

THEME 4: PUBLIC SECTOR EMPLOYMENT RELATIONS IN AFRICA
JUDICIAL REVIEW: PROCEDURAL FAIRNESS IN THE LAW OF UNFAIR
DISMISSAL IN THE PUBLIC SECTOR

-THE MAURITIAN CASE STUDY-

Abstract. The present study on the Mauritian law of procedural fairness¹ within the context of dismissal for misconduct is based on three important concepts, namely, ‘dismissal’, ‘misconduct’² and most importantly, ‘procedural fairness’³. They need to be defined, explained and critically examined from a comparative perspective with the South African doctrine of unfair labour practice. From the vast area of the law of dismissal, the topic of discussion has been narrowed down to dismissal for misconduct only. This being the case, the study will exclude all other forms of dismissal such as redundancy⁴, retrenchment and constructive dismissals. The two authors reflect to what extent many workers and employees sometime do not enjoy a fair trial during a disciplinary committee, why many of them are not promoted in the public sector despite long years of service but they rely on procedural fairness (natural justice, right to a fair hearing and judicial review) to expose their views with strong binding precedents to demonstrate same notwithstanding that Mauritian legislations are closely following English law.

¹ For example, vide the case of *Lewis Shops Group v. Wiggins* 1973 ICR 335 where the employee had been previously warned that unless her standards of management improved her job would be in jeopardy. There was no improvement and she was dismissed without being given the opportunity to defend herself. According to the Industrial Court: “*Certain formalities were essential before a dismissal could be fair.*”

² There is no proper definition of gross misconduct. According to Sir Hugh Griffiths in *Dalton v. Burton’s Gold Medal Biscuit Co Ltd* 1974 IRLR 45: “*It is not possible to provide a legal definition of gross misconduct which will fit the circumstances of every case. It would in each case be a matter of fact to consider whether it was gross misconduct or not.*”

³ According to De Smith, Woolf and Jowell’s (1999): Principles of judicial review: “*Procedural justice aims to provide individuals with a fair opportunity to influence the outcome of a decision, and deals with issues such as the requirement to consult, to hear representations, and to hold hearings. It addresses also the content and proper manner of those consultations, representations and hearings, so as to ensure that they are appropriate in the circumstances, meaningful, and that they are appropriate in the circumstances, meaningful, and that they assist and do not hinder the administrative process.*” Sweet and Maxwell, p. 245.

⁴ That is a reduction of employees.

EXTENDED ABSTRACT

“The progress towards a comprehensive system of administrative law I regard as having been the greatest achievement of the English courts in my judicial lifetime”- R v. Inland Revenue Commissioners, ex parte National Federation of Self Employed 1982 A.C 617, p.641.

Administrative Law, in particular judicial review, a specialised⁵ remedy in public⁶ law⁷, of administrative decisions emanating from inferior courts⁸, statutory public bodies⁹ exercising statutory¹⁰ duties, a local authority or a decision from a Minister to the Supreme Court¹¹ are very well developed in Mauritius. In *Unuth v. PSC*¹², the Supreme Court held that “*it is not appropriate to speak of this Court’s inherent powers in the same way as we do in relation to the English High Court of Justice. This Court is a creation of the Constitution and it derives its powers and jurisdiction from that instrument*”. In addition, as rightly pointed out in the case of *Ridge v. Baldwin*¹³, the distinction between administrative and judicial functions is of no relevance in deciding whether a decision-maker ought to comply with the rules of natural justice or to the availability of judicial review remedies. The important thing is not whether the decision-maker is

⁵ Judicial review is not an appeal. There are specific conditions as to time and delay (3 months). Judicial review is not based on the merits of the case like an appeal. Vide *Gujadhur v. Reunion 1960 MR 112*.

⁶ Vide *Augustave v. Mauritius Sugar Terminal Corporation 1990 MR 222* where it was stated that judicial review was not applicable when there is a question of purely private law remedy and not involving any public law remedy.

⁷ Vide *Atlas Communication International Co. Ltd v. CEB and Anor 2005 SCJ 104* where the court stated that: “*There is authority that public law element might be found in cases where either there was some special aim being pursued by the public body through the tendering process which set it apart from ordinary commercial tenders, or where there was some statutory underpinning, such as where there was a statutory obligation to negotiate the contract in a particular law, and with particular terms.*”

⁸ See *DPP v. Magistrate of Intermediate Court 1984* and *Karamuth v. Universal Hotel 1988 MR 171*.

⁹ Department of central government, local authorities and bodies created by statutes.

¹⁰ However, a body may be created by a statute but its administrative decisions may not be subject of judicial review because there is no public law element.

¹¹ In the absence of an Administrative Court in Mauritius, the Supreme Court of Mauritius is empowered to hear cases where application for judicial review is prayed. In France, there is a *Tribunal Administratif*, a *Tribunal de Conflits* and a *Conseil d’Etat* to deal with issues related to public and administrative law.

