Public Service Commission v Lai Swee Lin Linda
[2001] SGCA 5

Case Number : CA 69/2000

Decision Date : 29 January 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Kew Chai J; L P Thean JA

Counsel Name(s) : Jeffrey Chan and Hema Subramaniam (Attorney General's Chambers) for the appellant; Harpreet Singh Nehal, Rama S Tiwari and Adrian Kwong (Drew & Napier) for the respondent

Parties : Public Service Commission — Lai Swee Lin Linda

Administrative Law – Judicial review – Ex parte application for leave – Application for orders of certiorari and mandamus – Approach to ex parte application for leave

Administrative Law – Judicial review – Whether matters susceptible to judicial review – Whether element of public law involved – Whether relationship between parties governed by contract or law – Whether Civil Service Instructions Manual has statutory force – Whether source of power exercised in making decisions derived from contract or law – Whether decisions of general application affecting employees of a public body

(delivering the judgment of the court): ***Introduction***

This appeal arises from an application made by the respondent, Ms Linda Lai Swee Lin (`Ms Lai`), to the High Court under O 53 r 1 of the Rules of Court Order for leave to apply for an order of certiorari to quash the following:

(a) the decision of the Commissioner for Lands/Permanent Secretary (Law) conveyed to Ms Lai on 19 August 1998 extending her probationary period as a Senior Officer Grade III (Law) for one year retrospectively with effect from 28 November 1997;

(b) the decision of the Senior Personnel Board F conveyed to Ms Lai on 17 December 1998 terminating her appointment as Senior Officer Grade III;

(c) the decision of the appellant [`the PSC`] refusing Ms Lai`s appeal against the retrospective extension of the probationary period and the termination of Ms Lai`s appointment;

and also for leave to apply for an order of mandamus to reinstate Ms Lai as a confirmed Senior Officer Grade III with effect from 28 November 1997. Pursuant to O 53 r 1(2) the application was made ex parte, supported by a statement and an affidavit of Ms Lai verifying the facts relied on. Pursuant to O 53 r 1(3) the application together with the statement and affidavit was served on the Attorney General`s Chambers.

At the hearing before the judge below, Mr Jeffrey Chan, senior state counsel from the Attorney General`s Chambers, appeared for the PSC and resisted the application. At the conclusion of the hearing, the judge granted leave to Ms Lai to apply for the order of certiorari sought but refused her leave to apply for the order of mandamus. The PSC now appeals against the order of the judge.

Facts

The relevant facts which led to the application by Ms Lai were set out in her statement and affidavit

filed below and at this stage these were the only facts before the court. Both before us and before the judge, the hearing proceeded on the assumption that the facts as stated in the statement and deposed to in the affidavit are correct.

Ms Lai, an Asean scholar, graduated from the University of Malaya with an LL B degree in 1979. She worked for various Malaysian government departments for a number of years, before going into private practice. She migrated to Singapore in 1991, and in 1993, she graduated from the National University of Singapore with an LL M degree. She became a Singapore citizen in 1994.

She was appointed as a Senior Officer Grade III at the Land Office, Ministry of Law, in November 1996. The letter of appointment issued by the Commissioner of Lands (`Commissioner`) and dated 19 November 1996 stated that her tenure of office was `Permanent`. It also stated that the period of probation was one year with effect from the date of assumption of duty. The letter had conditions overleaf and with regard to these conditions the letter stated: `Conditions 1 to 9 and 17 overleaf are applicable`. The material conditions, Conditions 2 and 4 respectively provide:

> *2 During the whole period of your service, you will be governed by instructions, however styled, that are in force or may be made.*
>
> *4 Your appointment is in accordance with your Scheme of Service.*

The Civil Service Instructions Manual (`IM`) contain instructions to all civil servants and by virtue of Condition 2 was made applicable to Ms Lai. We shall refer shortly to some of the material provisions of the IM.

On 28 November 1996, Ms Lai assumed duty at the Land Office. She was then designated Head (Legal) reporting to the Deputy Commissioner of Land, Mr Liew Choon Boon. On 30 June 1997 or thereabouts, she was requested by the Deputy Commissioner to take on added responsibilities. In the course of her duties, the applicant oversaw the operations of the Lease Administration Section in carrying out title management work, in particular, lifting of title restriction, upgrading of lease tenure and enforcement of the covenants.

Under the IM, a confidential staff report was required every six months during the probationary period of all public servants. The PSC was given such a staff confidential report form to be completed and passed on to her immediate superior, the Deputy Commissioner, for the two six-month periods during her probation. In this regard para 42 of IM No 2 section B provides:

> *A Permanent Secretary must make sure that Staff Confidential Reports are put up every 6 months on all probationary officers in Divisions I, II and III under his charge. ... If Staff Confidential Reports contain adverse remarks or if an officer is not making enough progress in his work, the Permanent Secretary has to follow the instructions in paragraph B20.*

And para 20 of IM No 2 section B provides:

> *During the probationary or trial period, an officer has:*
>
> *(a) ...*

(b) ...

If an officer receives an adverse report after six months` service, his Permanent Secretary has to inform him verbally of his shortcomings, and, where necessary, give him all possible help to overcome them. If the shortcomings persist in the next six months, they have to be made known to the officer, in writing. If the Permanent Secretary has doubts about the suitability of the officer, or feels that the officer`s progress has not been of a high enough standard for him to be confirmed, the Permanent Secretary has to consider:

(c) extending his service for a further six months or a year; and

(d) stopping or deferring his increment at the same time.

If it is unlikely that the officer will qualify for confirmation at the end of the extended period, the Permanent Secretary will consider:

(e) terminating the officer`s service under para P25; or

(f) reverting him (putting him back) to his previous grade under para B115 and B116.

