Health Practitioners Registration Council & Kingdom of Tonga v Schafer-Macdonald

Court of Appeal
Morling, Burchett & Tompkins JJ
App. 5/97

17 & 20 June. 1997

Tort - abuse of public office - misfeasance of office - state of mind
Damages - discount for benefit of additional qualification - exemplary

The facts are set out in detail in the headnote to the judgment in the court below (reported above).

Held:

1. The tort alleged and found established was abuse of public office or misfeasance of office.
2. Malice and actual knowledge (of acting in excess of power) are alternatives but both were found proved. A case involving the tort of misfeasance of office is not an ordinary case. Nothing short of malice or knowledge of invalidity will do. Knowledge for this purpose, will not be imputed upon some principle of constructive knowledge, but must be found as a reality. However, where the necessary facts were proved, the law must not hesitate to make the appropriate finding in order to vindicate the citizen against abuse of official power.
3. The Kingdom was vicariously liable as well.
4. As to damages an amount should be deducted from the sum awarded for the cost of obtaining an alternative qualification, reflecting a discount for the benefit so gained by the respondent; and the amount of exemplary damages reduced to a sum sufficient to mark the court's strong disapprobation of the conduct in question.

Cases considered : Auston v C.A.A. (1994) 50 F.C.R. 272
Dunlop v Woollahra M.C. [1982] AC 158
Bourgoin S.A. v Min. of Agriculture [1986] 1 QB716

Counsel for appellant : Mr Cauchi
Counsel for respondent : Mr Niu

Judgment

The respondent, a medical practitioner, obtained in the Supreme Court against the appellants, the Health Practitioners Registration Council ("the Council") and the Kingdom of Tonga, a verdict for the sum of T$35,000 plus costs. The circumstances were most unusual, and in order to understand them, it is necessary to start at the beginning. The respondent came to Tonga in 1986 with graduate and post-graduate qualifications in medicine, gained in her homeland, Germany. Her qualifications had been recognised in England, and were accepted in Tonga, so that she was able to go into a practice here. She married a Canadian lawyer who had also taken up the practice of his profession in the Kingdom, Mr Peter Macdonald.

After the respondent had been practising here for some years, the Health Practitioners Registration Act 1991 came into force, on 1 July 1993. Previously, the respondent's registration to practise medicine was pursuant to the Medical Registration Act 1918, under which her registrations had twice been approved. However, as from 1 July 1993, new registration procedures were due to be put in place, under the control of the Council on behalf of the Ministry of Health of the Kingdom.

Section 9 of the new Act barred any person from practising as a health practitioner "unless his name is on the register". Accordingly, the view was taken that it was necessary for practitioners to seek fresh registration under the new procedures. But for many months there were delays in the constitution and establishment of the Council. Of course, illness did not vanish from Tonga, and medical practitioners, of necessity, continued to practise. In the case of the respondent, she had obtained, just five months before the commencement of the new Act, a certificate from the Acting Director of Health that she had "full registration as Medical Practitioner", and that "she is a medical practitioner of good standing." Eventually, in about March 1994, the Council began to function, and the respondent was told by its Registrar that she should apply for registration under the new Act, although, as her qualifications were already on the file (ie. the Department's file kept under the previous Act), this would be more or less a formality. The respondent completed the form of application produced by the Council, and paid the required fee of $88 on 22 April 1994.

Thereafter, the respondent was dealt with, as the trial judge, the Chief Justice, has found, by a long series of delays, procrastinating requests and deferrals. An answer to one difficulty would lead to the raising of another. A minute discrepancy in the recording of the respondent's date of birth in a document from Germany was seized upon. A certificate from the Bavarian Ministry of Health as to the respondent's qualifications was rejected because it was based on the Ministry's records, rather than on those of the University at Munich where she had obtained her degree. Although the respondent had a post-graduate degree, much was made of a request for "a transcript of her first medical degree". It would be tedious to repeat, in these reasons, the numerous inconsequential difficulties that were raised. A reading of them suggests there is truth in the written submission of Mr Niu (for the respondent) that the "could not produce the 'required' documents because they were only required because she could not produce them!"

But by 23 March 1995, the Registrar was able to write that the "Council no longer doubts the authenticity of the documents submitted so far". Nevertheless, the Council met on 29 March 1995, and, although all this time no objection had been raised to the respondent practising while her application was pending, the minutes record the following:

"The Council realises that it cannot claim that [the respondent] does not respect the law. Nor does it [have] the power to close [her] clinic ... It therefore resolved that the Chairman, as Director of Health, could firstly inform dispensaries not to accept prescriptions from her and secondly, refer the matter to the Ministry of Police to handle."

On 11 April 1995, the Director of Health wrote to the respondent, his Honour found, advising her to discontinue her medical practice immediately "as we have no authority to do otherwise but to refer your case to the police." The respondent received this letter on 13 April, and the same day her lawyer replied, by letter and orally. He recorded his discussion with the Registrar, and sent him a facsimile copy, also on the same day. In that discussion, the Registrar said "that they have received communication from the University in Germany which has now satisfied the Director of Health, and himself, the Registrar ... as to the matter required by the Council, and subject to any other view of the Council when it will meet, they see no reason to refuse to approve [the respondent's] registration under the new Act." The advice of two days before to close the clinic was withdrawn.

