

Mrs. Jill Spruce

Appellant

v.

The University of Hong Kong

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
30TH MARCH 1993

Present at the hearing:-

LORD TEMPLEMAN
LORD GRIFFITHS
LORD OLIVER OF AYLMEYTON
LORD BROWNE-WILKINSON
LORD SLYNN OF HADLEY

[Delivered by Lord Browne-Wilkinson]

The appellant, Mrs. Spruce, was a senior lecturer in law at the University of Hong Kong, the respondent, from 1983 until the Council of the University decided to terminate her appointment on 26th July 1990. In these proceedings, Mrs. Spruce seeks an order of *certiorari* to quash that decision. Her application failed before Jones J. on 4th April 1991. An appeal to the Hong Kong Court of Appeal was dismissed on 20th August 1991. Mrs. Spruce appeals to Her Majesty in Council.

As the matter proceeded before the Board, the facts relevant to the Board's decision lie within a narrow compass. Mrs. Spruce held her appointment as senior lecturer on the terms set out in the Terms of Service. Clause 4(e)(i) of those terms provided as follows:-

"A teacher may engage in outside practice, i.e. the use for reward ... by a teacher of his professional knowledge outside of or in addition to his University duties, in accordance with such regulations as the Council may make from time to time, but not to the detriment of the performance of his University duties."

It is the contention of the University that there were regulations relating to outside practice in force at the date

of Mrs. Spruce's appointment ("the Regulations") which had been approved by the Council of the University on 24th June 1982. Regulation 6 1(i) provided that a teacher in Mrs. Spruce's position should not undertake any commitment to practice without the approval of his Head of Department. Regulation 8 provided that a failure to comply with the requirements of paragraph 6 1(i) would be deemed to be "good cause" for termination of appointment.

The reference to "good cause" in Regulation 8 was a reference to section 12(9) of the University of Hong Kong Ordinance which provides as follows:-

"12(9) ... The teachers shall be appointed by the Council. The Council shall not terminate the appointment of any teacher except where after due enquiry into the facts and after receiving the advice of the Senate on the findings of such enquiry there exists in the opinion of the Council good cause for such termination."

"Good cause" is defined by section 2(2) as meaning "inability to perform efficiently the duties of the office, neglect of duty or such misconduct whether in an official or private capacity as renders the holder unfit to continue in office".

The Regulations were notified to staff in a book known as the Staff Manual where they were expressed to apply as from 1st April 1983. The Foreword to the Staff Manual stated that "the Staff Manual is issued for information only and does not form part of the University's contracts with its staff".

From 1986 onwards there were disagreements between the head of the Department of Law, Dr. Wacks, and Mrs. Spruce as to the amount of time she was devoting to her practice at the Bar to the prejudice, it was said, of her teaching duties. The matter came to a head in October 1988. On 27th October 1988 Dr. Wacks wrote to Mrs. Spruce after he had received information that she had appeared in court for sixteen consecutive days without his knowledge or consent. His letter also referred to the cancellation or rescheduling of lectures and tutorials without advance notification, and the holding of classes on Saturday mornings. Mrs. Spruce did not reply. On 1st November 1988, Dr. Wacks wrote to Mrs. Spruce again repeating the contents of the letter of 27th October together with details of further allegations relating to Mrs. Spruce's conduct in relation to outside practice. The letter of 1st November concluded by stating that Mrs. Spruce no longer had his permission for outside practice and that he had reported the matters set out in the letter to the Vice-Chancellor for his consideration as to whether or not there was cause for termination of Mrs. Spruce's appointment under Ordinance 12(9).

Disciplinary proceedings relating to two complaints were initiated. These were considered by the University's Committee on Personnel Matters ("CPM") which reported to the Vice-Chancellor. The Vice-Chancellor referred the matter to a Sub-Committee of the Senate whose report was produced in December 1989.

On 11th December 1989 Dr. Wacks made a third complaint against Mrs. Spruce that, despite the withdrawal of permission to engage in outside practice, Mrs. Spruce had appeared as counsel on five occasions in the High Court during 1989. On 29th December 1989 this third complaint was also referred to the CPM which, after a hearing, on 12th June 1990 reported that Mrs. Spruce's appearances in court, which she admitted, amounted to a breach of contract. On 14th and 19th June 1990 the Senate Sub-Committee considered the reports and concluded that good cause had been demonstrated. It made a recommendation that Mrs. Spruce be dismissed on the following grounds:-

- (a) Failure to comply with instructions from the Head of Department;
- (b) Neglect of University duties;
- (c) Lying to the Head of Department;
- (d) Engaging in outside practice without permission and after permission had been expressly withdrawn.

On 26th June 1990 the Senate adopted the Sub-Committee's report as its advice to Council. On 26th July 1990 the Council considered the Sub-Committee's report as well as a written statement from Mrs. Spruce and resolved to terminate her appointment under Ordinance 12(9) on the ground that it had "formed the opinion that good cause for the termination of Mrs. Spruce's appointment did exist in that the facts as determined by the enquiries showed a pattern of misbehaviour which constituted such misconduct in the performance of her duties as a University teacher as rendered her unfit to continue in office". On 27th July 1990 Mrs. Spruce was informed of the Council's decision and her appointment was terminated with effect from that date.

