BHADAIN S v ICAC

2005 SCJ 132

2005 MR 272

Record Nos: 83746, 83907 & 83746

IN THE SUPREME COURT OF MAURITIUS

In the matter of:-

Sudarshan Bhadain

Applicant

v

Independent Commission Against Corruption

Respondent

In the presence of:-

The Honourable Prime Minister & Anor

Co-Respondents

In the matter of:-

H.D. Ghoora

Applicant

v

Independent Commission Against Corruption

Respondent

In the presence of:-

The Corruption Advisory Committee

Co-Respondent

In the matter of:-

D. Halkharee

Applicant

v

Independent Commission Against Corruption

Respondent

Judgment

This is an application for judicial review of the decisions taken by the respondent, the Independent Commission Against Corruption (ICAC), to dismiss the applicants Messrs Bhadain, Ghoorah and Halkharee from their respective posts at the Commission. At the material time, applicant Bhadain was the Director of the Corruption Investigation Division, applicant Ghoora the Chief Investigator and applicant Halkharee an investigator. The affidavits show that they were all well qualified for their jobs which they had obtained after proper advertisement, a formal interview and an integrity check. They were dismissed one after the other: Bhadain on 23 December 2003 following an interdiction which occurred on 3 December 2003, Ghoora summarily on 6 January, without any preceding interdiction and Halkharee on 9 January 2004 after he was interdicted on 15 December 2003. All these dismissals were without enquiry, without charge and without hearing.

ICAC claims that such obligations did not arise under the law inasmuch as all three applicants were at the time under a probationary period which in the events which took place showed that they were unsuitable for the jobs they occupied.

On 20 July 2004, we gave leave for a judicial review of the decisions dismissing the applicants. We are, accordingly, at the merits stage. The facts concerning the three applicants are inextricably linked. The applications were heard together and we propose to deliver one common judgment. The issues they raise may more conveniently be subsumed under the following headings:

(1) the applicability and the nature of a probation clause in the case of the applicants;

(2) procedural impropriety and illegality in the decision-making process; and

(3) improper and extraneous motive involved in the decision taking.

There have been seven affidavits produced by and on behalf of the applicants and six by and on behalf of the respondent. The issues regarding the role of the co-respondents, the Honourable Prime Minister and that of the Corruption Advisory Committee, will be dealt with at their proper place.

1.0. THE APPLICABILITY AND THE NATURE OF THE PROBATION CLAUSE

As regards the probationary period, the case of applicant Bhadain is slightly different from the case of applicants Ghoora and Halkharee. Applicant Bhadain challenges the very fact that he was ever contractually under any probationary period. In his case, therefore, the issue is one of the very applicability of a probation clause. On the other hand, Ghoora and Halkharee admit that they were contractually under probation for a year within which the decisions were taken. In their case it is the nature of the probation clause that is in issue. These will be examined in turn.

1.1. The case of Bhadain

On 3 December 2003 at about 3 p.m., applicant Bhadain was in his office when four officers of ICAC, amongst whom the Secretary, accosted him in his office with a letter. The letter stated that –

> *"the recent course of events have led the Commission to believe that –*
>
> *(a) you are bringing the Commission into disrepute;*
>
> *(b) your presence at this office is prejudicing the smooth-running of the Commission;*
>
> *(c) your conduct is against the interest of the Commission."*

It was further stated that "*pending consideration of the desirability of an enquiry*," (underlining ours) the Commission had decided to interdict him with immediate effect.

The Commission purportedly took its decision -

> *"(a) in the interest of the Commission; and*
>
> *(b) in exercise of the powers of the Commission under Clause (viii) (b) of the Offer of employment (reference ICAC/P/105) of 16th May 2003."*

No enquiry, in fact, took place as contemplated in the letter. The applicant was instead dismissed out of hand by letter dated 23 December 2003. The letter of dismissal read –

> *"the commission has, after consideration of all relevant matters, including your performance and aptitude to work within this organization, reached the conclusion that you are not a suitable person for the post of Director of the Corruption Investigation Division."*
>
> *"Since you are still on probation, the Commission has decided to terminate your contract with immediate effect."*

1.1. (a) The applicability of the probation clause in the case of Bhadain

Applicant had worked for about a year at ICAC before he became the Director of the Corruption Investigation Division. The terms and conditions were set out in a letter dated 21 February 2003 which mentioned the contractual period to be for 3 years, the salary to be Rs 85, 000 per month with gratuity and the starting date to be the date of assumption of duty which happened to be 7 March 2003.

