20/12

Porter, NZ Law Reports

3

FWT

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

A.395/84

1571

Appeal rejected

No Special Consideration

IN THE MATTER of the Judicature Amendment Act 1972

AND

IN THE MATTER of an Application for Review

BETWEEN MICHAEL JOHN GOULDEN of Picton, General Manager

Applicant

AND THE MARLBOROUGB HARBOUR BOARD of Picton

Respondent

Hearing 4, 5 December 1984 (at Blenheim)

Counsel M R Camp and C T Clark for Applicant
R D Crosby for Respondent

Judgment 19 December 1984

JUDGMENT OF DAVISON C.J.

The applicant seeks a judicial review of the decision of the Marlborough Harbour Board ("the Board") given on 26 October 1984 dismissing the applicant from the position of General Manager.

BACKGROUND

The applicant joined the Board as Assistant General Manager in 1977. He was appointed General Manager on 23 May 1979.

On 12 October 1984 the Chairman of the Board prepared a report on the performance of the General Manager with particular reference to his withholding information from the Board in relation to a personal grievance dispute involving the Harbourmaster, Captain Jamison. That report was circulated in confidence to members of the Board. Six members then delivered to the Secretary a requisition to call a special meeting of the Board on Friday 26 October 1984 at 2 p.m. "to consider the performance of Mr Goulden as General Manager and his cooperation with the Board Chairman and members".

On 16 October a copy of that requisition was given to the applicant. At a meeting on 23 October 1984 the Board resolved:

> " That the General Manager be asked to explain:
>
> 1. Why the second letter from the M.O.T. dated 30 July 1984, signed by A.K.Ewing, Secretary of Transport, was not fully conveyed to the board's August meeting.
> 2. Why the letter in question was not processed in the board's normal administration procedure.
> 3. Why the board's 28 August resolution and the Chairman's instruction on the subject relating to change in responsibility between the Operations Manager and Harbourmaster was not carried out. "

Next day on 24 October the Secretary gave to the applicant a memorandum (to which the Board's resolution of 23 October was attached) requesting him to attend the meeting called for 2 p.m. Friday 26 October 1984. The applicant on 25 October delivered to the Secretary a memorandum acknowledging receipt of the Board Resolution and requesting a copy of the Chairman's report to enable him to prepare for the meeting.

He was given a copy of that report. The meeting of the Board was held on 26 October 1984 as arranged. The applicant attended with his solicitor, Mr Radich. The Board's solicitor Mr Macnab was also present. Lengthy discussion (which was recorded on tape) took place. The meeting then adjourned.

Later that day the applicant received a notice of dismissal terminating his appointment as General Manager in accordance with clause 6 of the Conditions of Appointment for that position and placing him on special leave with pay from 26 October 1984 to the termination of his employment on 26 January 1985.

THESE PROCEEDINGS

The applicant claims:

1. That the Board in dismissing him was exercising a statutory power of decision given it by s 42 of the Harbours Act 1950.

2. That the Board in exercising such statutory power was obliged to act fairly and in accordance with the rules of natural justice.

3. That the Board failed so to act in a number of respects as set out in para 14(a) - (l) of the statement of claim (which will be referred to later).

The applicant seeks an order setting aside the decision of the Board of 26 October 1984 dismissing him as General Manager.

THE BOARD says in reply:

1. That in dismissing the applicant the Board did not exercise a statutory power of decision under s 42 of the Harbours Act 1950 but dismissed him in exercise of its contractual right to do so in terms of clause 6 of the Conditions of Appointment.

2. That if it was exercising a statutory power of decision, it denies it was obliged to act in accordance with the rules of natural justice and says either -

   (a) That it was acting in terms of the contract that it was authorised to enter into by statute:

   (b) That if it is found that it was acting pursuant to the statutory power then it was only under an obligation to act fairly which it did in calling the meeting and giving the applicant an opportunity to be heard.

(c) That in any event it did act in accordance with the rules of natural justice.

STATUTORY POWER

The first matter to consider is whether or not the Board exercised a statutory power of decision in accordance with the provisions of the Judicature Amendment Act 1972. Unless it did, the applicant has no right to seek a judicial review of its decision.

The applicant claims that it did and in fact acted under s 42 of the Harbours Act 1950. The Board denies that and says it acted simply under clause 6 of the contract of employment. The facts which I find in relation to this matter are these:

The Board prior to the appointment of the applicant as General Manager published a document headed "Conditions of Appointment - General Manager" calling for applications for the position of General Manager for the Marlborough Harbour Board to be addressed to the Chairman of the Board and endorsed "Application - General Manager".

Clause 6 of those terms and conditions provided:

> " Three months notice of termination of employment shall be given by either party, except in the case of misconduct, negligence or other serious offence when the Board may summarily terminate the employment. "

The applicant applied for the position but initially was not appointed. When the successful applicant subsequently withdrew, the Board by letter dated 23 May 1979 from the Chairman, offered the position to Mr Goulden:

> " I have pleasure in confirming my verbal advice to you that at its meeting yesterday, 22nd May, the Board resolved to immediately offer you the position of General Manager at the salary of $19,365 per annum being the current determination by the Higher Salaries Commission. Would you please confirm acceptance of this offer. "

By letter of the same date the applicant replied:

> " I am pleased to confirm my acceptance of this position. As discussed today, I wish to draw to your attention a number of administrative matters relating to the appointment of General Manager but will do this separately. "

When the Board on 26 October 1984 moved to dismiss the applicant it did so by resolution in the following terms conveyed to the applicant:

(1) That the appointment of the General Manager Mr Goulden be terminated in accordance with Clause 6 of the Conditions of Appointment for that position.