¹² *Unuth v. PSC 1982 MR 232*

¹³ *Ridge v. Baldwin 1964 AC 40*.

performing a judicial or an administrative function but whether the decision made affects the public rights of those subject to it.

A number of decisions¹⁴ of the Supreme Court demonstrate clearly that the highest court in this country will not be able to entertain the application because the decision is not based on the merits¹⁵ of the case but on the decision¹⁶-making process¹⁷. Furthermore, there is no public law element in an ordinary master and servant relationship and accordingly, in such a case judicial review would not be available¹⁸. Consequently, the Supreme Court is very reluctant to substitute¹⁹ itself to that public body²⁰ since it is of the view that it cannot substitute²¹ its own views regarding the scheme of service relative to the post²² of director of the Board or for an application to order the Supreme Court a *certiorari* because the applicant has not been selected for promotion or for seniority²³ or he has not exhausted²⁴ all remedies²⁵ first, or the

¹⁴ According to the Supreme Court in *Hungraz v. MGI* 2008 SCJ 122: “Judicial review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this Court is concerned only with reviewing, not the merits of the decision reached, but of the decision-making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decision; to ascertain that is in conformity with all the elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this Court that it is not its role to substitute itself for the opinion of the authorities concerned. This Court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power, which the statute had granted to the body concerned. However, it will intervene when the body concerned had acted ultra vires its powers; reached a decision which is manifestly unreasonable in the *Wednesbury* sense; had acted in an unfairly manner and the applicant was not given a fair treatment.”

¹⁵ Vide *Naidoo v. The Public Service Commission and Anor* 2007 SCJ 77.

¹⁶ *Hungraz v. MGI* 2008 SCJ 122.

¹⁷ There is one leading case- *O'Reilly v. Mackman* 1983 2 AC 237 where it was suggested that where a person seeks to establish that a decision of a public body infringes rights which are public law, then he must proceed by way of judicial review and not by way of an ordinary action.

¹⁸ There is an exception to the general rule. Hodgson J stated that: “The public may have no interest in the relationship between servant and master in an ordinary case, but where the servant holds office in a great public service the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly.”

¹⁹ Vide *Ramdin v. PSC* 1990 SCJ 26. The Supreme Court held that: “The Court’s function is not to substitute itself for the respondent in determining what is the appropriate punishment to be meted out to an erring public officer.”

²⁰ *Breen v. AEU and Mc Innes v. Onslaw-Fane* 1978 1 WLR 1520.

²¹ Vide *Lutchmun v. The Mauritius Sugar Terminal Corporation* 1990 MR 343.

²² Vide *Luchman v. Mauritius Sugar Terminal Corporation* 1990 MR 241. The applicant averred that he had more experience in accounting and the decision of the respondent appointing the co-respondent was unfair and against the principles of Natural Justice but the Supreme Court refused to order a *certiorari* on the ground that the decision complained of is outside the public domain and that no public law right of the applicant has been infringed.

²³ Vide *Hungraz v. MGI* 2008 SCJ 122.

administrative body or inferior court has not acted outside its jurisdiction (*ultra vires*²⁶), and in no circumstance the applicant has been able to show that there are reviewable grounds²⁷ disclosed in the affidavit²⁸ for the Supreme Court to intervene in the matter. Similarly, the Supreme Court may not be satisfied that an administrative decision is subject to judicial review because, though it is a public body²⁹, the powers it is exercising do not contain any public³⁰ law element³¹ and the applicant can appeal from a decision of an inferior court instead of applying for judicial review. Consequently, because of these strict grounds, decisions where the Supreme Court has intervened in cases involving judicial review and where applicants have been successful are consequently rather meagre.

However, in England³², and by contrast, judicial review is becoming more and more important nowadays and “*courts have been prepared to intervene to provide relief for unlawful administrative action have expanded in spectacular fashion*³³...”

O. Hood Phillips suggested that:

²⁴ The question of alternative avenues (vide *Société Louclem v. Registrar General 1993 SCJ 431*) is not a strict rule as such and the Supreme Court can grant leave even if applicant has not exhausted all remedies available. In fact, there may be a piece of legislation where the legislator has provided for specific avenues in lieu of judicial review as such. Example: *The Land Acquisition Act*. Vide also *Harel Frères v. Ministry of Housing 1955*

²⁵ This criterion is by so far not strict. Indeed, the Supreme Court may grant an order of *certiorari* even if the applicant has not exhausted all remedies first- vide *Khedoo v. The Road Transport Commissioner and The Raod Traffic Licensing Authority 1981 MR 62*.

²⁶ The House of Lords in *Anisminic Ltd 1969 2 AC 147* which is one of the leading cases with respect to *ultra vires*.

²⁷ For instance vide *Jewdhun v. LGSC 1990 SCJ 116*.

²⁸ Vide *Nazeerally v. Minister of Works*.

