

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
No.11 of 1972

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT
JOHOR BAHRU

BETWEEN:

THE GOVERNMENT OF THE FEDERATION
OF MALAYSIA

Appellant

AND

CALISTER LIONEL

Respondent

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CASE FOR THE APPELLANT

RECORD

1. This is an appeal from the judgment of the Federal Court of Malaysia (Ong C.J., Gill and Ali F.J.J.) allowing an appeal by the Respondent against an order made by Syed Othman J. on the 19th January 1971 dismissing a claim by the Respondent for a declaration that the Respondent's dismissal from the Police Clerical Service as a Temporary Clerk/Interpreter was void, inoperative and of no effect and that he was still a member of the said Police Clerical Service, and for an account and payment of all emoluments owing to him as a Temporary Clerk/Interpreter from the date of the said dismissal.

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2. The facts are not in dispute. On the 1st October 1953 the Respondent was appointed as a Temporary Clerk in the Police Clerical Service. The conditions of his appointment were contained in a letter dated the 28th September 1953 and included the following condition:-

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"That your engagement will be terminable
"at one month's notice, or on payment of

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LEGAL STUDIES
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"one month's salary in lieu of notice on
"either side..."

p.51 By reason of his appointment, the Respondent was subject to the provisions of the General Orders. By letter dated 27th April, 1962, disciplinary action under Regulation 32 of the General Orders, Chapter 'D' was taken against the Respondent by the Chief Police Officer, Johore, for acts of indiscipline. The alleged offences against discipline fell under two headings: first, conduct bringing the public service into disrepute; and secondly, insubordination to his immediate superior on two specified occasions. The Respondent was required by the said letter to exculpate himself in writing within fourteen days of the receipt of the letter. By letter dated the 8th May 1962, the Respondent sent a written exculpation to the Chief Police Officer. By letter dated the 29th May, 1962, the Chief Police Officer wrote as follows:-

"With reference to my letter to you (SR)
"PF/3596 dated 30th April, 1962, and to
"your reply thereto dated 8th May, 1962,
"I have to inform you that, after careful
"consideration of your representations, I
"have decided that you have failed to
"exculpate yourself.

"2. I have, therefore, decided to terminate
"your services as a Temporary Clerk with
"effect from 1st June, 1962, on payment to
"you of one month's salary plus cost of
"living allowance in lieu of notice."

p.53 By letter dated the 10th June, 1962, the Respondent appealed to the Public Services Commission, Kuala Lumpur, against the decision of the Chief Police Officer. This appeal was dismissed.

3. The issues which arise upon this appeal are as follows:-

(i) Whether the letter dated 30th May 1962 terminated the Respondent's employment in accordance with the condition whereunder he was employed, or whether such letter

constituted a purported dismissal by reason of acts of indiscipline

10 (ii) If the said letter represents a purported dismissal on account of acts of indiscipline whether the Public Services Commission had delegated their power of dismissal to the Chief Police Officer or, alternatively, whether the Public Services Commission itself exercised the power of dismissal.

(iii) Whether the Respondent's cause of action was in any event barred by the Public Authorities Protection Ordinance 1948, Section 2, and the Government Proceedings Ordinance, 1956, Sections 6 and 38.

4. The statutory provision and the General Orders which have been considered to be relevant in the Court below are as follows:

CONSTITUTION

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Chapter X

Art. 132 (1) For the purposes of this Constitution, the public services are - (a) the armed forces; (b) the judicial and legal service; (c) the general public service of the Federation....

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Art. 132 (2A) Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a), (b), (c) ... of Clause (1) holds office during the pleasure of the Yang di-Pertuan Agong, and except as expressly provided by the Constitution of the State, every person who is a member of the public service of a State holds office during the pleasure of the Ruler or Governor

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Art. 135 (1) No member of any of the services mentioned in paragraphs (b) to (g) of Clause (1) of Article 132 shall be dismissed or reduced in rank by any authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank.

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Art. 139 (1) There shall be a Public Services Commission, whose jurisdiction shall, subject to Article 144, extend to all persons who are members of the services mentioned in paragraphs (b), (c) and (f) of Clause (1) of Article 132...

