1976 *Present :* **Thamotheram, J., Wanasundera, J., and Colin-Thome, J.**

THE CEYLON CO-OPERATIVE EMPLOYEES FEDERATION, Petitioner, *and* THE CO-OPERATIVE EMPLOYEES COMMISSION, Respondent

S. C. Application 222/76—In the matter of an Application for a mandate in the nature of a Writ of Certiorari

Certiorari—Dismissal governed by legislative provisions—Right of appeal to a quasi-judicial tribunal—Does right to a hearing include an oral hearing—Co-operative Employees Commission Act No. 12 of 1972.

W, an employee of a Multi-purpose Co-operative Society was dismissed from service, after an inquiry, on grounds of misconduct. He appealed to the Co-operative Employees Commission in terms of regulations made under Section 23 of the Co-operative Employees Commission Act No. 12 of 1972. The Commission, having examined the report required to be sent by the Society, in terms of regulation 101, and having also examined the inquiry proceedings relevant to the appeal, dismissed the appeal.

In an application for a Writ of Certiorari to quash the order made by the Commission, it was contended that the regulations which relate to the right of appeal to the Commission contemplate the granting of an oral hearing before the Commission. Admittedly 'W' was denied—an oral hearing before the Commission.

Held, 'W' should have been allowed to make oral submissions in support of his appeal and the order made by the Commission was accordingly quashed.

"Before a judicial or quasi judicial tribunal, a right to a hearing would normally include the right to an oral hearing and in certain circumstances even the right to representation." per Wanasundera, J.

APPLICATION for a Writ of Certiorari.

Prins Gunasekera, for the Petitioner.

P. L. D. Premaratne, Senior State Counsel, for the Respondent.

Cur. adv. vult.

August 31, 1976. WANASUNDERA, J.—

This is an application for a Writ of Certiorari asking for the quashing of an order made by the Co-operative Employees Commission in respect of an appeal made by the applicant, Gnanawardena Bandara Walisinghe.

Walisinghe was engaged by the Kegalle Multi-purpose Co-operative Society Limited in 1972. He continued in employment till 1974 when he was interdicted from service for misconduct. Consequently, disciplinary proceedings were taken

against him at the instance of the Secretary of the Board of Directors of the Kegalle Multi-purpose Co-operative Society Limited. After a protracted and exhaustive inquiry held by the Assistant Director Rural Institutions and Productive Laws, apparently a State officer who was detailed to hold the inquiry, the applicant was found guilty of five charges and was accordingly dism ssed from service. The applicant appealed to the Commission, through the Society in terms of the regulations made under section 23 of the Co-operative Employees Commission Act, No. 12 of 1972.

The Commission, having examined the report required to be sent by the Society, in terms of regulation 101, and having also examined the inquiry proceedings relevant to the appeal, dismissed his appeal.

Mr. Gunasekera for the applicant submitted that the applicant has been denied a hearing in respect of his appeal to the Comm ssion, and argued that regulation 103 under which action was taken by the Commission contemplates the granting of an oral hearing, and it would be insufficient to determine the appeal merely on the written material before the Board as averred in the affidavit filed on behalf of the respondent. Mr. Premaratne, Senior State Counsel, for the respondent contended that there had been due compliance with the provisions of regulation 103 in this matter and that that regulation does not contemplate the granting of an oral hear ng. He relied on the decisions in *Kulatunge v. The Board of Directors of the Co-operative Wholesale Establishment* (66 N.L.R. 169) and *Siriwardena v. Fernando* (77 N.L.R. 469).

The applicant's employment is governed by the provisions of the Co-operative Employees Commission Act, No. 12 of 1972, and the present case is not one of master and servant under the common law, but it is a case of an employment in wh ch the appointment, disciplinary proceedings and dismissal are governed by legislative provisions.

The right to a hearing in this category of case is usually presumed. Such a right may be expressly excluded or such an exclusion may be implied in certa n well-known situations. But this does not appear to be that type of case. Before a judicial or quasi-judicial tr bunal, a right to a hearing would normally include the right to an oral hearing and in certain circumstances

even the right to representation. S. A. de Smith in his well-known work "Judicial Review of Administrative Action" (3rd Edition 1973) says—

> ".....,, that when the words 'hearing' or 'opportunity to be heard' are used in legislation, they nearly always denote a hearing at which oral submissions and evidence may be tendered." (p. 177).

He adds that—

> "In the absence of clear statutory guidance on the matter, one who is entitled to the protection of the *audi alteram partem* rule is now prima facie entitled to put his case orally;".

