R v East Berkshire Health Authority, ex p. Walsh [1984] APP.L.R. 05/14

CA on appeal from QBD (Mr. Justice Hodgsson) before the MR; May LJ; Purchas LJ. 14th May 1984

THE MASTER OF THE ROLLS:

1. Mr. Walsh was employed by the East Berkshire Area Health Authority and its predecessor as a senior nursing officer at Wexham Park Hospital. Action was taken in September 1982 with a view to terminating his employment and he sought relief by way of judicial review. The authority raised, as a preliminary point, the question of whether such proceedings were appropriate and Mr. Justice Hodgson ruled against the authority. It now appeals. Practitioners will at once recognise that this raises issues of general interest and importance since the authority is seeking to establish what might be described as the obverse of the decision of the House of Lords in ***O'Reilly v. Mackman*** (1983) 2 AC 237.

2. During Mr. Walsh's service at Wexham Park Hospital relations between the medical and nursing staff became strained and the regional health authority set up an independent committee of inquiry under the chairmanship of Mr. Camp, the chairman of the Wycombe Health Authority. The Camp Committee's terms of reference were "to enquire into working relationships between Doctors and Nurses providing psychiatric services based on the Wexham Park Unit and to make recommendations."

3. In August 1982 an incident occurred at Wexham Park Hospital involving a patient, Mr. Walsh and Miss Cooper, the district nursing officer. The details and the merits of the dispute are a matter of controversy, but happily are irrelevant for present purposes. Suffice it to say that on or about the 25th August, 1982 Miss Cooper suspended Mr. Walsh from duty. Miss Cooper was senior to Mr. Walsh, the nursing hierarchy in descending order being district nursing officer, divisional nursing officer and senior nursing officer.

4. At about the same time the Camp Committee reported. It was concerned with much wider issues than those affecting Mr. Walsh, but its findings were critical of him and recommended, inter alia, that *"We are nevertheless firmly of the opinion that Mr. Walsh's conduct makes his further employment in any capacity in East Berkshire undesirable and fully justifies his dismissal. We recommend that he is immediately suspended from duty and that he is dealt with in accordance with the disciplinary policy operated by East Berkshire Health Authority in cases of serious misconduct."*

5. On the 9th September, 1982 Miss Cooper invited Mr. Walsh to attend a disciplinary hearing in her office on the 16th September at which seven specific allegations of misconduct and the findings and recommendations of the Camp Committee in relation to Mr. Walsh were to be discussed. That meeting duly took place and by a letter dated the 27th September, 1982 Miss Cooper purported to terminate Mr. Walsh's employment. Subsequently Miss Cooper gave 23 reasons for her action. Mr. Walsh initiated the internal appeal procedures, but the appeal committee of the authority affirmed Miss Cooper's decision and the regional health authority declined to entertain any further appeal.

6. During the course of these appeals Mr. Walsh did two things. First in point of time, he applied to an industrial tribunal alleging that he had been unfairly dismissed and seeking compensation. Second, he applied for judicial review claiming "An Order to quash the purported dismissal of the Applicant by the Respondent Authority and acts taken in relation thereto and to prohibit the continuance of the appeal hearings by the Respondent Authority considering the said purported dismissal and to quash any determination taken at or by any such appeal hearings." The application for prohibition was abandoned when the matter came before Mr. Justice Hodgson, because the appeal hearings had already been concluded. However it continued as one for certiorari. Mr. Walsh did not claim damages, no doubt because he or his advisers took the view that the quashing of the dismissal would leave his contract of employment intact and entitle him to full pay unless and until there was a further and valid dismissal. Furthermore he made no claim for declaratory relief in Form 86A, although in his supporting affidavit he stated that he was seeking an unspecified declaration. Before this court it was suggested that such a declaration would be to the effect that his purported dismissal was void or unlawful and that his contract of employment still subsisted. It would also declare that the purported delegation to district nursing officers of power to dismiss senior nursing officers was ultra vires the authority.

