

IN THE PRIVY COUNCIL

No. 7 of 1972

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N:

PAUL WALLIS FURNELL

Appellant

- and -

THE WHANGAREI HIGH SCHOOLS BOARD

Respondent

CASE OF APPELLANT PURSUANT TO RULE 25

RECORD

10 THE CIRCUMSTANCES OUT OF WHICH THE APPEAL
ARISES.

1. The appeal is brought from the judgment of the Court of Appeal which reversed the judgment of the Supreme Court of New Zealand. That judgment had ordered that a Writ of Certiorari issue removing certain decisions (including the decision to suspend the Appellant) of the Respondent, into the Supreme Court and quashing such decisions.

p.53 line 6 -
p. 73 line 2

p.34 line 25
- p.51 line
26

20 2. The judgment of the Supreme Court also ordered the issue of an injunction to the Respondent removing the suspension and a Writ of Prohibition to the Teachers' Disciplinary Board prohibiting the hearing of charges. These orders had been claimed in the Supreme Court under separate Action. This appeal does not concern these orders.

30 3. The facts are established by affidavits of the Appellant (hereinafter for convenience called "the teacher") and are uncontested by the Respondent (hereinafter for convenience called

p.5 line 34 -
p.33 line 33

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
10 MAY 1973
25 RUSSELL SQUARE
LONDON W.C.1

RECORD

"the Board"). The teacher was a high school teacher employed by the Board at the Kamo High School. He had been employed at that school since August 1968. He was at the time of suspension 36 years of age and held the qualification of Master of Arts from Cambridge University. He graduated in 1957 and in 1960 was brought to New Zealand by the New Zealand Government as a high school teacher. He taught at Gisborne High School and at Waikohu College advancing in grading from I to III and after his last inspection at Kamo High School to Grade B12 enabling him to apply for a position of responsibility. Since November 1969 at the request of Mr. H. W. Spragg the headmaster of the Kamo High School, he had been applying for teaching positions elsewhere. The teacher was so applying for other positions when on 20 March 1970, he was handed the letter of the same date, from the Chairman of the Board. This letter is reproduced in the judgments of Speight J. and Wild C.J. This letter advised that a complaint had been made about the teacher's conduct; that the complaint had been investigated by a committee set up under Regulation 4 of the Secondary and Technical Institute Teachers Disciplinary Regulations 1969 (hereinafter called for convenience "the regulations"); certain charges were formulated; and the teacher was advised that he was suspended. Until receipt of this letter the teacher had no knowledge that his conduct was under investigation by a committee or anyone else. He had not nominated which teacher organisation was to be represented on such committee. The teacher was not advised of any complaint by such investigating committee, nor was he interviewed by such committee or any member of it. He was not given any opportunity to make representations to such committee before such committee reported to the Board. The teacher had not seen such report nor had he any opportunity of replying to or commenting on the findings or recommendations of such report.

p.6 lines 23-36

p.37 line 31-p.38 line 40

p.57 line 6 - p.58 line 40

p. 6 line 7 - p.7 line 8

p.7 lines 9-14

10

20

30

40

4. On 25 March 1970, the teacher's solicitor wrote complaining of the secret investigation and requiring details of the offences for the purposes of a reply and denying the legal validity of the Board's action. By letter dated

6 April the Chairman of the Board wrote giving further details of the alleged offences committed by the teacher. An explanation was forwarded to the specific charges. This explanation was sent, without prejudice, to the Board which decided to refer the charges to the Director-General of Education. In the explanation the teacher repeated his agreement to transfer to another school. On 29 May 1970 the Director-General advised that after consideration of the matter, he had decided under paragraph (c) of subclause (5) of the regulations to refer the charges to the Teachers' Disciplinary Board for hearing and determination.

p.26 line 29-
p.30 line 15

p.17 lines
33 -37

A fixture was made for this hearing for 30 June 1970

p.31 line
38 - p.32
line 2.

5. The teacher then issued proceedings in the Supreme Court under No. A34/70 and claimed :-

- (i) A writ of injunction directed to the High Schools Board removing the suspension and reinstating the teacher to teaching duties.
- (ii) A writ of prohibition prohibiting the Teachers' Disciplinary Board from hearing and determining the charges.