To argue that applicant was under probation, ICAC relies on the first clause of the first sentence of paragraph 12 of its Notes and Instructions which states, inter alia, that –

> "*The first year of a three year term of agreement is a probationary period, ….*"

Mr Raymond d'Unienville Q.C. for ICAC in the application of Bhadain was judiciously poised in his address. His submission was that the cases cited by the learned counsel for the applicants were not the law in Mauritius. The position obtaining in our Labour Law is correctly expressed in the case of **Periag v International Beverages Ltd. [1983 MR 108]** where the Court of Appeal stated that whereas decisions in English law and French law were "*useful guide to illustrate judicial thinking … to reach just solutions, nevertheless the matter is governed by our own specific Labour Law*" so that *"it is best to look to our law and the cases decided in the context of that law in order to*

find precise solutions." He also submitted that the Bhadain matter was one of "rupture anticipee" on the authority of **Mauritius Steamship Navigation Company v Roussety [1977 MR 25].**

Bhadain claims that there was no reference to his being subject to any probationary period in the first letter offering him employment dated 21 February 2003 which he accepted and following which he assumed duty. That clause was added in a later correspondence provoked by the applicant himself when he sought to know the "*other terms and conditions*" applicable to his employment. That later correspondence was dated 16 May 2003. It repeated all the provisions of the previous offer but added two new terms: a probationary clause and a termination clause. The probationary period was stated to be for one year so that the contract duration now read –

> *"Three years, subject to an initial period of one year. During the term of contract, including the probationary period, you will be subject to an annual performance appraisal."*

The termination clause, for its part, read:

> *"(a) The contract may be terminated at any time by the Commission, without giving any notice and without compensation, in either of the following circumstances:-*
>
> *(i) in case of any breach of the General Conditions of Service and/or the Code of Conduct and Ethics;*
> *(ii) in the event of any gross misconduct …*
> *(iii) in case of unsatisfactory performance …*
> *(iv) conviction of crime or misdemeanour …*
> *(v) any other offence or act or neglect of duty which may:*
> *(a) bring into disrepute the Commission;*
> *(b) prejudice the smooth-running of the Commission;*
> *(c) be considered to be against the interest of the Commission;*
> *(d) be judged as unprofessional.*
> *(numbering re-done)*

(b) In any case either party may terminate the contract by giving three months notice."

Bhadain protested, and rightly so, in our opinion. As may be seen, he had been given a week from 21 February 2003, after the offer then made, to signify his acceptance. He had given a timely acceptance of the February offer and had already assumed duty. He was now, over two months later, on 16 May 2003, given another week to signify his acceptance of the May as well as the February offer combined.

Bhadain says that he did not accept the two modified terms, that he spoke to Mr G. Bisasur, the Deputy Commissioner, who reassured him citing section 24 (7) and 24 (8) of the Prevention of Corruption Act (POCA). These provisions make it clear that notwithstanding any provision in the contractual terms, the provisions of POCA must prevail. Section 24 (7) reads –

"24(7). Notwithstanding any condition contained in the contract of employment of an officer employed …, the Commission may, where it is satisfied that it is in the interests of the Commission to do so, but subject to subsection (8), terminate the employment of the officer.

On the other hand, section 24 (8) reads –

"24(8). The Commission shall not terminate the employment for an officer unless –

(a) it has provided the officer with a complete statement of the reasons why it is contemplated that his employment be terminated;
(b) it has given the officer a full and fair opportunity to show cause why his employment should not be terminated;
(c) it has, within 7 days of the date on which a hearing held under paragraph (b) is completed, referred the matter to the Corruption Advisory Committee for its advice; and

(d) the termination of the employment of the officer is effected within 7 days from the date on which the matter was referred to the Corruption Advisory Committee under paragraph (c).

Indeed, they do not speak of any probationary period and cannot be read or interpreted as being subject to the terms which may be contained in a probationary clause. The Deputy Commissioner in his affidavit denies that he had ever made any such comment respecting the legal position of the applicant. However, in case he had, and may have forgotten about it on account of their relationship which had soured, we can state that his view was sounder than that of the unnamed legal adviser of ICAC who apparently gave a contrary advice. Applicant admitted that he had read the Notes and Instructions generally distributed which speak of the existence of a probationary period of one year for "recruits." But his understanding was that it was meant only for those recruited at a lower level on the Commission's staff as opposed to those engaged specifically, as he was, at a professional level. The Commission also argues that since applicant accepted the car benefits given in the second letter of 16 May, he is deemed to have also accepted the probationary period as well as the termination clause by conduct.

We find the submissions of respondent on this issue untenable. First, the contract of Bhadain was concluded on the day applicant assumed duty, that is, on 7 March 2003. If certain terms and conditions remained pending, these could only relate to the package of incentives to be attached to the post such as car and other fringe benefits etc. which remained to be determined then. They could not be treated as a means which permitted ICAC to derogate from the terms of the contract already concluded since 7 March 2003. Were it otherwise, ICAC would have obtained a power to completely stultify the provisions of sections 24(7) and 24 (8) of POCA, which could not have been intended by the legislature. The English cases of **Maher v. Fram Gerrard & Anor [1974] 1 All ER 449** and **Western Escavations (Ecc) Ltd. V. Sharp [1978] 1 All E.R. 713** were cited by learned Counsel for respondent. The short answer as far as Mauritian law is concerned on the issue has been given in **Vacoas Transport Co. Ltd v. Pointu** [1970 MR 35] which held that the essential terms of a contract legally entered into between the parties cannot be revoked except by the mutual consent of the parties.