Art. 144 (1) Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends.

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Art. 144 (6) A Commission to which this Part applies may delegate to any officer in a service to which its jurisdiction extends...any of its functions under Clause (1) and that officer ...shall exercise those functions under the direction and the control of the Commission.

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FEDERATION OF MALAYSIA.

GENERAL ORDERS

CHAPTER "D"

31. In these Regulations the "Disciplinary Authority" means in relation to any officer the Commission whose jurisdiction extends to the service of which such officer is a member in accordance with the provisions of Part X of the Constitution.

Provided that where such Commission in pursuance of Clause (6) of Article 144 of the Constitution has delegated the exercise of disciplinary control in respect of any grade of service to an officer or board of officers, any reference to the Disciplinary Authority shall in relation to an officer within that grade of service be construed as referring to the officer or board of officers to whom such function has been delegated.

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10 32. Before the Disciplinary Authority imposes any penalty on an officer not on the pensionable establishment who is in Division III or IV of the Public Service or who is a daily-rated officer the officer concerned must be given an adequate opportunity to exculpate himself. The fact of dismissal of an officer in Division III or IV, or a daily rated officer must be reported in every case to the Secretariat concerned.

20 36. Notwithstanding anything in Regulations 32, 33 and 34 the Government may dispense with the services of any officer or employee not on the pensionable establishment by giving due notice in accordance with the terms of his appointment. In the case of monthly paid officers, who have served one year or more in a temporary capacity or are on the permanent non-pensionable establishment, the period of this notice will normally be three months but Government reserves the right to terminate the appointment of an officer not on the pensionable establishment by payment of one month's emoluments in lieu of notice without assigning any reason.

PUBLIC AUTHORITIES PROTECTION ORDINANCE 1948.
Federation of Malaya. Federal Ordinance No.
19 of 1948

30 Section 2. Where, after the coming into force of this Ordinance, any suit, action, prosecution, or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect -

40 (a) the suit, action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect, or default complained of or in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof.

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GOVERNMENT PROCEEDINGS ORDINANCE, 1956.
Federation of Malaya Federal Ordinance
No.58 of 1956

Section 5. Subject to the provisions of this Ordinance, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government

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Section 6 (1) No proceedings shall be against the Government by virtue of Section 5 in respect of any act neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

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(2) Any written law which negatives or limits the amount of the liability of any public officer in respect of any act, neglect or default committed by that officer shall, in the case of proceedings against the Government under Section 5 in respect of such act, neglect or default of such officer, apply in relation to the Government as it would have applied in relation to such officer if the proceedings against the Government had been proceedings against such officer.

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Section 38 Any written law relating to the limitation of time for bringing proceedings against public authorities may be relied upon by the Government as a defence in any civil proceedings against the Government

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5. Syed Othman J. held that the Chief Police Officer had not dismissed the Respondent but had terminated his appointment in accordance with its terms and, accordingly, that the question of compliance with General Order Chapter "D" 31 did not fall for consideration.

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He further held in any event that the only inference to be drawn from the Public Services Commission's dismissal of the Respondent's appeal from the Chief Police Officer's decision was that the Commission had delegated the power to dismiss the Respondent to the Chief Police Officer. The learned Judge supported this conclusion by reference to a letter dated the 27th April 1962 to the Chief Police Officer from the Senior Assistant Commissioner "A" for Commission of Police, Kuala Lumpur, containing advice obtained from the Officer of the Public Services Commission concerning the action to be taken against the Respondent which further evidenced the delegation of the power to dismiss the Respondent. The learned Judge did not deal with the issue of whether the Respondent's action was time-barred.

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6. Upon appeal by the Respondent to the Federal Court of Malaysia, Ong C.J., with whose judgment Gill and Ali F.J.J. concurred appeared to hold that the Respondent's employment had not been terminated lawfully upon notice but that he had been dismissed as a disciplinary act. He held that the Chief Police Officer did not have the power to dismiss the Respondent under the Constitution, relying particularly upon Article 144 (6), Article 139 (1) and Article 135 (1) of the Constitution. He held that the Appellant had neither pleaded nor proved that the Chief Police Officer was exercising powers delegated to him by the Public Services Commission. He further held that, in any event, it was no answer to the Respondent's claim that upon appointment he had agreed to accept one month's notice of termination of his services; he concluded that such provision would be invalid by reason of Article 4 of the Constitution being inconsistent with the provisions of Part X of the Constitution.