Before the judge, Mrs. Spruce relied on a number of different grounds for attacking the decision of the Council, including a contention that the decision was vitiated by an error of law viz. that Mrs. Spruce had committed a breach of contract by carrying on her outside practice in breach of the Regulations. The judge rejected all the grounds relied on by Mrs. Spruce and dismissed her application. The Court of Appeal upheld the decision of the judge on all grounds, save that relating to breach of contract. The Court of Appeal held that the decision to terminate the appointment was affected by an error of law in that the Regulations did not form part of Mrs.

Spruce's contract and therefore she was not in breach of contract. However, the Court of Appeal dismissed Mrs. Spruce's appeal on the ground that, given the breakdown of trust and the unhappy relationship between the parties, it was not a proper case in which to exercise the discretion to quash the decision of the Council. The Court of Appeal therefore dismissed the appeal, but ordered the University to pay all Mrs. Spruce's costs.

The appeal before the Board raises a number of issues, but Mr. Beloff, for Mrs. Spruce, accepts that, save for one point to be mentioned later, the appeal cannot succeed unless he can uphold the decision of the Court of Appeal that the Regulations did not form part of Mrs. Spruce's terms of employment. If the Regulations did form part of the contract, *inter alia* Regulation 6 1(i) prohibited Mrs. Spruce from carrying on outside practice without the approval of her Head of Department and such approval had been withdrawn by the letter from Dr. Wacks of 1st November 1988. Therefore, Mrs. Spruce was in breach of Regulation 6 1(i). Such breach constituted a breach of clause 4(e)(i) of her Terms of Service and was good cause for termination of her appointment.

The first question for determination therefore is whether the Court of Appeal was right in holding that the Regulations did not form part of Mrs. Spruce's contract. It is Mrs. Spruce's contention that the Regulations which have been quoted were not incorporated into the contract of employment because:

1. Council had no power under the Ordinance and Statutes of the University to make the Regulations;
2. If Council had such power, it had not exercised it;
3. If the Regulations had been validly made, they were not incorporated into Mrs. Spruce's contract because they had only come to her attention by reading the Staff Manual, the Foreword to which stated that it was not part of the terms of her contract.

The power to make the Regulations.

The University is governed by the Ordinance and the Statutes made thereunder. Section 12(14) of the Ordinance provides:-

"The powers and duties of the officers and teachers, the periods and conditions for and upon which they hold office and their emoluments shall be such as are prescribed by this Ordinance, the statutes, and the terms of their respective appointments; but the Council may assign to any officer or teacher, ... such further powers and duties as it may think fit."

Statute XIX-2. confers on Council the power to do certain things set out in sub-paragraphs (a) to (s). Sub-paragraphs (p) and (s) provide as follows:-

"(p) To prescribe the duties of officers, teachers and other employees whom it may appoint and to fix their remuneration and the terms and conditions of their appointments;

(s) To do all such other acts and things as may be requisite to perform any duty which the Court may delegate to the Council or to give effect to the powers conferred on the Council by the Ordinance or the statutes."

Paragraph 3(1) of Statute XIX provides as follows:-

"The Council may by regulation provide for any of the following matters or for any of the following purposes -

...

(f) the prescribing of anything which is by the Ordinance or the statutes to be prescribed by regulations made by the Council; and

(g) generally, all matters which by the Ordinance or the statutes it is empowered to regulate."

On the face of it, these powers are fully wide enough to authorise Council to make the Regulations governing outside practice. Under paragraph 3(1)(f) the Council is empowered to make regulations for the purpose of prescribing anything which is by the Ordinance or the Statutes to be prescribed by Regulations and paragraph 2(p) provides that the duties and terms of teachers' appointments (which include their ability to engage in outside activities) can be prescribed by Council. However, Mr. Beloff submitted that in order to fall within paragraph 3(1)(f) it is not enough to find that the Council has power to prescribe the matter; it is necessary to find in the Ordinances or Statute an express power to prescribe by regulation. The Board does not accept this submission since it is an unduly technical reading of the Statute. But in any event the Council had power to make the regulations under paragraph 3(1)(g): the Regulations deal with a matter which under paragraph 2(p) Council has power to regulate.

Were the Regulations in fact made?

Mr. Beloff submits that it is strange that the University have not been able to produce any document, other than the copy of the Regulations printed in the Staff Manual, which is officially identified as being the Regulations made by Council. He further submits that the minutes of meetings of Council do not show how or when the Regulations were in fact made.

At a Council meeting on 29th October 1981, Council considered recommendations from the Terms of Service

Committee on outside practice together with draft Regulations. Council approved the recommendations in principle but referred back to the Committee certain matters for further consideration.

At some stage, a document headed "Outside Practice: Memorandum of Guidance and Regulations" came into existence. That document contains a draft of the Regulations in the same terms as they were subsequently printed in the Staff Manual. At a meeting on 25th February 1982 Council approved the setting up of a Committee on Outside Practice by Teachers, amongst the duties of which was a duty to implement the control of outside practice "as laid down by the Council in its memorandum of guidance and regulations governing such practice". At the same meeting, Council requested the advice of the new Committee on certain matters relating to the outside practice regulations.