We hold, therefore, that, in the events which took place, the contract of Bhadain could not be interpreted as containing a period of probation inasmuch as –

(a) he did not accept it;

(b) his conduct cannot be interpreted as though he had accepted it; and

(c) that specific term could not be read into the applicant's contract –

(i) neither from the general provisions applicable to others;

(ii) nor from his conduct;

(iii) nor from the provision of the law, i.e. sections 24 (7) & (8) of POCA.

Inasmuch as the respondent relied specifically on the probationary clause to dismiss the applicant, the decision taken was *ultra vires* section 24 (7) and 24(8) as explained above. We accordingly hold that the decision in his case cannot stand.

With this, we come to the cases of Ghoora and Halkharee.

1.2. THE CASE OF GHOORA AND HALKHAREE

(a) Ghoora

Ghoora was appointed Chief Investigator at ICAC for a period of three years, following an application and due interview. He accepted the offer on the terms and conditions set out, subject to an initial probationary period of one year. He assumed duty on 20th June 2003. It was on 6 January 2004 that he received a letter from the Secretary of the Commission terminating his appointment. He wrote forthwith to the Chairman of the Corruption Advisory Committee (CAC) informing the Committee of the event and making reference to section 24 of the Prevention of Corruption Act. He also wanted to know from the Secretary whether the Committee had been apprised of the course of action taken by the Commission. He received a reply from the Secretary of CAC only on 8 March to the effect that his request could not be acceded to. We find this to be unfortunate since the Corruption Advisory Committee has a statutory duty to perform under the Act. The applicant was not asking for a free service to be performed in his favour but was apprising the CAC of its statutory responsibility under the law.

(b) Halkharee

Halkharee was offered and accepted employment as Investigator of ICAC and assumed duty on 20 June 2003. The contractual period was for three years, subject to an initial probationary period of one year. The terms are identical with those of Ghoora.

Following the suspension of Bhadain and events which started on 4 December 2003, he was met with in the early morning of his arrival in office on 15 December 2003 by 5 officers of ICAC. He was given his letter of interdiction and asked to leave immediately. His letter stated that the interdiction was "*with immediate effect, pending the outcome of an ongoing investigation concerning you*." The grounds for his interdiction were not mentioned. Again, in his case, no investigation took place. He received instead a letter of dismissal. It was dated 6 January 2004 sent by the Secretary of the Commission reaching him on 9 January 2004 by post.

1.2. (a) The Nature of the Probation Clause

We may now turn to the nature of the probation clause with respect to the two applicants, Ghoora and Halkharree. Learned counsel for respondent, Mr T. M. Gujadhur, urged before us that such a hyper-sensitive organization as ICAC should be allowed to give its personnel a trial period and that this is the prerogative of any employer in accordance with international trends, Mauritian Labour Law and local business practice. He cited from two non-legal works: **Robbins, Organizational Behaviour, 9th edition, 2000, at pages 521-529** and **DeCenzo & Robbins, Personnel, Human Resource Management 1999, at pages 214-222**. Accordingly, he argued, the power to insert a probation clause – a "contrat à l'essai" – included the power to determine the employment of the two officers within the trial period.

He sought to distinguish the English case of **R v Department of Education and Science, ex parte Kumar (1982) The Times 18 November**. In this case, the contract of the applicant had been terminated within the probationary period without the adverse reports having been shown to him on the ground that they were confidential. It was held that the reports should have been given to applicant despite their confidential nature. It did not matter whether the decision to dismiss her took place within the probationary

period or otherwise. The decision of the Secretary of State was quashed and the matter was remitted to him for further consideration.

Mr Gujadhur dwelled lengthily on the cases of **Gilbeys (Mauritius) Ltd v Paul MR [1975 MR 215]** and **Ooozeerally v The Judicial and Legal Service Commission [1981 MR 444].** The case of **Gilbeys** in our view does no more than reproduce, if succinctly, the law with respect to a "contrat à l'essai."

