Privy Council Appeal No 41 of 2008

Julius Corbette *Appellant*

v.

National Commercial Bank of Dominica *Respondent*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF DOMINICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 14th July 2009

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Present at the hearing:-

Lord Phillips of Worth Matravers
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Sir Jonathan Parker

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*[Delivered by **Lord Rodger of Earlsferry**]*

1. In 1998, in exercise of his power under section 9(1) of the National Commercial Bank of Dominica Act the Minister responsible for Finance ("the Minister") appointed the appellant, Mr Julius Corbette, to be the General Manager of the Bank. It is common ground that the statutory power of appointment carries with it, by implication, the power to terminate the appointment.

2. Section 5(2)(c) provides for the General Manager to be ex officio one of the 8 members of the Board of Directors ("the Directors"). He is the chief executive officer of the Bank and, subject to the general policy

decisions of the Directors, is responsible for the management, administration, direction and control of the business of the Bank. He has authority inter alia to perform all matters which are not specifically reserved to be done by the Directors, but he is answerable to the Directors for his acts and decisions.

3. In July 1998 Mr Corbette entered into a contract of employment with the Bank as General Manager for 5 years from 1 July 1998. In terms of the contract he expressly undertook that he would "act in administrative and managerial matters according to the instructions and directions given to him by the Bank through its Board."

4. In February 2000 a new government was elected and, following the election, 5 of the Directors, including the chairman, offered their resignations and were replaced by people chosen by the new Minister. Mr Milton Lawrence was appointed as the new chairman.

5. Without going into matters in any detail, it is fair to say that relations between the new chairman and Mr Corbette were not easy. Criticisms were made of some aspects of Mr Corbette's work as General Manager. Eventually, on 4 April 2001 an unofficial meeting of the Directors was convened in Mr Corbette's absence. The directors who were present agreed that Mr Corbette's employment could not be allowed to continue and they decided that he should be asked to resign.

6. This decision was communicated to Mr Corbette at a meeting of the Directors on 6 April 2001. He was invited to consider resigning. Later that day the Minister contacted him and told him that, in view of his lack of support among the Directors, the best option would be for him to resign. Having considered the position, Mr Corbette decided not to resign.

7. On 18 April Mr Lawrence circulated a memorandum to the Directors, giving alleged reasons why Mr Corbette's employment should be terminated. That same day the Directors met and, with Mr Corbette abstaining, agreed to recommend to the Minister that Mr Corbette's contract of employment should be terminated.

8. On the same day, on behalf of the Directors, the chairman wrote to the Minister setting out a list of alleged failings on Mr Corbette's part which were said to show that he had neglected or refused to perform his duties as General Manager and had neglected or refused to comply with instructions or directions from the Directors. The Directors recommended that the Minister should, accordingly, terminate his

employment forthwith in exercise of the power of dismissal in clause 5 of Mr Corbette's contract of employment which provided:

> "DISMISSAL
> If the Person Engaged shall at anytime after the signing hereof neglect or refuse or from any cause other than ill-health not caused by his own conduct as provided in Clause 4 become unable to perform any of his duties or to comply with any instruction or direction, or shall disclose any information respecting matters of the Bank to any unauthorized person or shall be guilty of serious misconduct, the Bank may terminate his engagement forthwith and thereupon all rights and advantages reserved to him by this Agreement shall cease."

9. On 19 April the Minister wrote to Mr Corbette telling him that he had been suspended from his position as General Manager and giving him until 10.30 am the following day to show why his employment should not be terminated. In the event, at Mr Corbette's request, this deadline was extended until 23 April. On that date Mr Corbette sent the Minister a letter setting out his response to the allegations in the chairman's letter to the Minister.

10. On 29 May the Minister invited Mr Corbette to a meeting at which he handed him a letter, stating that he had not found his response to be a sufficient answer to the allegations against him. In accordance with the Directors' recommendation and "in accordance with the provisions of clause 5 of your Employment Agreement", the Minister terminated Mr Corbettte's employment as General Manager with effect from 29 May 2001.

