



Michaelmas Term

[2018] UKPC 32

Privy Council Appeal No 0093 of 2015

JUDGMENT

Long (Appellant) v Police Service Commission (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Kerr

Lord Sumption

Lord Hodge

Lord Lloyd-Jones

Lady Arden

JUDGMENT GIVEN ON

3 December 2018

Heard on 1 November 2018

Appellant

Peter Knox QC

Anand Ramlogan SC

Phillip Patterson

(Instructed by Alvin Shiva Pariasingh)

Respondent

James Guthrie QC

Navjot Atwal

(Instructed by Charles Russell Speechlys LLP)

LORD SUMPTION:

1.

The respondent, the Police Service Commission of Trinidad and Tobago, was responsible under section 123 of the Constitution of 1976 for (among other things) the removal of police officers from the service and the exercise of disciplinary control over them. The appellant, Levelle Long, was an officer in the Trinidad and Tobago Police Service. In September 2007, the Commission required him to retire “in the public interest” under Regulation 50 of the Police Service Commission Regulations 1966. This appeal arises out of Mr Long’s application for the judicial review of that decision. A large number of complaints are made about the competence of the Commission to make the decision, having regard to the transfer of its functions to the Commissioner of Police with effect from 1 January 2007, and

about the fairness of the procedure by which the decision was reached. There is, however, a threshold issue of wider significance. Section 129(4) of the Constitution provides:

“No penalty may be imposed on any public officer except as a result of disciplinary proceedings.”

It is common ground that Mr Long’s compulsory retirement was not the result of disciplinary proceedings. The threshold issue is whether it was a “penalty”. If it was, then it was unconstitutional and cannot stand, whatever the answer to the other questions before the Board.

2.

The chain of events which led to Mr Long being required to retire began with an incident at Trincity Mall on 29 April 2005, in which he is said to have been involved. This resulted in his being arrested on 11 May 2005 and charged, together with three other men, with kidnapping. As a result, on 13 May 2005, he was suspended from duty. On 19 August 2005, he was given notice that the Commission proposed to interdict him from duty on half-pay under Regulation 80 of the Police Service Commission Regulations, on the ground that criminal proceedings had been instituted against him. However, when those proceedings came before the Magistrate, on 1 November 2006, the prosecutor reported that the complainant could not be found, two of Mr Long’s co-accused had died, no witnesses were available and the file had been mislaid. The charges were therefore dismissed for want of evidence.

3.

At the relevant time, disciplinary proceedings against police officers were governed by Chapter VIII of the Police Service Commission Regulations 1966 as amended by the Police Service Commission (Amendment) Regulations 1990 and the Police Service Commission (Amendment) (No. 2) Regulations 1966. These were subsequently replaced, with effect from 6 August 2007, by the Police Service Regulations 2007. The Commission acted throughout under the 1966 Regulations (as amended), and for present purposes the Board will assume, without deciding, that they were entitled to do so. Those regulations set out a detailed procedure leading to a hearing before an internal tribunal, at which the officer charged may call witnesses to give evidence in person and cross-examine any witnesses called to give evidence against him. Regulation 95 provided that the applicable standard of proof was the balance of probabilities, and that the tribunal would not be bound by the rules of evidence. The tribunal was required to report its findings to the Police Service Commission which was then to determine the “penalty” to be imposed. Regulation 104 defined the available penalties. They include dismissal, demotion, loss of earnings, a fine or a reprimand. Substantially similar procedures applied under the 2007 Regulations.

4.

On 28 November 2006, four weeks after the dismissal of the criminal charges, disciplinary proceedings were initiated against Mr Long by the appointment of an investigating officer under Regulation 84. A notice to this effect was sent to him under the heading “kidnapping”. This recorded that the investigating officer was “to enquire into the allegation which resulted in you being charged for the above-mentioned offence.” Particulars of the allegation were subsequently served upon him, which referred to the incident at Trincity Mall. Mr Long responded that the charges against him had been dismissed. No further steps appear to have been taken to prosecute the disciplinary proceedings. Instead, it was decided to require Mr Long to take early retirement.

5.

Chapter VI of the Police Service Commission Regulations dealt with the resignation, retirement and termination of appointment of police officers. Regulation 46 provided that in the case of a police officer such as Mr Long holding a permanent appointment, his services could be terminated only “on

dismissal or removal in consequence of disciplinary proceedings", by compulsory retirement at the age of 60 or voluntary retirement earlier, by retirement for medical reasons, by resignation without financial benefits, on the abolition of the office, or "on being retired in the public interest." Separate provision is then made for each of these modes of termination. It will be apparent that termination in consequence of disciplinary proceedings and on being retired in the public interest are distinct modes of termination governed by distinct rules governing the circumstances in which they may be imposed and the procedure to be followed.

6.