²⁹ Judicial Review granted in the case of *R v. Disciplinary Committee of the Jockey Club ex parte Massingberd-Mundy Times 3 January 1990*

³⁰ The *Takeover Panel case* in 1987 is one of the leading cases. It was held that the City Panel on Takeovers and Mergers was amenable to judicial review because it was exercising a public function or a power with a public element.

³¹ *Islam v. MHC 1992 SCJ 127*.

³² According to Pr Peter Crane: “*Judicial review, like nearly all of the techniques considered in this book for controlling government and redressing grievances are formal, institutionalized, and ‘external’ to the entity being reviewed. In one sense this presents a misleading picture because only a small fraction of complaints about the performance of public functions is handled through such channels.*” *Administrative Law, Fourth Edition, Clarendon Law Series, Oxford University Press, p. 26, 466 p.*

³³ De Smith, Woolf & Jowells (1999): *Principles of judicial Review*, p.3, Sweet and Maxwell, 720p.

“Administrative law determines the organisation, powers and duties of administrative authorities. It is the law relating to public administration. Administrative authorities include Ministers and Central government department, local Government authorities, public corporations and their officers and servants. There are numerous statutes establishing their structure and conferring the powers necessary for the exercise of their functions relating to such matters as public health. Administrative tribunals deal with a wide range of matters ranging from social welfare and employment to mental health and immigration from which appeal may lie to the courts on questions of law. But until recently it could not be said that there was a system of administrative law in this country and there is still no system of administrative courts.”

Long ago, like the Supreme Court of Mauritius, judges in England suggested that the rules of natural justice did not require the disclosure to an appellant of an inspector’s report to a government department on an inquiry³⁴ into an order for the closure of a house³⁵, that the Home Secretary’s decision to deport an alien was unreviewable and consequently he has no right to be heard before his deportation³⁶ or that a Minister can withhold any document because its disclosure would be contrary to security of the State³⁷.

In the interest of an individual a change of approach is needed!

The legislator makes the law in the form of statutes or Acts of Parliament but the administrative body is empowered to act in good faith so that any person is not aggrieved³⁸ by an administrative decision or a decision has been reached and which is affecting him/her³⁹.

³⁴ Very often employees are dismissed in the absence of a proper inquiry. According to *Knowles v. James North & Sons Ltd*: “No investigation was made although the dismissal was confirmed at two higher levels of management” and the dismissal was held to be unfair.

³⁵ *Local Government Board v. Arlidge* 1915 AC 120.

³⁶ *R v. Leman Street Police Station Inspector ex parte Venicoff*, *R v. Home Secretary ex parte Hosenball* 1977 1 WLR 766 and *R v. Brixton Prison Governor ex parte Soblen* 1963 2 QB 243.

³⁷ *Duncan v. Cammell Laird & Co.* 1942 AC 624.

³⁸ According to Lord Denning in *R v. Liverpool Corporation ex parte Liverpool Taxi Fleet Operators Association* 1972 2 QB 299: “The writs of prohibition/certiorari lie on behalf of any person who is a person aggrieved and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busy body who is interfering in things which do not concern him but it includes any person who has a genuine grievance because something has been done or may be done which affects him.”

³⁹ For example, vide the case of *R v. Liverpool Corporation ex parte Liverpool Taxi Fleet Operators Association* 1972 2 QB 299.

Administrative decisions emanating from a Minister or local authority or a public⁴⁰ body exercising statutory public duties are often invalid since the administrative decisions fall outside their statutory powers⁴¹ and are hence *ultra vires*⁴². As Lord Atkin rightly pointed out in the case of *R v. Electricity Commissioners, ex parte London Electricity Joint Committee*⁴³: “Wherever any body of persons, having legal authority to determine the right of subjects and having the duty to act judicially, act in excess of their legal authority....”

According to Griffith L.J in *R v. Commission for Racial Equality, ex parte Hillington L.B.C*⁴⁴:

“Now it goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in good faith or a power to abuse its power. When the court says it will intervene if the particular body acted in good faith, it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament. Of course, it is often a difficult matter to determine the precise extent of the power given by the statute particularly where it is a discretionary power and it is with this consideration that the courts have been much occupied in many decisions that have developed administrative law since the last war. To determine the extent of a statutory power must always require a close consideration of the statute by which it is given and although a power must be expressed in similar wording in two statutes, the subject matter with which these statutes are dealing may show the scope of the power to be very different.”

Indeed, Mauritian public law⁴⁵, with respect to judicial review, is inspired *in toto* from the English⁴⁶ model and we have retained the same grounds and procedure⁴⁷ for judicial review (*ultra vires*, error⁴⁸ of

⁴⁰ *Bromley LBC v. GLC* 1983 AC 768 and *Re Westminster City Council* 1983 1 AC 768.

⁴¹ *Jandoorsingh v. District Magistrate of Curepipe* 1993 SCJ 324 where the sentence passed by the Magistrate was set aside since it exceeded that which was provided by law.