Although in some contexts it has been held that an oral hearing and representation are not basic to the *audi alteram* rule, the trend of recent authority now is to the effect that, in proceedings before tribunals dealing with matters affecting a man's reputation or livelihood or on matters of serious import, the concept of fairness may require an oral hearing. (*Pett v. Greyhound Racing Association Ltd.* (1969) 1 Q. B. 125.)

It was brought to our notice that, prior to the coming into operation of the present law, employees of Co-operative Societies had sufficient protection against unfair and arbitrary disciplinary action as they were able to challenge such action before a Labour Tribunal and then come by way of an appeal to this Court. The new law has taken away this right; (*vide* section 39). Mr. Gunasekera urged that, having regard to this background, we should be slow to interpret the relevant provisions so as to vest almost arbitrary powers in the Commission, unless such a view is justified by clear language.

Bearing in mind that we are dealing with the case of the dismissal of an officer from a statutory institution, let me now consider whether there is anything in the relevant statutory provisions which has the effect of excluding either expressly or impliedly the right to an oral hearing in respect of an appeal.

Section 11 of the Co-operative Employees Commission Act, No. 12 of 1972, sets out the powers of the Commission. It states that the Commission shall have the following powers:—

> (i) to determine the procedure or procedures to be followed by any co-operative society in exercising its rights of disciplinary action against its employees;

(ii) to call upon any co-operative society to complete disciplinary inquiries against its employees within a time stipulated by the Commission, and

(iii) to hear appeals arising out of any disciplinary orders made by any co-operative society.

I would like here to emphasise the words "to hear appeals arising out of disciplinary orders." *Prima facie*, this terminology appears to bring in the rule of *audi alteram partem* and the right to make oral submissions. The word "hear" has invariably been used in similar contexts in statute law and regulations, both in respect of courts and administrative tribunals, to imply the existence of a right to a personal appearance and representation. Mr. Premaratne drew an analogy between the present case and the case of appeals to a District Judge from Rural Courts under the old Rural Court Ordinance in support of his position that an oral hearing is not required in such a case. I have examined those provisions and I find that the right to appear in person or by representation in respect of such an appeal has been excluded by express provision.

Paragraphs (*h*) and (*i*) of section 11 seem to indicate that the appeal is to the Commission and it is the Commission which is the actual appellate authority. This matter becomes relevant when we later consider the provisions of regulation 103.

Section 23 (1) of the Act states as follows :—

> "No employee of a co-operative society shall be dismissed or otherwise punished by any co-operative society except in accordance with the provisions of this Act or any regulations made thereunder."

Section 32 read with section 25 provides for the making of regulations, and regulations have been made by the Commission in respect of the interdiction of officers, the termination of appointments, dismissals or the imposition of any other form of punishment to such employees and appeals, and have been published in Government Gazette (Extraordinary) No. 15,009/12A of May 12, 1972.

Chapter IV of the Rules deals with Disciplinary Inquiries. Disciplinary action could be taken in cases of misconduct. Misconduct is divided into two classes—first, of a minor nature, and the second, of grave offences. Generally, in the case of misconduct of a minor nature, the disciplinary inquiry must be held by a senior official of the society, nominated by the Board of Management. In the case of grave misconduct, the inquiry has to be held by an "Inquiry Officer" presumably some public officer not attached to the society.

Although the Inquiry Officer is given some latitude in the matter and may follow such procedures as he thinks appropriate, regulation 74 (3) (*a*) to (*d*) sets out certain principles which are basic to such inquiry and which he must adhere to. They are the following :—

"74. (3) (*a*) that the accused employee must be informed in writing what the alleged offences are ;

(*b*) that the accused officer or his representative must be allowed to examine and, if necessary, take copies of any documents that may be used in evidence against him ;

(*c*) that the accused employee or his representative must be allowed to ask questions of witnesses who are called to give evidence against him ;

(*d*) that the accused employee or his representative must be allowed to produce witnesses and/or documents in his defence."

These provisions contemplate an oral hearing. The party concerned is even entitled to representation before the Inquiry Officer. Apart from leading evidence on his own behalf, he can ask questions from witnessess called against him, namely, cross-examine them. These principles apply equally in the case of an inquiry by an Inquiry Officer in respect of grave offences, like the present case.

Chapter V of the Regulations deals with appeals. Regulation 100 provides for an appeal to the Commission within sixty days of the order. A copy of such appeal must also be sent to the society and the society is enjoined to submit to the Commission a brief report relating to the matters set out in such appeal. The Commission can admit a second appeal within one year of the order when it is satisfied that there is new material which may affect the appeal.