But when the Council met, without recording minutes, on 27 April 1995, obstruction continued. A long resolved discrepancy was raised again; a need of further reference was suggested; and the respondent's continuance in practice was treated as a flouting of the law. It was resolved not to register her but to obtain translations of certain documents, and to refer the matter to the police. Letters then written to her and her lawyer, which made no mention of the references, the translations, or the discrepancy, but the letter to the lawyer did advise the matter was "being forwarded to the police for their appropriate action".

On 5 May 1995, the respondent commenced her action, seeking declarations, injunctions and judicial review, as well as damages.

On 6 June, 1995, the respondent's application for registration was approved by the Council.

Registration having been granted just a month after action, the matter could not proceed as a claim for judicial review. However, an objection was taken by the appellants that, as judicial review had been claimed, leave was required to maintain the proceeding. By orders made on 6 October 1995, the necessary leave was granted, and the respondent was also given leave to file an amended Statement of Claim, which was filed on 20 October 1995. The amended Statement of Claim abandoned all prayers for judicial review, declarations and injunctions. The relief it sought was damages, including exemplary and punitive damages, and costs. The cause of action was not given a name, but the essential facts were pleaded to found relief for the tort of abuse of public office or, as it is often called, misfeasance of office.

The pleading alleged that the requirement with respect to the respondent's primary medical qualification "was used by [the Council] as a ground for the delay of the approval"; and that the actions of the Council with respect to the respondent (pleaded in detail as "wrongful actions") "have been unlawful ... arbitrary and oppressive". It was alleged that the Council "was satisfied that the [respondent] was duly qualified to be entered into the register but that it chose to decline to approve her to be registered upon the ground that she had defied their advice to her to close her practice down".

At the hearing, the Chief Justice, having found the facts recited above, reached the conclusions: "that [the Council] has failed (entirely, in some instances and, properly in others) to perform its statutory duties; ... that [the Council], in exercising its statutory

powers and discretions acted capriciously and ... in bad faith".

The Chief Justice's findings and conclusions establish liability in accordance with the principles relating to misfeasance of office. In Salmond and Heuston On the Law of Torts, 19th ed. (1987), at 43, it is stated:

> "There is a recognised tort of misfeasance in a public office. Therefore damage caused by the malicious or negligent exercise of statutory powers by a statutory corporation or public officer is actionable. But the defendant must be proved to have known he was acting *ultra vires*, or maliciously, otherwise every property owner damaged by an invalid planning resolution could sue."

In Austen v Civil Aviation Authority (1994) 50 F.C.R. 272 at 280, a Full Court of the Federal Court of Australia accepted that "the rule should be taken to go this far at least that if a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person." The tort was described by Lord Diplock in Dunlop v Woollahra Municipal Council [1982] AC 158 at 172 as "well - established". What must be shown to prove a case on this basis was considered by the Court of Appeal in Bourgoin S.A. v Ministry of Agriculture, Fisheries and Food [1986] 1Q.B. 716 at 775 et seq. Oliver L.J. (as he then was) said (at 777): "If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them." Accordingly, he could see no distinction between an officer performing an act beyond power with the object of injuring a person (ie. maliciously), and the case where he performs an act, knowing it is beyond power, with some other object, there being a foreseeable and actual consequence of injury to a person. Oliver L.J. referred with apparent approval to a statement of Sir William Wade that either malice or knowledge of invalidity was a necessary element of the tort of misfeasance of office.

In the present case, the findings of the trial judge fully establish the requirements of the tort. It is apparent he was satisfied that the Council knowingly exceeded its powers, so as to act in bad faith in dealing with the respondent's application. As malice and knowledge are alternatives, he need not have gone further, but he found that the Council acted "capriciously" and that it acted towards th respondent in a manner that was "plainly discriminatory". That is a finding of malice.

It should be emphasized that a case involving the tort of misfeasance of office is not an ordinary case. Imcompetence, even gross incompetence, will not suffice. Nothing short of malice or knowledge of invalidity will do. Knowledge, for this purpose, will not be imputed upon some principle of constructive knowledge, but must be found as a reality. However, where the necessary facts are proved. the law must not hesitate to make the appropriate finding in order to vindicate the citizen against abuse of official power.

Accordingly, the challenge to the Chief Justice's finding of liability fails. As the Council was acting on behalf of the Ministry, and with its authority, both actual and as clearly held out, the Kingdom of Tonga is vicariously responsible.

The next question is damages. The Chief Justice calculated the damages at $5000 for loss of income, $10,000 for damage to reputation, $5000 for distress and other suffering, $10,000 for the cost of obtaining North American qualifications and $5000 for exemplary or punitive damages, a total of $35,000. Of these figures, the sum of $10,000

in respect of North American qualifications and $5000 exemplary or punitive damages came under particular attack.

There is a difficulty about allowing the whole cost of obtaining an alternative qualification, without any discount for the benefit so gained. The respondent is free to utilize her additional qualifications as she may choose. Therefore, there should be substituted for this sum an amount sufficient to compensate the respondent for being compelled to seek additional qualifications she might otherwise not have sought, and that at a time not of her choosing, a time forced on her by the respondent's actions. For this,
200 $2000 seems a reasonable estimate.

So far as exemplary or punitive damages are concerned, there is a principle that such an award should have regard to the punitive consequences of the compensatory damages. What is required, in this respect, is an award that marks the Court's strong disapprobation of the conduct in question. For that purpose, a sum of $3000 seems sufficient.

For these reasons, the verdict should be varied by reducing it to $25,000. Otherwise, the appeal should be dismissed. The appellants should pay three quarters of the respondent's costs.