In either case, the Permanent Secretary, if he is not the Appointing Authority, has to refer the case to the Appointing Authority at least two months before the end of the officer`s probationary or trial period. The Appointing Authority will then submit the case to the PSC together with a recommendation to terminate the officer`s service, or revert him (put him back) to his previous grade, as the case may be.

Thus, under the IM if there are any adverse comments on an officer in the report within the first six months, the Permanent Secretary of the Ministry should verbally inform the officer of his or her shortcomings. If these shortcomings persist in the next six months, the officer will have to be informed in writing. The respondent at no time during her probationary period received any adverse report; nor was she informed verbally or in writing of any shortcomings or that she was not performing up to expectation. This was conceded by the PSC.

In the normal course, in accordance with the IM, by 27 November 1997 or thereabouts, Ms Lai would have been informed officially in writing whether she was confirmed or her probation was extended or her service was no longer required. This is provided for in paras B66, B20 and P25 of IM No 2. However, Ms Lai received no such formal notification. The PSC conceded that Ms Lai should have been informed of her non-confirmation either on or before this date or soon thereafter.

Sometime during the period between November and December of 1997, pursuant to a query from Ms Lai, the Deputy Commissioner of Lands informed her that he had requested Director of Alienation 2 to appraise her and that the Director had given her a `generous appraisal`. The respondent expected that her confirmation was no more than a mere formality.

On 29 May 1998, there was a meeting of various senior officers in the Land Office, including Ms Lai. This meeting was called as a result of the query from the then President of the Republic of Singapore, Mr Ong Teng Chong, on the inefficiency of the Land Office with respect to land titles, which had been forwarded to him for approval after years of delay. It appeared that some 128 titles had been delayed, and some for a period between 10 and 20 years. After the meeting, on the next day, Ms Lai sent an email to her immediate superior, the Deputy Commissioner, alleging that her two senior officers, Directors of Alienation 1 and 2, did not accurately reflect the extent of the backlog of work. She also sent a copy of the email to the then Commissioner. In it, she highlighted the serious nature of the backlog of work.

By that time, 18 months had lapsed since Ms Lai`s assumption of duty. She had not received any adverse report. Nor had she been informed of any shortcomings on her part, whether orally or in writing. On 31 May 1998, Ms Lai alleged that she was verbally informed by the then Commissioner that her appointment would not be confirmed as there were frictions between her and the Director of Alienation 1. On 1 June 1998, Ms Lai was re-designated as Head (Remnant Land). Until this time, her designation was Head (Legal/Remnant). The significance of this re-designation did not emerge clearly from the documents. The respondent claimed that this was an indication that her performance at the Land Office was at least acceptable.

On or about 19 August 1998, which was some nine months after her probationary period, Ms Lai received a letter stating that adverse reports have been received with regard to her service from 28 November 1996 to 27 November 1997 and on account of these adverse reports Ms Lai`s appointment was not confirmed, and that the probationary period would be extended for one year with effect from 28 November 1997 to 27 November 1998. As there had already been a lapse of nine months before Ms Lai received this written notification, the extension of her probation was, in effect, for another three more months. On the basis of what Ms Lai said, clearly there were serious breaches of provisions of paras B 20 and 42 of the IM.

On 1 September 1998, Ms Lai wrote to the new Commissioner setting out her grievances and sought an appointment to see him. She asked that the Director of Alienation 2, one of the two senior officers whose shortcomings she had pointed out in her email of 30 May 1998, should not be appointed to appraise her. She also requested for a transfer to the State Land Division. In the later half of September 1998, Director of Alienation 1 informed Ms Lai that the Commissioner did not approve the transfer. The respondent was also informed to look for another job elsewhere.

On 30 September 1998, Ms Lai sent a letter to the Permanent Secretary of the Ministry of Law through the Commissioner, setting out her grievances. On the same day, Deputy Director (Human Resources) of the Ministry wrote to Ms Lai informing her that any appeal should be submitted through her supervisor and the Commissioner. The letter also warned her that should her performance fail to improve, the Ministry would have to terminate her service.

By 27 November 1998, Ms Lai`s extended probation ended. On 17 December 1998, the Senior Personnel Board F terminated her service, by giving her one month`s emoluments in lieu of one month`s notice pursuant to para 25(1) of IM No 2P. The termination was made effective from 21 December 1998. On 20 and 26 December 1998, Ms Lai wrote to the Minister for Law, stating her grievances. On 29 December 1998, the Deputy Secretary of the Ministry of Law wrote to her, advising her to appeal to the Appeals Board of the Public Service Division, constituted under the Public Service (Personnel Boards and Appeals Board) Regulations. On 23 January 1999, Ms Lai appealed to the Appeals Board. After three further representations by Ms Lai, the Appeals Board informed her on 22 March 1999 that the Appeals Board agreed with the Senior Personnel Board F and hence turned down her appeal.

On 3 April 1999, Ms Lai appealed for a second chance in a contrite letter to the Appeals Board. On 7 April 1999, the Appeals Board advised her instead to appeal to the PSC within 30 days from 22 March 1999. On 22 May 1999, Ms Lai appealed to the PSC, but on 25 May 1999, she was informed that she was out of time for the appeal. By a letter dated 28 May 1999, Ms Lai requested for a waiver of the time requirement, as the letter dated 7 April 1999 from the Appeals Board was misdirected by the postal authority. This was granted on 3 June 1999. Following that she submitted her appeal to the PSC on 10 June 1999. On 21 July 1999 she was informed by the PSC that her appeal was unsuccessful.

Proceedings below

On 20 January 2000, Ms Lai initiated proceedings by way of an ex parte originating summons seeking leave to apply for the order of certiorari and mandamus as mentioned above.

