1988 February 19

[TRIANTAFYLLIDES, P., MALACHTOS, PIKIS, JJ.]

SAVVAS PATIKKIS AND ANOTHER,

Appellants,

v.

THE MUNICIPAL COMMITTEE OF NICOSIA,

Respondents.

(Cases Stated Nos. 184 and 185).

Wrongful dismissal — Contract of employment governed by private law — Whether and in what circumstances the employee has a right to be heard before the decision to dismiss him is taken — When and in what circumstances such a right will be implied.

Municipalities — Dismissal of casual employees — The Municipal Corporations Law, Cap. 240, section 18 — The competency vests in the Municipal Committee — The Town Clerk has no authority in the matter — Affirmation of the decision of the Town Clerk by the Mayor does not remedy the situation.

Municipalities — Dismissal of casual employees — The Municipal Corporations Law, Cap. 240, section 72 — Does not empower the Mayor to dismiss them.

Wrongful dismissal — Contract of employment governed by private law — Notwithstanding the wrongfulness of the dismissal, the relationship between employer and employee comes at an end — No question of reinstatement arises.

Both appellants were employed by the Municipality of Nicosia. They did not qualify as «municipal Employees» under the Nicosia Municipal Service Regulations 1976. The relationship between the appellants and their employers was governed exclusively by private law.

Each of the appellants gave many occasions in the past for various complaints, but in each case he was given an opportunity to answer the respective complaint.

Each of the appellants was, finally, warned that in case of future breaches disciplinary action would be taken against them. It was

intimated that in case of future neglect of duty their conduct would be reported to the Municipal Committee for disciplinary action.

In the end, however, they were both dismissed by the Town Clerk, whose decision was later affirmed by the Mayor. No disciplinary action was taken against the appellants before their dismissal and no opportunity was given them to answer the complaints that led to their dismissal.

As a result the appellants claimed damages for wrongful dismissal. Their applications were dismissed by the Arbitration Tribunal on the ground that the dismissals were justified by section 5 (f) of The Termination of Employment Law 24/67.

Hence these appeals by way of case stated. Three issues were raised for determination, i.e. (a) The right, if any, of the appellants to an opportunity to be heard before dismissal, (b) The authority, if any, of the town clerk to dismiss them, and (c) the applicability of section 72 of Cap. 242.

Held, *allowing the appeals*: (1) (a) Recent English caselaw suggests that the principles of the common law governing the relationship of master and servant have undergone a perceptible change reflecting a reappraisal of the importance of the right to work. (See *Jupiter General Insce Co. v. Shroff* [1937] 3 All E.R. 67, *Dobie v. Burns International* [1984] 3 All E.R. 333, *Malloch v. Aberdeen Corporation* [1971] 2 All E.R. 1278, *Ridge* v. *Baldwin* [1963] 2 All E. R. 66, *Stevenson v. United Road Transport Union* [1977] 2 All E.R. 941, *CCSU v. Minister for the Civil Service* [1984] 3 All E.R. 935).

(b) What emerges from the caselaw is that the right to be heard before alteration of the terms of a contract of employment will be readily inferred whenever the contract of employment or the conduct of the employer leaves room for its application.

(c) In these cases the Municipality by its representations and practice created a legitimate expectation in the mind of the appellants that they would not be dismissed for an allegged misdeed unless prior opportunity was given them to be heard in the matter of the complaint. In fact, they were led to believe that a disciplinary procedure would be followed for the establishment of misconduct and the imposition of sanctions including termination of the contract of employment. The right to be heard should, in the circumstances, be deemed to have been impliedly incorporated in their contract of employment.

(2) In accordance with the provisions of s.18 of the Municipalities Law 1964, the exercise of the powers of a municipal corporation is

entrusted, save where provision to the contrary is made, to the Municipal Committee. Consequently, the town clerk had no authority to terminate the employment of the appellants and the affirmation of the decision by the Chairman of the Municipal Committee did not fill the vacuum of authority.

(3)The authority of the Mayor under s.72 is confined to the employment of casual labour for meeting extra ordinary needs of the Municipality. The employment of the appellants was not regulated by the provisions of s.72 - Cap. 240 (as adopted). Moreover section 72 does not lay down that the Mayor may, in addition to employing casual personnel, dismiss them as well. Termination of the contract of employment rested solely with the Municipal Committee.

(4) Unlike contracts of employment governed by public law, wrongful dismissal in the domain of private law causes the termination of the contract of employment, which is rested solely on the relationship of mutual confidence between employer and employee. No question of reinstatement to their position arises.

Appeals allowed with costs. Cases remitted to the Arbitration Tribunal for the determination of the damages.

