

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**IN THE MATTER OF AN APPLICATION BY DAVID ALEXANDER
PHILLIPS FOR JUDICIAL REVIEW**

CARSWELL LCJ

This is an appeal from an order of Kerr J given on 13 December 2000, whereby he dismissed an application brought by the appellant for judicial review of a decision of the respondent, the Civil Service Appeal Board (CSAB), dismissing the appellant's appeal against the decision of the Ministry of Defence (MoD) to terminate his employment with effect from 22 February 1993. The issue upon which the appeal turned was whether the CSAB in reaching its decision took into account sufficiently or at all certain correspondence which had passed between MoD and Short Brothers plc.

The dispute between the appellant and MoD has had a long and somewhat complex history. In my judgment given at first instance in *Re Phillips' Application* [1995] NI 322 at pages 324 to 331 I set out a summary of the facts of the dispute up to the time of hearing of that application in late 1994, and I would refer to that report rather than repeat the statement of facts over again.

Following the dismissal of that application for judicial review the appellant appealed to the Court of Appeal, which dismissed his appeal on 12 February 1996. On 1 October 1996 his complaint to the industrial tribunal was dismissed. He proceeded with his appeal to the CSAB, which heard the matter on 4 May 1997 and dismissed the appeal on 22 August 1997. The appellant then brought a further application for judicial review, challenging the validity of the decision of the CSAB. In consequence it was agreed that the CSAB would hold a fresh hearing of his appeal before a differently constituted tribunal. This hearing was scheduled for 14 October 1998, but the appellant and MoD agreed an adjournment to facilitate negotiations. These did not bear fruit and on 8 July 1999 the rehearing before the CSAB took place. On 9 July 1999 the CSAB sent a letter to the appellant informing him that his appeal had been dismissed and on 6 September 1999 issued its full written decision.

The appellant on 13 December 1999 commenced the present application for judicial review. The hearing took place on 21 September 2000 and 13 December 2000, and on the latter date the judge gave an oral judgment dismissing the application. The appellant appealed to this court by notice dated 30 January 2001, and on 24 May 2001 the court extended the time for appeal. Eventually after various applications the appeal came on for hearing on 17 April 2002.

The correspondence round which the present appeal centres consisted of letters between Shorts plc and MoD concerning complaints made by Shorts

plc about the appellant. The two most material letters upon which the appellant relied were the following:

- (a) a letter dated 29 October 1991 from Mr Raitt-Brown, an executive director of Shorts plc, to Mr G Eynon, Director, Quality Assurance – Operations in MoD, in which the writer stated:

“My Divisional Quality Manager, Mr R Paul has drawn my attention to the problems which exist between members of his team and DGDQA Representative Mr D A Phillips.

Formal complaints have been made, (Refs QA 55 RJP aa 70 dated 19 September 1991 and QA 55 RJP aa 75 dated 30 September 1991) to Mr K Ralfs and I understand Mr Phillips is aware of this, which has led to further problems in the workplace.

Mr Phillips is now based at our Armaments Facility, a highly sensitive area, where it is essential that good working relationships are maintained between the small team of Shorts people and the DGDQA Representatives.

I am of the opinion that Mr Phillips is disrupting the conduct of our business and I am not prepared to accept his continued presence in Shorts.

Your co-operation in resolving this matter would be appreciated.”

- (b) a reply dated 4 November 1991 from Mr Eynon to Mr Raitt-Brown in the following terms:

“Thank you for your letter regarding Mr D A Phillips, dated 29 October.

I have been aware of the problems surrounding Mr Phillips and would agree that it would be wise to remove him from his current post.

However, as we discussed by telephone today, it would be helpful to me if his removal could be delayed for a week or so. Perhaps we could speak again towards the middle of November.”

I should mention that the appellant maintained on the hearing of the appeal that the latter document was incomplete and had been edited. We do not, however, see any evidence that this was the case: the letter seems to us to be an ordinary carbon copy of a letter the original of which would have been “topped and tailed” by the writer.

The appellant was aware of the existence of letters of complaint from Shorts plc and unsuccessfully sought disclosure of them before the CSAB hearing held on 4 August 1997. The MoD unfortunately saw fit to withhold production of the letters, claiming that they were irrelevant to the issue before the CSAB. The letters were not before the CSAB at the August 1997 hearing, which the appellant did not attend. Eventually MoD did produce the letters, some of them in July 1998 and the copy letter of 4 November 1991 from Mr Eynon on or about 13 October 1998, the eve of the fresh hearing before the CSAB. That hearing was adjourned for settlement discussions and all the letters produced were available to the CSAB when the hearing went ahead in July 1999. The appellant filed a supplemental statement with the CSAB in October 1998, drafted by his counsel, which dealt with the letters produced, and MoD filed a statement in response.