The teacher at a later date issued further proceedings under No. A58/70 seeking the issue of the writ of certiorari to remove the decisions of the Board under Regulation 5 (1) into the Supreme Court for the purpose of quashing the decisions. By agreement of the parties both actions were heard together and the affidavits and exhibits filed by the teacher in support of each claim were also by agreement taken as being included in both actions.

6. On 22 October 1970, Speight J. delivered his judgment granting the writs as sought by the teacher in each action.

p.34 line
26 - p.51
line 26

7. At the request of the Board the teacher did not return to teaching duties at the Kamo High School until the appeal to the Court of Appeal was decided. The Board however paid the

RECORD

teacher's salary from the 22 October 1970 (the date of judgment of Speight J.) until 1 February 1971 when the teacher resigned from the employment of the Board. The teacher has not been paid any salary from 20 March 1970 (date of suspension) to 22 October 1970 (date of the judgment of Speight J.) The Court of Appeal delivered judgment on 19 March 1971 and allowed the appeal.

8. As the teacher is no longer in the employ of the Board the revival of the order of injunction is inappropriate and the writ of prohibition against the Teachers Disciplinary Board is not required because that Board has no further jurisdiction in the matter. 10

9. The restoration of the issue of the writ of certiorari as ordered by Speight J. and as claimed in Action No. 58/70 is asked for in this appeal.

" CONTENTIONS TO BE URGED BY APPELLANT " 20

p.49 lines
27-37

10. Speight J. in the Supreme Court was correct when he looked carefully at the procedure laid down in the regulations and came to the conclusion on the facts of this case that the failure by the investigating committee to give the teacher some opportunity of commenting on the allegations made against him was unfair to the teacher " in the way in which our principles of justice require ". This accords with the approach set out in Ridge v. Baldwin and others (1964) A.C.40; Wiseman and another v. Bournemouth and others 1971 A.C.297; Malloch v. Aberdeen Corporation (1971) 1 W.L.R. 1578. 30

11. The report of the investigating committee should be fairly compiled because :-

p.22 line
37- p.25
line 33.

(a) It may well contain material prejudicial to the teacher which is not reflected in the offences subsequently alleged against him by the Board under Regulation 5 (1) and to which he never has any right to reply. 40
In this case the allegations made against the teacher comprises a series of comparatively minor items and having regard to the fact that the Board after considering

the report or findings of the investigating committee decided to suspend the teacher, it is submitted that the report may well have contained material other than that reflected in the charges and to which the teacher has had no right to reply.

- (b) The Board maintains that the teacher has no right of access to such report. If that is right (which is contested) it is a secret or confidential report and unless the investigating committee hears him he has no opportunity of putting forward his comments on allegations, evidence or other material that may appear in such report and which are not reflected in the allegations made under Regulation 5 (1).
- (c) This report in fact governs the following decisions that may, and in this case did, adversely affect the teacher :-
- (i) The decision of the Board to formulate charges pursuant to Regulation 5 (1);
 - (ii) The decision of the Board to suspend the teacher pursuant to Regulation 5 (1);
 - (iii) The decision of the Board made under Regulation 5 (4) after consideration of any written explanation by the teacher. Such explanation was made to the Board in this case but rejected. The Board also rejected the teachers' offer made in his explanation that he be reinstated and transferred to another school when another position was available.
 - (iv) The decision of the Director-General to refer the allegations to the Teachers Disciplinary Tribunal under Regulation 5 (5). The Director-General must consider "the findings of the preliminary investigation".
- (d) The report may subsequently influence the decision of a Board if it is required to take disciplinary action under Regulation 6.

p.30, lines
6 - 11

p.30 line 34-
p.32 line 9

RECORD

(e) A member of the Board may serve on the investigating committee and may have there heard allegations complaints or material not reflected in the charges and to which the teacher has no right to reply. Such member (as permitted in Regulations 4 and 5) may take part in the decisions to be made by the Board under Regulation 5 and in particular the decision to suspend under Regulation 4 (1). Such a Board member may well have "an inbuilt tendency to support the recommendations" of the investigating committee. See Hannan v. Bradford City Council (1970) 1 W.L.R. 937. There is a possibility of bias. 10