Although the application before the judge was ex parte, Ms Lai was required under O 53 r 1(3) to serve the papers on the Attorney General`s Chambers. At the hearing before the judge, Mr Jeffrey Chan appeared for the PSC and resisted the application on two grounds: first, the matter in dispute is purely one of private law, namely, involving contractual rights of Ms Lai and does not involve any issue of public law, and therefore is not susceptible to judicial review; and secondly, Ms Lai had not applied for leave to commence these proceedings within six months from the decisions or proceedings in question under O 53 r 1(6). The judge overruled both the objections and granted leave to Ms Lai to apply for the issue of the orders of certiorari.

The appeal

Mr Chan before us is not taking issue with the decision of the judge that the application filed by Ms Lai seeking judicial review was made within the time prescribed by O 53 r 1(6). Before us, primarily there is only one issue raised by Mr Chan, and that is: whether the matters complained of by Ms Lai (assuming that they are true and well founded) are susceptible to judicial review.

Approach to judicial review

Before we consider this issue, it would be helpful to dispose of the arguments advanced by Mr Chan seeking to impugn the approach adopted by the judge in dealing with the application before him. The judge, following the decision of the Court of Appeal in **Chan Hiang Ling Colin v Minister for Information and the Arts** [1996] 1 SLR 609 , held that on such an ex parte application as the one before him it was not the duty of the court to embark upon a `detailed and microscopic analysis` of the material placed before it, but to peruse the material quickly and appraise whether such material disclosed an `arguable and a prima facie case of reasonable suspicion`. Reverting to the case before him, he found that Ms Lai had more than comfortably crossed the threshold barriers and established a prima facie case of `reasonable suspicion`. He said at [para] 44:

> *[T]he duty of the court hearing an ex parte application, such as the one at hand, was not to embark upon any detailed and microscopic analysis of the material placed before it but as enjoined by the Singapore Court of Appeal in* ***Chan Hiang Leng Colin*** *to peruse the material before it quickly and appraise whether such material disclosed an arguable and a prima facie case of reasonable suspicion. In my view, the applicant had more than comfortably*

> *crossed the threshold barriers and had placed adequate material before the court for it to conclude that there was indeed a prima facie case of reasonable suspicion.*

The judge adopted the test laid down by this court in ***Chan Hiang Leng Colin & Ors v Minister for Information and the Arts*** (supra) at p 616. There, Karthigesu JA, after referring to a passage of the speech of Lord Diplock in **Inland Revenue Commissions v National Federation of Self Employed and Small Businesses Ltd** [1982] AC 617[1981] 2 All ER 93 at 106, said at p 616:

> *This passage appears susceptible to two slightly different interpretations. One is that the court should quickly peruse the material put before it and consider whether such material discloses `what might on further consideration turn out to be an arguable case`. The other is that the applicant had to make out a `prima facie case of reasonable suspicion`. In our view, both tests present a very low threshold and it is questionable whether there is really any difference in substance between the two interpretations.*
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> *In **R v Commissioner for the Special Purposes of the Income Tax Acts, ex p Stipplechoice Ltd** [1985] 2 All ER 465, the English Court of Appeal held that the applicant had shown `a good arguable case` and has thus, `established a prima facie case` for judicial review. Leave was then granted in that case despite the applicant having twice been refused leave below. It appears that in **Re Application by Dow Jones (Asia) Inc**, TS Sinnathuray J applied the same test of whether there is an arguable case. It is again questionable whether there is any difference between this test and the one stated in the paragraph above.*
>
> *...*
>
> *What is required is not a prima facie case, but a prima facie case of reasonable suspicion. If the latter can be shown, then it cannot be said that the application must necessarily fail, for there would then appear to be an `arguable case`.*

In our opinion, the approach adopted by the judge is correct. Leave would be granted, if there appears to be a point which might, on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed. This is Lord Diplock`s threshold test as laid down in ***National Federation of Self Employed and Small Businesses Ltd*** (supra).

The ex parte application for leave to apply for an order of mandamus, prohibition and certiorari under O 53 r 1 of our Rules of Court is intended to be a means of filtering out groundless or hopeless cases at an early stage, and its aim is to prevent a wasteful use of judicial time and to protect public bodies from harassment (whether intentional or otherwise) that might arise from a need to delay implementing decisions, where the legality of such decisions is being challenged. In ***National Federation of Self Employed and Small Businesses Ltd*** (supra), Lord Diplock said at [1982] AC 617, 642-643; [1981] 2 All ER 93, 105:

> *The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and*

authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

The sphere of public law

That having said, the point raised by Mr Chan is one of law and relates to the justiciability of the matters complained of by way of judicial review. It is a jurisdictional issue, which, if the court decides in favour of the PSC, would be a `clean knockout blow` and makes it clear that there is no basis for Ms Lai to proceed with an application for the order of certiorari. In our opinion, it is appropriate to consider and decide such an issue at the stage of application for leave.

The judge did not fully consider this point. It appears to us that he was somewhat vexed or troubled by the events that had occurred with regard to Ms Lai - which we feel was understandable, if the matters alleged by Ms Lai were true - and he came to a provisional view that the matters complained of fell within the sphere of public law. In essence, the judge held that the decision not to confirm Ms Lai, after many months of service after the end of the normal probationary period - and that, in our view, was quite extraordinary - could be vitiated by ***Wednesbury*** unreasonableness: **Associated Provincial Picture Houses Ltd v Wednesbury Corp** [1948] 1 KB 223. He found that the fact that Ms Lai was told that her probation had been extended for one year after a lapse of nine months from the end of her probationary period - this appeared to be an unreasonably long delay on the part of her Head of Department - without any prior adverse reports, straddled the area of ***Wednesbury*** unreasonableness. The apparent disregard of the provisions of the IM was a concern more of public law. The PSC is a creature of statute and its decisions are susceptible to judicial review. He said at [para] 46:

> *In my provisional view, the circumstances under which the applicant`s probation came to be extended and the subsequent decisions by the Senior Personnel Board F as well as the PSC, seemed to fall in the sphere of public law rights. The fact she was told that her probation had been extended for one year after the lapse of nine months since her probationary period and that too without any previous adverse reports, patently straddled the area of* ***Wednesbury*** *unreasonableness. Again, in my provisional view, the apparent disregard of the provisions of the Instructions Manual by the applicant`s superiors was a concern more of public law and not private law. Such disregard also appeared to lend weight to the applicant`s allegations of unfairness, improper dealings and bad faith.*

These matters referred to by the judge, with respect, are more relevant to the merits of the application than to the issue of whether there is involved an element of public law.