The case of **Oozeerally v The Judicial and Legal Service Commission** (supra) was cited in support of the fact that in cases of temporary appointments, the statutory provisions do not apply. In that case, the applicant sought an injunction against the Commission. One of the issues was whether the laws and regulations governing the public service of Mauritius applied to the case. Judge Lallah, as he then was, held that those laws and regulations were meant for those who were confirmed in their appointments and not to those who had not reached that stage for being still either under a probationary period or in temporary employment. He added however that "*there would be nothing, I expect, which would prevent the Commission from giving to the officer concerned the kind of hearing that is envisaged for the applicant.*"

A "contrat à l'essai," admittedly, is an initial phase in an employment contract where both parties may agree that they may terminate the contract, without notice, without compensation and without formulating any reason for it -

> *"Les parties peuvent prévoir, dans le contract à durée determinée, l'existence d'une période d'essai. Son régime demeure celui du droit commun: les contractants peuvent rompre unilatéralement, à tout moment, cette période initiale du contrat, sans préavis ni indemnité, et sans avoir à donner les motifs de leur décision...* » **Répertoire Trav. Dalloz , décembre 2002, paragraphe 250**.

We have no difficulty in following Mr d'Unienville that if a "contrat a l'essai" may be inserted independently of our Labour Act, it could likewise be inserted independent of POCA. In fact, a "contrat à l'essai" is a creature not of legislation but of judges. It is not found in our civil code. However, in the cases of Ghoora and Halkharee the crucial question is the nature of the probationary period. Mr Gujadhur, in our view, has too

readily merged two legal terms of two different systems "probationary period" and "contrat à l'essai" as though they were interchangeable. However, when the meaning given to the term "probationary period" is gauged in the light of the literature and the documents of the respondent, it is anything but a "contrat à l'essai." It is more in the nature of the modern notion of a "stage" or training. Paragraphs 12 and 13 speak of the period as being one of scrutiny, team building and training. As may be noted, the term "contrat a l'essai" is used neither in the Notes and Instructions nor in the terms and conditions of employment of the applicants.

Even in the French system, an employer is precluded today from lightly invoking a *"contrat d'essai"* in every situation for the purpose of justifying a summary dismissal. In the recent case of **Rakotomalala,** a part-timer worked from 9 September to 30 September 2000 for société LKB Kart'in Drive on an oral contract of service. On 30 September 2000, the employer notified him that he was putting an end to his contract. Mr Rakotomalala seized the Tribunal de Prud'homme for unjustified dismissal. The employer pleaded that the employee was deemed to be under a "période d'essai." The Tribunal aligned itself to the submission of the employer.

The Cour de Cassation (Cass. soc., 14 janv. 2004) reversed the decision and held on to its line of decisions, more especially since 1999 to the effect, inter alia, that –

(a) a "période d'essai" (trial period) is not a period that may be presumed from the circumstances;

(b) both the principle of it and the duration of it should be settled right at the time the contract is concluded;

(c) inasmuch as it renders the security of the employment vulnerable, the employee should be informed of the precarious nature of the trial period.

The French doctrine, accordingly, comments that -

« La période d'essai, qui ne se présume pas, doit être fixée dans son principe et sa durée dès la conclusion du contrat de travail. Elle fragilise par nature l'emploi du salarié qui doit être pleinement informé de la précarité temporaire de sa situation. Il est donc logique que cette période ne puisse

résulter que du contrat ou de la convention collective, ce que la Cour de cassation avait déjà admis dans un arrêt du 23 novembre 1999 (TPS 2000, comm. 52).” Ibid. Travail et Protection sociale – Editions du Jurisclasseur, Note 79.

For that reason, both French doctrine and jurisprudence admit that on account of the ease with which an employer may use a “période d’essai” to his advantage, allowing him to circumvent entrenched provisions of labour laws, there is a need to be critical in interpreting a trial period in any given circumstances. In the **Rakotomalala case** cited above, the Cour de Cassation stated so clearly that such a clause *« … fragilise par nature l’emploi du salarié. »*

In English law, a probation period today is a meaningful period and no longer serves as an employer’s charter for easy and ready firing. It is a period of trial in good faith for both the employer and the employee during which the employer, on the one part, creates the conditions for adequate training and job-adaptation of the employee and the employee, on the other part, commits himself to those conditions.

English law, as early as 1981, speaks of a probationary clause as a purposive regime meant for mutual accommodation. Thus, in the case of **White v London Transport Executive [1981] IRLR 261,** the Employment Appeal Tribunal took the view that there was an implied term in relation to probationers that the employer will take reasonable steps to maintain an appraisal of a probationer during a trial period, giving guidance by advice or warning where necessary. Thus, it was not open to the employer to use the period as a handy device to arbitrarily put an end to a contract of employment.

Interestingly, this philosophy is inserted in paragraphs 12 and 13 of the Notes and Instructions advertised by ICAC. They represent that –

“12. The first year of a three year term is a probationary period during which the recruit is closely scrutinized to ensure he or she lives up to the requirements of the post. The period also allows for an assessment of the recruit’s ability to mix with colleagues and be part of a team, his or her social attributes and what special attention needs to be given to assist development …”

That rhetoric, however, is betrayed in reality when ICAC has used it not as a "stage" but as a weapon for abusive dismissal. Accordingly, the decisions to dismiss Ghoora and Halkharree on the ground that under the probation clause ICAC had the power to do so were plainly misconceived. At any rate, that clause must be read subject to Section 24(7) and 24(8) of POCA.

