JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 72/95

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE FORTE JA
THE HON MR JUSTICE DOWNER JA

BETWEEN **PAUL JENNINGS** **APPELLANT**

A N D **DIRECTOR OF CIVIL AVIATION** **RESPONDENT**

Lord Gifford QC & Keste Miller for appellant

Lackston Robinson for respondent

18th, 19th February & 3rd March 1997

CAREY JA

The appellant was appointed temporarily to the post of Air Traffic Controller I (Approach) in the Civil Aviation Department with effect from 11th February 1994. It appears that he was assigned to Sangster International Airport, Montego Bay in St. James. In late June 1994, an aircraft landed at the airport in somewhat suspicious circumstances at a time when the appellant was the officer on duty. Investigations revealed that the aircraft was involved in transporting ganja out of the island and while being loaded at Boscobel airport in St. Mary, persons concerned in that operation fired at the police. Mr. Jennings was asked to submit a report. The relevant portion of the request was couched in these words:

> "The aircraft is the subject of ongoing investigations by the Police, consequently as the officer on duty at the time, you are hereby requested to furnish this office with a written report as to the events surrounding the arrival of this aircraft and the correct point of departure.

Your immediate response is required."

The appellant replied promptly, explaining that he had arrived in time to take over his watch but had allowed himself to be persuaded to go off with his visitor and have a drink in the cafeteria. His absence during that period made it impossible for him to provide any information regarding the arrival or the departure of the particular aircraft. He concluded his reply thus:

> "As I have already stated , I was not in the tower at the time entered in the log for the aircraft's arrival. I acknowledge that it was wrong for me to have accepted responsibility for a period of time when I was not in the tower, therefore rendering myself unable to account for events which occurred during that time."

Subsequently, his services were terminated by the Director of Civil Aviation on the direction of the Chief Personnel Officer. The memorandum dated 23rd September 1994 said as follows:

> " I am directed to inform you that your temporary appointment as an Air Traffic Controller I (Approach) is hereby terminated with effect from 26th September, 1994 in accordance with the terms and conditions of your temporary employment under paragraph 19 (b) of the Second Schedule the Public Service Regulations, 1961.
>
> You will be paid one (1) month's salary in lieu of notice, as well as receive payment for any vacation leave for which you may be eligible."

The appellant sought an order of certiorari to quash the order terminating his temporary appointment but the Full Court discharged the order nisi and dismissed the application.

The high ground on which Lord Gifford QC rested his arguments was that the Director of Civil Aviation who purported to act within his authority by virtue of paragraph 19 (b) of the Second Schedule of the Public Service Regulations 1961 acted in breach of the principles of natural justice. He expanded this by submitting that a public authority may not lawfully conceal the true reason for dismissing a public officer. If the true reason is alleged misconduct, then the court must look to see whether the legal requirements attending such a dismissal were fulfilled. In the present case, they were not. The Full Court was wrong in looking to the label [paragraph 19 (b)] rather than to the substance [paragraph 19 (a)].

I would begin this part of the judgment by setting out the procedure (so far as material) for the dismissal of temporary employees such as the appellant as provided by the Public Service Regulations 1961:

> "*Temporary Employees, Daily-paid employees and Casual Employees*
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> 19. The following procedure shall apply only to temporary employees, daily-paid and casual employees -
>
> (a) the appropriate authorized officer may, after such informal enquiry as he may think fit, forthwith dismiss a temporary employee if he is satisfied that such employee has been guilty of any misconduct;
>
> (b) the appropriate authorized officer may, without an enquiry being held or without giving any reason, dismiss a temporary employee by giving him two weeks' notice (or such other notice as may be specified in the letter of appointment) or two weeks' salary in lieu of notice;
>
> (c) ..."

An authorised officer, in the instant case, the respondent, is given two options when contemplating dismissal. In the one, where there has been proof of misconduct, an employee may be dismissed without notice. In this case, be it noted, there must be an enquiry; natural justice is served, procedural propriety is honoured. In the other case, there need be no enquiry and without assigning a reason therefor, the officer is entitled to dismiss an employee by giving an appropriate notice or pay in lieu. Each provision is intended for mutually exclusive situations. Allegations of misconduct must prompt the holding of such an enquiry as the circumstances may warrant. The informal enquiry stipulated in paragraph 19 (a), in my view, means such investigation as provides the authorized officer with sufficient facts to understand the nature, scope and gravity of the situation and the enquiry must afford the employee an opportunity to be heard. I do not accept as Lord Gifford QC contended, that the employee must be given prior notice of his dismissal so that he may show cause why he should not be dismissed. Nothing in the language of paragraph 19 (a) of the Regulations even remotely suggests such a requirement in any shape or form. Indeed no notice of dismissal is called for.

It can be said with a degree of certainty that, if therefore, misconduct is the basis for dismissal then procedural fairness demands that a temporary employee cannot be dismissed without the holding of an enquiry. It would be entirely impermissible to send him off, albeit with the appropriate notice or pay in lieu thereof. I have no difficulty therefore in accepting Lord Gifford's argument in that respect. It is right to add that Mr. Robinson for the respondent concurred in that view. The New Zealand case of **Poananga v State Services**

Commission [1985] 2 NZLR 385 cited by Lord Gifford QC is helpful in that regard. But that acceptance does not, I fear, provide the consummation devoutly wished for by the appellant.

The appellant sought the discretionary remedy of certiorari. He rested his complaint essentially on a breach of natural justice, viz, he was not given an opportunity to be heard. Although the argument was framed in the way it was, that is, that the respondent concealed the true reason for dismissal by relying on paragraph 19 (b), at its core was the suggestion that there was no enquiry; the appellant was not heard. But that is entirely contrary to the facts and circumstances of the case. The Director transmitted a memo to the appellant who was well aware of his wrong doing which he plainly admitted in his response which has been recited earlier in this judgment. There cannot be the least doubt that he has been heard. Paragraph 19 (a) has been satisfied although it is true, that the respondent purported to act under paragraph 19(b) of the regulations. There is plainly no basis whatever for holding that the appellant has been treated procedurally unfairly. No breach of natural justice has occurred and accordingly this Court cannot order certiorari to go to quash the order of dismissal.

One final point may, I think, properly be made. The appellant who as a temporary employee had his appointment terminated, should not and cannot have on his file any record that he was dismissed for misconduct. The Full Court, in my judgment, came to a correct determination although their approach was somewhat different to that which I have adopted.

It was these reasons which constrained me to agree with my Lords that the appeal should be dismissed and the order of the Full Court affirmed.

FORTE, J.A.

I have had the opportunity of reading in draft, the judgment of Carey, J.A. whose conclusion and reasons accord with my own and consequently I have nothing to add.

DOWNER, J.A.

I agree with the reasons and conclusion of Carey, J.A.