Provision is made for retirement in the public interest in Regulation 50. This is part of Chapter VI dealing with termination, and not of Chapter VIII regulating disciplinary proceedings. It is in the following terms:

"(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 it shall call for a full report on the police officer from the Commissioner and may 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.

...

(3) If, after considering such report and such record and giving the police officer an opportunity to submit 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 so to do, it shall require the police officer to retire on such date as the Commission shall determine, and he shall be retired accordingly."

7.

At some stage, the Commission called for a report from the Commissioner of Police. On 1 June 2007, the Commissioner reported in the following terms (so far as relevant):

"During the period January 2001 to May 2005 he took a total of One Hundred and Twenty-eight (128) days sick leave for various minor medical complaints, which at times brought undue hardship on his colleagues, which resulted in his output being insufficient and caused him to be unreliable.

Constable LONG was described by his colleagues as being difficult to get along with and never willing to take on responsibilities. Constable LONG'S judgment was at times very erratic and he exhibited little or no interest in his job.

It was of no surprise when on May 11 2005 he was placed before the Court on a charge of kidnapping. It must be noted that although he was discharged of the charge on November 1, 2006, by her worship Ms QUINTYNE at the Arima Magistrate's Court the circumstances under which this matter was determined was very questionable."

The Commission considered this report and wrote to Mr Long on 8 June 2007 notifying him that it had decided to retire him in the public interest, subject to any representations which he might make within 14 days. The only ground given in this notice was that:

"The Commission has noted you were charged with the offence of kidnapping in May 2005."

No representations having been received, the Commission decided on 13 September 2007 to require Mr Long to retire. Although representations were received from Mr Long's attorneys a few days later and just before the decision was notified to him, the Commission considered them to have arrived too late and declined to take them into account.

8.

Mr Long's application for judicial review was dismissed by both courts below. Bereaux J, who heard the application in the High Court, dealt very briefly with the constitutional issue. He held that section 129(4) of the Constitution had no application because compulsory retirement in the public interest under regulation 50 and dismissal following disciplinary proceedings were distinct modes of termination based on different criteria and governed by distinct procedures. In his view only dismissal following disciplinary proceedings could be described as a "penalty". When the case came before the Court of Appeal (Jamadar, Smith and Rajnauth-Lee JJA) the point did not feature in the Appellant's Skeleton Argument and may not have been taken. At any rate, it was ignored by the court.

9.

Section 129(4) applies to all public officers. It is part of Chapter 9 of the Constitution, which is designed to secure the political independence of the public service, and to insulate it from political pressures. In *Endell Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113, 123-124, Lord Diplock said of the corresponding provisions of the 1962 Constitution:

"Under a party system of government such as exists in Trinidad and Tobago and was expected to exist after independence in other Commonwealth countries whose constitutions followed the Westminster model, dismissal at pleasure would make it possible to operate what in the United States at one time became known as the 'spoils' system upon a change of government, and would even enable a government, composed of the leaders of the political party that happened to be in power, to dismiss all members of the public service who were not members of the ruling party and prepared to treat the proper performance of their public duties as subordinate to the furtherance of that party's political aims. In the case of an armed police force with the potentiality for harassment that such a force possesses, the power of summary dismissal opens up the prospect of converting it into what in effect might function as a private army of the political party that had obtained a majority of the seats in Parliament at the last election ...

The whole purpose of chapter VIII of the Constitution which bears the rubric 'The Public Service' is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day."

10.

In the Board's opinion the reasoning of Bereaux J cannot be supported. The compulsory termination of a public officer's service against his will is a dismissal, by whatever name it may be called. As Lord Diplock went on to observe in *Thomas* (p 126), speaking of a reference in the 1962 Constitution to "removing" a police officer, it

"embraces every means by which a police officer's contract of employment (not being a contract for a specific period) is terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early retirement."

Section 129(4) of the 1976 Constitution precludes the imposition of any "penalty" on a public officer otherwise than as a result of disciplinary proceedings. As the judge pointed out, dismissal is one of the penalties that may be imposed as a result of disciplinary proceedings. But section 129(4) assumes that

something which would constitute a penalty if it were imposed on a police officer as a result of disciplinary proceedings might, apart from this provision, be imposed on him by some other process. The whole purpose of the provision is to prohibit its imposition by another process. If, as Bereaux J seems to have thought, a “penalty” is something that conceptually cannot be imposed otherwise than as a result of disciplinary proceedings, then section 129(4) is a meaningless tautology. For that reason, the Board considers it to be necessary, first, to answer the question what constitutes a “penalty” for the purpose of section 129(4), and then to enquire whether what happened to Mr Long qualified as one, irrespective of the procedure by which it was imposed.

11.