In the light of our decision on the inapplicability of a probation clause in the case of Bhadain and the distorted application of the probation clause in the case of Ghoora and Halkharee, we need not consider the other points raised by learned counsel for the parties. However, the nature of the complaints and the submissions are such that we think they warrant some consideration and some comment from us.

2.0. ALLEGED PROCEDURAL IMPROPRIETY AND ILLEGALITY IN THE DECISION MAKING

Mr Hawaldar, learned Counsel for Haulkharee pressed that the procedure adopted by ICAC was in violation of the very law which established ICAC which specifically provides for the manner in which a procedure for termination should be engaged. He was also supported by Mr. Y. Varma learned Counsel for Ghoora on the issues raised.

2.1. ICAC's power to insert termination clauses for summary dismissal

The contractual clause which ICAC invokes for the dismissal of Ghoora and Halkharee begs two questions:

(a) whether ICAC had the power to insert a termination clause of the type inserted in the first place;

(b) whether it had the power to dismiss the applicants in the manner it did under the law.

The terms under which both Ghoora and Halkharee were appointed are the same. As per clause (x) (a), the contract could be terminated at any time by the

Commission, without giving any notice and without compensation, in either of the following circumstances –

in case of any breach of the General Conditions of Service and/or Code of Conduct and Ethics;

(i) in the event of any gross misconduct or unapproved prolonged absence which in the opinion of the Commission is of such a nature as to constitute failure or unreliability of the person concerned to perform the duties of the post;

(ii) in case of unsatisfactory performance;

(iii) conviction of crime of misdemeanour which in the opinion of the Commission is of such a nature as to render you unfit to continue to hold office;

(iv) any other offence or act or neglect of duty which may –

(I) bring into disrepute the Commission;

(II) prejudice the smooth-running of the Commission;

(III) be considered to be against the interest of the Commission;

(IV) be judged unprofessional.

The purported ground for termination in both cases reads the same -

> *"2. The Commission has, after consideration of all relevant matters, including performance and aptitude to work within this organization, reached the conclusion that you are not a suitable person to remain in employment of the ICAC."*

The ground does not tally with any of the circumstances specifically set out in clause (x) (a) which would amount to permissible causes for termination of Ghoora's and Halkharee's employment under the contract. It cannot be disputed that, as per section 24(1), Parliament has given the Commission the power to insert a clause of termination where it is in the interest of the Commission to do so. However, that section is subject to section 24 (7) and (8), the effect of which is to guarantee the employee the fundamental principles of natural justice, including that of fair hearing. It is amply clear to us that ICAC was in breach of the entrenched guarantees when it sought to insert contractual clauses to the effect that it could terminate the employment of any person at any time without

giving any notice and without compensation in situations enumerated in clause (x) (a) of its contract of employment. It was in further breach of the fundamental principles of natural justice since the ground invoked for dismissal went beyond the situations outlined in clause (x) (a) which were themselves questionable.

With this we come to the issue of illegality: that is, ICAC's power to dismiss and whether it followed the law.

2.2. ICAC's power to dismiss

A reading of the relevant section shows that ICAC has the power to dismiss. We do not have to resort to the Interpretation and General Clauses Act to locate this power. This may be evident from section 24 (7) which provides -

> *(7) Notwithstanding any condition contained in the contract of employment of an officer employed …. the Commission may, where it is satisfied that it is in the interests of the Commission to do so, but subject to subsection (8), terminate the employment of an officer.* (underlining ours)

That power to dismiss, however, is entrenched by law. There is a mandatory prohibition against the Commission firing anyone without scrupulously following the provisions of the very law that set it up. Thus, section 24 (8) provides -

> *"(8) The Commission shall not terminate the employment of an officer unless –* (underlining ours)
>
> *(a) it has provided the officer with a complete statement of the reasons why it is contemplated that his employment be terminated;*
>
> *(b) its has given the officer a full and fair opportunity to show cause why his employment should not be terminated;*
>
> *(c) it has, within 7 days of the date on which a hearing held under paragraph (b) is completed, referred the matter to the Corruption Advisory Committee for its advice; and*

(d) the termination of the employment of the officer is effected within 7 days from the date on which the matter was referred to the Corruption Advisory Committee under paragraph (c).

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In the case of all the three applicants, the termination was summary and in total disregard of the procedure envisaged by section 24 (7) and (8). The Commission was thus in breach of three of its fundamental duties in a row. First, it did not give a complete statement of reasons why it was contemplated that the applicants' employment be terminated as required by subsection (8) (a). Second, it did not give a full and fair opportunity to any of them to show cause why their employment should not be terminated as required by subsection (8)(b). Third, it ousted the Corruption Advisory Committee in its statutory role vested in the latter by Parliament to give advice as regards the termination of officers employed by the Commission.