(2) That from this day, 26th October, to the termination of his employment, 26th January 1985, this period shall be taken as special leave with pay during which time Mr Goulden shall be relieved of all his responsibilities and duties.

(3) That the Chairman and Secretary be authorised to pay any holiday or other pay outstanding.

(4) That as soon as possible after this meeting the Assistant-Secretary and/or the Chairman convey this Resolution to Mr Goulden and take responsibility for all keys, files and any other property or thing which is the property of the Board.

(5) That the Chairman, Mr Johnson, Mr Mitchell together with the Secretary or Acting Secretary take whatever steps may be necessary in the short term for the management of the Board's affairs until the Nov. Board meeting to be held on the 27 Nov.

In order to determine whether the Board in effecting the applicant's dismissal exercised a statutory

power of decision, it is necessary to refer first to the statutory powers given to the Board to contract with its officers. They are these.

Harbours Act 1950, s 42(1):

> " Every Board may from time to time appoint and employ a Secretary, Treasurer, clerk, Harbourmaster, a collector or collectors of dues, pilots, and a wharfinger, and all such other officers and servants to assist in the execution of this Act as it thinks proper, and may from time to time remove or discontinue the office of any of those persons and appoint others in the place of such as are so removed or as die or resign. "

Local Authorities (Employment Protection) Act 1963, s 9(1):

> " Notwithstanding anything to the contrary in any enactment or rule of law, a local authority may enter into an agreement in writing with any person whom it proposes to appoint, or has appointed, an officer or servant of the local authority to the effect that he shall not be removed from office save as provided in the agreement or except for conduct justifying summary dismissal -
> (a) During such period (not exceeding five years from the date of his appointment or the date of the agreement, as the case may be) as is specified in the agreement; or
> (b) Except after such notice (not exceeding three months) as is specified in the agreement in that behalf. "

Harbours Act 1950, s 45(1):

> " An employee of a Harbour Board may appeal to an Appeal Board set up under subsection (2) of this section -
> (a) Against a decision of the Harbour Board whereby he is dismissed, suspended, disrated, or fined, or suffers a reduction of pay or other emoluments:
> (b) On the ground that his promotion has been unreasonably withheld. "

The Board's power to appoint the applicant to the position of General Manager stems from s 42(1) of the Harbours Act 1950 and from s 9(1) of the Local Authorities (Employment Protection) Act 1963. It is the Authority for entering into the contract of employment. The contract is contained in the following documents: the Conditions of Appointment, the letter of offer dated 23 May 1979 from the Chairman to the applicant, and the letter of acceptance also dated 23 May 1979 from the applicant to the Chairman. But in addition there is included in the applicant's terms of employment by virtue of s 45 of the Harbours Act 1950 a right of appeal to an Appeal Board against any decision of the Board dismissing him.

Mr Crosby for the Board submitted that the applicant was employed under a contract at common law and in terms of Clause 6 of that contract he could be dismissed on three months' notice. Such dismissal, he said, was not the exercise by the Board of a statutory power of decision by the Board in accordance with s 42 of the Act but simply the exercise by the employer of its common law contractual right to dismiss an employee. Mr Camp for the applicant submitted that such was not so and that the Board in dismissing the applicant was in fact and in law exercising a statutory power of decision such as to give rise to a right of review of that decision pursuant to the Judicature Amendment Act 1972.

There is no doubt that in some cases a statutory body may within its statutory powers enter into a contract of employment and subsequently dismiss an employee so engaged in accordance with common law rules. But the position of officers of Local Bodies such as the Marlborough Harbour Board is different. They have an expectation of some security of employment. They are given some protection against unjustifiable dismissal as evidenced by a right of appeal against dismissal by s 45 of the Act: see, too, Auckland Transport Board v Nunes [1952] NZLR 412.

The argument advanced by Mr Crosby that the Board was entitled to dismiss the applicant in terms of the

contract without being required to observe the terms of natural justice was an argument dismissed by Lord Wilberforce in Malloch v Aberdeen Corporation [1971] 2 All ER 1278 at p 1294:

> " The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found, in one form or another, in reported cases. There are two reasons behind it. The first is that, in master and servant cases, one is normally in the field of of the common law of contract inter partes, so that principles of administrative law, including those of natural justice, have no part to play. The second relates to the remedy: it is that in pure master and servant cases, the most that can be obtained is damages if the dismissal is wrongful; no order for reinstatement can be made, so no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void. I think there is validity in both of these arguments, but they, particularly the first, must be carefully used. It involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre. A specialist surgeon is denied protection which is given to a hospital doctor; a university professor, as a servant, has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied (see Barber v Manchester Regional Hospital Board, Palmer v Inverness Hospitals Board, Vidyodaya University of Ceylon v Silva, Vine v National Dock Labour Board, Glynn v Keele University). One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is