In *SA Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] QB 279, 299, Lord Denning MR defined a penalty as “a sum payable to the state by way of punishment.” In *Power v Provincial Insurance plc* [1998] RTR 60, 73, Mummery LJ observed that “as a matter of ordinary English a ‘penalty’ is a punishment for breaking the law.” It is, however, a protean term which is necessarily sensitive to its statutory context. No authority has been cited for its meaning in a context comparable to this one, nor is the Board aware of any. In the Board’s opinion, a “penalty” in the context of section 129(4) of the Constitution means an adverse consequence imposed by a relevant authority on a public officer on account of his or her misconduct. By misconduct, the Board means an act or omission constituting a breach of a disciplinary code binding on the officer in question. Dismissal, whether by way of compulsory retirement or otherwise, is clearly an adverse consequence that is capable of being a penalty. If it is imposed on account of the officer’s breach of a disciplinary code binding on him (as opposed, for example, to mere incompetence or incapacity to perform his or her duties), the Board considers that it is a penalty and cannot be imposed except as a result of disciplinary proceedings. A constitutional right such as that conferred on public officers by section 129(4) cannot be circumvented by relying on disciplinary infractions in support of dismissal by a non-disciplinary process.

12.

The practical importance of maintaining this principle will be apparent from the significant procedural differences between dismissal under regulation 104 following disciplinary proceedings and early retirement under regulation 50. The draftsman of section 129(4) can be assumed to have envisaged that disciplinary proceedings would be governed by procedural rules designed both to safeguard the independence of public officers and to ensure that fair procedures were followed, even if he did not envisage the precise content of the rules. Under the 1966 Regulations (as amended) a police officer facing a disciplinary charge was entitled to a hearing before a fact-finding tribunal, to be represented, to cross-examine adverse witnesses by his representative, to call for a formal exoneration and to lead evidence in support of his case. In deciding whether to require an officer to retire under regulation 50, the Commission is bound to act fairly, but that will not necessarily import all of the formal requirements governing the service of notices and the provision of information required by the Regulations in disciplinary proceedings. Nor does it necessarily imply a right in the officer to a hearing or to the deployment of evidence. Mr Long had none of these advantages

13.

It was urged on the Board on behalf of the Commission that it must be open to them to require an officer to retire in the public interest, because the nature of the allegations made against him made it undesirable that he should continue in post and there was no other way of removing him consistently with regulation 46. Disciplinary proceedings, it was said, were not a practical proposition because there was no evidence to prove the charge of kidnapping. Far from being a consideration favouring

their case, this appears to the Board to undermine it. The mere fact that proof to an exacting standard is required before an officer is dismissed as a result of disciplinary proceedings, cannot justify the Commission in the face of section 129(4) in bringing about the identical result by an administrative process in which no such safeguard applies.

14.

The Board has been referred to a number of decisions of the courts of other jurisdictions in which public officers were held to have been lawfully required to retire in the public interest on the ground of misconduct, in circumstances where there had been no disciplinary proceedings, or disciplinary proceedings had not been concluded: see *In re Pratt* (unreported) 12 February 1988 [Supreme Court of the Bahamas, Common Law Side, No 1192 of 1987]; *Mullings v Police Service Commission* (unreported) 23 February 2009 [Court of Appeal of Jamaica, Civil Appeal No 18/2007], *Police Service Commission v O'Connor* [2014] 2014 JMCA Civ 35] (Court of Appeal of Jamaica). In none of these cases, however, was any constitutional or legislative provision relied upon corresponding to section 129(4) of the Constitution of Trinidad and Tobago. All of them turned on the principle that early retirement in the public interest could be required only for cause and after a fair procedure. The Board readily accepts that in principle if these limitations and any relevant statutory conditions are observed, it would be open to the relevant authorities to require a public officer to retire on account of his or her misconduct without disciplinary proceedings, were it not for section 129(4). But that provision rules out such an approach in Trinidad and Tobago.

15.

In those circumstances, the only remaining question is whether Mr Long's alleged involvement in the Trincity Mall incident was in fact a material factor in the decision to require him to retire. The information on which the Commission acted was the report of the Commissioner of Police of 1 June 2007. It is clear from that report that the Trincity Mall incident was not necessarily the only relevant factor in the eyes of the Commissioner of Police. It was, however, the only factor referred to by the Commission in the provisional notice sent to Mr Long in the light of that report on 8 June 2007. In the Board's judgment, the fact that he may have been involved in kidnapping was at least a material part of the reasons for his dismissal. Indeed, Mr Guthrie QC, who appeared for the Commission, did not suggest otherwise. In those circumstances, before he was required to retire Mr Long had a constitutional right to the opportunity which disciplinary proceedings would have afforded to require the allegation to be substantiated by evidence and to call for his exoneration. The procedure adopted denied him that right.

16.

The Board will accordingly allow the appeal and set aside the decision of the Commission to require Mr Long to retire in the public interest.