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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M-028 OF 1996

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BEFORE: THE HON. MR. JUSTICE ELLIS
THE HON. MR. JUSTICE PANTON
THE HON. MR. JUSTICE SMITH

BETWEEN CARL FRASER APPLICANT
AND THE ATTORNEY GENERAL RESPONDENT

Lord Gifford, Q.C. and Hugh Wilson for
the applicant
Neville Fraser, Ms. Sheryl Lewis and
Cordel Green for the respondent

Heard: June 9 and 11, 1997

PANTON, J.

This is an application for "an Order of Certiorari to remove into the Supreme Court to quash the decision notified to the applicant by letter dated October 23, 1995, that he should be dismissed from the Public Service with effect from May 3, 1995".

The applicant has been a registered medical practitioner since 1976. At the relevant time, he was employed in the Casualty Department of the Spanish Town Hospital. He also has a private practice in the Corporate Area.

On February 1, 1995, the applicant went on vacation leave. He should have resumed his position at the Spanish Town Hospital on May 3, 1995. He did not. He informed no one that he was not resuming. Efforts were made to contact him at the telephone number that he had given to the hospital. There was no success. Messages were left for him to contact the Senior Medical Officer. He never responded to those messages.

On May 16, 1995, the Hospital Administrator informed the Ministry of Health of the applicant's failure to resume. On June 15, 1995, the Permanent Secretary in the Ministry of Health recommended to the Chief Personnel Officer, Office of the Services Commission, that the applicant be summarily dismissed with effect from May 3, 1995. The recommendation was considered by the Public Service Commission and it was decided that the applicant should be dismissed in accordance with Regulation 37(4) of the Public Service Regulations. His Excellency, The Governor-General accepted the Public Service Commission's advice and approved the dismissal. This approval was communicated to the Permanent Secretary in a memorandum dated August 11, 1995.

The affidavit of the Chief Medical Officer in the Ministry of Health disclosed that the applicant submitted to him a letter on June 27, 1995 - that is, after the Permanent Secretary's recommendation. That letter bears the date May 14, 1995. Incidentally, the applicant has not attempted to explain the gap between the date of the letter, and the date of its delivery to the Chief Medical Officer. In that letter, the applicant penned these words: "I will not be going back to STH (that is Spanish Town Hospital) because it is beyond my better qualities to quietly support any form of discrimination or exploitation of any sort". Having written this, the applicant's resignation ought to have followed. It did not, however. Now that he has been summarily dismissed, he is seeking to have the dismissal order quashed.

He has based his application on three grounds -

1. that the dismissal is in breach of Regulation 43(1) of the Public Service Regulations, in that he was not notified in writing or otherwise of any charge; and, no inquiry was held to allow him to defend himself.
2. the rules of natural justice were breached.
3. the Ministry of Health, the Public Service Commission, and or, the Governor-General failed to pay regard to relevant considerations raised in his letter dated May 14, 1995, which the Chief Medical Officer received on June 27, 1995.

Lord Gifford, Q.C. has submitted that -

1. the procedure in Regulation 43 should have been followed by the Public Service Commission.
2. the failure of the Commission to follow Regulation 43 is fatal, in that the dismissal is of no effect; and
3. proper consideration should have been given by the relevant authorities to the complaints and concerns expressed in the applicant's letter dated May 14, 1995.

In relation to the submission at (3), Lord Gifford relied on the well-known case.

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1947) 2 All E.R. 680.

In dealing with the questions that are before the Court for consideration, regard has to be given particularly to Regulation 37(4) of the Public Service Regulations, 1961. It states:

"The absence of an officer from duty for a period of five days or more without permission renders him liable to summary dismissal with effect from the first day of such absence".

In view of the fact that Regulation 43 is being relied on by the applicant, it is instructive to take a look at that Regulation.

It states in sub-regulation (1)

"Subject to the provisions of these Regulations an officer may be dismissed only in accordance with the procedure prescribed by this regulation".

The remainder of Regulation 43 sets out the proceedings for dismissal under that regulation.

It is our opinion that Regulation 43 is subject to the provisions of the other Regulations. Where, as in Regulation 37(4), there is a specific provision to govern a particular situation, there is no room for the operation of Regulation 43.

In the instant case, the applicant should have resumed duty on May 3. He did not. He also did not seek the permission of anyone who was authorised to give such permission. Indeed, he made himself incommunicado. In his affidavit, he even stated that he was absent from Jamaica for a considerable part of 1995 - including, no doubt, time when he ought to have been on duty in Jamaica.

Given this situation, the relevant authorities had only one reasonable choice - that is, to invoke Regulation 37(4), and dismiss the applicant.

The regulations view absence from duty for five days or more as a very serious breach warranting summary dismissal. In that situation, there is no room for the giving of notice and the conduct of a hearing as contemplated by Regulation 43. That is the result of Regulation 43 being made subject to Regulation 37(4).

The applicant took fifty-five days (from May 3 to June 27) to deliver his letter to the Chief Medical Officer. At that stage, that is on June 27, his dismissal had already been recommended. In any event, he advised the Chief Medical Officer that he would not be reporting for duty. It is therefore surprising that the applicant would dare, in the face of his own letter, to make an application of this nature to the Court.

Learned Queen's Counsel has submitted that the authorities should have given proper consideration to the reasons advanced by the applicant. The fact is that, in any event, there was nothing to consider. Apparently the applicant wished to be transferred to do surgery. He did not wish to be in the Casualty Department from which he had proceeded on leave. The applicant must have been aware that a transfer could not be effected by his remaining indefinitely on unauthorised leave. As a public officer, he would have been aware of the Regulations. He would have been aware of the power of summary dismissal for what he had done.

The applicant's conduct displayed a flagrant disregard for the Regulations by which, as a public officer, he was bound. He clearly dared the relevant authority to exercise the power of summary dismissal provided in the Regulations. The authority answered the challenge decisively. The applicant has, in his affidavit, sought to cloud the issue by mentioning his religious faith. This is not a case that has anything to do with his faith. It has to do only with his absence from duty for several weeks without permission and without even informing the authorities of his reasons for so doing.

There is no merit in the application. Accordingly, I am of the view that it should be refused with costs to the respondent to be agreed or taxed.

Ellis, J. I agree.

Smith, J. I agree.