> inevitably so), these must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void. "

The position of an elected public body in relation to dismissal of officers is quite different from that of an ordinary private employer. Lord Reid in Malloch's case described the position at p 1282:

> " An elected public body is in a very different position from a private employer. Many of its servants in the lower grades are in the same position as servants of a private employer. But many in higher grades or 'offices' are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and, where a statutory form of protection would be less effective if it did not carry with it a right to be heard, I would not find it difficult to imply this right. "

The applicant as General Manager is in the position of an officer. He holds the office of General Manager of the Board and by virtue of his office, his office is one of public employment or service and he has the right to have principles of natural justice observed in the event of his dismissal. But he has that right in addition by virtue of the right of appeal given him by s 45 of the Act. The fact that he is given that right of appeal is of itself a clear indication that he can not be dismissed without reasonable cause and the Board in determining whether or not to dismiss him must observe principles of natural justice.

The present case does not fall into one involving the dismissal of an employee by a private employer. It involves the dismissal of a person from an office with a local body. It is not a case falling solely within the field of private law, but one where principles of public law are brought into play and where the decision of the Board to dismiss the applicant falls to be considered in accordance with principles of administrative law as well as the law of contract.

The Board in my judgment can not as Mr Crosby submitted it could, avoid its public law responsibilities by claiming to have acted solely in accordance with the common law of contract. If such were permitted then the right of appeal given to the applicant by s 42 would be rendered nugatory.

Before this Court can review the decision of the Board, however, it must be satisfied that in dismissing the applicant it exercised a statutory power in terms of the Judicature Amendment Act 1972.

The power to appoint and to dismiss an officer is given to the Board by s 42 of the Act. In view of the fact that the Board in dismissing an officer has public law responsibilities and can not act simply under the common law contract of employment, the issues of dismissal and exercise of statutory power become interconnected. This is made more apparent when one considers the right of appeal given by s 45 of the Act.

The situation is in principle analogous to that discussed by Cooke J. in Webster v Auckland Harbour Board [1983] NZLR 646, 650:

> " The issues of invalidity and statutory power of decision are interconnected. They cannot satisfactorily, we think, be considered separately. Undoubtedly a public body which has, as here, lawfully entered into a contract is bound by it and has the same powers under it as any other contracting party. But in exercising the contractual powers it may also be

> restricted by its public law responsibilities. The result may be that a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed to some extent by statute. "

Mr Crosby referred me to the recent decision of the Court of Appeal in New Zealand Stock Exchange v Listed Companies Association Incorporated (C.A.83/84, 30 July 1984) where a distinction was drawn between the actual conduct of a statutory body in contract within its statutory sphere and the exercise of a statutory power in terms of the Judicature Amendment Act 1972. The distinction made in that case, however, does not apply to the present case so as to prevent the Court on proper grounds being shown from reviewing the decision of the Board to dismiss the applicant from the position of General Manager.

There are two main reasons why such is so. They are: First: The Board in dismissing the applicant was not simply acting in contract within its statutory sphere. It was obliged by virtue of the applicant's office and the statute to observe certain public law responsibilities.

Second: Its power to dismiss the applicant in terms of contract was circumscribed by the right of appeal given by s 45 of the Act.

Mr Crosby also referred to Mansfield v Blenheim Borough Council [1923] NZLR 842 and several other cases. I find none of them of any assistance in determining the private law/public law aspects of this case.

In the result, in my judgment the decision of the Board amounted to the exercise of a statutory power of decision in terms of the Judicature Amendment Act 1972 and its decision is reviewable by this Court.

FAIRNESS OR NATURAL JUSTICE

The next question to consider is what procedural requirements were the Board obliged to observe in dismissing

the applicant. The Board was not required to act judicially. It is an administrative body. It exercises in such circumstances administrative functions. Its duty is as referred to by Lord Pearson in Pearlberg v Varty [1972] 2 All ER 6 at p 17 cited with approval in Furnell v Whangarei High Schools Board [1973] 2 NZLR 705, 719:

> " A tribunal to whom judicial or quasi-judicial functions are entrusted, is held to be required to apply those principles in performing those functions, unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions, there is no presumption that compliance with the principles of natural justice is required, although, as 'Parliament is not to be presumed to act unfairly', the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed."

What is required to ensure fairness must be looked at in the circumstances of each case.

Mr Camp submitted that there were five matters affecting the Board's decision where the requirement of fairness had not been observed by the Board. They are:

1. Bias on the part of the Chairman, Mr Dalliessi and bias or predetermination on the part of Mr Mitchell, a Board member.

2. The Chairman acted as prosecutor and judge.

3. Insufficient particularity of matters to be considered and an inadequate hearing.

4. Taking into account in the decision matters not put to the applicant.

5. Insufficient time given to applicant to prepare his case in reply.

Before dealing with each of these matters it is necessary that I should set out the factual background against which they should be considered.