7. The simultaneous prosecution of two wholly inconsistent proceedings, one of which alleged that Mr. Walsh's contract of employment had been terminated and one which alleged that it still subsisted, generated a certain amount of argument. On the view which I take of the main issue in this appeal, these arguments can be disregarded. However it is a situation which can arise in cases in which there is no question of relief being given by way of judicial review. Thus, for example, an employee may have a claim in the High Court or the county court for wages earned before his purported dismissal and, assuming that ***Gunton v. Richmond-on-Thames L.B.C.*** (1980) Industrial Cases Reports 755 was rightly decided and correctly overruled ***Sanders v. Ernest A. Neale Ltd.*** (1974) Industrial Cases Reports 565, a decision of Sir John Donaldson, P. which ; I would otherwise have found wholly persuasive, may also claim a declaration that the purported dismissal was ineffective to terminate the contract of employment, coupled with consequential monetary claims. At the same time he may well wish to protect his right to claim compensation for unfair dismissal if, contrary to his primary contention, his contract of employment has been terminated. Such a claim can only be made to an industrial tribunal and, furthermore, the prosecution of such a claim is subject to strict time limits. Where such a situation arises, the applicant for compensation for unfair dismissal should plainly state in his application that it is) made to preserve his rights and that his primary contention is that his contract of employment still subsists. The industrial tribunal will then be able to decide whether to proceed with the application or to adjourn it pending the outcome of the parallel and inconsistent proceedings.

8. I now return to the main issue, namely whether Mr. Walsh's complaints give rise to any right to judicial review. They all relate to his employment by the health authority and the purported termination of his employment and of his contract of employment. Essentially they fall into two distinct categories. The first relates to Miss Cooper's power to act on behalf of the authority in dismissing him. The second relates to the extent to which there was any departure from the rules of natural justice in the procedures which led up to that dismissal. Both fall well within the jurisdiction of an industrial tribunal. The first goes to whether or not Mr. Walsh was dismissed at all within the meaning of section 55 of the Employment Protection (Consolidation) Act 1978. The second goes to whether the dismissal, if such there was, was unfair. Furthermore, both are issues which not uncommonly arise when the employer is a company or individual, as contrasted with a statutory authority. However, this only goes to the exercise of the court's discretion, whether or not to give leave to apply for and whether or not to grant judicial review. As the appellants seek to have the proceedings dismissed in limine, if they are to succeed they can only do so on the basis that, accepting all Mr. Walsh's complaints as valid, the remedy of judicial review is nevertheless wholly inappropriate and the continuance of the application for judicial review would involve a misuse - the term "abuse" has offensive overtones - of the procedure of the court under R.S.C Order 53.

9. The remedy of judicial review is only available where an issue of *"public law"* is involved, but, as Lord Wilberforce pointed out in ***Davy v. Spelthorne B.C.*** (1984) 1 AC 262, 276, the expressions "*public law"* and *"private law"* are recent immigrants and, whilst convenient for descriptive purposes, must be used with caution, since English law traditionally fastens not so much upon principles as upon remedies. On the other hand, to concentrate on remedies would in the present context involve a degree of circularity or levitation by traction applied to shoestrings, since the remedy of *"certiorari"* might well be available if the health authority is in breach of a *"public law"* obligation, but would not be if it is only in breach of a "*private law"* obligation.

10. The learned judge referred carefully and fully to ***Vine v. National Dock Labour Board*** (1957) AC 488; ***Ridge v. Baldwin (***1964) AC 40; and ***Malloch v. Aberdeen Corporation*** (1971) 1 WLR 1578. He seems to have accepted that there was no "public law" element in an "ordinary" relationship of master and servant and that accordingly in such a case judicial review would not be available. However, he held, on the basis of these three cases and, in particular, ***Malloch's*** case, that Mr. Walsh's relationship was not "ordinary". He said: *"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. It is not a pure question of contract. The public is concerned that the nurses who serve the public should be treated lawfully and fairly by the public Authority employing them ... It follows that if in the exercise of my discretion I conclude that the remedy of* ***certiorari*** *is appropriate, it can properly go against the respondent Authority."*

11. The learned judge then said that if he was wrong in this conclusion, it would be appropriate to allow the proceedings to continue as if they had been begun by writ - see R.S.C. Order 53 rule 9(5).