12. The report itself does prejudice the rights of the teacher by placing them in new jeopardy for the reasons set out in submission 11. Refer Testro Bros. Proprietary Limited v. Tait (1963) 109 C.L.R. 353-368; In re Pergamon Press 1971 Ch. 388. 20

13. Speight J. did not err when he took a serious view of the suspension imposed on the teacher. A suspension imposed under Regulation 5 (1) in respect especially of the particular allegations of incompetency made against the teacher in this case, has the following serious consequences:-

p.41 lines
30-49

(1) He is disgraced in his profession and his reputation may be irretrievably damaged. 30

(2) He suffers humiliation among fellow teachers, school pupils and members of the community who become aware of his suspension. North P. refers to "the humiliation of suspension".

p.72 lines
28-29

(3) He is deprived of his income over a substantial period of time. In this case he was suspended on 20 March 1970 and a hearing of the Teachers Disciplinary Board was not arranged until 30 June 1970. Subsequent restoration of income if ordered by the Disciplinary Board will not retrieve all financial losses suffered through deprivation of income over a 40

substantial period of time.

(4) In this case the teacher forfeited membership of the Teachers' Benevolent Fund and contributions made were forfeited.

p.32 line 30-
p.33 line 30

10 (5) In this case suspension virtually ended his employment at the Kamo High School. He was at the request of the Principal applying for positions elsewhere. After suspension he continued to apply. Even if reinstated by the Teachers' Disciplinary Board, his position at this particular school was virtually impossible following suspension. At the request of the Board, though paid his salary, he did not return to the school when the suspension was lifted by Speight J.

20 14. Suspension in these circumstances is a penalty or punishment. Refer Megarry J. in John v. Rees (1970) Ch. 353, 397; Wild C.J. and North P. were wrong in holding that suspension was not a punishment but even if they were right, punishment is not required to bring into play the rules of natural justice. If a decision or determination affects the rights of subjects the rules of natural justice must be observed. See Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1924) 1 KB 171, 205; Ridge v. Baldwin 1964 A.C.40 - see Lord Reid at page 76; 30 and Lord Morris of Borth-y Gest at page 121. Moreover, the rules of natural justice will be implied even when a body is under no duty to come to a determination or decision of any kind provided only that its activities may have repercussions prejudicial to an individual (see Lord Denning M.R., in re Pergamon Press 1971 Ch.388 at 399). The investigating committee is such a body; it was therefore bound to allow the teacher the opportunity of commenting on and/or 40 contradicting evidence placed before it. Alternatively, the Board, before coming to a decision on suspension was bound to allow the teacher to comment on and/or contradict the report of the investigating committee.

p.69 line 42
- p.70 line
8 and p.71
lines 18-23

RECORD

A determination was made affecting the rights of the subject when the teacher was suspended. His right to teach and practice his chosen profession was curtailed. He was deprived of his income. Suspension involved civil consequences to the teacher. Refer Ridge v. Baldwin at page 122. Even if the teacher was found finally to be innocent of the offence charged the consequences of suspension set out in paragraph 13 above might well still ensue. Wild C.J. was however wrong to consider it relevant that if the teacher was found innocent he would be restored both as to his position and as to his salary. If he were found to be guilty there would be no such restoration and the suspension would have caused him a real prejudice. He ought, therefore, to have had an opportunity of making representations as to suspension. Whether or not the rules of natural justice must be observed in relation to the decision to suspend cannot depend on whether the teacher is finally found to be innocent or guilty.

p.70 lines
18-20

10

20

p.64 lines
7-13

15. The Legislature had not in fact excluded suspension as being something different from punishment in subs (3) and (4) of S.157 of the Education Act 1964 as held by the Chief Justice. The words "or otherwise punished" refer to the two particular penalties of transfer or reduction of salary as set out in sub (1) and do not refer to all other forms of punishment. These are penalties alternative to dismissal. In fact it is clear from S.157 that suspension is one of the forms of "disciplinary action" open to a Board under S.157. It was considered by the Legislature to be a step serious enough to warrant giving a right of appeal against it (157 3).

