1963 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

L. KULATUNGE, Petitioner, *and* THE BOARD OF DIRECTORS OF THE CO-OPERATIVE WHOLESALE ESTABLISHMENT and another, Respondents

S. C. 326/63—Application for a Mandate in the nature of a Writ of Certiorari under Section 42 of the Courts Ordinance

Certiorari—*Employer and employee—Appointments and dismissals—Dismissal of persons holding office at pleasure—Employee of a statutory body—Right of employer to terminate an employee's service without holding an inquiry—Natural justice—Principle of* audi alteram partem—*Co-operative Wholesale Establishment Act (Cap. 126), s. 11—Interpretation Ordinance, s. 14 (f).*

Where a statutory body is merely given a power to dismiss a member of its staff, without any specification of the grounds of dismissal and/or of the procedure to be followed prior to dismissal, that body is not bound to act judicially in reaching its decision. In such a case, therefore, the dismissed employee is debarred from obtaining a writ of *Certiorari.*

"The principle *audi alteram partem* must be observed in cases of dismissal only where the power of dismissal is limited in one of two modes, that is to say, where the procedure prior to the act of dismissal is prescribed and requires notice of the charges and an inquiry, or where the grounds for dismissal are specified. In this latter instance, the dismissing authority must, before deciding that a specified ground of dismissal in fact exists, consider what the officer concerned has to say in his defence ; in other words, the duty to act in a judicial manner arises by implication from the specification of the grounds for dismissal."

On the 21st March, 1963, the petitioner was appointed to the staff of the Co-operative Wholesale Establishment in terms of section 11 of Act No. 47 of 1949 (Cap. 126). The letter of appointment issued to him provided that his employment would be terminable on one month's notice on either side or on payment of a month's salary in lieu of notice. On the 22nd June, 1963, the Board of Directors of the establishment terminated his employment stating that it was not possible to continue him in service because he had been found guilty by the Bribery Commission which made its report in June, 1949. In the present application for a writ of *certiorari* to quash the order of dismissal the petitioner submitted that the Board acted in breach of the rules of Natural Justice in that the Board did not afford to the petitioner an opportunity of defending himself or of showing cause against his dismissal.

Held, that the Board, in the absence of any express provision in the statute (Cap. 126) specifying either the grounds of dismissal or the procedure to be followed prior to a decision to dismiss, had no duty to inform the petitioner of the grounds of his dismissal or to give the petitioner an opportunity of being heard, or to act judicially in reaching its decision.

2——B 19343— 1,855(7/64)

APPLICATION for a writ of *certiorari* against the Board of Directors and General Manager of the Co-operative Wholesale Establishment.

M. Tiruchelvam, Q.C., with *B. J. Fernando*, for the Petitioner.

H. L. de Silva, Crown Counsel, for the Respondents.

Cur. adv. vult.

December 2, 1963. H. N. G. FERNANDO, J.—

The Petitioner was on 21st March 1963, appointed to the staff of the Co-operative Wholesale Establishment constituted under Act No. 47 of 1949 (Cap. 126). On the 22nd June 1963, the Board of Directors of the Establishment wrote to the Petitioner informing him that his appointment (as Security Officer in the Establishment) is terminated with effect from the same date. In this letter, the Petitioner was informed that it was not possible to continue him in service because he had been found guilty by the Bribery Commission, meaning thereby the Keuneman Bribery Commission which made its Report in June 1949.

The present application is for a mandate in the nature of a Writ of Certiorari quashing the order of 25th June terminating the Petitioner's employment. In asking for this order the Petitioner submits inter alia, that the Board of Directors of the C. W. E. was aware before they appointed him in March 1963 of his previous history and also that the order of dismissal was not made bona fide by the Board, but was dictated by directions given by the Minister of Agriculture, Food & Co-operatives upon representations made to the latter by a Member of Parliament. The legal ground of the petition is that the Board acted in breach of the rules of Natural Justice in that the Board did not afford to the Petitioner an opportunity of defending himself or of showing cause against his dismissal. The Board does not now aver that such an opportunity was in fact afforded to the Petitioner.

At the argument, Counsel for the Petitioner relied heavily on the recent decision in the case of *Linus Silva v. University Council of the Vidyodaya University et al.*[1] Section 18 of the Vidyodaya University and the Vidyalankara University Act No. 45 of 1958 empowered the Council of each University, " to suspend or 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, *render him unfit* to be an officer or teacher of the University. "

T. S. Fernando J., in considering the question whether the Council is required to act judicially, pointed out that, " that question must ultimately rest on the construction of the relevant words of the Statute ". For present purposes it is sufficient for me to observe that he refers to

