

the evidence adduced at the trial having regard particularly to the unproven allegations of misconduct levelled against the Plaintiff and the trial courts own finding amongst others that the Final Audit Report on the basis of which the Plaintiff was summarily dismissed itself contained several errors.

3. The Court of Appeal erred when it reached the wrongful and untenable conclusion that having regard to the conflict between Exhibit 'F' the Conditions of Service for Senior Staff and Exhibit 'A' the Plaintiffs Letter of Appointment it was not envisaged that the Plaintiff could be covered by the disciplinary procedures set out in Exhibit 'F'. On the contrary the Court of Appeal ought to have held that the mere absence of any disciplinary procedures in the plaintiff's letter of appointment did not in any way relieve the defendant Board Of Directors which exercised final disciplinary authority over the plaintiff of their duty to comply with the very procedures the defendant had itself spelt out in Exhibit 'F' for its employees in conformity with the rules of natural justice.
4. The Court of Appeal erred in upholding the finding of the learned trial judge that the defendant was not liable for damages for defamation."

FACTS OF THE CASE

The plaintiff has been in the service of the Defendant/respondent (hereinafter defendant) for 13 years prior to his appointment as the Managing Director on 1 September 2001 for a term of 5 years. He was asked to proceed on his accrued leave in December 2002. While on his extended leave, the Board of Directors requested, the Auditor General to undertake a forensic audit and management review of the operations of the company. According to the plaintiff the audit exercise was carried on without any questions or explanation sought from him by the auditors. He was summarily dismissed by a letter dated 17 June 2003 for stated misconduct based on adverse findings against him in the Audit Report.

Additionally the defendant circulated the Audit Report to the media which published same and made adverse comments which were defamatory and thereby injured his reputation. He therefore instituted this action at the High Court Accra claiming:

1. A declaration that in all the circumstances of the case the plaintiff's dismissal was wrongful and unlawful;
2. An order that the plaintiff be paid all entitlements and earnings for the unexpired two and one-half years of the contract term of five years
3. A declaration that in all general damages for defamation following the publication of the alleged findings in the electronic and print media;
4. An order to the Defendant Company to retract the defamatory publications in the electronic and print media;
5. Punitive and exemplary costs.

PARTICULARS OF WRONGFUL DISMISSAL

"Paragraph 18 of statement of claim:

"The Plaintiff says that the Defendant Company did not follow proper procedure in dismissing the Plaintiff in that the Defendant Company as employer of the Plaintiff did not raise any query on the alleged misconduct of the Plaintiff to allow the Plaintiff to be heard in his defence on the alleged misconduct by the Forensic Audit team for the reasons given below:

- (a) The Plaintiff was only asked by the Defendant Company to comment on a report, which had been finalised without any input by the Plaintiff;
- (b) The Plaintiff only carried out approval policies, plans and programs of the Board of Directors in respect of the Home Ownership Scheme, and related matters in accordance with the schedule of duties given him by the Defendant Company at the time of his employment;

- (c) The Defendant Company had not by itself on its own at anytime prior to the issuance of the letter of 17th June 2003 conducted any disciplinary proceedings which resulted in the decision to dismiss the Plaintiff summarily
- d) The Forensic Audit Team did not give the plaintiff the right or opportunity to be heard on the allegations of misconduct during the audit despite all the available records at the defendant company offices showing all the allegations were unfounded and unsustainable.

The defendant on its part denied the plaintiff's claim and pleaded that the plaintiff was heard through the comments he submitted on the draft audit report, The defendant pleaded further that any publication that was made in the media was without malice and was in the public interest and therefore same was privileged.

In his statement of case to this Court, the plaintiff's complaint on the breach of his fundamental right to natural justice was twofold. Firstly, the defendant breached the terms of the Senior Staff Service Conditions regarding dismissals and secondly they breached the audi alterem partem rule.