30

16. A Board has alternative avenues of less serious consequences open to it when deciding upon suspension under S.157 or 159. Under both sections instead of suspending the teacher he may be transferred to other duties. There is no such less drastic alternative open to a Board under the regulations. This demonstrates the seriousness of the decision to suspend under the regulations and the need for fairness in reaching such decision.

40

17. The Regulations are not a complete and exhaustive code of disciplinary procedure as held by the Chief Justice because :-

10 (a) Regulation 6 (1) is silent on the right to be heard and procedures to be followed before action is taken by a board under this Regulation. The Chief Justice erred in holding that the explanation given under Regulation 5 (3) satisfies the right to be heard. The explanation or statement under Regulation 5 (3) is optional. A teacher who has elected not to make a statement under Regulation 5 (3) must have the right to be heard if being dealt with under Regulation 6. Furthermore, the explanation or statement under Regulation 5 (3) may not be complete and would in all probability not concern questions to be decided by a Board under Regulation 6 namely :-

p.67 lines
6 - 15

- 20
- (i) as to whether or not an offence is proved;
 - (ii) if proved, whether the teacher be cautioned, reprimanded or censured;
 - (iii) what part of a teacher's salary is to be deducted if he was absent without leave and by what instalments such salary shall be refunded.

30 It is also to be noted that the decision reached and penalty (if any) imposed under this Regulation is to be forwarded to the Director-General. If the right to be heard has to be imported into Regulation 6 then it is submitted it may also be imported into Regulation 4.

40 (b) The Regulations or other legislation do not exclude or limit the application of the rules of natural justice either by the investigation before it makes findings under Regulation 4 or by the Board before it acts upon Regulation 5 (1) as held by the Chief Justice. Clear and express language in the legislation is required before natural

RECORD

justice will be held to be excluded by the Legislature. Refer Lord Wilberforce in Wiseman v. Bourneman 1971 A.C. 297 at 318. Regulation 2 on the contrary in defining "Teachers Organisation" indicates that there must be some prior reference to the teacher to enable nomination by him of the organisation to act on the investigation committee under Regulation 4. There was no such reference in this case.

10

- (c) The maxim "expressio unius, exclusio alterius" should not be applied when "its application having regard to the subject matter to which it is to be applied leads to inconsistency or injustice"; per Hopes J in Colquhoun v Brooks (1888) 21 Q.B.D. 52, 65. See also Jenkins LJ in Dean v. Wiesengrund 1955 2 Q.B. 120 at 131. It is submitted that the maxim should not be applied as, in effect, the Court of Appeal applied it in relation to the right to natural justice under the statutory procedure.

20

- (d) The Chief Justice in considering the history of the regulations for the basis of this interpretation has taken too arbitrary a view of, and in some cases wrongly interpreted, certain parts of the legislation.

Reference has already been made to the Chief Justice's interpretation of subs (3) and (4) of S. 157.

30

p.64 lines
3-7

There is no express authority in the legislation for the finding of the Chief Justice that under S.157 a Board's power to suspend a teacher "charged with an offence of the kind mentioned arises immediately the charge is laid and may be exercised without reference to the teacher".

p.64 lines
14-20

S.158 would not necessarily "include all criminal offences which are not punishable by imprisonment for 2 years or more" as held by the Chief Justice. Such an offence must be brought within the ambit of one or

40

more of the specific offences set out in paragraphs (a) to (g) of subs (1) of Section 158. It is difficult to see how gaming, liquor licensing and many traffic and transport offences would automatically fall within the specific offences so set out in Section 158.