⁴² It may be *substantial ultra vires* or *procedural ultra vires*.

⁴³ *R v. Electricity Commissioners, ex parte London Electricity Joint Committee* 1924 1 KB 171

⁴⁴ *R v. Commission for Racial Equality, ex parte Hillington L.B.C* 1983 3 WLR 529, 536.

⁴⁵ For example, whether it is an order of *certiorari*, *mandamus* or *prohibition* the Supreme Court in *CEB v. Forget* 1974 MR 299 suggested that an applicant must comply with the present English practice. At first, *mandamus* was a prerogative writ (vide *IRC v. National Federation of Self-Employed and Small Business Ltd* 1981 2 AER 93), a royal command issued from the King’s bench but now it is a peremptory order requiring the respondent to perform a specified public duty.

⁴⁶ In *Bérenger v. Gobhurdhun* the Supreme Court held that the Mauritian courts will follow or will be guided by English practice but not blindly. Similarly vide *Mardaye v. Police S.C* 1984 SCJ.

law⁴⁹ on the face⁵⁰ of the record⁵¹, breach of natural justice⁵² (that is, a decision should be impartial⁵³ or unbiased⁵⁴ having no personal interest⁵⁵ in the outcome of the case⁵⁶ and the decision reached should not have been taken until the applicant affected by it has had an opportunity⁵⁷ to state his case⁵⁸) and the Wednesbury⁵⁹ principle that is, a decision⁶⁰ reached by the administrative body is so unreasonable that no reasonable authority would have acted this way⁶¹).

⁴⁷ Vide *CEB v. Forget* 1974 MR 299

⁴⁸ Vide the leading case of *Yerriah v. PSC* where the Supreme Court held that insufficiency of evidence to ground a particular decision would be an error on the face of the record.

⁴⁹ *Mauritius Federation Transport v. The Arbitration Tribunal* 1963 MR 13, *Norton v. PSC* 1985 MR 108, *Ibrahim v. The Town Clerk* 1990 SCJ 202, *Dina v. District Magistrate of Rodrigues* 1993 SCJ 218, *Jandoosingh v. District Magistrate of Curepipe* 1993 SCJ 324, *Soobratty v. CWA* 1988 MR 53 and *Jaunbacus v. Nananpragassen* 1984 MR 150.

⁵⁰ Vide *R v. Northumberland Compensation Appeal Tribunal* 1952 1 KB 338.

⁵¹ *R v. Northumberland Compensation Appeal Tribunal* 1952 1 KB 338

⁵² Vide *Dimes v. Grand Junction Canal* 1852 3 HLC where it was held that the Lord Chancellor's (he had shares in the company) decision would be quashed because he had a financial interest in the company.

⁵³ *R v. Sussex Justices ex parte* 1924 1 KB 256. In this case, a solicitor was working in a firm and the court held that for this solicitor to act as a clerk was a breach of the rule against bias as he may influence the Magistrate's decision against the appellant.

⁵⁴ *R v. Sussex Justices ex parte* 1924 1 KB 256.

⁵⁵ Vide *Metropolitan Properties Ltd v. Lannon* 1969 1 QB 607 where the court held that: "No man can be an advocate for or against a party in one proceeding, and at the same time sit as a judge of that party in another proceeding."

⁵⁶ *Nemo iudex in causa sua*. This decision is then biased because a judge cannot be judge and party at the same time but a judge may be disqualified if there is a real likelihood of bias or a reasonable suspicion of bias - *R v. Board of Visitors ex parte Lewis* 1986 1 WhR 130, *R v. St Edmundsbury B.C.* 1985 1 WLR, *William v. Beesley* 1973 1 WLR 1295 and *Metropolitan Properties v. Lannon* 1969 1 QB 577

⁵⁷ Vide the leading case of *Baureek v. The PSC* 1988 SCJ where the applicant, an economist posted at the Ministry of Economic Planning, sought that the decision to reprimand him should be quashed on the ground that he had not been afforded an opportunity of being heard.

⁵⁸ *Audi alteram partem* – vide *Cooper v. Wandsworth Board of Works* 1863 and *Re H.K* 1967 2 KB 617 where the court held that the boy has a right to establish his true age and the inferior courts failed to do so.

⁵⁹ *Wednesbury Corporation* 1966 2 QB 275. According to the Wednesbury principle the Court stated that the decision is such that no authority properly directing itself and acting reasonably could have reached it.

⁶⁰ According to Lord Greene with regard to the Wednesbury principle: "Their conduct should be shown to be unreasonable in the sense that it is so unreasonable that no reasonable authority properly informed would have acted thus."