11. On 23 July 2001 Mr Corbette began proceedings in the High Court for wrongful termination of his contract of employment. The proceedings were brought against the Bank, the Minister and the Attorney General. The claim was heard by Lewis S Hunte J (Ag), a lawyer who had been brought in specially from the British Virgin Islands because of the sensitivity, in a small community like Dominica, of the action involving the government.

12. The hearing lasted for ten days and on 14 April 2006 the judge gave judgment in favour of Mr Corbette: he held that he had been wrongfully dismissed and that the Bank and the Minister were jointly and severally liable for the wrongful dismissal. Damages were to be assessed

by a judge or by the Master. He dismissed the claim against the Attorney General.

13. The Bank and the Minister appealed. At a case management conference in advance of the hearing of the appeal counsel for Mr Corbette conceded that the Minister had not been a proper party to the claim and that the judgment against him should be set aside. This was duly done, with the result that the Bank is now the only defendant to the action.

14. On 15 January 2007 the Court of Appeal (Gordon QC, Barrow SC and Rawlins JJA) allowed the Bank's appeal. On 10 July 2008 the Board granted Mr Corbette special leave to appeal.

15. It would be fair to say that both Ms Proops, who appeared for Mr Corbette, and Mr Astaphan SC, who appeared for the Bank, acknowledged that they faced difficulties - Ms Proops in seeking to argue that the judgment of the trial judge should be upheld, Mr Astaphan in seeking to argue that the Court of Appeal had applied the correct legal approach to wrongful dismissal or that, in any event, the Court of Appeal had been entitled to reverse the trial judge on the facts. Each of them had, accordingly, a fallback position that, if the appeal were allowed but their primary argument were rejected, the Board should remit the case to the High Court to be reheard by a different judge. Since that is what the Board has decided should happen and there will require to be a fresh hearing, the Board will avoid expressing any views on disputed matters of fact.

16. Usually, a trial judge's findings of fact will be difficult for an appellant to challenge since the judge saw and heard the witnesses and, in this respect, is much better placed to assess their credibility and reliability than an appeal court. Unusually, however, in this case the Bank was able to point to a fundamental, and frankly astonishing, error which the trial judge made.

17. As the Board has already explained, on 18 April 2001 the chairman wrote a letter to the Minister setting out the grounds on which the Directors recommended that Mr Corbette's employment should be terminated. That letter was an exhibit at the trial. Also, of course, available to the judge at the trial was the Bank's defence to the action. At para 10 of the defence the Bank set out, in 14 numbered paragraphs, the particulars of the ways in which they alleged that Mr Corbette was in breach of his contract of employment. Item 14 in the list read:

> "Further the First Defendant [i e the Bank] will rely on all the particulars set out in the Memorandum from the Chairman to the Claimant dated 31st day of May 2000 [sic] and also the Memorandum dated the 18th day of April 2001 sent to the Claimant by the second Defendant [i e the Minister]."

18. In para 7 of his judgment the trial judge quoted the terms of the Minister's letter of termination and referred to Mr Corbette's response to "the allegations and recommendations made by the Board of Directors". In the following paragraph the judge rightly said that the "allegations and recommendations" were contained in the letter dated 18 April 2001 from Mr Lawrence to the Minister. The judge then said "There are fourteen of them" and proceeded to set out the 14 paragraphs of the particulars of breach contained in para 10 the Bank's defence to this action. Having done so, the judge continued:

> "It is beyond my understanding how item 14 became a ground for dismissal since it was obviously concocted after the action was filed; for, at the time the recommendations were sent to the Minister, there could have been no Claimant and no Defendants. This in itself raises much suspicion about the genuineness of the other grounds."

Subsequently, at para 40 of his judgment the trial judge said:

> "The Board, in its recommendations to the Minister for the dismissal of the General Manager, engaged for the most part in broad generalizations. Whenever there were attempts at specific allegations, they were often biased and garbled. They were reproduced earlier and were all explained by the Claimant in his evidence and had the Minister paid attention to what the Claimant was trying to tell him, this case might not have come before the Court."