Mr Chan submits that the remedy of judicial review is not available to Ms Lai, unless she can show that a public law right has been infringed. In his submission, there is no element of public law involved in her complaint. The fact that she was not confirmed does not give rise to any public law right. Confirmation is not an entitlement or a right under her contract of employment. He further submits that Ms Lai was not dismissed from public service. Her service contract was terminated and the termination of her service was made pursuant to the contractual terms governing her employment. The statutory provisions on dismissal of civil servants have no application and are not relevant to the appeal.

Mr Harpreet Singh Nehal for Ms Lai accepts that the remedy of judicial review is only available, if there is an element of public law involved in Ms Lai`s complaints. His submission is that there is present the element of public law. He approaches this issue in this way. The respondent sought judicial review of: (a) the decision of the Commissioner of Lands and/or the Permanent Secretary to the Ministry of Law and/or such other appointing authority to extend her probationary period for one year retrospectively with effect from 28 November 1997; (b) the decision of the Senior Personnel Board F to terminate her employment effectively on 21 December 1998; and (c) the decision of the PSC refusing Ms Lai`s appeal from the two decisions just referred to. Having regard to this, Mr Singh submits that whether a decision of a particular body is susceptible to judicial review depends on, and is to be resolved by reference to, the source of the power that is being exercised in making that decision. The source of power which is being exercised is usually decisive. In the instant case, the bodies concerned in making these decisions were, in each case, exercising a statutory power. He relies on para 65 of the IM No 2 section B, which provides that under art 110(1) of the Constitution of Singapore, the power to confirm a public officer who is on probation is reposed in the PSC. In the case of Division 1 officers who are not in the Administrative Service, the PSC has delegated this power to the Permanent Secretaries and Superscale officers who hold the posts of Heads of Department. The respondent was an officer in Division I but not in the Administrative Service. The power to confirm the appointment of Ms Lai was therefore reposed in her Head of Department. Thus, the power exercised by each of these bodies has a statutory underpinning, and each of them was established by the relevant law: the Constitution of Singapore, Public Service (Special and Senior Personnel Boards) Order, and Public Service (Personnel Boards and Appeals Board) Regulations. The effect is that these provisions `underpinned` the employment of Ms Lai by the Government in the sense that they governed the terms of employment of Ms Lai and imposed restrictions on its termination. There was therefore an element of public law in the matters complained of, which justified the institution of proceedings for judicial review.

In response to this point, Mr Chan submits that, when statutory bodies make certain decisions, it does not invariably follow that the statutory bodies are exercising a statutory power. If the dispute relates to a breach of the terms of the contract between a public employee and the Government per se, the dispute is a private matter which is to be dealt with in an ordinary suit or action. The provisions of the IM were imported into the contract of Ms Lai by her letter of appointment. These provisions are not statute or subsidiary legislation made under a statute; they are merely internal administrative guidelines for the operation of the civil service. Under the terms of her employment, Ms Lai if aggrieved by any decisions affecting her employment was given recourse in the form of appeal to various statutory bodies, such as the Senior Personnel Board F, the Appeals Board and the PSC. These bodies, when considering and dealing with her appeals, were not exercising any statutory powers as such. Instead, they were exercising the powers under Ms Lai`s contractual terms of service. In short, although the Senior Personnel Board F, the Appeals Board and the PSC are statutory bodies, their decisions in dealing with the appeals by Ms Lai were taken purely pursuant to Ms Lai`s terms of employment. The powers that were exercised had nothing to do with statutory powers; they were exercised pursuant to the contract.

These rival contentions advanced on behalf of the parties respectively give rise to two questions for consideration. The first is whether the relationship between Ms Lai and the Government was purely a contractual one and nothing more. The second is whether in extending Ms Lai`s probationary period and terminating her service and in rejecting her appeals, the relevant bodies were exercising statutory powers.

Contractual relationship

There are numerous cases bearing on the first question, and it is necessary to consider them in some detail. We take as a useful starting point the case of **R v British Broadcasting Corporation, ex p Lavelle** [1983] 1 All ER 241[1983] 1 WLR 23, which was a decision of Woolf J (as he then was). There, the applicant was employed by the British Broadcasting Corporation (`BBC`) as a tape examiner, and her contract of employment set out the grounds on which she could be dismissed and gave her a right to be heard before being dismissed and a right of appeal. At the material time, the disciplinary procedure was set out in the Staff Instruction 366 of 24 May 1977, which contained detailed provisions for disciplinary proceedings. As a result of some information lodged, the police went to her home and found some BBC`s tapes there. Arising from this, the applicant was interviewed and was subsequently dismissed. She appealed but before her appeal could be heard she was charged for theft. Later her appeal was heard and was dismissed. She sought an order of certiorari by way of judicial review to quash the decision to dismiss her. Woolf J held that remedies of mandamus, certiorari and prohibition were not available for enforcing private rights and were inappropriate remedies for enforcing the ordinary obligations owed by a master to his servant. He said at [1983] 1 All ER 241, 248; [1983] 1 WLR 23, 30:

> *Those remedies were not previously available to enforce private rights but were, what could be described as, public law remedies. They were not appropriate, and in my view remain inappropriate remedies, for enforcing performance of ordinary obligations owed by a master to his servant. An application for judicial review has not and should not be extended to a pure employment situation. Nor does it, in my view, make any difference that what is sought to be attacked is a decision of a domestic tribunal such as the series of disciplinary tribunals provided for by the BBC.*

He found that the disciplinary appeal procedure set up by the BBC depended purely on the contract of employment between the applicant and the BBC and therefore it was a procedure of a purely private or domestic character. He said at at [1983] 1 All ER 241, 249; [1983] 1 WLR 23, 31:

> *[T]he application for judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character. The disciplinary appeal procedure set up by the BBC depends purely upon the contract of employment between the applicant and the BBC, and therefore it is a procedure of a purely private or domestic character.*

Accordingly, he held that it was inappropriate to seek relief by way of judicial review in the circumstances of the case.

Next, we come to the leading case of **R v East Berkshire Health Authority, ex p Walsh** [1985] QB 152[1984] 3 All ER 425, which was considered by the judge below. In that case, the applicant was employed as a senior nursing officer by the East Berkshire Area Health Authority under a contract of employment which, pursuant to the National Health Service (Remuneration and Conditions of Service) Regulations 1974, incorporated the terms and conditions negotiated by a body recognised by the Secretary of State for Social Services. His term of service was suspended by the district nursing officer, who later purported to terminate his employment. The applicant sought judicial review of the dismissal on the ground that the nursing officer acted ultra vires and that there had been breaches of the rules of natural justice in the proceedings leading to his dismissal. The judge at first instance held, inter alia, that there was sufficient element of public law involved in his complaints which entitled him to public law remedies. On appeal his decision was reversed. The Court of Appeal held that there was

no `public law` element involved in the complaints of the applicant, which gave rise to administrative law remedies. Whether a dismissal from employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions, which underpinned the employee`s position, and not on the fact of employment by a public authority per se or the employee`s seniority or the interest of the public in the functioning of the authority. Sir John Donaldson MR said at [1985] QB 152, 164; [1984] 3 All ER 425, 430:

> *Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a `higher grade` or is an `officer.` This only makes it more likely that there will be special statutory restrictions upon dismissal, or other underpinning of his employment: see per Lord Reid in* ***Malloch v Aberdeen Corporation****, at p 1582. It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient.*

Turning to the applicant`s complaints, the court held that the complaints did not involve an element of public law to attract administrative remedies. The applicant`s contract of service expressly adopted the conditions of service negotiated by the Whitley Council of Health Service (Great Britain) and were not the conditions of service laid down in the National Health Service (Remuneration and Conditions of Service) Regulations. Sir John Donaldson MR said at [1985] QB 152, 165; [1984] 3 All ER 425, 431:

> *When analysed, the applicant`s complaint is different. It is that under those conditions of service Miss Cooper had no right to dismiss him and that* ***under*** *those conditions he was entitled to a bundle of rights which can be collectively classified as `natural justice`. Thus he says, and I have to assume for present purposes that he is correct, that under section XXXIV of the Whitley Council`s agreement on conditions of service, his position as a senior nursing officer is such that his employment can only be terminated by a decision of the full employing authority and that this power of dismissal cannot be delegated to any officer or committee of officers. I do not think that he relies upon any express provision of those conditions when claiming the right to natural justice, but if he has such a right, apart from the wider right not to be unfairly dismissed which includes the right to natural justice, it clearly arises out of those conditions and is implicit in them.*
>
> *The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on.* ***Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee `public law` rights and at least making him a potential candidate for administrative law remedies****. ... If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of `public law` and gives rise to no administrative law remedies. [Emphasis is added.]*

Purchas LJ, the other member of the court, said at [1985] QB 152, 180; [1984] 3 All ER 425, 442:

> *[I]n my judgment, the relationship between the applicant and the health authority was one which fell within the category of `pure master and servant` although the powers of the authority to negotiate terms with their employees were limited indirectly by statute and subordinate legislation. Any breach of those terms of which the applicant complains related solely to the private contractual relationship between the health authority and him and did not involve any wrongful discharge by the health authority of the rights or duties imposed upon it qua health authority. ...* ***The manner in which the authority terminated, or purported to terminate, the applicant`s contract of employment related to their conduct as employers in a pure master and servant context and not to the performance of their duties, or the exercise of their powers as an authority providing a health service for the public at large****. The importation by direct reference or by implication into a contract of employment of the rules of natural justice does not of itself import the necessary element of public interest which would convert the case from the first category envisaged by Lord Reid into one in which there was an element of public interest created as a result of status of the individual or the protection or support of his position as a public officer. [Emphasis is added.]*

R v Derbyshire County Council, ex p Noble [1990] ICR 808[1990] IRLR 332 is another case, where a claim by an officer employed by a local authority was held to be one involving only private law. There, the applicant was a doctor and was engaged by a county council as a deputy police surgeon. By the provisions of the Police Act 1964, the county council by its police committee had the power to employ civilians for police purposes. The applicant was so employed. After about five years in service, the applicant`s employment was terminated upon three months` notice. The applicant complained of the termination and took out an application for an order of certiorari to quash the dismissal and an order of mandamus to reinstate him. The Divisional Court dismissed the application on the ground that the case was not an appropriate one for judicial review. On appeal, the Court of Appeal affirmed the decision. Woolf LJ (as he then was) delivered the main judgment of the court. His Lordship was of the view that what the applicant complained of was his private interest of being employed by the authority that had been terminated. He said at [1990] ICR 808, 815:

> *[W]hat really is at the basis of the applicant`s complaint is the fact that the council have not continued to appoint him. It is very much a case in which it is in his private interests to be employed by the council, and those interests having been determined as a result of the conduct of the council, it is in relation to those interests to which his complaint goes.*