We wish to emphasize that a statutory duty to consult requires that the person or body consulted should be given a reasonably ample and sufficient opportunity to state their views: **Port Louis Corporation v Attorney-General of Mauritius 1965 AC 111, Rollo v Minister of Town and Country Planning [1948] 1 All ER 13; Union of Benefices of Whippingham and East Cowes, St James [1954] AC 245**. Failure to consult will normally render the order void, for neglect of a mandatory requirement: ***Union of Benefices of Whippingham and East Cowes, St James [supra].*** A similar duty should be read in the respondent's statutory duty to refer a matter to a person or body. In this case, the law provides that within 7 days of the date on which a hearing is completed, the matter shall be referred to the Corruption Advisory Committee for its advice. The procedure provided by Parliament cannot be circumvented by the respondent merely informing the Committee – in the words of ICAC itself "as a matter of courtesy." POCA does not speak of colourable courtesy but of mandatory compliance.

Cases will be very exceptional and limited where the employment of a citizen may be terminated summarily without a statement of reasons, without affording him an opportunity to say anything if he wanted to, without a full and fair hearing. Where the statute requires that such a specified procedure for termination be followed, to do otherwise is tantamount to impermissible executive legislation. POCA 2002 does not provide for any exception and no exception should be implied. The respondent clearly

went beyond the bounds of the law in the manner in which it dealt with the applicants. It flouted the procedure provided for under the POCA as well as its own internal rules as publicized to the world at large. It also acted in breach of sections 24 (7) and (8) of POCA by inserting conditions which were not consistent with the provisions of the Act.

The decisions taken to dismiss the three applicants, therefore, are also flawed on the grounds of procedural impropriety, *ultra vires* and illegality.

3.0. ALLEGED IMPROPER AND EXTRANEOUS MOTIVE INVOLVED IN THE DECISION-TAKING

The applicants have challenged the decisions also on the ground of improper motive and extraneous considerations. The respondent denies any sinister motive.

The affidavits of all the three applicants contain serious and grave allegations, which on the face of them, would range from breach of work ethics to breach of criminal law including breach of provisions of POCA itself. They are against the Commissioner, the Deputy Commissioner, Mr. Peerun, Mr. Dawoodharry, Mr. Nemchand, Mr. Nielson, Mr. Neerunjun, Mrs Lachman, Mrs Maistry and a couple of others. The majority of them have taken refuge behind corporate affidavits. Where some of them have given affidavits, they evade the issues, make general denials or keep a subdued discretion over what is alleged against them. Their versions do not accord with common sense and are in the nature of official white lies. In the result, the probative weight of the version given by the applicants far outweigh that of the persons impugned.

Indeed, if the affidavits of applicants make gruesome reading, the counter-affidavits of the respondent ends up by only sharpening that picture by the very nature and content of the pleas taken. The picture of ICAC left with us is one of a couple of head-hunters, playing employees against employees, using stratagems for developing personal registers, brandishing high-sounding rhetorics to justify actions based on mere suspicions and seeking to justify questionable goals by culpable harassment, sequestration, confessions coupled with indignities.

As an illustration of the comments we have just made, it is appropriate that we refer to some matters canvassed in the appellants' affidavits and to the reply of the

respondent. Bhadain stated that in the course of an interview on Friday 28 November 2003 with a suspect, the latter produced a letter showing that the Deputy Commissioner (Investigation) had been the attorney-at-law of a company involved in the MCB/NPF investigation. That fact had not been disclosed to Bhadain in his capacity as Director of Corruption Division (CID) by the Deputy Commissioner at any stage of the investigation. The suspect had allegedly stated that he would give a detailed statement to ICAC on Monday 1 December 2003 on the company and on the involvement of the Deputy Commissioner. Bhadain wrote a memo to the Commissioner, seeking guidance on the matter, as he was reporting directly to the Deputy Commissioner (Investigation). When the suspect came to ICAC on 1 December 2003 for his statement to be recorded, he was allegedly told by a named Assistant Director posted in Bhadain's division that he could leave as they would not interview him. Bhadain wrote a memo to the Assistant Director for explanation as to why the statement of the suspect was stopped. The Assistant Director would have told him: "*M. Bhadain mo pas capave donne ene reponse en ecrit. C'est Commissaire ki fine dire moi arête prend statement are [the suspect]. Mo pou embarrasse pou mette ca en ecrit.*"

Bhadain also stated that on 1 December 2003, he was informed in writing by an officer of his division that another officer had been allegedly harassed and threatened by the Commissioner. The officer had allegedly been ordered by the Commissioner, in presence of the Deputy Commissioner, to retrieve files and documents from the investigation division without Bhadain's knowledge or consent or that of the officer's immediate superior. She was given to understand that her career would suffer if she failed to carry out the order. Being given the involvement of the Commissioner, Bhadain submitted the matter to the Chairman of the Parliamentary Committee on 2 December 2003. On the following day, he was interdicted.