⁶¹ For a local case vide the case of *Bacsoo* SCJ 1990. The applicant sought an order of *certiorari* in order to quash a decision of respondent No. 1 on the ground that it has reached an unreasonable decision in all the

In 1980, Order⁶² 53⁶³ was given legislative recognizance by the Supreme Court Act 1981. The procedure to be followed for the matter to be heard before the Supreme Court is in two⁶⁴ stages: a first stage where the applicant, it is understood that he has the necessary *locus standi*⁶⁵ or sufficient interest⁶⁷ in the matter, must prove *ex parte* before a single judge that he has an arguable case and, if leave is granted, then applicant can proceed to the merits of his application.

The purpose of the first stage is to eliminate any application which is frivolous, vexatious, and hopeless or which does not involve a public law remedy. It is also to prevent the Supreme Court of Mauritius from wasting its time with applications which can be otherwise entertained before a Court of Appeal⁶⁸, or where other remedies⁶⁹ are available⁷⁰.

In Mauritius, the Supreme Court must be satisfied, in order to entertain the application, that the body is a public body exercising statutory duties⁷¹. For example, the Bulk Sugar Terminal is a body created by a

circumstances of the case. The Supreme Court had the decision quashed, as the decision reached by respondent No.1 was indeed *Wednesbury*, that is, unreasonable. Similarly, *Rujub v. LGSC 1991 SCJ 48*.

⁶² Vide *Luchman v. Mauritius Sugar Terminal Corporation 1990 MR 241* where order 53/1-14/6 was quoted.

⁶³ Vide *Monty v. PSC*

⁶⁴ In *Société Ramdin and Co. v. Tea Board 1979 MR 21* the Supreme Court reviewed the procedure applicable in *certiorari* cases and explained that it involved two stages.

⁶⁵ For *locus standi* vide the case of *Bérenger v. Goburdhun*.

⁶⁶ *IRC v. National Federation of Self-Employed & Small Business Ltd 1982 AC 617 1981 2 AER 93*.

⁶⁷ *R v. GLC ex parte Blackburn 1976 3 AER 184*.

⁶⁸ *Mon Loisir SE v. District Council of Pamplemousses 1983 MR 183* where the Court distinguished the appeal procedure from the judicial review.

⁶⁹ In *R v. Chief Constable of the Merseyside Police ex parte Calveley 1986 2 WLR 144* where the court granted relief by way of judicial review without requiring the applicant to pursue the alternative remedy available to him. Similarly vide the case of *Khedoo v. RTC 1981 MR 62* and *Municipal Council 1988 SCJ 345*.

⁷⁰ For example, in *Jaunbaccus v. NTA 1993 SCJ 234*, the court said that in an action by way of judicial review it would not act as a court of appeal.

⁷¹ In the case of *Dacruz v. Central Housing Authority 1983 SCJ 267* it was held that: “*There may be instances where the Authority, when proceeding to appoint an officer acts so blatantly against the basic principles of fairness and reasonableness that its decision may have to be reviewed and held to have been made ultra vires the provisions of the act.*”

statute. Leave was allowed on this threshold test and the applicant could proceed to a substantive⁷² hearing the Supreme Court being satisfied that there was a case fit for further consideration⁷³.

Without going into depth, the Supreme Court must also be satisfied at the first stage that there is an arguable case for granting the relief sought⁷⁴ and that the applicant has shown good faith.

There is a duty on applicant to make a full and frank disclosure⁷⁵ and grant of leave to move for judicial review may be set aside⁷⁶.

The Supreme Court may refuse leave on false⁷⁷ statement of material facts in the affidavit but in most cases it is because the applicant fails to apply promptly⁷⁸ for judicial review within three months⁷⁹, unless there is good reason⁸⁰ shown for the Supreme Court to extend⁸¹ the delay⁸² in applying for relief shown, from the date⁸³ when the grounds for the applicant first arose. Here, the date will be taken to be the date for that judgment, order or conviction as the case may be. In most cases, the first motion should be made within three months from the date of the administrative decision⁸⁴.

⁷² For example, vide the case of *R v. Secretary of State for Home Department ex parte Rukshanda* 1990 C.O.D. 109

⁷³ Vide *Lutchumun v. MSTC* 1990 SCJ 138

⁷⁴ *Muttur v. LGSC* 1992 SCJ 144

⁷⁵ *Gopaul v. National Transport Authority* 1991 SCJ 388

⁷⁶ *R v. The Jockey /club Licensing Committee ex parte Wright* 1991 COD 306

⁷⁷ *R v. Kensington Commissionners* 1917 1 KB 486

⁷⁸ *R v. Ind. Telev. Commissionners ex parte TV N 1* *The Times* Dec. 30 1991.

⁷⁹ *R v. Stradford-On-Avon D.C ex parte Jackson* 1985 1 WLR 1319.

⁸⁰ There is an important case: *R v. Dairy Product ex parte Caswell* 1989 1 WLR 1089 where the court held that since application for leave was not made promptly, that is, within 3 months and that even where the applicant has shown good reason for an extension of the delay, it is open to the court hearing the substantive application for judicial review to refuse relief on the ground of 'substantial hardship' or detriment to good administration.

