

Judicial review problem question essay



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Judicial Review problem question (3000 words)

Part 1

The first significant area for consideration in this scenario is whether Jack will be granted permission to proceed with his application for judicial review. He is seeking review of a decision by an internal disciplinary tribunal that he be dismissed for unprofessional conduct. The tribunal found unanimously in favour of dismissing Jack. In order to assess whether Jack will be permitted to pursue his claim for review, the nature of judicial review must briefly be considered. Following the Bowman Report of 2000, in the light of Lord Woolfe's recommendations for law reform, the regime of judicial review has been altered in certain ways. The 1977 reforms of the procedure did not state expressly that judicial review was an exclusive procedure.^[1] It was in the case of *O'reilly v Mackman* (1983) that the court considered the issue of exclusivity. In this case, the House of Lords held that it would be contrary to public policy to allow an applicant to seek to enforce public law rights by way of ordinary action rather than by way of judicial review. In the present instance, then, it must be considered whether the decision of the tribunal is a public or a private law matter. The ruling of the House of Lords in this case means that procedural exclusivity exists in cases of public law.

In order to assess whether Jack's case is one of public law, the common law must be considered in this area. In *Cocks v Thanet District Council* (1983), the House of Lords held that under the relevant Act in the case, the Housing (Homeless Persons) Act 1977, the housing authorities' functions were essentially public law functions. These functions included deciding whether

they had a duty to house the applicant under the 1977 Act. It was only after this decision had been made, and if it was considered that such a duty did exist, that private rights and obligations would arise. In *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* (1992), the House of Lords held that an issue was concerned exclusively with a public right should be determined in judicial review proceedings. This strict application of the exclusivity principle, however, has been superseded by the more liberal approach characterised in the decision of *Clark v University of Lincolnshire and Humberside* (2000). In his judgement, Lord Woolfe explained the effects of the new Civil Procedure Rules on the rule in *O’Reilly v Mackman*. “ The intention of the CPR is to harmonise procedures as far as possible and to avoid barren procedural disputes which generate satellite litigation.”[2] The important question has become whether failure to follow the correct procedure amounts to abuse of process of court.

In the present case, then, the question of whether this matter is properly described as public law or private law is of the utmost significance. As long as Jack can satisfy the court that the functions of the tribunal are public law ones, he will most likely be granted permission to proceed with his claim. This, however, may be difficult. In *R v Legal Aid Board, ex p Donn & Co* (1996), Ognall J stated that ‘ there can be no universal test’ for deciding whether a matter is properly described as public law. If the tribunal is a public body, it will have derived its authority from statute or delegated legislation (as opposed to deriving powers from the agreement of those who are subject to the body). Some guidance as to what would constitute a public body was offered by the Court of Appeal in *R v Disciplinary Committee of the*

Jockey Club, ex p Aga Khan (1993). Here it was held that although the Jockey Club regulated a significant national activity, it did not properly constitute a public body, as it was not mentioned in statute, and its powers were simply over those who agreed to be bound by it. In Jack's case, however, the tribunal does indeed derive its powers from statute. Furthermore, following R v Panel on Take-overs and Mergers, ex p Datafin plc (1987), the court should look to the nature of the functions the body performs, as well as its origins. The functions of the tribunal will be considered to be public law functions, and so in the light of the doctrine of exclusivity, Jack will be granted permission to proceed with his claim for judicial review.

Part 2

There are various grounds that may arise for Jack to pursue his claim for judicial review in the scenario. Firstly, Jack is told by the tribunal that he may not have legal representation present. Furthermore, although he is entitled to have a friend or relative present at the proceedings, this person must not be legally qualified. Is this a breach of protocol? In other words, does Jack have a right to be represented at the Tribunal? It is established at common law that no such right exists. In the case of R v Board of Visitors of HM Prison, the Maze, ex p Hone, the appellants claimed that the Board's refusal to allow them to be legally represented at the disciplinary proceedings was counter to natural justice. Lord Goff, however, said " it does not follow that simply because a charge before a disciplinary tribunal ... relates to facts which in law constitute a crime, the rules of natural justice require the tribunal to grant legal representation.' According to this analysis, then, Jack does not necessarily have a right to legal representation. Whether legal