Problems arising out of alleged lack of cooperation between the applicant and the Board Chairman first surfaced in February 1984 when the Board on 28 February 1984 passed a resolution:

> " That the Board considers that the General Manager in exercising his duties could cooperate with the Chairman and the Board to a far greater extent than is currently apparent and that the Chairman be authorised to convey this information to Mr Goulden. "

Later at a meeting on 26 June 1984 the Board passed a further resolution:

> " That the Board express its extreme concern at the apparent non-cooperation of the General Manager with the Chairman, that the Board record that they are not prepared to tolerate a continuation of such an attitude, and that the General Manager be advised that the Board are at the situation where, if this continues, it will seriously consider terminating the General Manager's employment. "

Both these resolutions were brought to the notice of the applicant.

The Chairman was not satisfied with the applicant's subsequent performance and on 12 October 1984 he wrote a report dealing with "the General Manager's performance - withholding of information". It was circulated to the Board. Six members requisitioned a special meeting of the Board to be held on 26 October 1984. At a Board meeting on 23 October 1984 the Board resolved to ask the General Manager to explain three matters set out in the report as detailed earlier in this judgment.

At the meeting of 26 October 1984 the applicant was present accompanied by his solicitor Mr Radich. Mr Radich at the outset addressed the Board on the principles of natural justice applicable and referred to the following matters:

1. Applicant's right to be heard:
2. That only matters dealt with at the meeting could be taken into account:
3. That the Chairman having prepared the report on which meeting was called should not chair the meeting and be both prosecutor and judge.

The Board rejected Mr Radich's request that the Chairman step down.

The recorded transcript of the meeting shows that the applicant then chose to answer those three questions in writing and the written document was read out to the meeting by Mr Radich. There followed questions from the Board members and replies from the applicant. Near the conclusion of the meeting Mr Radich again addressed the Board. He asked the Chairman:

> " What is this all about. What is contemplated - is it contemplated that Mr Goulden's going to be dismissed or punished or, because I'm afraid I don't think I understand, I think that if it is to be contemplated that he be dismissed or something major of this kind then I think I've got to make some submissions on that. "

The Chairman replied:

> " Well for the record the business of the meeting will be to consider the performance of Mr Goulden as GM and his cooperation with the Board Chairman and members. So what comes out of our deliberations I suppose is like a judge - you don't sit with the judge while he deliberates.

Mr Radich: I'm not asking to sit here, but what I'm asking to do is to try and sum up the situation as I see it and..

Chairman: Well I don't think in this instance Mr Radich your point is noted that you made this request. I've stated the fact that I believe it's an employer/employee situation. I've given

> the Mr Goulden to answer questions and make a statement you've prepared with him, given him the opportunity to answer questions and at this stage I would rule that the Board now will exclude all staff and counsel and we will consider the business of the meeting that was called by 6 members of the Board. "

Mr Radich subsequently addressed the Board further, dealing in some detail with each of the three questions asked of the applicant.

All persons other than the Board members then retired.

Mr Johnson then left the meeting and made enquiries from the Harbour Master and Operations Manager as to whether they had received a certain memorandum which the applicant had stated had been received by all relevant staff. He returned to the meeting and reported that the Harbour Master still maintained that he had not received it and the Operations Manager could not be sure as his papers were at home.

Early in the meeting, Mr Mitchell who had been one of the six members requisitioning the meeting and who had prepared a resolution dismissing the applicant, moved his resolution. After discussion it was carried by nine votes to three.

I now deal with Mr Camp's five points.

1. BIAS

Matters relied upon by Mr Camp as indicating "bias" or "real likelihood of bias" on the part of the Chairman, Mr Dalliessi, were:

(a) Has alleged antipathy to the applicant as far back as April 1980 as appears from the minutes of the meeting of the Board of 22 April 1980 when the Chairman, Mr Stace, criticised the actions of Mr Dalliessi in relation to his attitude to the applicant and Mr Dalliessi's attempt to disguise it.

(b) The alleged bias in the report of 12 October 1984.

(c) The short time scale given by the Chairman of two days' notice for applicant to attend the meeting and one day after receiving the Chairman's report for applicant to answer it.

(d) Mr Mitchell's pre-drafted resolution.

The Board in considering the actions of the applicant was not acting judicially but in an administrative capacity. Its duty was to act fairly and to give him a reasonable opportunity to be heard to state his case and answer allegations against him. The Board could not have been expected to have approached the matter with no prior knowledge. But members were required to have minds which were not closed and to be prepared to consider fairly evidence and arguments put forward on behalf of the applicant in response to the summons to answer the questions set out in the Board resolution of 23 October 1984: see 1 Halsbury (4th ed) para 69. Of course if a Board member was affected by bias towards the applicant then he could not act towards him with that degree of fairness and open-mindedness that the law requires.

Mr Camp submitted that the Chairman was so biased towards the applicant and that his bias appears evident from the following matters:

First: Antipathy going back to 1980:

The evidence shows that in 1980 when Mr Stace was Chairman of the Board and Mr Dalliessi was a Board member, Mr Stace at a meeting of 22 April 1980 took Mr Dalliessi to task over his conduct towards the applicant. The Board minutes record Mr Stace as having said: "The two members that most frustrated Mr Crawley are still frustrating Mr Goulden".

