions of anonymity and privacy, the judge having acceded to an application for such protection by the Deputy.

5. Open justice is a fundamental principal of the judicial process. It is required, subject to limited derogations, by sections 6(9) and 6(10) of the Bermuda Constitution Order 1968, which provides:

> *" (9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.*

> *(10) Nothing in subsection (9) of this section shall prevent the court from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court—*
>
> > *(a) may be empowered by law so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings…"*

6. These provisions reflect the approach of the common law, namely, that open justice is the rule, but there must be exceptions in circumstances where publicity would itself be productive of injustice.

7. In the Supreme Court the judge explained his decision to depart from open justice in this brief passage. At paragraph 28 of the judgment he says:

> *"[28] Public service disciplinary proceedings are conducted in private. If this matter were to be referred to the Chief of the Civil Service that adjudication would be conducted in private. I do not believe it appropriate to interfere with this privacy regime by making these proceedings or this judgment public. I therefore continue the Anonymity Order made on 18 April 2019."*

8. Perhaps surprisingly, the judge made no reference to *R (on the application on Willford) v Financial Services Authority [2013] EWCA Civ 674*, upon which he had received submissions. In *Willford*, which was also concerned with an application for Judicial Review in the context of disciplinary proceedings, that were taking place in private, Moore-Bick LJ said at para 9:

> *"[9] The question, then, is whether in those circumstances it is strictly necessary in the interests of justice to anonymise and redact our judgments in order*

> *to protect the Respondent's identity. In my view it is not. The redactions proposed by counsel for Mr Willford are extensive and go to the heart of the judgments. The anonymisation is, of course, complete. The principle of open justice requires that the court's judgment should be published in full unless there are overriding grounds for not doing so. Although the FSA disciplinary proceedings were private, once the Respondent stepped outside those proceedings, whether by referring the matter to the Upper Tribunal or by making a claim for judicial review, he brought the matter into the public forum where the principle of open justice applies. That may happen in other contexts. Parties to arbitration proceedings, for example, are entitled to have the confidentiality of those proceedings maintained, but if one party invokes the assistance of the court, perhaps by appeal or by an application to set aside the award, the court will not normally take steps to preserve the confidentiality of the proceedings or their subject matter."*

9. How then does Mr. Pettingill seek to distinguish the present case from the general principle as applied in *Willford*? First, he submits that special considerations arise in a small jurisdiction such as Bermuda. For my part, I do not accept that the size of the country requires the public interest in open justice to be modified. The constitutional provision does not suggest that it does.

10. Secondly, he points to the difference in language between sections 6, 9 and 10 of the Bermuda Constitution, and the corresponding provision in the United Kingdom Human Rights Act 1998. The former permits exclusion where it is *"necessary or expedient in circumstances where publicity would prejudice the interests of justice"*. The Human Rights Act 1998, on the other hand, refers to *"the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"*. I accept that "*necessary or expedient*" are words more permissive that *"strictly necessary"*. However, both formulations are aimed at exceptionality *"where publicity would prejudice the interests of justice"*. In the present case, the interests of justice will not be

prejudiced by open proceedings, even though at least one of the parties will be disadvantaged by them.

11. Thirdly (and he places great emphasis on this), Mr Pettingill submits that the interests of justice in general, will be adversely affected by publicity of a dispute between the Director, who is shortly to take up a position as a Supreme Court Justice, and the Deputy. It is suggested that public confidence in the justice system would be undermined if the public were to learn of this dispute. I reject this submission. It effectively seeks an indulgence for legal practitioners and judges which is not extended to other professions or spheres of operation. This cannot be justified. The Director and the Deputy are both senior wielders of state power, and where a dispute about its exercise is litigated between them, the public have a right to know. The Director accepts this, even though his personal interests would be served by privacy.

12. Fourthly, Mr. Pettingill submits that if this Court upholds the finding of apparent bias, this could lead to further bias in the course of the resumed disciplinary proceedings. I see no reason to fear this.

13. This fifth and final submissions is effectively a rerun of the contention that was roundly rejected in *Willford*, namely that the confidentiality of the internal disciplinary proceedings should be preserved when they are subjected to judicial review. In my judgment, we should follow *Willford* for the reasons stated in the judgment of Moore-Bick LJ. It is for these reasons that we rejected the Deputy's application for privacy in this court.