[1] *(1961) 64 N. L. R. 104.*

several English and Ceylon decisions upon statutes, the language of which require certain facts to be established before the statutory authority may make administrative orders, and he held that when the University Council is given the power of dismissal of a teacher " on the grounds of incapacity or conduct which renders him unfit " that power can be exercised only where incapacity or misconduct exists, whatever be the extent of that incapacity or misconduct. " Although " he said, " the Council is the judge of the extent of the incapacity or misconduct, in deciding whether incapacity or misconduct exists, the Council is required to act not administratively but judicially ". The decision is not authority for the proposition that in a case where a statutory body is merely given a power to dismiss, without any specification of the grounds of dismissal and/or of the procedure to be followed prior to dismissal, the body would be bound to act judicially in reaching its decision. And that precisely is the situation in the present case. So far as Cap. 126 affects the Petitioner the only provision in the Act is that in Section 11 :—" Every appointment to the staff of the Board shall be made by the Board. " There is no provision as to dismissal of a person in the position of the Petitioner, and if any statutory provision does apply it is to be found in the Interpretation Ordinance (section 14 (f)) which declares that the power to appoint shall include the power to dismiss. The letter of appointment issued to the Petitioner provides that his employment will be terminable on one month's notice on either side or on payment of a month's salary in lieu of notice. The letter of termination was in conformity with this condition.

In my opinion the mere fact that a person is an employee of a statutory body does not *per se* have the consequence that his employment will be governed by conditions different from those which obtain in an ordinary contract of employment between master and servant, or that as a condition precedent to his dismissal the employer will be held by the Courts to be bound to follow any procedure involving the holding of an inquiry or the opportunity to the employee to be heard. As I read it, the judgment in the case of *Linus Silva v. University Council of the Vidyodaya University* decided only that when the statute specifies the grounds of dismissal, the employing authority had the duty to act judicially, i.e. with observance of the principles of Natural Justice, in reaching its decision that the grounds are established in a particular case.

The principles of the English law on this matter have been much clarified in a recent decision of the House of Lords in the case of *Ridge v. Baldwin*[1].

That case concerned the dismissal from office of a Chief Constable by a watch committee which had power by statute to "dismiss any borough Constable whom they think negligent in the discharge of his duty or otherwise unfit for the same ". The judgment of Lord Reid is of great interest because of the analysis which it contains of the different

[1] *(1963) 2 A. E. R. 66.*

classes of cases in which the principle *audi alteram partem* has been applied. The first class dealt with are cases of dismissal and this class is shown to have 3 subdivisions :—

(1) The pure case of master and servant, where (in the words of Lord Reid) the contract can be terminated " at any time and for any reason or for none ", and where the only remedy would be damages for breach of contract if there is termination not warranted by the contract. In such cases there is no question of a need to hear the servant in his defence, and the principle *audi alteram partem* does not apply.

(2) The case of an office held at pleasure in which it has always been held that such an officer has no right to be heard before he is dismissed, this because the person having power of dismissal is not bound to disclose his reasons.

(3) The case of dismissal from an office where there must be something against a man to warrant his dismissal. It is in this case that the principle of *audi alteram partem* applies.

In considering the third category mentioned above, Lord Reid examines a series of decisions concerning dismissal.

Ex parte Ramshay [1] was one in which the Lord Chancellor was empowered by statute to dismiss a County Court Judge " if he should think fit to remove on the ground of inability or misbehaviour " and it was held that this power of removal " was only on the implied condition prescribed by the principles of eternal justice ".

In *Osgood v. Nelson* [2], there was statutory power for the Corporation of the City of London to dismiss the clerk to the Sheriff's Court " in case of inability or misbehaviour or for any other cause which may appear reasonable". It was held that there arose a duty before exercising the power of dismissal to give the officer an opportunity of knowing the charges and of the evidence in support of them and of producing such evidence as he desired to produce.

Lord Reid refers also to the case of *Fisher v. Jackson* [3] where the power to remove the master of an endowed school depended on inefficiency or failing to set a good example, and where it was held that he must first be afforded an opportunity of being heard.

In *Ridge v. Baldwin*, Lord Morris was also of the opinion (at page 107) that if the Police authority in the exercise of powers given them by the statute contemplated dismissing the appellant on the ground of neglect of duty, they would have been under obligation to give him an opportunity to be heard and would have had to consider anything he had to say :—" I cannot think that the dismissal of the appellant

[1] *(1852) 18 Q. B. 173.* [2] *(1872) 5. H. L. 636.*

[3] *(1891) 2 Chancery D. 84.*

can be regarded as an executive or administrative act if based on neglect of duty : *before it has been decided that there has been neglect of duty it is prerequisite that the question should be considered in a judicial spirit.* In order to give the appellant an opportunity to defend himself against a charge of neglect of duty he would have to be told what the alleged neglect of duty was." These several references to " Neglect of duty ", which is the ground for dismissal specified in the statute, satisfy me that the need for hearing the appellant arose because the ground for dismissal was specified in the statute. Lord Hodson (at page 114) expressed himself to the same effect :—" The matter which to my mind is relevant in this case, is that where the power to be exercised involves a charge against the person to be dismissed, by that I mean a charge of misconduct, the principles of Natural Justice have to be observed before the power is exercised." I should add that the decision in *Ridge v. Baldwin* is based also on certain regulations made under the Police Act of 1919 which require a special procedure (which involved an inquiry) to be followed before the dismissal of Police Officers, and that one ground for holding in favour of the dismissed Chief Constable was the fact that the prescribed procedure was not followed.