12. None of the three decisions of the House of Lords to which I have referred was directly concerned with the scope of judicial review under R.S.C. Order 53. Two (***Ridge*** and ***Malloch***) were concerned with whether or not the plaintiff had a right to be heard before being dismissed and the third (***Vine)*** with whether the body purporting to dismiss was acting ultra vires. ***Vine*** and **Ridge** were actions begun by writ. ***Malloch*** was a Scottish proceeding in which the remedy of "production and reduction" was claimed. This is indeed akin to certiorari, but it is available whether or not the claim involves "public" or "administrative" law. There are, however, dicta, particularly in the speech of Lord Wilberforce in ***Malloch's*** case, which may be thought to point the way in which we should go.

13. In ***Ridge v. Baldwin*** (1964) AC 40 at page 65, Lord Reid classified dismissals under three heads in terms of the right to be heard. They were (a) dismissal by a master, (b) dismissal from an office held during pleasure, and (c) dismissal from an office where there must be something against a man to warrant his dismissal. He held that in case (b) there was no right to be heard and that in case (c) there was always a right to be heard. Dealing with *master and servant cases (case (a) above) he said: "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence; it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them."*

14. Lord Reid was also a party to the decision in ***Malloch's*** case. He said, (1971) 1 Weekly Law Reports at page 1582G: *"An elected public body is in a very different position from a private employer. Many of its servants in the lower grades are in the same position as servants of a private employer. But many in higher grades or 'offices' are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and, where a statutory form of protection would be less effective if it did not carry with it a right to be heard, I would not find it difficult to imply this right. Here it appears to me that there is a plain implication to that effect in the 1982 Act."*

15. Lord Wilberforce said at page 1595H: *"One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there*

*is no element of public employment (or -service, (ho support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some **inter partes** aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void."*

And at page 1596H he said: *"Statutory provisions similar to those on which the employment rested would tend to show, to my mind, in England or in Scotland, that it was one of a sufficiently public character, or one partaking sufficiently of the nature of an office, to attract appropriate remedies of administrative law."*

16. In all three cases there was a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff. In ***Vine*** the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismiss given by that scheme. In ***Ridge*** the power of dismissal was conferred by statute (section 191(4) of the Municipal Corporations Act 1882). In ***Malloch*** again it was statutory - section 3 of the Public Schools (Scotland) Teachers Act 1882. As Lord Wilberforce said, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law. Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a "higher grade" or is an "officer". This only makes it more likely that there will be special statutory restrictions upon dismissal or other underpinning of his employment (see per Lord Reid in ***Malloch*** (supra)). It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the interest of the public per se is not sufficient.

17. I have therefore to consider whether and to what extent Mr. Walsh's complaints involve an element of public law sufficient to attract public law remedies, whether in the form of certiorari or a declaration. That he had the benefit of the general employment legislation is clear, but it was not contended that this was sufficient to attract administrative law remedies. What is relied upon are statutory restrictions upon the freedom of the authority to employ senior and other nursing officers on what terms it thought fit. This restriction is contained in the National Health Service (Remuneration and Conditions of Service) Regulations 1974, S.I. 1974 No. 296, which provides that "*Where conditions of service, other than conditions with respect to remuneration, of any class of officers have been the subject of negotiations by a negotiating body and have been approved by the Secretary of State after considering the result of those negotiations, the conditions of service of any officer belonging to that class shall include the conditions so approved."*

18. The conditions of service of, inter alios, senior nursing officers were the subject of negotiations by a negotiating body, namely the Whitley Councils for the Health Service (Great Britain) and the resulting agreement was approved by the Secretary of State. It follows, as I think, that if Mr. Walsh's conditions of service had differed from those approved conditions, he would have had an administrative law remedy by way of judicial review enabling him to require the authority to amend the terms of service contained in his contract of employment. But that is not the position. His notification of employment dated the 12th May, 1975, which is a memorandum of his contract of employment, expressly adopted the Whitley Council regulations and conditions of service.