For purposes of clarity, we will begin with ground 3 of the Notice of Appeal that touches this first leg of complaint.

BREACH OF CONDITIONS OF SERVICE FOR SENIOR STAFF

GROUND THREE

The Court of Appeal erred when it reached the wrongful and untenable conclusion that having regard to the conflict between Exhibit 'F' the Conditions of Service for Senior Staff and Exhibit' A' the Plaintiffs Letter of Appointment it was not envisaged that the Plaintiff could be covered by the disciplinary procedures set out in Exhibit 'F'. On the contrary the Court of Appeal ought to have held that the mere absence of any disciplinary procedures in the plaintiff's letter of appointment did not in any way relieve the defendant Board Of Directors which exercised final

disciplinary authority over the plaintiff of their duty to comply with the very procedures the defendant had itself spelt out in Exhibit 'F' for its employees in conformity with the rules of natural justice.

The relevant portions of his appointment letter, Exhibit 'A' on disciplinary matters are as follows:

"For purpose of disciplinary control, you will be responsible to the Board of Directors....This appointment may be terminated by either party giving three (3) months notice in writing or the payment of three (3) months salary in lieu of such notice. The Board, however, reserves the right to dismiss you for stated misconduct."

At the trial it was the contention of the plaintiff that he was covered by the Conditions of Service for Senior Staff which was tendered in evidence at the trial as Exhibit 'F' and as such the Board of Directors ought to have followed the disciplinary procedures stipulated under Articles 42 to 47 and given him a hearing before proceeding to dismiss him.

Both the trial court and the Court of Appeal gave adequate consideration to these submissions. The findings by the High Court on this issue in her judgment were that:

"A careful reading of Article 42 through to Article 47 gives one the impression that those provisions are applicable to Managers or employees other than the Managing Director that is the Chief Executive. For instance Article 46 gives the Chief Executive (the Managing Director) the power to appoint a Committee of enquiry into any disciplinary matter. Nothing is said about how disciplinary issues regarding the Chief Executive are to be dealt with. Since he cannot appoint a committee to deal with his own misconduct the impression that these articles are not intended to cover him is reinforced. One finds the answer to this omission in his letter of appointment where it is stated that the Board will be responsible for his disciplinary control and that it reserved the right to dismiss him for stated misconduct. I find as a fact that the Plaintiffs appointment was not subject

to Exhibit F but rather to Exhibit A, his appointment letter.”

The Court of Appeal concurred on these findings. Akoto-Bamfo J.A. held as follows:

"Exhibit F is the conditions of service for the senior staff. Therein is provided a procedure, the appointment of a committee of enquiry by the chief executive whose composition shall be 3 managers 1 of whom not being below the grade of the subject of the investigation shall be the chairman; after the investigations the report shall be submitted to the chief executive. That the Plaintiff was the Chief Executive is beyond question having regard to the procedure as outlined can it be argued that the conditions of service applied to him? I think not.... Furthermore if he is under investigations who appoints and receives the report? If he does, will he not be a judge in his own cause? Answers to these questions lead to one irresistible conclusion that it was not envisaged that the Chief Executive be covered by Exhibit 'F'. I am fortified in this view by the fact that in the interpretation section a Chief Executive and an Employee were differently defined and with two separate headings. If an Employee includes the Chief Executive, it is my considered view that there would have been no need for the separation. "

The learned judge accordingly held that

".... Since clearly the terms in Exhibit 'F' (assuming they are applicable the Plaintiff) seem to be in conflict with the contents of Exhibit 'A' the letter of appointment for whereas the conditions of service as per Exhibit 'F' set out a procedure the letter of appointment Exhibit 'A' did set none. Since there is a conflict it is evident that the terms of the special contract would prevail. The findings of the learned judge that the conditions of service for the senior staff was not applicable to the Plaintiff cannot therefore be faulted. I therefore feel unable to disturb same."