The appellant has maintained throughout, and made it the main plank of his argument in the present appeal, that the correspondence, especially Mr Eynon’s letter of 4 November 1991, showed that his removal to BAe Filton in

1993 was “pre-ordained”, ie the appellant’s MoD superiors had intended all along to send him away from Shorts to another post and the later adverse reports were contrived to support a reason for doing so. The MoD case was that the reason for the appellant’s dismissal was his absence without leave and his failure to report for duty at Filton when instructed, despite warnings of the consequences if he should fail to do so. On that case the letters were background history only and had no bearing on the eventual dismissal.

In his supplementary statement of October 1998 the appellant made his case clear to the CSAB that his removal from Shorts to another location was “pre-ordained” and that his dismissal was not based upon genuine grounds and was unlawful. In our view, with this submission and the letters before them, the CSAB cannot have been left in any doubt that this was an important feature of his case upon which he placed substantial emphasis. At the hearing in July 1999 the appellant was represented by counsel, who made submissions on his behalf in the course of a full day’s hearing of the appeal. It appears from paragraph 5(iii) of the CSAB’s written decision that this case was put before the CSAB and understood by its members.

The CSAB’s understanding and consideration of the appellant’s case appear throughout its detailed written decision. That deals in some detail with the history of the deteriorating relationship between the appellant, Shorts plc and MoD. The CSAB does not accept the MoD submissions uncritically and makes adverse comments in places concerning MoD’s procedures in dealing with the appellant. At paragraph 7(vi)(b) it states:

“The Board were not persuaded by Mr Keogh’s argument that the Box 5 marking of Mr Phillips’ second report (Document L) was preordained, nor could they agree that there was sufficient evidence that the outcome had been determined by the complaints from Shorts.”

Later in the same paragraph it expresses the conclusion that consideration had been given to a transfer from Shorts well in advance of the complaints, and on reasonable grounds. It goes on to refer to the appellant’s unwillingness to compromise or become reconciled to the local MoD management. It states at the end of that paragraph:

“In the circumstances the Board did not think it unreasonable that management were no longer prepared to accept an intransigence which had appeared to affect most important aspects of his performance. They were not surprised that he had received another adverse marking because by that time he had placed himself in an entrenched position. And whilst they could appreciate that, under stress, Mr Phillips may have perceived that the exercise was not carried out in good faith, they did not consider his claim to have been justified.”

In forming its conclusions on the substantive issue the CSAB stated at paragraph 8(ii) of the decision:

“(ii) The Board did not perceive Mr Phillips’ case as either unique or complex although they acknowledged that the inordinate amount of documentation – much of which was repetitious – and the time taken to reach the present stage gave the impression that the reasons for dismissal were complicated.

In fact this was not so. Mr Phillips was dismissed for a straightforward disciplinary offence, the consequences of which he had been warned about on numerous occasions.”

It went on in paragraph 8(iv):

“(iv) The confusion was compounded by the fact that the letters of complaint from Shorts had assumed overwhelming significance for Mr Phillips. He continually maintained that they were the real reason for his transfer to Bristol and ultimately the dismissal. This was perhaps understandable, because they were never shown to him. The Board however, recognised that the letters merely confirmed difficulties with Mr Phillips experienced by others in the past, and as such the Department were fully entitled to take account of them. They agreed also that Mr Phillips’ second report had forced a transfer from his current line management for sound operational reasons, and they viewed his removal from Shorts and the transfer to Bristol as two distinctly separate issues. This was accepted at the hearing. In the view of the Board Shorts’ opinion of Mr Phillips and their request for his removal were not the central issues in this case; they considered that the importance of the correspondence had been greatly exaggerated.”

In her affidavit sworn on 9 March 2000 on behalf of the respondent Miss Patricia Downs, the chairman of the CSAB, states at paragraph 22 that the members of the Board subjected the MoD line managerial representative Mr Rodgers to close and detailed questioning, as the appellant himself acknowledged in paragraph 5 of his affidavit sworn on 12 April 2000. She went on in paragraphs 23 to 26 state the Board’s view of the case made by the appellant:

“23. The detailed questioning of Mr Rodgers by Board members focused on topics which included the content of and background to the correspondence, the reasons why the letters were written, the attitude of Mr Rodgers and other representatives of management to the Applicant and the contents of various staff assessment

reports. The main purpose of this questioning was to explore thoroughly the case which the Applicant was making about the correspondence.