19. As Ms Proops frankly acknowledged, the judge clearly made a fundamental error by confusing the particulars in the defence with what the Directors said in their letter to the Minister. On any view that was a howler. But what made it – contrary to her submissions - a fatal howler was that the judge regarded para 14 as casting "much suspicion" on the genuineness of the grounds put forward by the Directors for terminating Mr Corbette's employment. Self-evidently, when it is appreciated that para 14 forms part of the defence, it provides no basis whatever for the judge doubting the other grounds advanced by the Bank for terminating

Mr Corbette's employment. The judge sets out this completely fallacious reasoning at an early stage in his judgment before he goes on to examine and assess the competing accounts given by Mr Corbette and by the witnesses for the Bank. The Board is quite satisfied that the judge's mistake must have coloured his whole approach to the evidence and that, for this reason – as the Court of Appeal held – the judge's decision cannot stand.

20. Having reached that conclusion, the Court of Appeal had to decide what should be done. Should they send the case back to the High Court or, avoiding the judge's error, could they decide for themselves, on the record, whether Mr Corbette had breached clause 5 of the contract of employment with the result that the Minister had been entitled to dismiss him? The Court of Appeal felt able to decide the matter for themselves and proceeded to do so: they found that the Bank had been entitled to dismiss Mr Corbette under clause 5 of the contract.

21. Mr Astaphan's difficulties begin at this point.

22. In para 46 of his judgment Barrow JA said this:

> "The judge's exercise of determining whom to believe as between the respondent versus the chairman and the Board regarding the causes for the differences between them was the wrong exercise. It was also the wrong exercise for the judge to decide on the respondent's performance. The judge's views on those and on a number of other matters including the asserted stellar performance of the Bank under the respondent's management, the conduct of the chairman in relation to the transactions that the judge examined, and the minister's response to complaints about the chairman are all substantially immaterial and do not even call for discussion. The correct exercise was the one the judge did not conduct, namely, to consider whether the minister honestly, and on reasonable grounds, formed the opinion that the respondent failed or neglected or was unable to perform his duties and comply with directions and instructions. By considering the wrong questions and failing to consider the correct question the judge misdirected himself in law and, in my view, his decision cannot stand but must be set aside."

As Mr Astaphan really acknowledged, the exercise which the Court of Appeal identified as being "the correct exercise" was actually the wrong exercise.

23. As authority for adopting the approach which they did, the Court of Appeal cited a passage from *David Lashley & Partners Inc v Bayley* (1992) 44 WIR 44, 46g-j:

> "If an employee is dismissed because of his incapability, the correct test to apply is whether the employer honestly and reasonably held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that the employee was incompetent. …in other words, the test … is a subjective one… It is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent."

The passage is actually from *Selwyn's Law of Employment* (6th edn), para 8-114, which counsel for the employers had quoted in support of his submissions in the *Lashley* case. But, in quoting it, the Court of Appeal in this case used three dots to mark material which they excised - and the significance of which they overlooked. As quoted by the Court of Appeal of Barbados in *Lashley*, the full version actually read:

> "If an employee is dismissed because of his incapability, the correct test to apply is whether the employer honestly and reasonably held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that the employee was incompetent (*Taylor v Alidair Ltd*). In other words, the test under section 57(3) is a subjective one. The industrial tribunal must consider the employer's state of mind as well as his reasons. But it is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent."

As the references to section 57(3) of the Employment Protection (Consolidation) Act 1978 (UK), to *Taylor v Alidair Ltd* [1978] ICR 445 and to "the industrial tribunal" all show, the passage is actually describing the approach to be taken in a claim for unfair dismissal under statute, not the approach to be taken in a claim for wrongful dismissal at common law. They are entirely different: whereas an unfair dismissal claim presupposes that the claimant has no contractual entitlement to continued employment, a wrongful dismissal claim asserts contractual rights. *Cook v Thomas Linnell & Sons Ltd* [1977] ICR 770, the other case cited by the court below, also applies to unfair dismissal. References to these

authorities was therefore entirely out of place in the present case where the only issue was whether Mr Corbette had done anything which justified his dismissal under clause 5 of his contract of employment.