After quoting Mr Crawley's report to the Board in which he said: "Whoever your next General Manager is, he will need your full support - and I mean that", Mr Stace continued:

" Mr Goulden is not getting that full support. He is continually getting undermined and sniped at particularly by one Board member. During recent months and weeks there have been a string of interferences that have taken up many hours of time that would have been better spent in productive work for the Board....

1. Mr Dalliessi you are that Board Member. You have no loyalty to the Board or its administration.

2. You have never fully accepted the Board's majority decision to appoint Mr Goulden as General Manager.
.....

5. Last year you accused Mr Goulden of taking leave to which he was not entitled - and ultimately in committee had to apologise to him.

6. At the December meeting of the Board you made quite unwarranted statements in open meeting about the Board's management which were not founded on fact or justified. ..... "

There was considerable discussion at that meeting and the truth or otherwise of the allegations made at it is not for me to judge at this time. What is apparent, however, is that there was some antagonism between Mr Dalliessi and the applicant at that early stage. Mr Daliessi denied any ill feeling towards the applicant and claimed that when he was unseated at the 1980 Election he received a pleasant letter from the applicant and that during this three years off the Board until re-elected in 1983 and becoming Chairman he had met the applicant at social functions on a very friendly basis. The applicant was not cross-examined about this matter.

The applicant alleged, however, that the appointment of Mr Dalliessi as Chairman provided him with the opportunity to do something about the allegations made at the 22 April 1980 meeting that he had never fully accepted the applicant's appointment as General Manager. Relations between the applicant and the Chairman seemed to begin on the wrong foot from shortly after Mr Dalliessi was elected again and appointed Chairman.

In December 1983 the Board passed a resolution about the availability of information from the Board. On 30 January 1984 the applicant delivered a terse memorandum to the Chairman. The applicant asked the Chairman to draw the issue to the attention of the Board. That the Chairman did. The Board then passed the first of the two resolutions regarding the applicant's non-cooperation with the Chairman. A second resolution followed at the meeting on 18 June 1984. Leading up to that resolution the minutes record:

> " Mr Mitchell read the following statement which the Chairman subsequently (19 June) requested to be printed in full in the report -
>
> ' Mr Chairman I wish to express concern at the number and proliferation of staff complaints against our General Manager, Chairman and board members. I know contrary to what may be told to the board, that there is disharmony within our staff. It appears management is by domination rather than by co-operation. That lack of co-operation by the General Manager appears to extend to the Board through the Chairman who apparently is not receiving the support and respect that he should expect.
>
> In November this board unanimously elected Mr Dalliessi, a new member, to be its Chairman because it wanted to 'change the direction of the past board' and implement policies that would give board members freer access to information and more involvement in decision-making and monitoring of board activities.
>
> Early this year the board resolved that the General Manager was to co-operate with the Chairman to a greater extent than was apparent. I do not believe he is following that direction.' "

The resolution which followed was recorded in the following words:

> " The motion (moved Mr Mitchell, seconded Mr Robb)
>
> ' That the board express its extreme concern at the apparent non co-operation of the General Manager with the Chairman, that the board record that they are not prepared to tolerate a continuation of such an attitude, and that the General Manager be advised that the board are at the situation

> where, if this continues, it will seriously consider terminating the General Manager's employment.' "

At that time it is apparent that there were problems in communication and cooperation between the applicant and the Board and he was quite plainly put on notice that his position as General Manager was in jeopardy unless relations improved. The initiative in the matter appears to have come from the Board although undoubtedly the Chairman discussed matters with Board members.

The problems seemed to have arisen because the new Board elected in 1983 intended to see changes in the method of the Board's operations. The applicant does not seem to have altogether accepted these changes. I am not prepared to find on the basis of this past association alone that there was carried over from 1980 to 1984 any bias on the part of the Chairman. But, on the other hand, the past relationships had not been of the best and if Mr Dalliessi believed that the applicant should be removed as General Manager then his appointment as Chairman provided him with the opportunity to effect such removal.

Second: The 12 October 1984 report.

Then came the Chairman's report of 12 October 1984 which concluded:

> " I would recommend to the Board that before it officially considers this report that -
> (a) The General Manager be asked to explain
> (then follow the three matters earlier referred to in this judgment) "

The applicant contended that that report was biased. It is an apparently factual report as the Chairman saw events except for three comments. They were:

> " The only reasonable inference in the absence of any explanation is that the balance of the letter was purposely not disclosed as it did not assist the General Manager's case.
> ....

> " In my opinion he was non-committal and evasive when asked why the letter was not processed in the normal way.
>
> When asked why he had not implemented my instruction he stated that as the appeal was 'sub judice' no action could be taken. I told him that I was not satisfied with his explanation and that I would be making a special report to the Board on the subject. "

These three comments persuade me that the Chairman did form preconceived views on the topics of the report and although on that evidence alone I would not be prepared to find bias or real likelihood of it, it is a pointer which must be looked at and considered along with the other evidence in the case. There was there at least an indication of a degree of predetermination. It remains to be seen whether the Chairman yet had his mind closed and was unable to consider the allegations against the applicant fairly.

Third: Time scale.

Mr Camp submitted that the time scale of two days notice given the applicant to attend the meeting and one day to answer the report are both relevant as showing bias in so far as it was suggested that he had already made up his mind and wanted to hasten the applicant's dismissal.