24. The Board is normally presented with staff assessment reports spanning a period of two years. In this case, the Applicant's staff assessment reports relating to a five-year period were specially requested by the Board. This too was designed to probe carefully into the proffered reason for the Applicant's dismissal and the background thereto and to investigate the Applicant's claim that, as evidenced by the correspondence, his final staff assessment report had not been undertaken bona fide and had a pre-ordained unsatisfactory outcome. Board members considered that this would assist them in determining whether the Applicant had been the victim of any unfairness or bias or conspiracy on the part of the individuals concerned.

25. The five-year history which was duly investigated confirmed to Board members that the Applicant's claims about these matters were without foundation. The staff assessments reports spanning this period established a fairly clear pattern of a progressively deteriorating unsatisfactory attitude displayed by the Applicant to his superiors. The Applicant had made the case that his problems had commenced at the time when Mr Ralfs became his manager. However, the staff assessment reports pre-dating and post-dating this change belied the Applicant's assertion in this respect, showing that he had experienced episodes of difficult relationships with other managers to the extent that his continued employment had been seriously in doubt prior to Mr Ralfs' arrival. The problem was at all times one of unsatisfactory attitude, rather than unsatisfactory aptitude.

26. The Board did not conclude that the reason for the Applicant's dismissal was his unsatisfactory staff assessment reports or any of them. Rather, these were considered by the Board to be relevant background to the impugned

decision. A combination of the staff assessment reports and the replies and explanations furnished by Mr Rodgers in response to detailed questioning at the hearing impelled the board to the conclusions that (a) the case made by the Applicant in relation to the correspondence was without substance, (b) the reason proffered by the Ministry for the Applicant's dismissal was genuine and (c) the dismissal was fair and reasonable in all the circumstances."

In paragraph 4 of his affidavit of 12 April 2000 the appellant complained that the Board did not ask the MoD representatives for an explanation of this correspondence:

"The members of the Board did not ask either of the MoD representatives for an explanation of his correspondence. In particular they did not ask either of the MoD representatives for an explanation of Mr Eynon's letter to Shorts, or for their comments on the inference which my counsel had drawn from the letter in the context of the Shorts correspondence as a whole, or whether the letter had any alternative plausible meaning."

This allegation is rejected in paragraph 8 of an affidavit sworn by Mr John Renton, a member of the Board. Mr Renton also states in his affidavit that he pursued with the MoD representatives the issue why they had not made the appellant aware of the contents of the letters of complaint from Shorts. He expressed his own conclusion at paragraph 7:

"Ultimately, at the conclusion of the hearing and following deliberations among Board members, I was satisfied that whereas the Ministry had handled the matter of the correspondence badly, the matters contained in the correspondence did not constitute the reason why the Applicant had been finally dismissed. On this issue, I was sympathetic to the Applicant and considered that he should have been made fully aware of the

contents of the correspondence. However, I concluded with little hesitation that there was no nexus between the correspondence and the decision ultimately made to dismiss the Applicant."

In his judgment Kerr J reviewed the appellant's case and the MoD response and concluded at page 4 that the members of the CSAB were fully alive to the issue that was being raised by the appellant's counsel. He was of opinion that Mr Renton and his colleagues were entitled to reach the conclusion that there was no nexus between the correspondence between Shorts and MoD and the appellant's eventual dismissal. After examining the content of the Board's decision the judge concluded at page 6:

"All of that in my opinion bears testimony to the Board's clear understanding of the case that was being made on behalf of the Applicant and the evaluation of the evidence which touched upon it and well reasoned and analysed rejection of the case that Mr Phillips had been the victim of experiencing. I am therefore satisfied that the central case made on behalf of the Applicant included in this Judicial Review Application has not been made out. I am satisfied that the Board were fully appreciative of the nature of the case made on his behalf in relation to the conspiracy, they investigated that in a manner which was appropriate and that they analysed the evidence and reached a reasonable conclusion upon it."

I am in agreement with the judge's conclusion as so expressed by him. All of the matters set out in the appellant's skeleton argument are facets of that main case, that the CSAB failed to take into proper account and appreciate properly the significance of the correspondence between Shorts and MoD. In so holding I would take the opportunity to re-emphasise that

neither the High Court on an application for judicial review nor this court on appeal is determining the merits of the decision under review, in the sense of forming a view on the correctness of the decision and whether it would have itself reached that conclusion. So long as there is material upon which the deciding tribunal can properly act, and so long as it has taken into account the proper considerations, has not misdirected itself or acted in a procedurally unfair manner – in other words, so long as it has acted within the bounds of the jurisdiction and discretion conferred upon it – it is not for the court to set it aside. In my judgment there was such material, the CSAB did not take into account incorrect considerations or misdirect itself, and there was no procedural irregularity or unfairness. Accordingly its decision must stand and I would dismiss the appeal.