19. When analysed, Mr. Walsh's complaint is different. It is that under those conditions of service Miss Cooper had no right to dismiss him and that under those conditions he was entitled to a bundle of rights which can be collectively classified as "natural justice". Thus he says, and I have to assume for present purposes that he is correct, that under section XXXIV of the General Council's agreement on conditions of service, his position as a senior nursing officer is such that his employment can only be terminated by a decision of the full employing authority and that this power of dismissal cannot be delegated to any officer or committee of officers. I do not think that he relies upon any express provision of those conditions when claiming the right to natural justice, but if he has such a right, apart from the wider right not to be unfairly dismissed which includes the right to natural justice, it clearly arises out of those conditions and is implicit in them.

20. The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for re-instatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedies. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring "private law" rights under the terms of the contract of employment. If the authority fails or refuses to thus create "private law" rights for the employee, the employee will have "public law" rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of "public law" and gives rise to no administrative law remedies.

21. At one stage in the argument, I did wonder whether the issuing of the *"personnel policy*" document whereby the authority authorised district nursing officers, such as Miss Cooper, to "hire and fire" senior nursing officers, such as Mr. Walsh, could be regarded as a breach of a *"public law"* duty of the authority, but came to the conclusion that it could not. If Mr. Walsh is right in his claim to be dismissable only by the authority itself, the issuing of this document was an anticipatory breach of his contract of employment which became a final breach when Miss

Cooper acted on it. I say this because the authority was not purporting to vary his conditions of service, but only to act consistently with them. In any event, no relief was claimed by Mr. Walsh in respect of the issuing of this policy document.

22. I therefore conclude that there is no *"public law"* element in Mr. Walsh's complaints which could give rise to any entitlement to administrative law remedies. I confess that I am not sorry to have been led to this conclusion, since a contrary conclusion would have enabled all National Health Service employees to whom Whitley Council conditions of service apply to seek judicial review. Whilst it is true that the learned judge seems to have thought that this right would be confined to senior employees, I see no grounds for any such restriction in principle. The most that can be said is that only senior employees could complain of having been dismissed in the exercise of delegated authority, because it is only senior employees who are protected from such dismissal. All employees would however have other rights based upon the fact that Parliament had intervened to specify and, on this view, protect those conditions of service as a matter of "public law".

23. In my judgment, this is not therefore a case for judicial review.

24. There remains the alternative of allowing the matter to proceed pursuant to R.S.C. Order 53 rule 9(5) *"as if it had been sought in an action begun by writ"*.

25. This is an anti-technicality rule. It is designed to preserve the position of an applicant for relief, who finds that the basis of that relief is private law rather than public law. It is not designed to allow him to amend and to claim different relief.

26. Only two species of relief are claimed by the notice of application, namely certiorari and prohibition. Prohibition is no longer sought and certiorari is a purely public law remedy. If Order 59 rule 9(5) is to be applied in Mr. Walsh's case, it can only be on the basis that the passing reference in his affidavit to "a declaration" is sufficient to justify the court in ordering the proceedings to continue as if a declaration had been sought in an action begun by writ. But if a declaration had been so sought, its terms would have been defined, if not in the writ, at least in the statement of claim. Yet in the 592 pages of documentation before Mr. Justice Hodgson the terms of the declaration are never mentioned. Even in this court all that has been achieved, under pressure from the court, is a few lines indicating the type of declarations which might be sought if leave were given to amend to seek declarations. Furthermore, it seems likely that Mr. Walsh will want to claim damages, although there is no hint of that in the papers, and may also want to claim accrued wages, i.e. to have a judgment in debt, but that is outside the scope of Order 53. Accordingly I would not allow Mr. Walsh to continue the proceedings under rule 9(5) and claim declaratory relief. I consider that costs will be saved and the issues emerge much more clearly if Mr. Walsh issues a writ and properly formulates what relief, if any, he is really seeking in addition or in the alternative to his claim for unfair dismissal.

27. Mr. Justice Hodgson also gave certain preliminary rulings on whether the dismissal of itself terminated the contract of employment, whether the bringing of proceedings in the industrial tribunal constituted an acceptance of a repudiation of his contract of employment by the employing authority and - -the effect of a declaration that the employers' dismissal was unlawful, assuming that there was no acceptance of the employing authority's conduct as a repudiation. As I understand the matter, these points were explored in the context of whether rule 9(5) should be applied and on the basis of very considerable assumptions. If the view of this court is that rule 9(5) is inapplicable or should not be applied, their correctness or otherwise is not material and I would express no view on these rulings.