- 10 18. The Chief Justice and North P. both accepted the submission of the Solicitor-General that the Board might have to act quickly to suspend. However, the procedure set out in Regulations 4 and 5 (1) must be followed and this procedure would of necessity take some time to implement. Reference to the teacher in the way proposed by Speight J. before suspension would not necessarily take any significant additional period of time. The short answer given on such reference could well explain or clear a teacher and avoid wrongful suspension even in the case cited by the Chief Justice and also relied on by North P. Refer Megarry J. in *John v. Rees* 1970 Ch. 353 at 402. The teacher may have been married to the young lady described in the example relied on by the Chief Justice and North P. He may have been wrongly identified.
- p.69 lines 2 - 19 and p.71 line 7 to p.72 line 3
- p.44 lines 1 - 13
p.49 lines 27 - 34

In the case under appeal there was no need to act quickly. There were no moral undertones. This was not a case of emergency or urgency.

- 30 Refer *De Vertuil v. Knaggs* (1918) A.C. 557, 560-561. Each case must be looked at on its own facts. Refer Lord Hodson in *Ridge v. Baldwin* 1964 A.C. 40 at page 133.

- 40 19. Wild C.J. emphasises that suspension is one "pending the determination of the matter in accordance with the following provisions" However if either the investigation under Regulation (4) or the Board before it acts under Regulation 5 (1) is bound by the rules of natural justice and has not complied then that failure is not cured by a sufficiency of natural justice in the subsequent determination of the matter. Refer *Leary v. National Union of Vehicle Builders* 1971 Ch. 34.49.

RECORD

The rules of natural justice may apply in relation to the imposition of a sanction which is only to have temporary effect pending a further investigation (*Byrne v. Kinematograph Renters Society Ltd.* 1958 1 W.L.R. 762).

Moreover, the provision for representations and a hearing in regulation 5 relates to the substance of the offence charged and not to suspension. The procedure laid down by the Regulations up to and including a hearing by the Teachers Disciplinary Board makes no express provision for representations or a hearing on the question whether suspension should be imposed. The Court of Appeal erred in not recognising that as a deficiency in the statutory procedure which should be made good by an implication that the rules of natural justice must be observed. 10

If there had been such deficiency of natural justice then the decision of the Board to suspend under Regulation 5 (1) is void. Refer Lord Reid in *Ridge v. Baldwin* (*ibid*) at page 80 and Lord Hodson at page 136; also Speight J. in *Denton v. Auckland City* (1969) N.Z.L.R. 256. 20

p.70 lines
30-39 and
p.71 lines
30-37

20. Wild C.J. and North P. were wrong in treating the decision to suspend as an administrative act not requiring the application of natural justice. This approach does not accord with the authorities cited in paragraph 10 and also *R. v. Gaming Board of Great Britain ex Parte Benaim* 1970 2 Q.B. 417 30

p.42 lines
11 -24

21. Speight J. was right in holding that the teacher came within the third category as set out by Lord Reid in *Ridge v. Baldwin* (*ibid*) at page 66. The teacher could not be dismissed or suspended except pursuant to the provisions of the Education Act 1964 or the regulations. A teacher has special status accorded to him under the Act. He is paid by the Government. The ordinary relationship of master and servant does not exist. Reliance is also placed upon *Malloch v. Aberdeen Corporation* 1971 1 W.L.R. 1578. 40

22. Certiorari is an appropriate remedy. Refer Lord Morris of Borth-y-Gest in *Ridge v. Baldwin* (*ibid*) at pages 125-126; also *Banks v.*

Transport Regulation Board (1968) A.L.R. 445.

23. The Appellant respectfully submits that this appeal should be allowed and the writ of Certiorari reinstated and that the Respondent should be ordered to pay the Appellant's costs and disbursements for the following among other

REASONS

- 10 (a) BECAUSE the Court of Appeal were wrong in holding that the teacher should not be heard before suspension on the grounds -
- (i) that the regulations comprised a complete code that excluded the application of natural justice before suspension, and
 - (ii) that suspension was not a punishment;
- (b) BECAUSE the decision of Speight J. in the Supreme Court was right for the reasons given by him;
- 20 (c) BECAUSE in the circumstances of this case the Respondent Board acted unfairly in suspending the teacher and the procedure followed did not measure up to what justice demanded.

M. E. GOLDSMITH

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF
NEW ZEALAND

BETWEEN
PAUL WALLIS FURNELL Appellant
- and -
THE WHANGAREI HIGH SCHOOLS BOARD
Respondent

CASE FOR THE APPELLANT