On 24 October 1984 the Board Secretary gave to the General Manager a copy of the Board Resolution of 23 October 1984 and advised him of the meeting at 2 p.m. Friday 26 October. On 25 October 1984 the applicant was given a copy of the Chairman's report.

I do not think much can be read into the timing as Mr Camp suggested. The six Board members requisitioned the meeting for 26 October 1984. It was only on 23 October 1984 that the Board resolved to summon the applicant to the meeting and he was so advised the following morning. I am not prepared to impute to the Chairman the motives suggested by Mr Camp even though I notice that it was the Chairman who moved the motion to ask the applicant to answer the three questions. However, that was perhaps not unexpected

seeing that it was his own report which asked for such answers.

Fourth: Mr Mitchell's predrafted Resolution

The evidence showed that the Board member who had initiated the steps resulting in the meeting of 26 October 1984 was Mr Mitchell. After receiving the Chairman's report of 12 October 1984 he approached the Chairman and then spoke to five other members. He then prepared the requisition for the special meeting to be held.

Mr Mitchell next prepared a draft resolution dismissing the applicant. He discussed it with the Chairman and arranged for photocopies for each member of the Board. Both Mr Mitchell and the Chairman claimed that Mr Mitchell's reference of these two matters to the Chairman was merely to check that the correct procedure was being followed. I do not accept that such was the case. The motion to dismiss contains material which purports to preempt the Board's decision and the terms on which the dismissal was to take place must have been discussed with the Chairman. At the meeting, Mr Mitchell moved the motion to dismiss the applicant. Mr Mitchell endeavoured to explain his actions in preparing the draft motion on the basis that such was a practice of his but I am not prepared to accept that explanation. Coupled with the preparation of the resolution was its circulation to other Board members, and perhaps most significant of all Mr Mitchell's own statement:

> " That motion was moved by me fairly early in the deliberations of the Board after the applicant and other counsel had left. "

I would have thought that on a serious question such as the dismissal of the General Manager there would have been discussion as to the correctness or acceptability of the applicant's answers to the questions posed, and further discussion as to whether the actions of the applicant justified dismissal before a decision was evident which could culminate in a motion being moved.

There was no transcript of that part of the meeting when the Board deliberated. The majority of the Board members decided the tape recorder should be switched off. That decision was perhaps unfortunate. Mr Cambridge, one of the Board members, said in his affidavit:

> " I felt that the proceedings were very unfair and that the result was inevitable right from the start regardless of what Mr Goulden had said... I had seen this result coming for some time. I suspected what was going to happen before the meeting started. "

Mr Fuller, the Deputy Chairman, said:

> " I must say that I went to the meeting expecting that Mr Goulden was going to be dismissed.... I spoke against the motion and had my vote recorded against it as did Mr Cambridge and Captain Eckford."

The evidence of these two members indicates that there appeared to have been an element of prejudgment of the applicant before the meeting was held.

It is highly significant in my mind that of the twelve Board members present at the meeting on 26 October 1984, those who voted in favour of the dismissal were the Chairman and the six Board members who signed the requisition for the special meeting - Messrs Mitchell, Johnson, Robb, Kennington, Reeves and Collins plus two others whose names I am unable to find from the papers. Of these members, Mr Reeves clearly did not approach the matter with an open mind. He said:

> " I have known the Board's Chairman, Mr Dalliessi, for a long time. I trust what he has to say and I believe completely everything that Mr Dalliessi said in the report. "

What chance would the applicant have had of persuading Mr Reeves to the contrary? And I am not prepared to accept, in spite of their statements that they did so, that Mr Mitchell and the other four members who signed the requisition with Mr Mitchell and Mr Reeves did so either. They must be judged as well by their actions as what they have subsequently

said on affidavit. The state of one's mind is a very subjective thing and it is very easy to say or believe after the event that one's mind was other than it actually was at the time.

The Chairman, too, cannot be accepted as having an open mind and to have been open to persuasion by the applicant. He was responsible for the applicant being summoned to answer three questions but he allowed during deliberations the whole performance of the General Manager to be the subject of discussion, no doubt for the purpose of ensuring a decision was made to dismiss him when no information that such matters were to be considered was contained in the Board Resolution of 23 October 1984 calling the applicant to the meeting. The Chairman raised further extraneous matters during the first part of the meeting when the applicant was making his explanation on the three named topics. Taken all together the three observations earlier referred to in the Chairman's report, his discussion with Mr Mitchell over the calling of the meeting and Mr Mitchell's draft resolution, his presiding as Chairman, his allowing extraneous matters to be introduced during the first part of the meeting and backgrounded against his antipathy towards the applicant in the earlier years of the Board during deliberations, all indicate to me that there was an element of predetermination in the Chairman's attitude.

In the result, I conclude that there was a real likelihood of bias on the part of the majority of Board members - the Chairman and six Board members who signed the requisition - such that they did not approach the matter of the applicant's dismissal with an open mind or treat him fairly.