Cases referred to:

KEM (Taxi) Ltd. v. Tryfonos (1969) 1 C L.R. 52;

Constantinou v. Woolworth (1980) 1 C.L.R. 302;

Jupiter General Insce. Co. Ltd. v. Shroff [1937] 3 All E.R. 67;

Dobie v. Burns International [1984] 3 All E.R. 333;

Malloch v. Aberdeen Corporation [1971] 2 All E.R. 1278;

Ridge v. Baldwin [1963] 2 All E.R. 66;

Stevenson v. United Road Transport Union [1977] 2 All E. R. 941;

CCSU v. Minister for the Civil Service [1984] 3 All E.R. 935;

Sanders v. Neale [1974] 3 All E.R. 327.

Cases stated.

Cases stated by the Chairman of the Arbitration Tribunal relative to his decisions dated 16th May, 1981 and 16th July, 1981

in proceedings under sections 3 and 9 of the Termination of Employment Law, 1967 (Law No. 24/67) instituted by Savvas Patikkis and Christodoulos K. Glykys against the Municipality of Nicosia whereby their claims for damages for wrongful dismissal were dismissed.

E. Efstathiou, for the appellants.

K. Michaelides, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Pikis J.

PIKIS J.: A question of great legal importance has to be resolved in these appeals: The right, if any, of an employee whose contract of employment is governed by private law to be heard before dismissal for alleged default of duty. It arises in the context of two appeals made by way of case stated from decisions of the Arbitration Tribunal whereby the claims of two employees of the Municipality of Nicosia, for damages for wrongful dismissal, were dismissed.

The trial Court found that the employers had a valid cause for the dismissal of their employees whose conduct and performance at work fell short of the devotion to duty and subordination to superiors expected of an employee. They held that their conduct was incompatible with their duties and as such could not be reasonably tolerated. Therefore, their dismissal was justified under the provisions of s.5(f) of the Termination of Employment Law 1967, instancing specific causes for which dismissal is justified.

Briefly, the facts and circumstances relevant to the employment and dismissal of the two appellants were the following:

Savvas Patikkis served as a labourer with the Municipality from the year 1958. His duties involved driving a cesspool lorry. On a number of occasions he was reported for laxity in the performance of his duties, friction in his relationship with fellow employees and insubordination. On every occasion he was given the opportunity to answer the complaints.

On 20.10.80 the town clerk terminated his employment on the basis of a complaint that appellant was guilty of refusal to obey the instructions of his superiors and unacceptable conduct. The complaint leading to his dismissal was not brought to his notice nor

was he given an opportunity to be heard in the matter before termination of his employment. As it emerges from the letter of the town clerk it was felt that the conduct of the appellant could no longer be tolerated.

The facts surrounding the employment of the other appellant, Chrystodoulos Glykys, as well as his dismissal, bear close resemblance to those affecting Savvas Patikkis. He was also an employee of the Municipality, of long standing, having commenced employment with the Municipality as a labourer in 1967. On 21/10/80 he was dismissed on the basis of a complaint that he was not devoting his working time exclusively to the discharge of his duties, sweeping of streets. In his case, too, there were previous complaints of indifference and lack of devotion to his duties. Like Patikkis, he had been repeatedly apprised of the complaints made against him and warned of the consequences. However, the complaints were refuted and he had on every occasion a different story to tell from that of his accusers.

It is significant to notice that both employees were, prior to their dismissal, warned that in case of future breaches disciplinary action would be taken against them (warning to Patikkis administered on 4/6/79 and to Glykys on 7/10/80). It was intimated that in case of future neglect of duty their conduct would be reported to the Municipal Committee for disciplinary action. In the end the matter was not referred to the Municipal Committee and the decision rested solely with the town clerk though subsequently affirmed by the Mayor, as may be gathered from correspondence with the appellants. No disciplinary action was taken against the appellants before their dismissal and no opportunity was given them to answer the complaints that led to their dismissal. The Tribunal held that the *Nicosia Municipal Service Regulations 1976** had no application in the case of the appellants as they did not qualify as «municipal employees». The application of the disciplinary Code established by the Regulations was confined to municipal employees serving in an organic post with the Municipality. The contract of employment of the appellants was solely regulated by private law and as such governed by the relevant principles of the common law. Their employment was subject to the provisions of s.72 of Cap. 240** that empowered the Mayor to employ casual personnel on daily wages for the needs of the Municipality. The trial Court dismissed the submission that the rules of natural justice found application in

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** (Regulatory Administrative Act 11/77, No.11 - Official Gazette 14/1/77).*

*** (Made applicable by the provisions of Law 64/64).*

the case of the appellants. As the conduct of the appellants gave the respondents proper justification for their dismissal under s.5(f) of Law 24/67, their dismissal was valid notwithstanding the absence of prior notice or warning or failure to afford them an opportunity to be heard in the complaint leading to their dismissal.