One would have expected the Commissioner and the Deputy Commissioner who had been specifically named in Bhadain's affidavit to rebut the allegations of misfeasance on their part. But strangely enough, an affidavit in rebuttal was affirmed by respondent's Secretary who obviously had no personal knowledge of the matter and who could only traverse Bhadain's allegations in broad and vague terms. The material part of his affidavit dated 5 March reads –

"31. As regards paragraph 15 of AA2, without admitting any of the averments contained therein, the Respondent avers that the Applicant is merely surmising and using his application of judicial review as a platform to air his discontentment and to publicize matters internal to the Respondent …."

Bhadain went on to state that on 4 December 2003, the day after his interdiction, Halkharee, an officer of his division was allegedly coerced and forced to give a false and damning statement against him. Following Halkharee's report of the incident to the Police, he in turn was dismissed by the Respondent.

Bhadain was convened before the Parliamentary Committee on 10 December 2003. He attended and waited for 1½ hours but was not heard. He verily believed that the Commissioner had objected to the Committee hearing him.

On 17 December Bhadain applied to the Supreme Court for leave to apply for judicial review of his interdiction. On 22 December, Counsel appearing for Respondent moved for a short postponement to take a stand and the matter was put to 12 January 2004 for mention. On the following day, however, by letter dated 23 December 2003, respondent terminated Bhadain's employment on grounds which were completely different from those given for his interdiction. We express our regret at this rather indecent haste in dealing with Bhadain with finality.

4.0. PRIVATE RIGHTS v. PUBLIC RIGHTS

The respondent also argued that, if at all, it is the private rights of applicants which may have been infringed so that they should seek redress in private law rather than public law. We disagree. The respondent is a publicly funded institution, drawing for its heavy expenses, on the pockets of the citizens of this country. As Fredman and Morris state in their article **"Public or Private: State Employees and Judicial Review" L.Q.R Vol. 107, p. 298** at page 311:

"Government derives its revenue to pay employees primarily from taxation rather than profits."

The respondent is not a service provider as some statutory bodies or regulatory authorities which are run along business lines and which are unaccountable to the legislature. The employees of ICAC have the status of officers involved in a public duty to combat corruption under a dedicated Act of Parliament. It is more in the nature of a law enforcement agency operating along principles of legislative accountability. The Appointments Committee comprises the Prime Minister and the Leader of the Opposition.

That is not all. It is all too easy for some statutory bodies, not under parliamentary scrutiny, to be whimsical and generous with the tax-payer's money and wash hands with such issue as to whether the alternative remedy for their indiscriminate breaches of the law will lead to substantial damages to be footed by public funds. The Courts would be abdicating their responsibility if they did not censure such reckless public wastage since damages in the millions that may be awarded may only be billed to the tax-payer.

As may be read from paragraph 453 at page 418 of **Halsbury, Laws of England, 4th Edition, Volume 16 on Employment, Year 2000 Re-issue** –

> *"Public law remedies might be available :*
>
> *(1) where the employment was of a nature of an office warranting legal protection; or*
>
> *(2) more generally, where there was an element of public employment or service, support by statute or something in the nature of an office or status capable of protection."*

On the first limb, one may refer to the cases of **Social Club and Institute Ltd v Bickerton [1977] ICR 911, EAT; R v Hertfordshire County Council, ex p. National Union of Public Employees [1985] IRLR 258, CA; Hopley, R v Liverpool Health Authority & Ors Neutral Citation Number [2002] EWHC 1723 (Admin).**

On the second limb, one may refer to the cases cited**: Malloch v Aberdeen Corpn [1971] 1 WLR 1578 at 1576, HL as per Lord Wilberforce. Cf Vine v National**

Dock Labour Board [1957] AC 488; Barnard v National Dock Labour Board [1953] 2 QB 18; Taylor v Furness, Withy & Co Ltd [1969] 1 Lloyd's Rep 324.

There is another reason for which we would hold that what happened was not merely a violation of private rights between employer and employee as obtains in "pure master and servant cases:" see **Malloch v Aberdeen Corpn (supra) and Vine and National Dock Labour Board (supra)**. The cases of **R v Lord Chancellor's Department, ex parte Nangle [1992] 1 All ER 897** and **R v British Broadcasting Corporation ex parte Lavelle [1983] 1 W.L.R. 23** were cited before us. Both these cases were clearly examples where disciplinary proceedings had been engaged. In our case, no disciplinary proceedings have been engaged at all. The case of **Augustave v Mauritius Sugar Terminal Corporation and anor [1990 MR 222]** had to do basically with an administrative exercise in the managerial function of a corporation appointing one person in the place of another on criteria not necessarily erroneous. The present case is one based, inter alia, on breach of natural justice, procedural and substantive illegality and ill-will in decision-making.