The Lord Justice (at [1990] ICR 808, 818) accepted the contention made on behalf of the council that the decisions the council made in terminating the employment of the applicant were private and not public law decisions and concluded thus at [1990] ICR 808, 820:

> *This is a situation where the applicant is making complaint, as the grounds of his application disclose, as to the way in which he and he alone was treated. It is true that his was not a contract of service but a contract for services. But putting that aside, on the basis of the application which is being made for judicial review, the case is much the same as* ***R v East Berkshire Health Authority, ex p Walsh*** *[1984] ICR 743. It is a case where in my view there is not the public law element which is required to make it an appropriate subject of an application for judicial review.*

Very soon after ***ex p Noble*** , came the case of **McClaren v Home Office** [1990] ICR 824[1990] IRLR 338 before the Court of Appeal, in which Woolf LJ was also a member. That case demonstrates the other side of the coin, which was the reverse situation to what we have considered. In 1979 the plaintiff was engaged by the Home Office as the prison officer at Wandsworth Prison under a letter, which referred to the special position of civil servants as servants of the Crown. In 1988, a collective agreement was entered into between the Home Office and the Prison Officers` Association. Subsequently, a dispute arose and the plaintiff refused to work under the new shift system and was suspended from work and was not paid. He brought an action against the Home Office making a claim based on the collective agreement. The Home Office applied to strike out the action on the ground that there was no contract between them and the plaintiff and that the plaintiff was only entitled to seek the relief claimed by way of an application for judicial review. Hoffmann J (as he then was) allowed the application, holding that there was no contractual relationship between them and that no arguable claim in private law was disclosed. On appeal his decision was reversed. The Court of Appeal held that it was at least arguable that the relationship between the plaintiff and the Home Office was contractual. Woolf LJ held that the issue raised was one of private law, and in considering the issue whether the plaintiff was required to bring his claim by way of judicial review, laid down, inter alia, the following principles at [1990] ICR 824, 836-837:

> *(1) In relation to his personal claims against an employer, an employee of a public body is normally in exactly the same situation as other employees. If he has a cause of action and he wishes to assert or establish his rights in relation to his employment he can bring proceedings for damages, a declaration or an injunction in the ordinary way. ... The fact that a person is employed by the Crown may limit his rights against the Crown but otherwise his position is very much the same as any other employee. However, he may, instead of having an ordinary master and servant relationship with the Crown, hold office under the Crown and may have been appointed to that office as a result of the Crown exercising a prerogative power or, as in this case, a statutory power. If he holds such an appointment then it will almost invariably be terminable at will and may be subject to other limitations, but whatever rights the employee has will be enforceable normally by an ordinary action. Not only will it not be necessary for him to seek relief by way of judicial review, it will normally be inappropriate for him to do so.*
>
> *(2) There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the `tribunal` or other body has a sufficient public law element, which it almost invariably will have if the employer is the Crown, and it is domestic or wholly informal, its proceedings and determination can be an appropriate subject for judicial review.*

It is also helpful to refer to the case of **R v Lord Chancellor`s Department, ex p Nangle** [1992] 1 All ER 897[1992] ICR 743. There, the applicant was employed in a clerical position in the Lord

Chancellor`s Department. His appointment was stated to be at the pleasure of the Crown and was subject to Civil Service Pay and Conditions of Service Code, which provided, inter alia, that for the most part the relationship between the civil servants and the Crown was regulated by the prerogative and was based on personal appointment, and as such civil servants could be dismissed at pleasure. Subsequently, he was appointed an executive officer. While holding that position, complaints were made against him which were investigated, and an oral hearing was conducted. Following the conclusion of the hearing, he was transferred to another department with 12 months` loss of increment. He appealed to the permanent secretary who dismissed the appeal but reduced the loss to three months` increment. He sought judicial review of the decisions relating to his dismissal, and the department applied to dismiss the application on the ground that the conduct of the disciplinary proceedings was not a matter of public law susceptible to judicial review. The court held that all the incidents of a contract were present in the relationship between the applicant and the Crown and there was a contractual relationship between the applicant as the employee and the Crown as the employer, and this relationship was governed by private and not public law. The internal disciplinary proceedings were the result of a private law contract between the Crown and a public employee and there was no public law element involved. The submission of the applicant to the disciplinary proceedings was purely consensual and arose out of a master and servant relationship and was part of the terms and conditions which he accepted upon his entry into the service: see [1992] 1 All ER 897, 908.

The next important case is **R v Crown Prosecution Service, ex p Hogg** [1994] 6 Admin LR 778. In that case, Hogg, a barrister, was employed by the Crown Prosecution Service and his employment was made pursuant to s 1(1) of the Prosecution of Offences Act 1985. The Act entitled the Director of Crown Prosecution Service to appoint such staff for service as he considers necessary for the discharge of his functions, and he is authorised to designate members of his staff as Crown Prosecutors. The letter of appointment made it clear that Hogg was to be a Crown servant and that his employment was to be at the pleasure of the Crown. It provided that he was on probation of one year and that his service might be terminated at any time during the probationary period in certain circumstances. The letter made reference to various terms and conditions of employment and gave references to where they could be found and in particular the Civil Service Pay and Conditions of Service Code supplemented by CPS Handbook and Civil Service Handbook. Hogg accepted the terms and conditions. In the course of his service, there occurred an incident which gave rise to some complaints against him. He was subsequently dismissed by the Chief Crown Prosecutor. Hogg exercised his right of appeal to the Director of Public Prosecution but the appeal was unsuccessful. He initiated proceedings seeking judicial review. His application for leave was allowed, but upon application by Crown Prosecutor Service, the leave was set aside. Auld J in a written judgment (unreported, 15 October 1993) held that the mere facts that Hogg was employed by a public body, or performed public functions, or had any particular designation were determinative of the question whether the dismissal was the subject of public law remedy and that one way of determining the answer to that question was whether the statute under which he was appointed underpinned his appointment in the sense that it imposed a code or restrictions on his dismissal. In this regard, the judge relied on the decision of Sir John Donaldson MR in ***ex p Walsh*** (supra), and the decisions of Woolf LJ in ***ex p Noble*** (supra) and ***McClaren v Home Office*** (supra). He was of the opinion that this statutory underpining is part of the subject matter enabling the court to categorise any issue arising from it as a public law matter. He held that the applicant`s employment was not `underpinned` by statute so as to render his dismissal a matter which might be challenged on public law grounds by way of judicial review. His decision was affirmed on appeal.