The Disciplinary Procedure

14. The relevant procedure is set out in the Second Schedule to the Public Service Commission Regulations 2001 ("the Regulations"). It provides:

*"**PROCEDURE FOR HANDLING CASES OF ALLEGED GROSS MISCONDUCT***

1 The Head of Department shall prepare a written statement of the alleged offence and give a copy to the officer in question.

2 The Head of Department shall afford the officer the opportunity to meet him to discuss the allegation and present the officer's side of the matter. A representative of the Director and also, where appropriate, the officer's job supervisor shall be present at any such meeting. The officer may have a trade union representative or a friend present to assist him if he so wishes.

15. The Second Schedule further provides that:

3 After the meeting referred to in paragraph 2, the Head of Department shall—

(a) determine whether the allegation should be dismissed. If he so decides, he shall inform the officer by notice in writing accordingly; or
(b) refer the case to the Head of the Civil Service."

16. In the Supreme Court there was an issue as to who was the head of department in this case. The Deputy contended that it was the Permanent Secretary. However, the judge concluded that it is the Director, and there is no cross appeal in relation to that finding. Thus, the Director has three duties: 1) preparation and service of a written statement of the alleged offence; 2) arrangement of a meeting with the alleged miscreant "to discuss the allegation and present [her] side of the matter"; and 3) determination of whether the allegation should be dismissed or referred to the Head of the Civil Service for a disciplinary hearing. There is an express provision whereby the Head of the Civil Service may delegate any of his functions to his Deputy. I should add that, more recently, the Head of the Civil Service has been re-designated the Head of the Public Service, but I shall continue to refer to him in accordance with the language of the Regulations.

17. It seems to me the purpose of the "dismissal referral" power of the Director is to provide a filter. This has two benefits. So far as the alleged miscreant is concerned, it provides an early opportunity to secure the dismissal of a weak or unsustainable allegation; and so far as the Head of the Civil Service is concerned, he is shielded from having to become involved in the determination of unmeritorious allegations.

What Happened in the Present Case?

18. The relevant procedural history is as follows. On 15 February 2019, the Director wrote a formal letter to the Deputy setting out the background to that date. He stated that he had consulted with the Head of the Civil Service as required to obtain his opinion as to whether such conduct alleged could amount to gross misconduct. On 14 February the Head of the Civil Service replied in the affirmative.

19. On 26 March 2019 Chancery Legal, on behalf of the Deputy, wrote to the Director asking when the matter would be referred to the Permanent Secretary. It seems that at that stage Chancery Legal considered that the Permanent Secretary, and not the Director, was the Head of Department. The Director replied briefly, that he would not be "referring it to someone else".

20. On 12 April 2019, the Director sent to the Deputy a detailed Statement of the Alleged Disciplinary Offences. Chancery Legal wrote to the Director again on 17 April 2019. This time they acknowledged the Director as Head of Department but maintained that, as such, the Director was in "an impossible position…of conducting any formal hearing or determination of merit in relation to the allegations that you have personally made". It was suggested that someone else, for example the Permanent Secretary, should make the initial determination of whether to dismiss the charges or refer them to the Head of the Civil Service for adjudication.

21. On 18 April 2019 there was a meeting attended by the Deputy, accompanied by Mr. Pettingill, and the Director. An HR representative was also present for at least some of the time. The Director intended this to be the meeting prescribed by the Regulations for consideration of dismissal or referral of the charges. The Deputy sought an adjournment to enable her to apply for judicial review; the Director refused. The Deputy handed in a written statement. Later on that same day the Deputy obtained an *ex parte* injunction restraining the Director from taking any further steps in the disciplinary proceeding. Thereafter, the full application came before the Assistant Justice on 13 May 2019, and he handed down the judgment which is now the subject of this appeal on 17 May 2019.