The Commission was required by statute, in the present cases, to follow a specified statutory procedure. The Commission defied that statutory procedure so that those directly touched by the non compliance as well as those who are vested with a duty to maintain good governance in public institutions have a public law right to compel the Commission to comply with its obligations under the Act of Parliament which established the institution: see ***R v East Berkshire Health Authority, ex parte Walsh (1988) 3 All ER 725*.**

For the above reasons, we hold that the decisions taken by ICAC to dismiss the three applicants were seriously flawed from whichever angle we may look at: *ultra vires*, procedural impropriety, illegality and improper motive. It should, as a consequence, be treated as null and void and they are, accordingly, quashed. In case the Commission contemplates pursuing with taking disciplinary measure against any of the 3 applicants, we must start that no decision may be taken in violation of the provisions contained in POCA. The applicant is entitled to a proper enquiry being made; in case of any prima facie case being retained, a proper charge sheet should be served and applicant is

entitled to be heard by an independent and impartial body. Moreover, no decision may be taken in violation of the dismissal provisions contained in POCA.

5.0. THE ROLE OF THE CO-RESPONDENTS

We must now turn to the two remaining issues adverted to at the start of this judgment, viz. the role of the co-respondents, the Honourable Prime Minister and the Corruption Advisory Committee (CAC).

A. The Honourable Prime Minister

The Honourable Prime Minister is the co-respondent in the application of Bhadain. Mrs Cheetoo, learned counsel appearing for the Honourable Prime Minister, submitted before us that whatever ICAC did was under section 24 (7) of POCA and that the Prime Minister was not in any way concerned in the matter under dispute. We agree with her submission that the Honourable Prime Minister was not legally concerned with what ICAC did in a case of termination of employment of its officers. It is otherwise in a case of appointment of or termination of appointment of its members pursuant to section 21 and 23 of POCA. We must also remark that section 29 of POCA states that the Director of the Corruption Investigation Division shall be appointed by the Commission after consultation with the Prime Minister. But there is no provision that such a consultation is required to terminate such an appointment so that the adjunction of the Honourable Prime Minister as a co-respondent, though unnecessary, must have been done out of the abundant caution of the legal advisers retained by appellant Bhadain to be compliant with the procedures of appeal.

B. The Corruption Advisory Committee

The applicants also argued that there was a need to consult the Corruption Advisory Committee (CAC) before any decision for dismissal could be taken. ICAC for its part plead that it had no duty under the law to do so inasmuch as section 24 (7) is not exhaustive. However, as a matter of courtesy, they did inform the CAC. CAC was the other co-respondent in this case. As per section 24(8), the Commission is required,

within 7 days of the date on which a hearing contemplating dismissal is completed to refer to the matter to the Corruption Advisory Committee for its advice.

Mr. Jhowry appearing for the CAC endorsed the submissions made by counsel for respondent that the CAC was no more than an administrative component of ICAC, and, therefore, that there was no potential conflict in the roles of the two bodies. We do not think that such a submission can seriously be sustained since it would only be advocating institutional promiscuity in ICAC. An advisory institution statutorily set up by Parliament in its wisdom cannot be reduced to an administrative component of the very organization it is meant by Act of Parliament to advise.

For the reasons given above, we hold that the decisions taken by ICAC to dismiss the three applicants were flawed all along the line. We allow the application in all the three cases and quash the decisions taken against the three applicants. With costs.

Y. K. J. Yeung Sik Yuen
Ag. Chief Justice

S.B. Domah
Puisne Judge

13 May 2005

Judgment delivered by Hon S.B. Domah, Judge

<u>For Applicant Bhadain</u>: Mr Y. Mohamed, S.C instructed by Mrs Attorney A. Jeewa

For Respondent:- Messrs R. D'Unienville Q C & Mr Ramphul, instructed by Mr Attorney M.H. Salehmohamed

For Co-Respondent: - Mr S. Sohawon, Mr D. Jhowry
State Attorney/Counsel

<u>For Applicant H.D. Ghoora</u>: Mr Y. Varma of Counsel, instructed by Mr Attorney R. Posooa
For Respondent: Mr R. D'Unienville QC, instructed by Mr Attorney M.H. Salehmohamed

For Co-Respondent:- Mr S. Sohavon, Attorney

<u>For Applicant D. Halkharee</u>:- Mr S. Hawaldas of Counsel, instructed by Mrs Attorney A. Jeewa

For Respondent:- Messrs R. D'Unienville QC & Mr T. Gujadhur of Counsel, instructed by Mr Attorney M.H. Salehmohamed