representation is granted is a matter, in this instance, for the tribunal to decide. In doing so, it must take into account a number of factors. These include whether there are complex matters of law at issue (which it does not appear there are in this case); and whether Jack is incapable of presenting his own case. If fairness dictated that Jack should be allowed representation for either of these reasons, then of course he should be, but the tribunal appears to have acted within its rights to deny him this representation in the present instance. Lord Denning highlighted this principle in *Pett v Greyhound Racing Association* (1969): 'It is not every man who has the ability to defend himself on his own ... He may be tongue-tied or nervous, confused or wanting in intelligence.' Jack's tribunal could make a case for denying Jack representation, and this is not therefore a suitable ground for his claim for judicial review.

The second issue relates to the tribunal's decision to limit Jack's witnesses to five, as opposed to the ten he originally sought to act as character witnesses. There are two possible avenues which Jack could proceed down with this. The decision can be identified as falling within, perhaps, one of the original categories of grounds for judicial review as set out by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* (1985). This ground was irrationality, which was likened in that case to the principle of unreasonableness identified in the other key case for judicial review, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948). This principle of irrationality applied, in Lord Diplock's words, to 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be

decided would have arrived at it.’[3]This was adapted and mollified somewhat by Lord Cooke in *R v Chief Constable of Sussex, ex p International Trader’s Ferry Ltd* (1999), who asked ‘ whether the decision in question was one which a reasonable authority would reach.’ The problem of proceeding down this avenue, for Jack, is the high standard of proof which Jack must meet in order to be successful in his claim. He would need to show that the decision to limit his witnesses to five would not be reached by any reasonable person. Lord Ackner identified the reason for this high level of proof as being that judicial review is a supervisory process, not an appellate jurisdiction (*R v Secretary of State for the Home Department, ex p Brind* (1991)). It seems unlikely that Jack would succeed in establishing that this decision on the part of the tribunal was so irrational as to be worthy of judicial review.

He would more likely be successful following the second potential avenue in relation to this decision of the tribunal; that of procedural impropriety, which was also one of the original grounds for judicial review identified in the *GCHQ* Case. This phrase encompasses both the breach of statutorily defined procedural rules, and also the breach of common law rules of natural justice. Jack’s claim in this area will depend in part on the procedural rules set out in the relevant statute governing employment tribunals. If the tribunal has not complied with statutory provisions by limiting Jack’s witnesses to five, it will be considered to have acted *ultra vires* . In this case, the tribunal has met with its statutory obligation under the *Tribunals and Inquiries Act 1992*, s10 to give reasons for its decision to limit the number of witnesses to five for each side (‘ it would not be administratively expedient to allow the calling of

such a large number of witnesses, particularly as it is the view of the tribunal that many of the witnesses would not provide evidence which would have a material impact upon the outcome of the proceedings’).

It is a central principle of natural justice that Jack must be entitled to a fair hearing. It is in this area that Jack has the best chance of securing judicial review of the employment tribunal’s decision. Firstly, in relation to the composition of the panel, Jack has a valid complaint against the inclusion of a member of staff with whom he had a relationship that ended acrimoniously. This instantly raises the possibility of bias in the tribunal panel. English courts have developed two tests for bias, based on reasonable suspicion, and on real likelihood. In *R v Gough* (1993), however, it was held that the same test should be applicable in all cases of apparent bias. This test is whether there is a real danger of bias. Given the nature of the woman’s previous relationship to Jack, it is fair to suggest that there is a real danger of bias. This, then, according to the *Gough* test (despite subsequent challenges to that test in cases such as *Porter v Magill* (2002)), would give Jack a strong ground for seeking judicial review.

Part 3

The grounds under which Jack might be able to pursue his claim for judicial review have been considered. Purely on the grounds for judicial review, Jack’s best chance of success lies with the danger of bias in the composition of the panel in the tribunal, given that one of his ex-girlfriends is a member of it. Jack might well, however, be able to strengthen his claim by supporting

it with Human Rights Act claims. The impact of this will be considered on each of the possible grounds for review outlined above.