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7. The appellant first submits that there is a distinction to be drawn between dismissal of a temporary public servant by way of penalty and termination of the appointment of such a servant in accordance with the term of his appointment as to notice or payment in lieu of

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notice. Article 135 (1) of the Constitution and General Orders, Cap.D, Regulations 31 and 32 apply only to the former as held by the Federal Court in Haji Ariffin v. Government of Panang (1969) 1 MLJ 6 and Granasundram v. Government of Malaysia (1971) M.L.J. 208.

Termination by proper notice or by payment in lieu of notice is entirely different and is governed only by the provisions of General Orders, Cap. D. Regulation 36. The Court held in each of the cases cited that temporary officers are appointed in accordance with the terms of their appointment and consequently there was no conflict with Article 135 of the Federal Constitution. The question whether a public servant has been dismissed by way of penalty, or whether his appointment has been terminated in accordance with the conditions of employment does not depend on the reasons of the Appellant for deciding to cease to employ the Respondent and it matters not that misconduct was alleged against him. The question depends solely upon whether in fact the term of the appointment and General Orders Cap. D, Regulation 36, are complied with. The Appellant submits that in the instant case the Respondent's appointment was properly terminated in accordance with its conditions and with General Orders, Cap.D. Regulation 36.

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8. The Appellant also submits that, even if it be held that the provisions of the Constitution as to dismissal and General Orders, Chapter "D" Regulations 31 and 32 did apply in the instant case, there was sufficient evidence that the Public Services Commission had delegated their power of dismissal to the Chief Police Officer. This evidence was constituted by the Public Services Commission's dismissal of the Respondent's appeal to them and by the letter from the Senior's Assistant Commissioner of Police at Kuala Lumpur to the Chief Police Officer containing the information obtained from the Officer of the Public Services Commission concerning the action to be taken against the Respondent. The Federal Court was accordingly wrong to reverse Syed Othman J. on this issue. Alternatively, if the powers of the Public Services Commission had not been delegated to the Chief Police Officer, the Public Services

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Commission had before it the exculpatory letter of the Respondent when it considered his appeal against the purported decision of the Chief Police Officer. If the decision of the latter was invalid, then upon a proper interpretation the dismissal by the Public Services Commission of the Respondent's appeal should be regarded as compliance with Regulations 31 and 32

10 9. Finally, the Appellant submits that the Respondent's action was statute-barred by Section 2 of the Public Authorities Protection Ordinance, 1948, and by Sections 6 and 38 of the Government Proceedings Ordinance, 1956, being commenced more than 12 months from the date of the acts which formed the subject-matter of the Respondent's complaint. The Appellant can by reason of the Government Proceedings Ordinance, 1956, avail itself of the defence which would have been available to the Chief Police Officer had he been sued personally. Accordingly, 20 having reached a different conclusion from Syed Othman J. on the issue of whether the Respondent had been validly dismissed, the Federal Court should have dealt with the limitation issue and held that the Respondent was out of time and therefore barred from bringing his suit.

30 10. The Appellant submits that the judgment of the Federal Court should be reversed and the Order of Syed Othman J. restored for the following, among other

R E A S O N S

- (1) BECAUSE the Respondent was not dismissed but his employment was terminated in accordance with the terms of his employment and Article 135 of the Constitution does not apply to such termination
- 40 (2) BECAUSE there was evidence to justify Syed Othman J. holding that the Public Services Commission had delegated its power of dismissal to the Chief Police Officer

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- (3) BECAUSE if the Chief Police Officer had no power to dismiss the Respondent, the decision of the Public Services Commission ratifying the decision of the Chief Police Officer constitutes a valid dismissal.
- (4) BECAUSE the Respondent's action was barred by the combined effect of the Public Authorities Protection Ordinance 1948 and the Government Proceedings Ordinance 1956.

ROBERT ALEXANDER.

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