2. CHAIRMAN PROSECUTOR AND JUDGE

This is perhaps a rather colourful way of saying that the Chairman had predetermined the issues. Of course this was not a meeting at which the Board was required to

act judicially where there would be the elements of a judicial hearing present. This was an administrative tribunal considering a question of employer and employee in relation to the employee's conduct. But what Mr Camp was really saying was that the Chairman prepared the report which resulted in the applicant being called upon to answer the three questions and he was bound to support his own report. His questioning of the applicant appeared to indicate that such was the case. In such circumstances, Mr Camp said, the Chairman can hardly have been expected to have approached the matter with an open mind fairly to the applicant. I agree. This is just another reason for my concluding that there was a real likelihood of bias on the part of the Chairman. The applicant through his solicitor endeavoured to have Mr Dalliessi step down as Chairman but such request was refused.

3. INSUFFICIENT PARTICULARITY AND INADEQUATE HEARING

The Resolution of the Board of 23 October 1984 called upon the applicant to explain three matters:

1. Why the second letter from the M.O.T. dated 30 July 1984, signed by A.K.Ewing, Secretary of Transport, was not fully conveyed to the board's August meeting.
2. Why the letter in question was not processed in the board's normal administration procedure.
3. Why the board's 28 August resolution and the Chairman's instruction on the subject relating to change in responsibility between the Operations Manager and Harbourmaster was not carried out.

The applicant acknowledged having received the notice requisitioning the special meeting dated 16 October 1984 to consider his performance as General Manager. However, when he received the Board Resolution dated 23 October 1984 requiring him to answer three questions he was entitled to assume that the inquiry was to be limited to those three matters and that the Board did not propose to enter the wider field of his performance as General Manager and his cooperation with the Board Chairman and members.

It was on the basis of the three questions that he prepared his case in writing and presented it to the Board at the meeting. That was not the way however in which it was dealt with by the Board. The transcript shows that the Chairman opened the meeting by saying:

> " The procedure that I intend to take is that um, as the bd resolved on the 23rd of October at its last bd mtg, when the report was presented to the bd, the bd resolved to ask the GM to answer the 3 questions that are listed in that report and they also resolved to give the GM the opportunity to make any further comments and the bd members themselves would then have the opportunity to ask any questions that may arise from his answers or from any comments that he makes. "

The transcript indicates, however, that matter outside the scope of those three questions was asked of the applicant. Such matter was also discussed by the Board when deliberating. The affidavits of Messrs Reeves, Mitchell and Johnson indicate that this was so.

The meeting having been called for the purpose of having the applicant answer three questions, he should not have been required to answer and deal with other matters in relation to his general performance and cooperation, and such matters should not have been taken into account during deliberation. The fact that the Board did so was in my judgment unfair to the applicant.

I have in my consideration of these matters not overlooked the affidavits of Mr Radich, the applicant's solicitor, and of Mr Macnab, the Board's solicitor. Mr Radich said that he considered that only the three questions were in issue and had he been told that the question of Mr Goulden's cooperation from the time he was appointed was to be in issue, he would certainly have dealt with the matter differently.

But there was another matter which persuades me there was unfairness towards the applicant at the hearing.

Question No 3 specifically related to the applicant carrying out the Board's resolution of 28 August 1984 and involved a question of whether an instruction had been given to the Harbour Master and the Operations Manager. The applicant said in his explanation that he was on leave at the time and notice in writing was given by the Secretary to the Harbour Master and the Operations Manager. Copies of the memoranda were annexed to the applicant's written statement.

During the final part of the meeting, Mr Johnson asked a question in which he stated that he believed that the Harbour Master had not received a notice and he doubted whether the Operations Manager had. He left the meeting to make a telephone call to the Harmour Master but was unable to speak to him as he was not in. After the meeting was closed for the Board to deliberate, Mr Johnson said he again telephoned the Harbour Master and was advised by him:

> " that he had not received any such notice other than the notice given to him on the 29th August. "

Mr Johnson then spoke to the Operations Manager who "said to me that he could not be sure as he had his papers at home."

Mr Johnson then returned to the meeting and reported:

> " that the Harbour Master still maintained that he had not received a notice and I also stated that Mr Riach (the Operations Manager) could not be sure as he had his papers at home. "

Now these statements should be compared with what the Harbour Master said:

> " Mr Johnson advised me that at the Board meeting which was being held at that time the applicant had produced a copy of a memorandum from the Secretary advising me of the Board's resolutions. I advised Mr Johnson I could not recall receiving such a memorandum. "

And those statements should be compared with what Mr Reeves said happened during deliberations:

> " Mr Johnson came back into the meeting and told us that Captain Jamison was prepared to swear on oath that Captain Jamison had not received his memorandum from the Secretary. He also told us that the Operations Manager could not be sure whether he had received his memorandum or not. As far as most of us were concerned that was the end of the matter for Mr Goulden. We felt that what Mr Johnson said proved that Mr Goulden was being untruthful on the second question and as far as most of us were concerned this meant that he could not be trusted on his answers to the first question. "

It will be seen that Mr Johnson on that evidence completely misrepresented what the Harbour Master, Mr Jamison, had said. And Mr Johnson's statement should be further compared with what Mr Cambridge said of the matter:

> " Later during the discussion Mr Johnson came back and reported that Captain Jamison was prepared to swear that he had not received the Memorandum which Mr Goulden said was sent. He also said that Mr Riach was unsure whether or not he had received his Memorandum. These comments had the effect of giving Board Members something to get hold of and they did. There was then discussion about Mr Goulden not being truthful and trustworthy and a conclusion happened fairly quickly after that. The general feeling amongst the majority of Board Members at that stage seemed to be that Mr Goulden was telling the Board untruths in his answers. "

Again Mr Johnson's version is at odds with what the Harbour Master says he told him and what Mr Johnson is said by Mr Cambridge to have told the Board.