The following three questions must be answered:-

(a) The right, if any of the appellants to an opportunity to be heard before the dismissal.

(b) The authority, if any, of the town clerk to dismiss them, and

(c) the applicability of s.72 - Cap. 240.

(A) THE RIGHT OF AN EMPLOYEE TO BE HEARD BEFORE DISMISSAL UNDER CONTRACTS OF EMPLOYMENT GOVERNED BY PRIVATE LAW:

Counsel for the appellants submitted the 1976 Regulations applied indistinguishably to all employees of the Municipality and no exception could be made in the case of labourers. The answer to this contention, a fairly obvious one, is the one advanced by counsel for the Municipality, that is, that the Regulations have no application to appellants as a matter of construction of the definition of «municipal employees» furnished by s.2 of the Regulations. A municipal employee is defined as one who holds permanently, temporarily or on an acting basis, a position in the establishment of the Municipality. The appellants did not belong to that class of personnel. Had that been the case the contract of their employment would have been governed by public law and review of its breach would lie exclusively with the Supreme Court under Article 146 in the exercise of its revisional jurisdiction. A more consequential submission is that the rules of natural justice should, in view of the position of the corporation employing them, be deemed to be incorporated in their contract of employment. This understanding was reinforced by the conduct and practice of the respondents to invite the response of the appellants to complaints of default of duty. Counsel for the respondents acknowledged that a right to be heard prior to dismissal may exceptionally be implied in a contract of employment governed by private law. This may occur whenever a statute ties dismissal to such a requirement or the contract specifically provides for such a right. An ordinary contract of employment, on the other hand, is solely regulated by the provisions of the common law, as the Supreme Court acknowledged in the case of *KEM (Taxi) Ltd. v. Anastassis*

*Tryphonos**. The rules of natural justice have no application to contracts of private employment, a fact noticed by the Supreme Court in *Constantinou v. Woolworth***. To be precise the Court did not in that case rule out the application of the rules of natural justice in every case. A dictum of the Court (p.318) suggests that the rules of natural justice do not necessarily find application in contracts of employment governed by private law. Section 5 of the Termination of Employment Law (24/67) is modelled on the common law understanding of a contract of employment and principles relevant to the right of an employer to dismiss his employee. This was affirmed in the case of *KEM Taxi*, and *Constantinou* supra. The continuance of the relationship of master and servant, as the «relationship» was termed at common law, was dependent on the subsistence of a climate of confidence and trust between employer and employee. Conduct inconsistent with that standard of fidelity entitled the employer to terminate the contract. Recent English caselaw suggests that the principles of the common law governing the relationship of master and servant have undergone a perceptible change reflecting a reappraisal of the importance of the right to work. In *Jupiter General Insce. Co. v. Shroff**** it was recognised that instant dismissal is a strong measure justified only in exceptional circumstances. For an isolated incident to justify dismisal, it must be of some gravity; though a series of incidents none of which would in itself justify dismissal may compound a sufficiently grave case to warrant dismissal.

The significance of employment in one's life has been recognised as all important for human well being. Hence it was proclaimed in *Dobie v. Burns International***** that an employer must not be oblivious to the injustice that may be occasioned to an employee as a result of his dismissal. The length of his service, as well as the likelihood of finding fresh employment, must be taken into account. These observations were made in the context of the 1974 English legislation governing the award of damages for unfair dismissal and as such are not immediately applicable to Cyprus. Nevertheless, they signal a new era and fresh awareness of the importance of the right to work and the need for its protection.

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* *(1969) 1 C.L.R. 52.*

** *(1980) 1 C.L.R. 302.*

*** *[1937] 3 All E.R. 67.*

**** *[1984] 3 All E.R. 333 (CA).*

In *Malloch v. Aberdeen Corporation** the House of Lords noted that the common law recognised no right to an employee to be heard as a condition precedent to his dismissal. The ascertainment of the facts by the employer and their objective validity, sufficed to justify dismissal. On the other hand, the Court did acknowledge that in certain species of contracts of employment the right to be heard may be implied from the terms or circumstances of employment. *Lord Reid* in his judgment stressed that public bodies are generally in a different position from a private employer though, with regard to contracts with lower grades of employees, they are ordinarily in a similar position as a private employer. Nonetheless it was observed that the right to be heard in one' s defence for an alleged misdeed is, under any circumstances, an elementary protection. Therefore, if at all reconcilable with the terms of the contract of employment, it should be implied. In *Ridge v. Baldwin*** the House of Lords decided that the right to be heard is very much dependent on the nature of the contract of employment, and drew attention to three categories of such contracts, that is,

(a) pure master and servant contracts,

(b) office held during pleasure of the employer (public office) and

(c) contracts expressly safeguarding the right to be heard before dismissal for misconduct.