24. Mistakenly basing themselves on the unfair dismissal authorities, however, the Court of Appeal proceeded as if the wording of clause 5 had introduced a reference to the Minister's belief as to what had happened. This, the court found, allowed the Minister to dismiss the General Manager if he *honestly and reasonably believed* that Mr Corbette had neglected or refused to perform any of his duties as General Manager or had neglected or refused to comply with any instruction or direction of the Directors – irrespective of whether he had in actual fact neglected or refused to do any of those things. But, although contracts of employment sometimes refer to the employer's opinion or belief, that is not the case with clause 5.

25. The significance of the difference was brought out in *Macari v Celtic Football and Athletic Co Ltd* [1999] IRLR 787, where the relevant clause gave the company power to terminate the manager's employment "in the event that in the opinion of the board" any of a series of events had occurred. The Lord President (Rodger) said, at para 66:

> "The starting point is that under the general law of contract the defenders would not be entitled to dismiss the pursuer summarily unless he was actually in material breach of his contract. The matter would ultimately be one for the determination of the courts. Clause 13 alters that position by giving the defenders power to dismiss the pursuer forthwith if 'in the opinion of the Board' any of a number of events has occurred. As Mr. Clarke QC emphasised on behalf of the defenders, the clause shifts the balance dramatically in favour of the defenders by substituting the opinion of their board of directors for the judgment of the courts on a whole range of events. The pursuer could be dismissed, for instance, if 'the board' formed the opinion that he had become bankrupt or compounded with his creditors; or that he had become addicted to intemperance - a remarkably fluid concept - or that he had committed any act which brought the club into disrepute - again, rather a loose test. Scarcely the least obvious sign that this clause was not intended to benefit the pursuer is the fact that under it he could be summarily dismissed without having any right to be heard by the board or to challenge their opinion. Although the courts could, doubtless, review the board's opinion on these matters

> if it was one which no reasonable board could have reached, the terms of clause 13 significantly added to the defenders' powers under the general law of contract. A contract without clause 13 would have been more favourable to the pursuer than one containing the clause."

26. Since there was no comparable wording in clause 5, references to the Minister's belief were inappropriate: what the judge had to consider was whether, as a matter of fact, Mr Corbette had neglected or refused to perform any of his duties as General Manager or had neglected or refused to comply with any instruction or direction of the Directors. Mr Corbette's position at trial was, of course, that he had not done, or failed to do, anything which would have justified his dismissal on these grounds.

27. By the stage when the Court of Appeal came to consider the evidence in the light of the false test which they had formulated, there was "no challenge to the honesty of the minister's decision" and so they identified the crucial issue as being "the reasonableness of the minister's decision". Barrow JA felt able to conclude, mostly on the basis of the minutes of the board meetings, that the Minister's decision to terminate Mr Corbette's employment had been reasonable.

28. Unfortunately, as just explained, this was a wholly misconceived approach. It follows that the Court of Appeal's conclusions based on that approach cannot stand. Understandably, Mr Astaphan did not really struggle to support the Court of Appeal's reasoning. He proceeded instead to invite this Board to examine the minutes of the meetings of the Board of Directors and, on that basis, to conclude that, as a matter of fact, Mr Corbette had neglected or refused to perform some of his duties as General Manager or had neglected or refused to comply some instruction or direction of the Board.

29. The Board cannot possibly proceed in that way. This was a case where witnesses for both sides were examined and cross-examined. Even assuming that the minutes are an accurate record of what was said and done at the meetings, they cannot be isolated from all the other evidence given by the various witnesses about the events to which the minutes refer. Since the trial judge's whole approach to the evidence was based on an egregious error, however, the Board cannot rely on his assessment of the witnesses or on the conclusions which he drew from the evidence. Nor is the Board in a position to make its own fresh evaluation of the evidence. In these circumstances the only solution is for the case to be remitted to the High Court.

30. The appeal is accordingly allowed and the case is remitted to the High Court to be heard afresh by a different judge. Parties are to make submissions in writing as to costs within 14 days.