28. I would allow the appeal and order that Mr. Walsh's application for judicial review be dismissed.

LORD JUSTICE MAY:

29. In these proceedings Mr. Walsh seeks judicial review in the nature of certiorari to quash not only his dismissal by the Health Authority, but also all acts taken in relation to that dismissal as well as any determination taken at or by appeal hearings considering his dismissal. The authority sought to have those proceedings dismissed in limine. The learned judge below rejected their application and they now appeal against that decision. I respectfully agree with the Master of the Rolls that we must decide this appeal on the basis that Mr. Walsh's allegations of fact are accurate and his complaints against the appellants are valid, and that the latter can only succeed if, nevertheless, the original application under R.S.C. Order 53 was misconceived and an abuse of the process of the court.

30. Before I consider the principal question in this case, however, there are a number of preliminary matters to which I wish to refer. First, as the Master of the Rolls has commented, the appellants' application to the learned judge below and their appeal from his decision raise issues which are the obverse of those considered in ***O'Reilly v. Mackman (***1983) 2 AC 237. In that case the House of Lords was concerned to ensure that where a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law, he should not be enabled, by proceeding by way of an ordinary action, to evade the provisions of Order 53 for the protection of such authorities - see per Lord Diplock at page 285E of the report. By their application in this case the appellants are necessarily disclaiming any entitlement to rely upon those protective provisions of Order 53. This consideration cannot of course be relevant to the basic question whether there is any "public law" element in this case: it does, however, form part of the context in which the appellants' application and appeal are being prosecuted and would be relevant on the question of the exercise of the court's discretion.

31. Secondly, over the last decade Parliament has enacted a body of employment protection legislation, now consolidated in the Employment Protection (Consolidation) Act 1978. This has created a new cause of action and consequent remedies for employees who have been "unfairly" dismissed. An unfair dismissal under the statute is by no means simultaneously a wrongful dismissal at common law. This new cause of action, however, and the statutory remedies that go with it, are not enforceable by ordinary action, nor indeed by judicial review: they are only available to an employee upon a successful application to an industrial tribunal. As the Master of the Rolls has said, Mr. Walsh has indeed made an application to such a tribunal alleging that he has been unfairly dismissed and seeking compensation. Any hearing of this has been adjourned pending the determination of the instant proceedings for judicial review.

32. Upon a successful application to an industrial tribunal alleging unfair dismissal, the tribunal may in its discretion order the reinstatement of the employee - see section 69 of the 1978 Act. Such an order cannot be specifically enforced against the employer, but if the latter does not reinstate the employee whom ex hypothesi he has unfairly dismissed, then the employee is entitled to compensation under sections 71 to 76 of the Act, which will in most cases well exceed any damages to which the employee might have been entitled for wrongful dismissal at common law.

33. Further, a substantial number of successful applications alleging unfair dismissal are decided in favour of the employee because his employer has failed fully to operate his own dismissal and appeals procedures. Section 1(4) of the Act contemplates that all employers will have some such procedures and as long ago as 1977 the Code of Practice on Disciplinary Practice and Procedures in Employment was issued by the Advisory, Conciliation and Arbitration Service (ACAS) pursuant to section 6(1) and (8) of the Employment Protection Act 1975. By section 6(11) of this Act this Code of Practice is admissible in evidence in any proceedings before an industrial tribunal and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings it has to be taken into account in determining that question.

34. In the course of the argument on this appeal, counsel for Mr. Walsh contended that one of his client's principal objects in initiating his judicial review proceedings was "to clear his name". How much more quickly and cheaply this could be achieved by obtaining a finding from an industrial tribunal that he had indeed been unfairly dismissed.

35. I next turn in these preliminary observations to what was in fact the final substantive question which the learned judge below was asked to answer in the proceedings before him, namely the effect in law of the purported dismissal on Mr. Walsh's contract of employment. Clearly associated with this is the question of the effect in law either of quashing the dismissal by way of judicial review or of making a declaration that the dismissal was invalid in proceedings properly started claiming such declaratory relief. As the Master of the Rolls has said, the only claim for relief presently before the court is for judicial review of the dismissal in the nature of certiorari.