⁸¹ For instance, vide *R v. Ashford Kent ex parte Rickley* 1955 1 WLR 562. The Supreme Court will grant leave after delay easily since an extension of delay may cause substantial hardship or prejudice to the parties to the case or to good administration.

⁸² For delay vide the case of *Bissessur v. Irrigation Authority* 1992 SCJ 393 and *Muneesawmy v. Mauritius Housing Corporation* 1990 SCJ 138.

⁸³ For outside delay vide the case of *Murday v. CP* 1984 MR 118

⁸⁴ *Monty v. PSC*.

Once leave has been granted at the first stage, in the second stage applicant can now move to his substantive⁸⁵ hearing for judicial review within 14 days of the date of the grant of leave by serving all parties directly affected a notice of motion and affidavit and lodge the motion in court. An order of *certiorari*⁸⁶ of the Supreme Court would then quash the decision reached by the administrative body. In addition to an order of *certiorari*, there are other orders such as a declaration⁸⁷ order, mandamus⁸⁸ or prohibition order, but in Mauritius, an order of *certiorari* is most commonly issued by the Supreme Court. Originating from equity, there are also various types of injunctions⁸⁹ which are available even against the Crown⁹⁰ or the State⁹¹. A declaration order is available when a statute so provides: under the *State Proceedings Act*, section 13 (1) and section 13 (2) (a) enact that: “*In any civil proceedings by or against the State, the Court, may subject to this Act, make orders as it may make in proceedings... the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties.*”

Since the principle of judicial review is more and more important, this book tries to encourage applications for the public law remedy in Administrative Law more particularly in summary⁹² dismissal

⁸⁵ Vide *Seeboo v. LGSC 1994 SCJ 217*.

⁸⁶ In addition to an order of *certiorari*, prohibition is available where the public body acts without possessing jurisdiction, or where an error of law violates a natural principle of justice. Prohibition is a discretionary remedy- *Town Council of Curepipe v. Arbitration Tribunal and Ors 1966 MR 127*.

⁸⁷ It is a discretionary power such that the Supreme Court may intervene to declare that the decision reached by the administrative body is null and void. Vide *Government Servant Association v. Minister of Fiance 1989 SCJ 469*. According to Lord Denning: “*If a substantial question exists which one person has an interest to raise, and the other to oppose, then the Court has a discretion to resolve it by a declaration, which it will exercise if there is a good reason for so doing.*” In *Gouriet v. Union of Post Office Workers 1978 AC 435*, it was held that for a declaration to be granted, the private rights of the applicant had to be affected.

⁸⁸ The purpose of mandamus is to compel the performance of a public duty irrespective whether it be the duty of an inferior court or tribunal to exercise its jurisdiction properly, or that of an administrative authority to fulfil its obligations as provided by statutes. Vide *Vallet v. Ramgoolam 1973 MR*.

⁸⁹ Injunctions are available in applications for judicial review. Vide section 31 of the Supreme Court Act.

⁹⁰ Vide Article 806 of the French Code de Procédure Civile.

⁹¹ Vide *Ragoobar v. Ministry of Housing 1990 SCJ* where it was held that there is no distinction between a private individual and the Crown and that an injunction can now be issued against the Crown. In the past, no injunction could be issued against the Crown- *Fishmongers Association v. Government of Mauritius 1977 MR* and in *Grand Sable Club v. Minister of Housing 1985 MR 6* where the Supreme Court refused to grant an injunction against the Minister but there have been considerable changes since *Ragoobar's case*.

⁹² “*I couldn't care less about your bloody greenhouse and your sodding garden and walked off.*” The Court held that P's summary dismissal was justified- in *Pepper v. Webb 1969 2 All ER 216, CA*. By contrast vide *Wislon v. Racher 1974 IRL 114 (CA)* where the employer wanted to get rid of his employee. The employer was very aggressive and unseemly manner towards him and the employee lost his temper and made the grave error of using obscene and deplorable language. The Court (Edmund Davies L.J) held that “*To say that he ought to be kicked out because on this solitary occasion he fell into such error would, in my judgment, be wrong.*”

cases linked with some statutory provisions of Labour Law but this study is confined to dismissal, misconduct⁹³ and procedural fairness. According to the common law⁹⁴ of contract⁹⁵, an employee (*Ridge v. Baldwin*⁹⁶) can be dismissed without being given a hearing and the question is whether or not it is fair for an employer⁹⁷ do so? Professor Griffith⁹⁸ observed that: “Judges were not restrictive in their attitudes to the measures of the Labour Government when it was in office from 1945 to 1951. Sometimes they seemed to be leaning over backwards almost to the point of falling off the Bench, to avoid the appearance of hostility.” After all, the main function of a tribunal established by law is to protect individual rights against the abuse of official power and that, whatever the circumstances, he enjoys a fair trial⁹⁹. If courts are not empowered to do so then individuals would be condemned unheard and, worst, the administrative body would exercise its power arbitrarily. Basically, the guiding start should be fairness to the accused¹⁰⁰. In no circumstance shall an employee¹⁰¹ be summarily dismissed because there is no judicial authority

⁹³ What is gross misconduct? According to Sir Hugh Griffiths in *Connely v. Liverpool Corporations 1974 9 ITR 51*: “This Court declines to accept the invitation to attempt any legal definition of ‘gross misconduct’. What is or is not ‘gross misconduct’ will be a question of fact depending upon the particular circumstances of each case.”