Firstly, in respect of the decision by the tribunal not to allow Jack to be legally represented, it is possible that although this is not necessarily improper in itself, it may be a breach of Jack's human rights as encompassed in the European Convention on Human Rights, incorporated into English law by the Human Rights Act 1998. The relevant article of the Convention is Article 6, which guarantees the right to a fair hearing. This entitles Jack, 'in the determination of his civil rights and obligations ... to a fair and public hearing.'^[4] Firstly, does this cover tribunals of the sort Jack is involved in? In the case of *Ringeisen v Austria* (1971), the European Court held that Article 6(1) covers all proceedings whose result affects private rights and obligations. In the present instance, Jack's right to continue working as a teacher is to be determined by the outcome of the tribunal. It seems then, that his case is at least covered by the Article.

The Article only confirms that Jack would have a right to legal representation, however, if he were charged with a criminal offence. 'Everyone charged with a criminal has the following minimal rights ... to defend himself in person or through legal assistance ...'^[5] This, however, is merely a civil offence, so once again, there is no guarantee that Jack should be granted legal representation under the ECHR.

The same Article of the Convention is also applicable, however, to the composition of the tribunal panel as well as the manner in which the tribunal was conducted. Firstly, the Article guarantees the right to a 'fair and public

hearing within a reasonable time by an independent and impartial tribunal...'[6]In the European Court case of Langborger v Sweden (1989), the Court established that ' even if individuals are technically qualified to address a given issue and even if there is no subjective reason to doubt their personal integrity, it is important that the appearance of objective impartiality and independence is observed.'[7]More specifically, in the case of Sramek v Austria (1984), those adjudicating a particular matter cannot be seen to have a relationship with any of the parties. This case law clearly impacts upon Jack's case, as the previous relationship he had with the female member of the panel can be seen to breach this principle of fairness and impartiality, despite her assurances that the history had no effect on her judgment.

Furthermore, also under Article 6(1), the court or tribunal is required to give reasons for its decisions. Jack's employment tribunal met this requirement insofar as it gave reasons for its refusal to allow Jack more than five witnesses, but it must also have given reasons for its unanimous decision to dismiss Jack. Perhaps linked to this is Jack's right under the same Article to a ' fair hearing'. The fact that Jack noticed one of the panel was falling asleep during his defence hardly seems commensurate with this principle. He could conceivably, then, mount a challenge to the decision of the tribunal based on human rights claims under Article 6 of the ECHR. He would have two substantial avenues of challenge; firstly the impartiality of the tribunal could be called into question due to its inclusion of Jack's ex-girlfriend. Secondly, the conduct of the tribunal itself, particularly the fact that a member of the

panel was falling asleep during Jack's submission, suggests Jack would have a valid claim for breach of his rights.

In this scenario, then, Jack would be able to establish grounds for his claim for judicial review. The tribunal is exercising a quasi-judicial function, and would be properly categorised as a public law function. As such, judicial review is the proper way to proceed to challenge its decisions. In terms of actual grounds for review, Jack's best chances lie with the composition of the panel. The inclusion of his ex-girlfriend, despite the panel's claim to the contrary, could be seen to have an adverse effect on the impartiality of the panel. Again, the falling asleep of one of the panel's members during Jack's presentation also gives ground for judicial review due to procedural impropriety. It seems the panel has acted within its rights to deny legal representation to Jack. Nor is this legal representation guaranteed under human rights legislation, as this is clearly a civil matter, while the ECHR only guarantees legal representation in criminal cases. Again, in the context of the Human Rights Act 1998, Jack's best chances of mounting a strong case for breach of his rights lies in the composition of the panel and the conduct of the hearing. These seem to have constituted potential breaches of Article 6 of the ECHR.

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Footnotes

[1] See, for example, Parpworth, N. (2004) *Constitutional and Administrative Law*, 3rd Edition (London: LexisNexis), p264

[2] Quoted in Parpworth, p270

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[3] Quoted *ibid*, p309

[4] European Convention on Human Rights, Article 6(1)

[5] *Ibid*, Article 6(3)(c)

[6] *Ibid*, Article 6(1)

[7] Quoted in Gomien, D. (2005) *Short Guide to the European Convention on Human Rights* (Strasbourg: Council of Europe), p56