36. On these questions the learned judge relied on the decision of this court in ***Gunton v. Richmond-upon Thames L.B.C.*** (1980) 1 ICR 755 and held that an order quashing the dismissal or making a declaration that the dismissal was invalid would not be nugatory. He followed the opinion of both Lord Justice Buckley and Lord Justice Brightman in that case that an unaccepted wrongful dismissal of an employee by an employer does not of itself determine the contract of service, even though it will put an end to the status or relationship of master and servant - per Lord Justice Brightman (as he then was) at page 778E-F of the report. As the judgment of Lord Justice Buckley in particular in the same case shows, this is a question upon which over the years there has been a substantial difference of judicial opinion. This being so, it is to be noted that the learned judge below was not referred to the later decision also of this court in ***London Transport Executive v. Clarke*** (1981) Industrial Cases Reports 355 and to the subsequent reserved judgment of the Employment Appeal Tribunal in ***Robert Cort & Son v. Charman*** (1981) Industrial Cases Reports 816 given by the then President, Mr. Justice Browne-Wilkinson (as he then was). In that judgment the learned President expressed the view, with which I respectfully agree, that this difficult question of the effect of an unaccepted wrongful dismissal is still unresolved. I also agree that the 1978 Act appears to have been drafted on the footing that "*the unilateral view*" is correct, that is that a dismissal even without the contractually required notice terminates the contract - see section 55 of the Act. For my part, although it may not be directly relevant to the basic issue which we have to decide, I too prefer the unilateral approach and answer to this preliminary question. Respectfully I find it difficult to see any real distinction between a contract of service, on the one hand, and the status or relationship which it creates on the other. I respectfully agree with the dissenting opinion of Lord Justice Shaw in ***Gunton's*** case which was in these terms:

> *"Therefore, as it seems to me, there can be no logical justification for the proposition that a contract of service survives a total repudiation by one side or the other. If the only redress is damages, how can its measure or scope be affected according to whether the contract is regarded as subsisting or as at an end? To preserve the bare contractual relationship is an empty formality. The servant who is wrongfully dismissed cannot claim his wage for services he is not given the opportunity of rendering; and the master whose servant refuses to serve him cannot compel that servant to perform his contracted duties. In this context remedies and rights are inextricably bound together. It is meaningless to say that the contract of service differs from other contracts only in relation to the availability of remedies in the event of breach. The difference is fundamental, for there is no legal substitute for voluntary performance."*

37. In my opinion, therefore, if this is an "ordinary" master and servant case with no element of "public law" Involved, then any order by way of certiorari as that which is sought by Mr. Walsh would be nugatory, as would any declaration (had such relief been asked for) to the like effect.

38. For all these reasons I think that earlier decisions in this general field must now be read in the light of the employment protection legislation to which I have referred. The concept of natural justice involved in many of the cases is clearly now subsumed in that of an "unfair dismissal". To the extent that such cases laid down any principle of law, then of course they must be followed. As always, however, to the extent that they were really decided upon their own facts they provide no precedent for later cases.

39. Further, I think that at the present time in at least the great majority of cases involving disputes about the dismissal of an employee by his employer, the most appropriate forum for their resolution is an industrial tribunal. In my opinion the courts should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure provided for by Order 53. Employment disputes not infrequently have political or ideological overtones, or raise what are often described as "matters of principle": these are generally best considered not by the Divisional Court but by an industrial tribunal to the members of which, both lay and legally qualified, such overtones or matters of principle are common currency.