⁹⁴ In England, the court would look into the nature of the business, the normal circumstances which prevail at the particular establishment, and the employee’s position.

⁹⁵ *Biwater PLC v. CWA & Ors 2000 SCJ* where the court found that: “A judicial review would in principle lie against the decision of the first respondent to award the contract, given that there was plainly a public interest element that had been injected into the contract awarded which allowed co-respondent, a foreign firm, to undertake the management of the first respondent’s water resources in Mauritius.”

⁹⁶ *Ridge v. Baldwin 1964 AC 40*.

⁹⁷ Vide *Wislon v. Racher 1974 IRLR 114 (CA) (supra)* where the employer wanted to get rid of his employee although there was no background of inefficiency or insolence (*Pepper v. Webb*). The employee was subjected to petty criticisms and the employer was often aggressive towards him. He retaliated in an inelegant manner by using obscene and deplorable language. Lord Justice Cairns referred to *Laws v. London Chronicle 1959 2 All ER 285, CA* and said that “In my view this was not a case where it can be said with any justice to the plaintiff that the way in which he behaved regrettable though it was, was such as to show deliberate flouting of the essential contractual conditions having regard to the unjust accusation which had been made against him.”

⁹⁸ Pr Griffith (1959): *Law and Opinion in England in the Twentieth Century*, 1959, 120.

⁹⁹ According to the Supreme Court in *Gopechand v. The Queen 1988 SCJ 37*: “Inherent in the right of an accused person to a fair trial, there exist procedural and evidential rules which prohibit the introduction of any matter which may cause prejudice to the accused and thereby jeopardize his right to a fair trial.” Similarly, vide the case of *Frivet v. The Queen 1988 SCJ 256*.

¹⁰⁰ *Selvey v. DPP 1968 52 Cr App R 443, p. 484 (per Lord Guest)*.

¹⁰¹ Vide the leading case of *Laws v. London Chronicle Ltd 1959 2 All ER 285, CA*. In this case an unfortunate scene broke between the managing director and the advertisement manager. The employee worked under the advertisement manager. The latter said that he would leave taking the staff with him. The managing director told the employee to “stay where you are” but she left the room. She was summarily dismissed the following working day. The Court (Lord Evershed, MR) stated that the dismissal was unlawful because: “The act of disobedience or misconduct can justify only if it is of a nature which goes to show in effect that the servant is repudiating the contract or one of its essential conditions; the disobedience must at least have the quality that is ‘wilful’: it does (in

which supports the proposition that a trial judge has discretion to exclude admissible evidence because, in his opinion, its admission would be calculated to bring the administration¹⁰² of justice into disrepute¹⁰³.

Questions also arose whether the applicant has a fair hearing under the public law remedy or whether he has a right to legal representative of his choice especially in a country like Mauritius where misconduct is still borrowed from the English common law. And is it fair that an employer may dismiss an employee without notice and without severance allowance at all¹⁰⁴? According to the Judicial Committee of the Privy Council in *Jupiter General Insurance Co. Ltd v. Schroff*¹⁰⁵ quoted in *Town Council of Beau Bassin Rose Hill v. Jeenah*¹⁰⁶:

«Their Lordships recognise that the immediate dismissal of an employee is a strong measure. On the one hand, it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence; on the other, their Lordships would be very loath to assent to the view that a single outbreak of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground for dismissal. Sir John Beaumont, C.J was stating a proposition of mere good sense when he observed that in such cases one must apply the standards of men, and not those of angels. »

It is implied that the applicant for judicial review has not been able to enjoy a fair trial¹⁰⁷ or fair hearing¹⁰⁸, unless applicant had no legitimate¹⁰⁹ expectation¹¹⁰ to have one¹¹¹, when the Constitution¹¹² of

other words) connote a deliberate flouting of the essential contractual conditions. The situation was plainly one which was as embarrassing as it was unpleasant for her; and in the circumstances, with her immediate superior walking out and asking her to follow, I am satisfied that it cannot be said that her conduct amounted to such a wilful disobedience of an order, such a deliberate disregard of the conditions of service, as justified the employer in saying: "I accept your repudiation. I treat the contract as ended. I summarily dismiss you."

¹⁰² *R v. Collins* 1987 1 SCR 265 where it was held that if the admission of the evidence would affect the fairness of the trial then it ought to be excluded because such would bring the administration of justice into disrepute.

¹⁰³ Vide *R v. Wray* 1970 3 CCC 122 (per Justice Aylesworth).