The Judgment Below

22. It is common ground that the test for apparent bias is "whether the relevant circumstances ascertained by the court would lead a fair minded and informed observer to conclude that there was a real possibility that the [decision maker] had been biased". See *Porter and Another v Magill [2001] UKHL 67.*

23. The judge correctly observed that in relation to disciplinary proceedings, it is not always possible to require the same standards of purity that apply in courts and tribunals. See *R v Chief Constable of Merseyside Police ex p Bennion [2001] IRLR 442*, where it was held that the Chief Constable could retain his role in the determination of disciplinary proceedings, even though the police officer who was charged with misconduct was suing the Merseyside Police represented by the Chief Constable in other unrelated proceedings. Hale LJ said:

> *"…that unless he has a personal interest in a particular case which is closer than this, he cannot be regarded as automatically disqualified from his duty to deal with the matter."*

24. In the present case, the judge distinguished *Bennion*. He said this at paragraph 24:

> *[24] In Bennion the court found that the chief constable did not have any involvement or interest in the underlying compliant other than fulfilling his responsibility to maintain the discipline of the force in accordance with the rules. Here, the DPP alleged in the Statement of Alleged Disciplinary Offences that the [Deputy] attempted to defraud him…*
>
> *[25] The reasonable independent observer may well find that there is an appearance of bias because the DPP might want to justify his allegation of fraud practised against him. By way of analogy, if there was a complaint that a member of the department fiddled his travel expenses, I can see no reason why the DPP as HoD should not be able to fulfil his responsibilities under Schedule 2 of the Regulations including deciding whether to refer the complaint to the Head of the Civil Service. If, however, the complaint was that a member of the department stole the DPP's Mont Blanc fountain pen, I believe there would be an appearance of bias that would preclude the DPP as HoD from carrying out the functions under Schedule 2 of the Regulations.*
>
> *[26] Accordingly, I find that there is an appearance of bias."*

As a result of that holding, he proceeded to remit the continued conduct of the disciplinary proceeding to the Permanent Secretary.

The Grounds of Appeal

25. In this Court, Mr. Adamson on behalf of the Director, advances submissions under two headings. On the issues of apparent bias, he challenges the implicit finding that the Director has a personal interest in the disciplinary proceedings, and also submits that the judge misapplied the test prescribed in *Porter* v *Magill.*

26. Secondly, he seeks to invoke the doctrine of necessity, essentially contending that there was no lawful alternative to the Director retaining the decision whether to dismiss or to refer.

1) Apparent Bias

27. I can take Mr. Adamson's point about applying the wrong test briefly. He submits that, having set out the test in *Porter v Magill* correctly, the judge then proceeded to dilute it when he came to apply it. Instead of considering whether a fair-minded and informed observer would conclude that there was a real possibility of bias, he simply satisfied himself that such an observer "may well" find that there was an appearance of bias. For my part, I do not think that this was a material error. The linguistic mutation is unfortunate but I am prepared to accept that the judge was applying the test which he had faithfully set out.

28. The real issue is whether in principle the judge was justified in concluding that the test was satisfied. This turns on his finding that the Director's decision was quasi-judicial and that he had a personal interest in the outcome.

29. The term "quasi-judicial", which used to play a significant part in administrative law, has become less helpful now that public law constraints operate over a much wider range of decision making. This is illustrated by *Regina v Secretary of State for Trade ex parte Perestrello [1981] 1 QB 19*, which concerned the exercise of statutory powers by officers of inspectors appointed by the Secretary of State. Section 109 of the Companies Act 1948 empowered inspectors to act "if they think there was good reason to do so." The issue before Woolf J was the scope of the legal constraints which applied to the inspectors' decision to exercise the power. In concluding that the constraints were less demanding than the full range of demands of natural justice, he said at pages 34-35:

> *"In the case of section 109, to talk of the rules of natural justice is not really helpful. It is much better to…ask*

> *oneself whether in the situation, what is required by the Act requires a degree of fairness. In this particular section, the opening words make it clear that the Board of Trade, before they exercise their powers, must think there is good reason so to do…But although they must think there is good reason so to do, this does not seem to me to be a situation where it would be appropriate to read into the Act the requirement of lack of bias which was enunciated in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 QB 577.*
>
> *When one considers the functions of those officers, it really is wholly inappropriate to talk about them not being regarded as biased if they are performing their functions properly. Take this very case - it is, in my view, almost inevitable that before the powers under section 109 are exercised, the officers concerned, and through his officers, the Secretary of State, must regard the situation as one where there are matters to be investigated. They are acting in a policing role. Their function is to see whether their suspicions are justified by what they find, and that being so, it is wholly inappropriate for the case to be approached in the same way as one would approach a person performing a normal judicial role or quasi-judicial role; a situation where the person is making a determination."*