Regulations 102 and 103 are the most material for the purpose of this case and they are worded as follows :—

"102. In every appeal other than an appeal from an order of termination of services or dismissal, the Comm ssion may decide such appeal on the basis of the written material in appeal.

"103. In an appeal from an order of termination of service or dismissal, the Commission may dispose of the appeal in its own or refer such appeal to a person nominated to hear such appeal, (hereinafter referred to as Inquiry Officer) and to report thereon to the Commission."

Regulations 104 to 106 also have a bearing on this matter. All these regulations, 102 to 106, however, are not happily worded and add to the difficulties of ascertaining the scheme contemplated by these provisions. Regulation 104 allows the Inquiry Officer at his discretion to permit the parties to be represented at the inquiry. A provision like this, far from excluding the right of the appellant to appear in person, seems actually to imply such a right. Regulation 104 states that, in exceptional cases, he could allow fresh evidence to be admitted. These provisions seem to suggest that, when the Commission delegates the hearing of an appeal to an Inquiry Officer, there is compliance with the normal *audi alteram partem* principles, i.e., in this case it would include an oral hearing.

It will be observed that in regulations 102 and 103, a fundamental distinction is drawn between an appeal in respect of an order of termination of services or dismissal—the extreme penalties in disciplinary proceedings, and the case of lesser punishments.

Regulation 102 deals with appeals from cases for lesser punishments and provides that the Commission may decide such an appeal on the basis of the written material in appeal. This could mean that the Commission would decide the matter only on the basis of the available written material and that no evidence to supplement that material would be allowed. This view would however not affect the right to present the case in person, which is normally presumed when the *audi alteram partem* rule applies. On the other hand, regulation 102 can also mean that no oral presentation of the appeal will be allowed and that the Commission will determine the appeal merely by perusing the written material. Assuming the latter to be the correct view, we are faced with a significant contrast. There is no equivalent provision in respect of appeals concerning termination of services or dismissal—the extreme penalties. The immediate inference therefore would be that such an oral presentation is presumed in the latter case.

The provisions relating to the alternate procedure of the hearing of an appeal by an Inquiry Officer seems to support such a conclusion. The Inquiry Officer is requ red to "hear" the appeal. Regulations 104 and 105 are also suggestive of it and have already been referred to.

Mr. Premaratne has, however, argued that the wording of regulation 103 does not suggest that the applicant should be given an oral hear.ng when the Commission itself decides to dispose of the appeal. The cases cited by him, and referred to earlier, were decided before the present law came into effect. I observe that the rationale of those decisions was that neither the statute nor the regulations provided the grounds for dismissal or contained the procedure therefor. The present case is not similar to those cases and, therefore, they have little bearing on the issue before me.

Our attention has also not been drawn to any guide lines laid down in the law or the regulations, or to any satisfactory practice, which provide how the Commission should decide whether it should itself dispose of the appeal or refer it to an Inqu'ry Officer. The lack of guide lines could result in unequal treatment and injustice, for an appellant fortunate enough to go before the Inquiry Officer would be granted an oral hear ng, but another appellant going before the Commission will find himself denied such a right.

It would be noted that all appeals are to the Commission and it is the Commission and the Commission alone that can make the final order thereon. The main enactment contemplates a hearing by the Commission. Even when the matter is referred to an Inquiry Offiecr, the decision in the appeal is still taken by the Commission. It seems to me that the provisions of regulations 103 to 106 should be cons dered together, as they constitute the totality of the powers of the Commission and the manner in which it disposes of appeals. It will also be observed that it is only regulation 106 that sets out the powers of the Commission in respect of appeals. I am of the view that the powers g'ven to an Inquiry Officer, embrace the powers of the Commission and could equally be exercised by the Commission in the first instance. Therefore, if an oral hearing is posited in the case of the Inquiry Officer, it should be equally a requirement when the Commission decides to deal with the appeal itself.

The present applicat'on is in respect of an appeal which was dealt with by the Commission itself. The applicant has complained that he was not given a hearing when his appeal was cons dered by the Board. I am of the view that the applicant

should have been allowed to make oral submissions in support of his appeal. Accordingly the order made by the Board cannot be allowed to stand.

I would therefore quash the order made by the Board. The applicant would also be entitled to the costs of this application which I fix at Rs. 210.

THAMOTHERAM, J.—I agree.

COLIN-THOME, J.—I agree.

Application allowed.