For his part Justice Asiamah JA (as he then was) in his concurring judgment said:

" It is manifest that it is only the Board in which is vested the power to exercise disciplinary responsibility over the appellant in relation to the latter's misconduct in the execution of his duties..... I might at this juncture mention that neither in the appointment letter nor in Exhibit 'F' was provided a specific laid down procedure to be followed in the event of a disciplinary investigation being conducted against a Managing Director in the Respondents employ.

The Committee of enquiry's provision in Article 46 of Exhibit 'F' does not cover the MD in any disciplinary investigation enterprise..... Certainly the Appellant as the MD is not amenable to Article 46..... "

We do not find any fault in the reasoning of both the trial and Appellate Court that from the terms of the special contract between the parties, the disciplinary proceedings for the senior staff as set out in Exhibit 'F' was not applicable to the Managing Director. The appeal therefore fails on this ground.

BREACH OF NATURAL JUSTICE

The second leg of concern by the appellant was that he was not given a hearing before he was summarily dismissed. This is contained in ground one of his grounds of appeal.

GROUND ONE

The Court of Appeal erred in upholding the finding made by the learned trial judge that the comments submitted by the Plaintiff on the Interim Audit Report constituted a hearing and an opportunity to present his side of the case. The failure by the Court of Appeal to set aside that wrongful finding has occasioned the Plaintiff a grave miscarriage of justice.

It is undisputed that the plaintiff was summarily dismissed upon the adverse finding made against the plaintiff as contained in the Final Report on Forensic Audit Report and Management Review of the Ghana Supply Company Limited set up by the Auditor General.

It is the plaintiff's evidence that he was asked to hand over to an interim management committee and proceed on his accrued leave. The leave was later extended and in his absence a forensic audit was undertaken and he was never invited to answer any queries by the team or the Board of the defendant company and yet he was dismissed upon the basis of the audit report. The defendant on the other hand in evidence led on its behalf claimed the plaintiff was given a hearing through comments the plaintiff submitted on the draft report by the auditor.

In considering this ground of appeal it is worthy to note that even in purely administrative actions some administrative justice is required by way of fairness and reasonableness. It is a Constitutional requirement under Article 23 of the 1992 Constitution that:

"Article 23. Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal."

As explained by Bamford-Addo J.S.C. in the case of **Aboagye v. Ghana Commercial Bank Ltd. [2001-2002] SCGLR 797 at 806:**

"... article 23 says that administrative bodies and officials shall act fairly. And acting fairly implies the application of the rules of natural justice, which have been elevated to constitutional rights and are binding on all adjudication and administrative bodies as well as courts and tribunals."

Accordingly the Supreme Court held in the Aboagye case supra that the defendant bank, having taken disciplinary action against the plaintiff under the bank's disciplinary procedure rules, should have followed that procedure. The Supreme

Court concluded that there was no fair trial as the bank failed to apply the rules of natural justice.

In another case of **Awuni v. West African Examinations Council [2003-2004] SCGLR 471** the phrase "to act fairly and reasonably" was explained by Kpegah JSC at page 489 in his judgment. He said:

"The phrase 'to act fairly and reasonably' in my opinion necessarily imports a duty to observe the common law maxim of audi alterem partem and other principles of natural justice which is very much part of our jurisprudence and are implicit in the constitutional provisions in article 23. Because I cannot contemplate how a person could be said to have acted fairly and reasonably if he did not give notice or hearing to another who was entitled to such notice or hearing before taking a decision which adversely affects his rights; neither can I contemplate a situation where a person could be said to have acted fairly as a judge in his own cause or give a biased and perverse decision."