30. In these circumstances the public law constraints were essentially not to exceed or abuse the discretion, to act *bona fide* and honestly and not to use the discretion for an ulterior purpose. The role of the director at the filter stage in the present case is not on all fours with that of the officers in *Perestrello*, but nor is it a final adjudicatory one. In the case of *Bennion*, *supra*, the role of the Chief Constable was a final adjudicatory one in the disciplinary regime. Nevertheless, the rules of natural justice were ameliorated for operational or organisational reasons. It was said that the Chief Constable "always has an interest…in the outcome of every act of disciplinary proceedings brought against one of his officers", per Judge LJ paragraph 44. This is because, per Hale LJ at paragraph 50, "he is personally responsible for the good order and discipline of his force".

Accordingly, he is only disqualified in the event of a more pronounced personal interest in the outcome.

31. It seems that the judge had all this well in mind. The more controversial question is whether he was right to find in the present case that the Director did have a more pronounced personal interest in the outcome. He came to the conclusion that he did, because he considered the disciplinary charges, or at least one of them, alleged that the Deputy had actually deceived the Director.

32. In the Statement of Alleged Disciplinary Offences dated 12 April 2019, the Director wrote of one of them "I am concerned that you fraudulently and dishonestly created the third nolle and gave it to me, probably to create an impression on me" [emphasis added] that you drafted and filed it on 12 January 2018."

33. Mr. Adamson submits that the judge was wrong to characterise this as "a fraud practised on the Director" giving rise to a more pronounced personal interest in the outcome of the proceedings. In my judgment, there is force in this submission. It is important to keep in mind that this is not a case in which it is now said that the Director was motivated by bad faith, or acted pursuant to an ulterior motive. He was the person with the responsibility for maintaining the integrity of his department. He had an important constitutional role. It seems to me that his interest is more properly described as institutional, organisational or professional, rather than personal, even though in relation to one of the charges he has alleged an intention to deceive him. Any such deception, if proved, would be of the Director in capacity as head of department, not in his personal capacity. To this extent, I consider the judge's "stolen pen" analogy to be inappropriate. Accordingly, I consider that the requirements of fairness, which apply to the Director at the filter stage, were more akin to the ones which applied in *Perestrello*, and that apparent bias was not an issue. I should record

that at one point in his submissions, Mr. Pettingill, somewhat unexpectedly, appeared to concede that the Director's interest is not "a personal one".

34. When one stands back and surveys the situation at the filter stage, what do we see? Plainly the Director had considered there to be a prima facie case against the Deputy at the earlier charging stage. However, at the filter stage he would have more material, in particular that which the Deputy and her attorney chose to place before him, before consideration of whether to dismiss or refer the decision. I do not accept that we should fear that an experienced Director of Public Prosecutions would not act conscientiously at that stage. Moreover, we must still keep in mind the context of the filter; it is not a final adjudication. If the Director decides to refer the matter to the Head of the Civil Service there will, we must assume, be a fair procedure leading to an independent adjudication. Having regard to all these circumstances, I consider that the judge was wrong to find this to be an apparent bias case applying the test in *Porter v Magil*.

2) Necessity

35. In view of my conclusion on apparent bias, it is not strictly necessary to address Mr. Adamson's alternative submission based on the doctrine of necessity. The principle is set out in *Wade and Forsyth Administrative Law, 11th Edition at pages 395-396:*

> *"In most of the cases so far mentioned the disqualified adjudicator could be dispensed with or replaced by someone to whom the objection did not apply. But there are many cases when no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity; for otherwise there is no means of deciding and the machinery of justice or administration will break down."*

36. Mr. Adamson submits that the Director's statutory duty to conduct the filter stage is non-delegable, and that there is simply no alternative to his conducting

it. We were taken through the provisions of the Constitution, the Public Service Commission Regulations 2001 and the Public Service (Delegation of Powers) Regulations 2001. I shall not set them all out; it is apparent that there are specific and more general provisions permitting delegation by appropriate persons in terms which may suggest that absent such a provision a power is non-delegable. It seems to me that this is the case in relation to the role of the Director in disciplinary proceedings. There are very good reasons why this should be so. The maintenance of integrity and good order of the department is his sole responsibility. Also, it should be kept in mind that we are concerned only with the filter stage and not the final adjudication.