Before departing from the authorities pertaining to the point under consideration, we should consider one authority which is heavily relied upon by Mr Chan: **Gnanasundram v Public Services Commission** [1966] 1 MLJ 157 . In that case, the applicant was offered employment as a temporary

enforcement officer at the road traffic department, and he accepted the offer. The material terms of the offer were as follows:

> *2 This offer is subject to the following conditions:*
>
> *...*
>
> *(d) That during the first year of the period of your appointment, your services would be terminable at any time with one month`s notice or one month`s salary plus cost of living allowance in lieu, and without any reason being given. You would also be free to relinquish your appointment by giving one month`s notice or one month`s salary in lieu plus cost of living allowance. During the rest of the period of appointment, the appropriate notice required for both parties would be three months or one month`s salary in lieu plus cost of living allowance.*
>
> *3 The appointment offered is temporary.*

His service was subsequently terminated, and he sought judicial review. Raja Azlan Shah J (as he then was) held that the applicant was bound by those terms in the same way the Government was bound. The Government was therefore entitled to terminate the employment of the applicant by payment of one month`s salary in lieu of notice, as provided for in the contract. The judge said at p 159:

> *In the light of the facts presented by the applicant, the offer made by the Public Services Commission was in respect of temporary employment and cl 2(d) specifically states that during the rest of the period of employment, that is to say after the first year of employment, the appropriate notice required by both parties would be three months` or one month`s salary in lieu thereof plus cost of living allowance. The applicant accepted those terms and entered into a contract with the Government. He was thus bound by those terms in the same way as the Government was bound In the circumstances I see no escape from the conclusion that the present case is sufficiently analogous to a contractual relationship. Thirdly, it was contended that by virtue of art 132(2A) of the Federal Constitution the applicant holds office during the pleasure of the Yang di-Pertuan Agong and therefore he cannot be dismissed unless he was given a reasonable opportunity of being heard: see art 135(2) of the Federal Constitution. Without deciding whether the applicant holds office during pleasure, I am clearly of the opinion that art 135(2) does not apply. The applicant was never dismissed from service. Dismissal pre-supposes some disciplinary proceeding against him whereby he is found guilty of indiscipline and misconduct under the Public Officers (Conduct and Discipline) Regulations, 1956. That is not the present position here. This is purely a case of a contract being terminated under one of its clauses.*

Gnanasundram was a straightforward case of an employment contract between the applicant and the Government of Malaysia and the relationship between the two was, pure and simple, contractual. It did not appear from the report that there was any incorporation into the contract of any terms of the Malaysian civil service instructions manual or the equivalent or that there was any non-compliance of such terms. To that extent, that case was distinguishable from the case at hand, where the terms of employment of Ms Lai imported the IM which contains elaborate provisions governing confirmation and appeals. We therefore do not find that case to be of any assistance.

Reverting to the instant case, there clearly was a contract of employment made between Ms Lai and the Government of Singapore under which Ms Lai was appointed a Senior Officer Grade III (Law). The offer of appointment dated 19 November 1996 was issued to her by the Permanent Secretary on behalf of the Public Service Commission Personal Board and was accepted by her. That document constituted the contract of service with the Government. The letter of appointment contained terms and conditions of service which incorporated the provisions of the IM. In consequence, the provisions of the IM became part of the contract of employment. As between the parties to the contract, they were no more than contractual terms. The terms relating to confirmation and termination of her employment were spelled out in the provisions of the IM. It follows that the extension of Ms Lai`s probationary period and the termination of her service were governed by these terms which formed part of the terms of the contract.

We next turn to consider the nature of the IM. It is not disputed that the provisions of the IM were not made or enacted under any statute or any subsidiary legislation. They therefore have no statutory force or effect. Mr Chan describes the provisions of the IM as administrative guidelines. In our opinion, they are more than guidelines. As their terms imply, they are instructions regulating the terms of service of persons employed by the Government.

On this analysis, on the basis of the authorities we have considered, the relationship between the Government and Ms Lai was one of employer and employee and Ms Lai`s employment was not underpinned by any statute or any subsidiary legislation made under a statute in the sense that the statute or subsidiary legislation imposed any code or restriction on matters such as the extension of her probationary period and the termination of her service. The respondent`s complaints were directed at the retrospective extension of her probationary period and the subsequent termination of her employment. Such complaints, assuming that they were well founded and valid, related to the conduct of an employer in a `pure master and servant context` and not to the performance by the PSC of its public duties or the exercise of its powers as an authority. In effect, what they amounted to were breaches of contract, for which the remedy is provided by private law and which are not susceptible to judicial review.