The Harbour Master had said he could not recall receiving the memorandum. For Mr Johnson to have said that the Harmour Master was prepared to swear on oath he had not received it is to place an entirely wrong emphasis on what the Harbour Master said and that emphasis was no doubt conclusive in persuading the Board to disbelieve the applicant.

There are two aspects to the Johnson matter: First he wrongly conveyed to the Board the Harbour Master's statement and the effect of his so doing was conclusive in the finding of the Board as to the applicant's credibility. Second - Fairness to the applicant required that the matter should have been investigated further and the applicant given the opportunity to answer Question 3 further in the light of the information Mr Johnson conveyed to the Board in his absence during deliberations.

In the respects just discussed neither Mr Johnson nor the Board acted fairly to the applicant even in the context of an administrative hearing.

4. MATTERS NOT PUT TO APPLICANT

I have already discussed this topic in relation to the previous one and it needs no repetition here. However, Mr Dalliessi in his affidavit said:

> " The Board did not give reasons for the termination of the applicant's contract but obviously the Board members who voted that way were not satisfied with the applicant's performance or co-operation with the Chairman and Board members. I believe from comments made by Board members that they just were not satisfied that he would carry out in the proper spirit Board resolutions and they believed that his approach and attitude over the Harbour Master issue was indicative of a continuing attitude on his behalf that would not enable the Board to function properly with him continuing as General Manager. "

If confirmation were needed that matters outside the three questions asked of him were required, it is to be found there.

5. INSUFFICIENT TIME

This is not a matter of major significance. Had this been thought a problem at the time I would have expected applicant through his solicitor to have sought an adjournment of the meeting.

REASONS FOR DISMISSAL

Mr Dalliessi said in his affidavit:

> " The situation is as I have said before that there were no 'charges' and there was no dismissal for cause. The Board decided to terminate the applicant's contract of service. By the same token it is patently obvious that whilst he considers he gave full and complete answers to the questions that were asked of him the Board or the majority of members of the Board clearly did not accept those answers as satisfying it that his performance and co-operation with the Board would improve in future. "

It appears that the Board at the hearing before me was endeavouring to avoid judicial review by claiming to have acted simply under common law contract.

Now as I mentioned earlier in this judgment there are authorities which indicate that a local authority may not dismiss an officer without reasonable cause to do so and that statutory public authorities are required to give a fair hearing into employment contracts: Rigg v University of Waikato [1984] 1 NZLR 149, 213. That is not a matter which I can inquire into here. It was not pleaded as an error of law that the Board claimed to have acted simply under contract and does not relate to the procedure adopted by the Board in dismissing the applicant. I am not required to consider the Board's claim or able to go into the merits of the dismissal. That is a matter for the Appeal Board acting under s 45 of the Act if the applicant takes his case before that Board.

Under the Judicature Act, the function of this Court is as referred to in Chief Constable v Evans [1982] 3 All ER 141 at p 143:

> " But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority

> constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. "

CONCLUSION

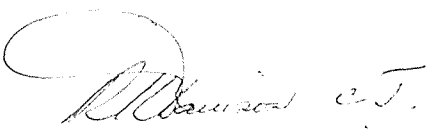
I have a discretion whether I set aside the Board's decision or not. Mr Crosby submitted that if I did so I should direct the Board to reconsider the matter as was done in Lower Hutt City Council v Bank [1974] 1 NZLR 545.

I have decided to set aside the Board's decision to dismiss the applicant and direct that the Board reconsider his case. I realise that such a course may be thought by the applicant to be unfair to him in so far as he may think it unlikely that the Board could overcome the element of bias by predetermination which I have found to have been present in relation to its decision. Such a difficulty would not be experienced by observing the principles of fairness which I have found were not present in the Board's handling of the applicant's dismissal. However, to simply set aside the Board's decision and restore the applicant to his employment would in an employer/employee situation cause many problems to arise and I think the only real alternative is to set aside the decision of the Board and direct that it reconsider the applicant's dismissal in the light of this judgment. Such reconsideration should be carried out promptly with clear notice to the applicant of the matters to be dealt with. The Board must adopt procedures that are fair to the applicant so as to give him reasonable opportunity to answer allegations made against him. The Board members should approach the inquiry with open minds, not closed, and be prepared to consider fairly any evidence and explanations given by the applicant.

I make an order setting aside the Board's decision and give directions for reconsideration of the matter in accordance with the indications above. In addition, I direct

that the applicant do not return to his position with the Board pending the reconsideration of his case and that his pay be continued until the Board's decision on such reconsideration is given.

The applicant is entitled to costs. I will receive memoranda from counsel as to quantum.



Solicitors for the Applicant: Lundon Radich Dew (Blenheim)

Solicitors for the Respondent: Gascoigne, Wicks & Co (Blenheim)