In the first case no right to be heard accrues to the employee. The case of *Stevenson v. United Road Transport Union**** is highly instructive because it suggests that a right to be heard may be more readily inferred whenever a decision leading to dismissal is made by someone other than the master stricto senso, in that case a committee of the Union.

The most consequential case for the purposes of this case and, to my mind, a landmark in the development of the law is, *CCSU v. Minister for the Civil Service*****. The importance of that decision for the purposes of the present case lies in the acknowledgment that a right to be heard may derive not only from the terms of the contract but from the practice followed by the employer at work relevant to the modification of the terms of the contract or their

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* *[1971] 2 All E.R. 1278.*
** *[1963] 2 All E.R. 66, 71.*
*** *[1977] 2 All E.R. 941.*
**** *[1984] 3 All E.R. 935.*

alteration to the detriment of the employee. If the employer by his conduct creates a legitimate expectation in the mind of the employee that his contract of employment will not be altered to his detriment without prior opportunity being afforded to be heard, the employer cannot defeat the expectation by falling back on strict contractual obligations. In such circumstances the right of the worker to be heard must be honoured and given effect to before any decision is taken to change the terms of employment. Although the decision of *CCSU*, supra, was taken in the context of examination of the amenity of judicial review of the impugned government action, its significance remains undiminished for the purposes of this case for it affected the rights of an employer under a contract of employment governed by private law.

As noticed the right of a worker to be heard before modification of the terms of his contract of employment, including termination, is an aspect of the wider principle of fairness. What emerges from the caselaw is that the right to be heard before alteration of the terms of a contract of employment will be readily inferred whenever the contract of employment or the conduct of the employer leaves room for its application. The fact that a contract of employment is, in the absence of statutory regulation governed by common law, does not per se militate against the ackowledgment of such right, nor will the Court exclude its application whenever room exists for such course. The right to be heard is an aspect of fairness, an all embracing concept, that engulfs with the passage of time - an increasing number of relationships governed by private law.

Notwithstanding the absence of a provision in the contract of employment of the appellants recognising a right to be heard before dismissal, the Municipality by its representations and practice created a legitimate expectation in the mind of the appellants that they would not be dismissed for an alleged misdeed unless prior opportunity was given them to be heard in the matter of the complaint. In fact, they were led to believe that a disciplinary procedure would be followed for the establishment of misconduct and the imposition of sanctions including termination of the contract of employment. The right to be heard should, in the circumstances, be deemed to have been impliedly incorporated in their contract of employment.

The practice followed by the Municipality was consonant with its duties under article 28.1 to treat its employees in a spirit of equality. Though a distinction could be made between members belonging to the establishment of the Municipality and members who did not belong to that class of employees. The

acknowledgment of a right to be heard to every employee in an accusation of misconduct would ensure that fundamental principles of fairness were adopted and adhered to with regard to every member of the employees of the Municipality. In this case the decision to dismiss the appellants was taken by the town clerk on the basis of an accusation of misconduct in breach of the right of the appellants to be heard in the matter before a decision was taken affecting their employment.

(B) AUTHORITY TO DISMISS EMPLOYEES OF THE MUNICIPALITY:

In accordance with the provisions of s.18 of the Municipalities Law 1964, the exercise of the powers of a municipal corporation is entrusted, save where provision to the contrary is made, to the Municipal Committee. Consequently, the town clerk had no authority to terminate the employment of the appellants and the affirmation of the decision by the Chairman of the Municipal Committee did not fill the vacuum of authority. Authority to dismiss resided exclusively with the Municipal Committee. That is an additional reason for declaring the dismissal of the appellants wrongful.

(C) The authority of the Mayor under s.72 is confined to the employment of casual labour for meeting extraordinary needs of the Municipality. The employment of the appellants was not regulated by the provisions of s.72 - Cap. 240 (as adopted). Moreover, s.72 does not lay down that the Mayor may, in addition to employing casual personnel, dismiss them as well. Termination of the contract of employment rested solely with the Municipal Committee.

In view of the above the dismissal of the appellants was made contrary to and in contravention of their right to put forward their case in answer to the accusations that led to their dismissal. Consequently, their dismissal was wrongful.

Unlike contracts of employment governed by public law, wrongful dismissal in the domain of private law causes the termination of the contract of employment because, as explained in *Sanders v. Neale**, it destroys the relationship of mutual confidence between employer and employee. No question of reinstatement to their position arises. In fact, no such jurisdiction vests in the Arbitration Tribunal. Its jurisdiction is confined to the award of the damages for wrongful dismissal in accordance with the provisions of the law.

* [1974] 3 All E.R. 327.

The appeals are allowed with costs. The orders of the trial Court are set aside. The cases are remitted to the Arbitration Tribunal for determination of the damages to which the appellants are entitled.

Appeals allowed with costs.