On her part, Sophia Akuffo JSC expounded further at page 514 thus:

"I will not venture to give a comprehensive definition of what is fair and reasonable, since these qualities are dictated by the circumstances in which the administrative function is performed. At the very least however, it includes probity, transparency, objectivity, opportunity to be heard, legal competence and absence of bias, caprice or ill-will"

In the appeal before us from the terms of the Special Contract between the parties there was no established disciplinary procedure which the Board Of Directors were obliged to follow in respect of its Chief Executive Officer. The issue then is whether on the facts of the case the Board of Directors acted fairly and reasonably in summarily dismissing the plaintiff without giving him a hearing after the final audit report? Was the comment he was invited to make and his subsequent response sufficient to satisfy the requirements of natural justice?

Counsel for the plaintiff submitted that:

“...considering the circumstances of this case the Board of the Defendant Company which was also the disciplinary authority should personally have given him a hearing and come to its own conclusion instead of relying on the report of the investigative team as a conclusive evidence of misconduct. It is further submitted that it is the authority exercising the disciplinary power which ought to afford the Plaintiff the opportunity to be heard. Not being the disciplinary authority the investigative team could not by any stretch of legal imagination be said to have afforded the Plaintiff that opportunity to be heard in this case.” Counsel however conceded that “natural justice does not invariably require that the parties be entitled to an oral hearing. It will sometimes be fair to determine an issue on the basis of written representations”. He referred to the cases of **R v. Judge Amphlett [1915] 2 KB 233; Stuart v. Haughley Parochial Church Council [1935]Ch 452; Board of Education v. Rice[1911] AC 179 HL; Local Government Board v. Arlidge [1915] AC 120 HL** on this point. Counsel however sought to distinguish the case of the **Republic v. Ghana Railways Corporation; ex parte Appiah [1984-86] 1 GLR424 C.A** from the present case on the grounds that, whereas in the Ghana Railway Corporation case the applicants were notified to appear before a board of inquiry this was not done in the present case. He said although other senior members were invited by the Auditors to answer questions, the plaintiff was denied such an opportunity

All these points were vigorously canvassed at the two lower courts. Both the trial and the appellate courts were of the view that in the absence of any requirement in the service contract between the plaintiff and the board for the setting up of disciplinary proceedings; what was essential for determination is whether the plaintiff was given an opportunity to re-act to the charges laid against him. We are in agreement with this proposition, for if the plaintiff was given a chance to answer to the charges even not directly to the board or a body set up by it; this should satisfy the requirements of natural justice. It is trite law and a cardinal principle on justice; that no man shall be condemned unless he has been given prior notice of the allegation against him and a fair opportunity to be heard. **Halsbury’s Laws of England 4th Edition Vol.1 page 76.**

The trial judge came to the conclusion that the comments the plaintiff made on the Draft Forensic Audit Report amounted to a hearing. The Court held that:

"The Court is satisfied that the plaintiff was able to tell his side of the story through the document styled "Comments by Management" and by this process he was heard. The defendants did not breach the audi alterem partem rule."

The appellate court also came to the same conclusion in the following words:

*"The issue is whether the comments made constituted a hearing. It is settled that where there are rules for a disciplinary procedure to be followed an employer who fails to adopt the laid down procedure stands to be mulcted in damages for wrongful dismissal. Where however, there are clearly no specific disciplinary procedures the employer is under a duty to act fairly and to comply with the rules of natural justice; that is the Plaintiff must be given a proper opportunity of making out his case.... Indeed in the **Republic Vrs Ghana Railway Corporation Ex-parte Appiah & Anor [1981] GLR 753** it was held that the principle simply meant that a party ought to have reasonable notice of the case he has to meet and ought to be given the opportunity to make his statement in explanation of any question or to answer any arguments put forward against it. The principle does not in any way require that there must be a formal trial of a specific charge akin to court proceedings....*

I am of the view that the plaintiff was given a hearing in the circumstances, for the "charges" as it were laid in the interim report; he was given a copy, and therefore an opportunity to give his side of the story which he did. His comments were incorporated into the final report which formed the basis of his dismissal..... "

We entirely agree with this conclusion and the appeal accordingly fails on this ground.