37. At one point I was concerned that a submission by Mr. Pettingill, based on section 27 of the Interpretation Act 1951, might be an effective answer to Mr. Adamson's necessity submission. Section 27(1) provides:

> ***"Powers to delegate functions***
> *27 (1) Where by any provision of law any function is vested in the Governor, Minister or other public authority, the Governor, Minister or other public authority, as the case may be, may, unless expressly prohibited from so doing, by notice published in the Gazette, depute any public officer by name or the person for the time being holding any public office, to exercise such function on his or its behalf, subject to such conditions, exceptions and qualifications as the Governor, the Minister or public authority in whom the function is vested may prescribe, and thereupon or from a date specified in the notice, the person so designated shall exercise such function vested in him or it subject as aforesaid…"*

38. However, on close analysis this provision is not as all-embracing as Mr. Pettingill would have it. When one looks at the definition of "public authority" and "public officer" in section 3 of the 1951 Act, it becomes apparent that the Director is an example of the latter rather than of the former. Because the necessity issue does not strictly arise in the light of my conclusion on apparent bias, I have dealt with it somewhat briefly, but I hope sufficiently to show that if I were wrong about

apparent bias, the appeal would have failed in any event because the duty of the Director at the filter stage is non-delegable and in those circumstances it would still be for him to make the decision to dismiss or to refer the charges.

39. Mr. Pettingill sought to circumvent this analysis by placing reliance on a previous case in which the previous Director of Public Prosecutions had referred a case of alleged gross misconduct to the Permanent Secretary at the filter stage – the solution favoured by the judge in the present case. However, the mere fact that something has done before does not mean that it was or would now be lawful. In any event, it seems to me that the previous case was somewhat different from the present case.

Conclusion

40. It follows from what I have said that I would allow the Director's appeal on the basis that on the reasons I have said out he was legally justified in retaining the dismiss or refer decision for himself. Accordingly, I would discharge the injunction which has restrained him from making that decision, whatever it may turn out to be. It is a matter for him to consider whether the meeting on 18 April 2019, which took place in suboptimal circumstances, was sufficient for the purposes envisaged by the second schedule of the Regulations. In any event, I hope that in the interests of both parties the disciplinary process can be completed without undue delay.

BELL JA:

41. I agree, and would just wish to add the following. For my part, I am concerned at the appearance of bias (not, I stress, actual bias) which pertains by reason of the Director's role as complainant and arbiter of the threshold test or filter prescribed by section 3(a) of the Second Schedule of the Regulations.

42. But, I am persuaded that even if apparent bias were to be established, the doctrine of necessity would apply, by reason of the Director's powers being non-

delegable. I entirely understand why, in the circumstances of this case, the Director took the view that he should not withdraw before the threshold test was undertaken, since in my view, he did not have a personal interest, but rather a professional responsibility to proceed in accordance with the Regulations.

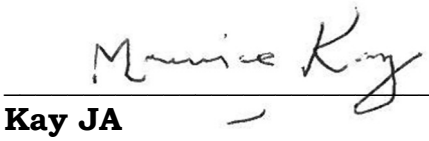
43. I too, would therefore allow the appeal.

SMELLIE JA:

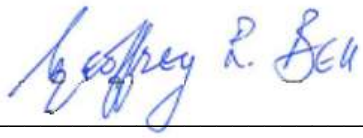
44. I also agree that the appeal should be allowed for the reasons given by my Lord Kay and would add the following brief comments.

45. In relation to concerns of apparent bias, I am particularly mindful that the *Porter v Magill* test would require the matter to be seen through the eyes of a fair-minded and informed observer. Thus, it would be understood that, in carrying out his function in the particular circumstances of this case, for the purposes of the disciplinary process, the Director also had to consider matters which only he could consider, having regard to the nature of his independent constitutional remit.

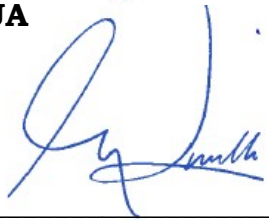
46. With that consideration also especially in mind, I do not consider that it could reasonably be thought, that by deciding to continue in the process for the purposes only of the initial determination, the Director exhibited apparent bias. This consideration would also in my view indicate the applicability of the doctrine of necessity.



Kay JA



Bell JA



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