The Terms of Service Committee considered these points and made a report to Council, the last paragraph of which recommended that "the new Outside Practice Regulations should be implemented with effect from April 1, 1983". That report was considered by Council on 24th June 1982, when Council approved the Committee's report. Thereafter the Regulations were printed in the Staff Manual.

This history shows that there were draft Regulations before Council in the same form as those eventually printed in the Staff Manual. Council approved the recommendation that such Regulations be implemented. In the circumstances, in the view of the Board, it is impossible to contend that Council had not approved and made the Regulations: it could not have approved a recommendation to implement such Regulations without either having previously made them or, implicitly, made them by directing their implementation. There is no statutory requirement as to the procedure to be adopted in making Regulations. In the absence of such a requirement, a resolution that the Regulations are to be implemented necessarily implies that the Regulations are approved by Council.

Were the Regulations incorporated into Mrs. Spruce's contract?

The Staff Manual contains a Foreword which says "The Staff Manual is issued for information only and does not form part of the University's contracts with its staff". The Court of Appeal held that, since Mrs. Spruce was only aware of the terms of the Regulations through reading them in the Staff Manual, these prefatory words prevented the Regulations from being incorporated into her contract.

The Board is unable to agree. Clause 4(e) of Mrs. Spruce's contract of employment requires that any outside practice is to be conducted in accordance with regulations. The University has made the Regulations. Therefore, by the terms of clause 4(e) the Regulations are incorporated into the contract. The fact that Mrs. Spruce was only

aware of the terms of the Regulations through reading them in the Staff Manual is nothing to the point: the Regulations bound her wherever she read them or even if she did not read them provided that they were available to her. The words of disclaimer in the Staff Manual would be effective to prevent any provision in that Manual becoming incorporated into contracts of employment simply by virtue of it appearing in the Manual. But the prefatory words can have no effect to downgrade from being a contractual term that which the contract of employment itself incorporates into the contract and provides shall be a term of the contract.

Therefore, there was no error of law made by Council in reaching its conclusion to terminate Mrs. Spruce's appointment. She was in breach of the terms of her contract. In those circumstances, Mr. Beloff accepts that there is no ground on which he can support the decision of the Court of Appeal.

Mr. Beloff takes one other point which was rejected by both the judge and the Court of Appeal, viz. that the termination of the appointment by Council without giving Mrs. Spruce an opportunity to make submissions in mitigation was a breach of natural justice.

Under section 12(9) of the Ordinance, Council could not resolve to terminate the appointment for good cause without, first, due enquiry into the facts, and second, receiving the advice of the Senate. Even if Council was of opinion that there was good cause for termination, Council was not bound to terminate: it could have adopted some other course. The enquiry into the facts was conducted by the Sub-Committee who found that there was "good cause" for termination and advised that, in the absence of mitigating circumstances, Mrs. Spruce should be dismissed. However the Sub-Committee pointed out that Mrs. Spruce had had no opportunity to address the Sub-Committee on mitigating circumstances and recommended that "the Council invite Mrs. Spruce to attend before it to make any further submissions she wishes Council to take into consideration".

On 26th June 1990, the Senate adopted the report of the Sub-Committee as its advice to Council and endorsed the recommendation of the Sub-Committee that Council invite Mrs. Spruce to state her case before it in person.

At a Council meeting on 28th June 1990, Council considered the Report of the Sub-Committee and the advice of the Senate. Council decided not to hear Mrs. Spruce in person but resolved to invite her to submit by 19th July 1990 any written statement she might wish to make on the findings of the Sub-Committee for consideration by Council at a special meeting to be held on 26th July 1990.

At the meeting on 26th July, Council received a written submission sent by Mrs. Spruce in response to the invitation of Council. Council rejected a request by Mrs. Spruce to be allowed to address Council in person and resolved to terminate her appointment.

It is suggested that the refusal to hear Mrs. Spruce in person in some way constitutes a breach of the rules of natural justice. The Board is quite unable to accept this submission. There is no general principle that the rules of natural justice require an oral hearing, let alone an oral speech in mitigation. Mrs. Spruce was given full opportunity to put in writing any mitigating circumstances which she might wish to draw to the attention of Council with a view to persuading it not to adopt the advice of the Senate. The trial judge found that "all the bodies concerned treated the applicant with the utmost fairness and provided her with every opportunity to meet the allegations that were made. In fact, it can be justifiably said that the University leant over backwards to ensure that she was treated fairly". The Board agrees.

There is a cross-appeal by the University against the order of the Court of Appeal that the University pay all the costs of Mrs. Spruce. This order can only have been based on the erroneous view of the Court of Appeal that the University had made an error of law in terminating Mrs. Spruce's employment. Therefore that order for costs cannot stand.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed and the cross-appeal allowed and that Mrs. Spruce ought to pay the costs of the University before Jones J. and the Court of Appeal. Mrs. Spruce must also pay the University's costs before their Lordships' Board.