¹⁰⁴ According to Rideout and Dyson (1983): "*The common law offered no security of employment. The contract could be terminated for no reason and the only compensation available was the equivalent of wages for a short period*" in Rideout's principles of Labour Law, London Sweet and Maxwell, p. 182.

¹⁰⁵ *Jupiter General Insurance Co. Ltd v. Schroff*

¹⁰⁶ *Town Council of Beau Bassin Rose Hill v. Jeenah*

¹⁰⁷ According to Frivet's case: "*We hold that it was perfectly wrong to have allowed a question as to whether (the accused) was serving a sentence or not. Such a question was highly prejudicial.*"

Mauritius provides for the fundamental rights¹¹³ of the individuals¹¹⁴. These rights are borrowed from the Universal Declaration of Human Rights and it is therefore imperative that he enjoys a fair trial within a reasonable time and, above all, that he is represented. “*An accused person shall not be deprived of life, liberty or property without due process of law*¹¹⁵.”

The *Employment Rights Act 2008* and the *Employment Relations Act 2008* are two important pieces of legislations that clearly demonstrate that the employee deserves that his rights be fully respected. However, as stated before, this book is focused mainly on unfair dismissal in Mauritius with particular reference to the South African law of procedural fairness. There is still one question which is left unanswered: employees are not entitled to the protection of natural justice because they owe no duties to the public but to what extent? Professor Peter Cane suggested that: “*At least where a body has some sort of monopoly power over employment in a particular trade or profession, it must comply with the rules of natural justice regardless of any particular public interest in the applicant’s job. The public interest in such cases seems to be a wider one of preventing abuse of monopolistic powers, which affect a person’s ‘right to work’. Especially at times when unemployment is high and dismissal from one job may sentence the dismissed employee to long-term unemployment, it seems hard to justify allowing any employer to dismiss an employee without giving the employee a chance to put their side of the case.*”

¹⁰⁸ According to *Betty v. Brady* 316 US 455: “*It is shocking to the universal sense of justice or offensive to the common and fundamental ideas of fairness. Whatever is implicit in the concept of ordered liberty and essential to the substance of a hearing is within the procedural protection afforded by the Constitution guarantees.*”

¹⁰⁹ Vide *Council of Civil Service Unions v. Minister for the Civil Service* 1985 AC 374

¹¹⁰ In *Schmidt v. Secretary of State for Home Affairs* 1969 2 ch. 149, a member of the Church of Scientology was refused a permit to remain in England by the Home Secretary but Lord Denning said that the applicant had no legitimate expectation because he had been allowed to remain for the period of time originally granted to him but he would have a legitimate expectation had Schmidt’s permit been revoked before the expected time, for then he would have a legitimate expectation of being allowed to stay for the permitted time.

¹¹¹ Vide *Rakotozafy v. Minister of Employment* MR 1977.

¹¹² Vide *Retreaders Ltd v. Marie* 1989 MR 272.

¹¹³ According to *Williams v. People of State of New York* 337 US 241: “*Due process of law includes at least the idea that a person accused of crime shall be accorded a fair hearing through all the stages of proceedings against him.*”

¹¹⁴ According to Justice Rutledge in *Michelson v. US*: “*It is part and parcel of our scheme which forbids conviction for other than specific acts criminal in character and which, in their trial, casts over the defendant the presumption of innocence until he is proved guilty beyond all reasonable doubt. To take away his right to bring in any substantial and pertinent proof bearing upon the existence of reasonable doubt is, so far, to nullify the rule requiring removal of that doubt.*”

¹¹⁵ *Spencer v. Texas* 385 US 554

Several issues related to dismissal, misconduct and procedural fairness have been identified and they are explained in five chapters. Far from the principles of judicial review, our judiciary must inspire from Article 6(1) of the European Convention on Human Rights. It seeks to protect access to the courts for, *inter alia*, people wishing to challenge the legality of government action such that: *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”*

If administrative law is sufficiently pro-active, that is, where the principles of judicial review are respected where necessary, we can say that Mauritian Law recognises three principles of Administrative Law in the public law remedy: Natural Justice, Procedural Propriety and Legality¹¹⁶ when dismissal for misconduct is in issue before the Supreme Court. And even if the rules of Natural Justice can be seen as part of public law, it: *“may be that the principles which underlie them are so basic that the courts will be prepared to apply them to many cases where a decision by one private citizen affects another, provided the interest of the latter in the decision is sufficiently great”*¹¹⁷. The rules of natural justice coupled with labour law may then provide an employee a fair hearing such that in no circumstance his rights are infringed.



¹¹⁶ *Council of Civil Service Union v. Minister for the Civil Service 1985 AC 374 (per Lord Diplock).*

¹¹⁷ According to Professor Peter Cane (2004): *Administrative Law*, Fourth Edition, Clarendon Law Series, Oxford University Press, p.146, 46 p.