It seems perfectly clear from the judgment in *Ridge v. Baldwin* and from the cases relied upon by Lord Reid in particular, that the principle *audi alteram partem* must be observed in cases of dismissal only where the power of dismissal is limited in one of two modes, that is to say, where the procedure prior to the act of dismissal is prescribed and requires notice of the charges and an inquiry, or where the grounds for dismissal are specified. In this latter instance, the dismissing authority must, before deciding that a specified ground of dismissal in fact exists, consider what the officer concerned has to say in his defence ; in other words, the duty to act in a judicial manner arises by implication from the specification of the grounds for dismissal.

Neither of the two modes of limitation just mentioned are specified in the Statute now under consideration (Cap. 126), and hence the present case does not fall within the third sub-division of cases of dismissal in regard to which the principle *audi alteram partem* applies. It may well be that we have here the simple case of master and servant and not one of an " officer ". But even if the petitioner, by virtue of his appointment under a statutory power, can claim to hold an " office", his case falls within the second sub-division mentioned by Lord Reid in which category of cases the principle does not apply. " I entirely accept the reasoning of the Lords Justices (the Court of Appeal) that if a statute gives an unfettered right to dismiss at pleasure without more, there is an end of the matter " (Lord Hodson in *Ridge v. Baldwin* at p. 112). For reasons which I am about to state, the Board of the C. W. E. had at the least the right to dismiss the petitioner by virtue of provision in section 14 (*f*) of the Interpretation Ordinance, and that provision gave the Board an unfettered right to dismiss.

In dealing with the class of cases relating to the removal of persons holding office at pleasure, Lord Reid refers not only to decisions affecting Public Officers who in English Law held office "during pleasure" in the strict and well understood sense of that expression. He mentions also the case of *R. v. Governors of Darlington School* [1] as a leading case on the matter. In that case the Charter of a school empowered the governors of the school, *according to their sound discretion*, to remove a master appointed to the school. It was held both in the Queen's Bench and in the Exchequer Chamber on appeal that the discretion to remove can be exercised without summons or hearing and although no charge is exhibited. Both Courts went even further than this; for they held that by-laws made by the governors, which provided for a charge to be framed and furnished before removal, were void as being contrary to the discretion conferred by the Charter. It will be seen therefore that in the view of Lord Reid a provision which confers a power of removal *simpliciter*, and does not prescribe either grounds for removal or the procedure to be followed, is regarded as being equivalent to the power to remove from an office held at pleasure. With much respect, I cannot think of any consideration which is in reason opposed to this view.

Counsel for the petitioner has argued that the act of dismissal is one which affects the rights of a subject, and that the Board had therefore a duty to act judicially in deciding to dismiss him. I think the true answer to this argument is stated by Lord Reid in the same judgment, when (at p. 73) he points out that the cases of decisions which adversely affect property rights and privileges are cases dealing with a different subject-matter from those of dismissal, and when (at p. 74) he refers to yet another distinct class of cases—those dealing with deprivation of membership of a professional or social body. The distinction thus drawn should be of great assistance, particularly in view of the modern trend to establish statutory institutions for the conduct of commercial activities. It is unreasonable to suppose that the Legislature, merely because it by Statute provides (perhaps otiosely) for the appointment of officers to such institutions, intends that such an officer should be accorded by the Courts a greater measure of protection in his employment than a person employed in a similar capacity by a private employer, or than a public officer holding high office in the State. There is on the other hand little or no resemblance between the decision of the Board of the C.W.E. to dismiss the petitioner from his office or employment, and dicisions or orders for the demolition of private buildings (*Cooper v. Wordsworth Board of Works* [2]), or for the prevention of erection of buildings on private property within building lines (*Spackmor v. Plumstead Board of Works* [3]) or for the denial of the right to practice on the Stock Exchange (*Weinberger v. Inglish* [4]) or for the deprivation of a right to a pension (1906 A.C. 535), or for the cancellation of the registration of a medical practitioner (*General Medical Council v. Spackman* [5]) or for the compulsory taking over

[1] *(1844) 6 Q. B. 682.*
[2] *18 C. B. N. S. 180.*
[3] *1885 10 A. C. 229.*
[4] *(1919) A. C. 606*
[5] *(1943) A. C. 62*

of a private school (*Vadamaradchy Hindu Educational Society v. The Minister of Education* [1]). The fact that the present petitioner was employed by the C. W. E., albeit that he was "appointed" by the Board, did not in my opinion clothe him with any property right or with any privilege, whether professional or social, of which a subject may not be deprived except by a determination reached in a judicial manner.

I hold that the Board, in the absence of any express provision in the Statute (Cap. 126) specifying either the grounds of dismissal or the procedure to be followed prior to a decision to dismiss, had no duty to inform the petitioner of the grounds of his dismissal or to give the petitioner an opportunity of being heard, or to act judicially in reaching its decision.

The application is dismissed, with costs fixed at Rs. 250/-.

SANSONI, J.—I agree.

Application dismissed.