Source of power

We now turn to the source of power exercised by the respective bodies in relation to the complaints of Ms Lai. It is not disputed that one of the tests for determining whether a particular decision made by a body or an authority is susceptible to judicial review is the source of the power that is being exercised in making that decision. Lord Diplock in **Council of Civil Service Unions & Ors v Minister for the Civil Service** [1985] AC 374[1984] 3 All ER 935 at 949-950 said:

> *For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, ie that part of the common law that is given by lawyers the label of `the prerogative.`*

More recently, in **R v Panel on Take-overs and Mergers, ex p Datafin plc & Anor** [1987] QB 815[1987] 1 All ER 564 at 583, Lloyd LJ, having said that the source of power is not the sole test, continued:

> *Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see* ***R v National Joint Council for the Craft of Dental Technicians (Dispute Committee), ex p Neate*** *[1953] 1 QB 704*

In the instant case, Ms Lai by her application sought judicial review of: (a) the decision of the Commissioner of Lands, and/or the Permanent Secretary to the Ministry of Law and/or such other appointing authority to extend her probationary period for one year retrospectively with effect from 28 November 1997; (b) the decision of the Senior Personnel Board F to terminate her employment on 21 December 1998; and (c) the decision of the PSC refusing Ms Lai`s appeal from the two decisions just referred to. The question is whether these bodies in making these decisions were, in each case, exercising a statutory power or a power derived from contract.

In support of his submission that these bodies exercised statutory powers in making the decisions, Mr Harpreet Singh Nehal relies on para 65 of the IM No 2 Section B, which provides that under art 110(1) of the Constitution of Singapore, the power to confirm a public officer who is on probation is reposed in the PSC. In the case of Division 1 officers who are not in the Administrative Service, the PSC has delegated this power to the Permanent Secretaries and Superscale officers who hold the posts of Heads of Department. Paragraph 65 provides:

> *Under Article 110(1) of the Constitution of Singapore, the Public Service Commission has the power to confirm an officer on probation or trial. The Public Service Commission has kept its power to confirm Administrative Officers in the Singapore Administrative Service. But it has delegated to Permanent secretaries and Superscale officers who hold the post of Head of Department its power to confirm all officers in Division I (except Administrative Officers) and all officers in Divisions II to IV (see paragraph B4).*

In the instant case, Ms Lai was an officer in Division I (not of the Administrative Service) and the power to confirm her appointment was reposed in her Head of Department. Counsel therefore submits that the power exercised by each of these bodies had a statutory underpinning, ie art 110 (1) of the Constitution of Singapore and/or Public Service (Special and Senior Personnel Boards) Order and/or Public Service (Personnel Boards and Appeals Board) Regulations.

It is true that the Senior Personnel Board F, the Appeals Board and the PSC are statutory bodies and they have the relevant powers under the legislation in question. However, as Mr Chan has submitted, and we agree, when statutory bodies make certain decisions, it does not invariably follow that the statutory bodies are exercising a statutory power. Much depends on the circumstances. In this case, as between the Government and Ms Lai, there was a contract of employment and as we have said, their relationship was that of an employer and employee. The contract imported the provisions of the IM, but these provisions are not statute or subsidiary legislation made under a statute. They are instructions governing the terms of service of persons in the employment of Government. The source

of powers in this case was therefore derived from the contract of employment. Under the terms of her employment, Ms Lai was given recourse to various statutory bodies, such as the Senior Personnel Board F, the Appeals Board and the PSC in the form of an appeal against a decision affecting her, and these bodies, when considering and dealing with her appeals, were not exercising any statutory powers. Instead, they were exercising the powers under Ms Lai`s contractual terms of service. Like the cases of ***ex p Lavelle*** (supra) and ***ex p Nangle*** (supra), the appeal procedure depends purely on the contract of employment and was part of the terms and conditions of that contract. It arose out of a master and servant relationship. The recourse to the appeal procedure and disposal of the appeals by the respective bodies were therefore consensual. In short, although the Senior Personnel Board F, the Appeals Board and the PSC are statutory bodies, their decisions in dealing with the appeals by Ms Lai were taken purely pursuant to Ms Lai`s terms of employment. The powers were exercised pursuant to their contractual rights.

For completeness, we have also considered whether the decisions under challenge in this case fell within the third principle stated by Woolf LJ in **McClaren v Home Office** [1990] ICR 824 at 837:

> *(3) In addition if an employee of the Crown or other public body is adversely affected by a decision of general application by his employer, but he contends that that decision is flawed on what I loosely describe as* ***Wednesbury*** *grounds (* ***Associated Provincial Picture Houses Ltd v Wednesbury Corp*** *[1948] 1 KB 223), he can be entitled to challenge that decision by way of judicial review. Within this category comes* ***Council of Civil Service Unions v Minister for the Civil Service*** *[1985] ICR 14. In the House of Lords there was no dispute as to whether the case was appropriate brought by way of judicial review. The House of Lords assumed that it was and I would respectfully suggest that they were right to do so. The decision under challenge was one affecting employees at GCHQ generally. The action which was being challenged was the instruction by the Minister for the Civil Service in the interests of national security to vary the terms and conditions of service of the staff so that they would no longer be permitted to belong to trade unions. Although the decision affected individual members of the staff, it was a decision which was taken as a matter of policy, not in relation to a particular member of staff, but in relation to staff in general and so it could be the subject of judicial review.*

In our opinion, the decisions here were not of that category. None of them was a decision of general application affecting employees of a public body. They related solely to Ms Lai and were made purportedly in accordance with her terms of employment and based on factual judgement as to her conduct (per Auld J in ***ex p Hogg*** (supra)). Such decisions are not susceptible to judicial review. It may be that on the strength of what she said, she may well have very strong cause for complaint, and one cannot but entertain some sympathy for her for the manner she had been treated. However, the merits of her complaints are not in issue before us, and we express no opinion thereon.

Conclusion

In conclusion, in our judgment, the matters complained of by Ms Lai are not susceptible to judicial review, and the appeal succeeds. The order below is set aside. The deposit in court as security for costs, with interest, if any, is to be refunded to the PSC. Before we make an order for costs of the appeal and below, we would invite parties to submit arguments on such costs within seven days from

the date hereof.

Outcome:

Appeal allowed.

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