JUDGMENT WAS AGAINST THE WEIGHT OF EVIDENCE

GROUND TWO

The Court of Appeal fell into grave error in upholding the judgment of the trial court which judgment was totally against the weight of the evidence adduced at the trial having regard particularly to the unproven allegations of misconduct leveled against the Plaintiff and the trial courts own finding amongst others that the Final Audit Report on the basis of which the Plaintiff was summarily dismissed itself contained several errors.

One of the issues set down for determination was whether or not the plaintiff only carried out decisions, policies and programs of the defendant company Board of Directors for which the plaintiff has been wrongfully or arbitrarily dismissed summarily. It is fair to mention here that it is a different Board of Directors which summarily dismissed the plaintiff.

The basis for his summary dismissal was stated in the dismissal letter as follows:

*"MR. JUSTICE AWUKU-SAO
NO. 9. OSHIPI STREET
NORTH KANESHIE, ACCRA*

Dear Mr. Awuku-Sao

SUMMARY DISMISSAL

This serves to inform you that the Board at its meeting held on Thursday June 12, 2003, decided that based on the evidence of misconduct from the report of the investigative team appointed by the Auditor General to conduct a Forensic Audit and Management Review of the company, your services are no longer required by the company.

The Board's decision is based on the following findings against you:

1. *You failed to adhere to the recommendations of the External Auditors by not using the rates of the first valuation (February 2000) of the Management Houses in the sale of the company houses to Management staff and to yourself in the Home Ownership Scheme approved by the Board.*
2. *You failed too adhere to and did not implement the provisions of the Employee Assisted Home Ownership Scheme payment system by not making staff to pay the 70% deposit of the selling price as required by scheme using the Home Finance Facility.*
3. *You personally authorized and approved company money to the tune of forty-three million eight hundred and seventy thousand cedis for renovation works on your house after it had been sold to you.*
4. *You used a lower valuation rate to sell the company property you occupy to yourself after renovation works had been carried out.*
5. *You failed to sell the properties of the Management Staff including yours at the February 2000 valuation prices that were however, applied in the disposal of the properties occupied by the middle and junior staff.*

In view of the above findings, the Board has decided to summarily dismiss you for misconduct with immediate effect in accordance with the relevant clauses in your appointment contract. You are advised to hand over all properties of the company in your possession to the Interim Management Committee.

We count on your cooperation in this matter and thank you for your services during the period of your appointment.

Signed....”

This particular ground of appeal was mainly against the trial judge's finding that the plaintiff was guilty of misconduct in expending the company's monies to renovate his house after its sale to him, as the trial judge found as a fact that the plaintiff was not guilty of the charges under 1, 4, and 5 above, as there was evidence that he was merely carrying out the decision of the Board.

Counsel for the plaintiff submitted that this particular charge was not mentioned in the Draft Report and so the plaintiff had no chance to re-act to it and therefore a dismissal based on this charge was unlawful. Counsel relied on the Aboagye case supra where Bamford-Addo JSC said at page 183 that:

"Finally in considering the question whether or not in any particular case there has been a failure of natural justice, the fact that there was evidence to support the charge preferred against the plaintiff namely negligence, is immaterial to the determination of the issue whether the plaintiff had not been given a fair trial."

What counsel failed to consider was that in the Aboagye case the bank was bound by its own disciplinary rules to follow certain procedures including a right of being heard in person, which they failed to do. In the instant case there was no such requirement in the service contract held by the plaintiff. At common law it is enough if the fact upon which a person is summarily dismissed objectively establishes ground or cause for dismissal. **Edward Nasser & Co Ltd v. Abu-Jawdi Presbyterian Hospital, Agogo v Boateng [1984-86] 2 GLR 381, CA; Boateng v Volta Aluminum Co Ltd [1984-86] 1 GLR 733, CA.; Lever Brothers Ghana Ltd v. Annan [1989-90] 2 GLR 385.** These cases in effect applied the common law principle that:

"A servant, whose conduct is incompatible with the faithful discharge of his duty to his master, may be dismissed ...Dismissal is also justified in the case of a servant ... if his conduct has been such that it would be injurious to the master's business to retain him." [**Halsbury's Laws of England (3rd ed.), Vol. 25 page. 487, para. 938]**

This principle of common law is still followed by our Courts in a line of modern cases and it was recently succinctly examined in the case of **Lagudah v. Ghana Commercial Bank [2005-2006] SCGLR 388**. Date-Bah JSC in his judgment commented at page 401 that:

"I am not persuaded that, in a commercial setting, in the absence of a contractual provision to the contrary, an employer is bound to comply with the rules of natural justice. At common law, it is enough if the facts objectively establish cause for dismissal."

He also went on at page 405 to state that:

"... in the ordinary common law of employment, unaffected by public law considerations, there is no obligation on an employer to set up a tribunal or committee of enquiry before he can dismiss an employee summarily for misconduct. Irrespective of the procedure which he adopts, if he establishes facts justifying the dismissal, that is enough."

Both the trial court and the Court of Appeal were of the same view that there was sufficient evidence on the record to justify the summary dismissal of the plaintiff. There was evidence that the board in 2001 approved a budget for renovation works to be carried on the plaintiff's house before the sale to him. The trial court was of the view that:

"Even if the plaintiff had found refuge in respect of expenses made on the house by the defendant after the house was sold to him under the 2001 budget, then in the present case he will find no such refuge. The 2002 budget did not make provision for any such expenses and the Board did not expressly or by implication approve of these expenditures per the 2002 budget. The Court is satisfied that in allowing or approving these expenditures the plaintiff misconducted himself"

We find no fault with this reasoning. We hold the view that the plaintiff's conduct

in allowing the company to continue with the renovation of the house to the tune of GH¢4,300 after the sale to him was a gross abuse of his office. The court of Appeal even went further to describe the plaintiff's conduct to amount to misappropriation of the company's money" (per Asiamah J.A.) which merited a dismissal despite the arithmetical errors in the calculation contained in the audit report.

We will accordingly dismiss this ground of appeal.

GROUND FOUR

The Court of Appeal erred in upholding the finding of the learned trial judge that the defendant was not liable for damages for defamation.

Under this ground it was the contention of the plaintiff that once the defendant has admitted that it handed over the audit report to the press it ought to be held responsible for the defamatory publication in the media. The issue here is whether it was proper for the defendant to have handed the audit report to the press. It was the view of the Court of Appeal per Asiamah J.A. that the defendant was a public company and the plaintiff a public officer and that:

"The appellant being a public officer his conduct and performance of his duty in relation to the office he holds in the respondent employ as a public officer is a matter about which the public has a right to comment upon either favorably or in an uncomplimentary manner provided the facts constituting the comment or publications are true in substance and that the comment is relevant to the facts."

On all the issues raised in this appeal there had been concurrent findings of facts by the two lower courts that there was evidence of misconduct by the appellant to justify his summary dismissal by the Board of Directors. It is settled law that:

"In an appeal against findings of facts to a second appellate court., this Court would not interfere with the concurrent findings of the two lower

courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice was apparent in the way in which the lower tribunals had dealt with the facts.” Per Acquah JSC in the case of **Achoro vrs. Akanfela [1996-97] SCGLR 207**. See also the cases of **Obrasiwa II V. Otu [1996-97] SCGLR 618; Ntiri v. Essien [2001-2002] SCGLR451**.

We have carefully studied the evidence and we have come to the same conclusion that the Court of Appeal’s findings in support of that of the High Court was correct. We therefore have no reason to disturb the judgment of the Court of Appeal. The appeal fails and it is accordingly dismissed.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

I agree

S. A. BROBBEY
(JUSTICE OF THE SUPREME COURT)

I agree

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

I agree

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

I agree

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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