40. I turn therefore to consider the basic issue in this case. On it the learned judge relied principally, if not entirely, on the House of Lords decision in ***Malloch v. Aberdeen Corporation*** (1971) 1 WLR 1578 and expressed his conclusion that Mr. Walsh's employment did have a "public law" element so as to make his dismissal amenable to judicial review in this way: *"Mr. Morison seeks, as he must, to distinguish **Malloch** from the present case. I am quite unable to see how that can be done. And I am glad it cannot. 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. It is not a pure question of contract. The public is concerned that the nurses who serve the public should be treated lawfully and fairly by the public Authority employing them."*

41. If in this passage from his judgment the learned judge used the word "office" in contradistinction to "employment", then with respect I cannot agree with him. There was no evidence before him, nor is there before us, that Mr. Walsh held an "office" with the appellants in the sense that that word was used, for instance (albeit in an income tax context) in ***Edwards v. Clinch*** (1981) 3 WLR 707, where the House of Lords approved the dictum of Mr. Justice Rowlatt in ***Great Western Railway Co. v. Bater*** (1920) 3 King's Bench 266 at page 274 that an office was something: *"Which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders."*

42. If, on the other hand, the learned judge was saying no more than that where a servant is employed by a great public service a "public law" element is involved because such an employment is not a pure question of contract - "the public are concerned that the nurses who serve the public should be treated lawfully and fairly by the public Authority employing them" - then I think that he was stating the test in far too wide terms. At one time it was contended before us that Mr. Walsh was entitled to seek judicial review because of the seniority of his post, but if the learned judge's statement is taken in its ordinary meaning it would follow that every nurse employed by a health authority is entitled to judicial review of his or her dismissal. Indeed, if one carries the argument to its logical conclusion, any employee of any substantial public body could do so as well. So wide an extension of the procedure would clearly involve a misuse of the provisions of Order 53.

43. Further, I do not think that the speeches of the majority of the House of Lords in ***Malloch's*** case do support the wide principle which the learned judge applied in his judgment in the instant case. In the former, the appellant school teacher was contending that his dismissal by the Aberdeen Corporation had been invalid, principally because it had been effected contrary to natural justice in that he had not been given a hearing by the appropriate committee. On the question with which we are presently concerned, the relevant passage in Lord Reid's speech, with which Lord Simon of Glaisdale agreed, is at page 1582G of the report and was to this effect:

> *"An elected public body is in a very different position from a private employer. Many of its servants in the lower grades are in the same position as servants of a private employer. But many in higher grades or 'offices' are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and, where a statutory form of protection would be less effective if it did not carry with it a right to be heard, I would not find it difficult to imply this right. Here it appears to me that there is a plain implication to that effect in the 1882 Act. The terms of that Act have been altered by later legislation, but I can find nothing in any later Act which can reasonably be interpreted as taking away that elementary right."*

44. In my opinion the ratio for Lord Reid's view that the appellant in ***Malloch's*** case had been entitled to a hearing was that a statutory provision to that effect was plainly to be implied into the principal statute regulating the relationship between education authorities and teachers. I do not think that Lord Reid's opinion was based upon any general proposition that just because the employer was a public body this necessarily involved some "public law" element in a contract of employment between it and one of its servants, however senior, and that consequently that public employer was bound to observe the principles of natural justice when dismissing the employee.

45. Lord Wilberforce was also prepared to decide the case on the basis of an implied provision in the relevant statute. At page 1598C he said: *"I find the right to be heard in an appropriate situation clearly given by implication."*

46. Nevertheless in discussing the respective arguments which had been addressed to the House of Lords in that case he did express views on the relevant principles upon which the learned judge below in the present case and

counsel for Mr. Walsh before us strongly relied. I think it necessary to quote two short passages from Lord Wilberforce's speech. At page 1594G he said: *"The appellant's challenge to the action taken by the respondents raises a question, in my opinion, of administrative law. The respondents are a public authority, the appellant holds a public position fortified by statute. The considerations which determine whether he has been validly removed from that position go beyond the mere contract of employment, though no doubt including it. They are, in my opinion, to be tested broadly on arguments of public policy and not to be resolved on narrow verbal distinctions."*

And at the foot of page 1595: *"One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void."*

47. In applying the considerations to which the learned Lord referred to the circumstances of the present case I first think, as I have already said, that one must remember that ***Malloch's*** case was decided before the enactment of any of the modern employment protection legislation. Secondly, there is also the fact that Mr. Walsh's contract with the appellants did contain detailed provisions relating to disciplinary and dismissal procedures. Thirdly, although the relevant statutory instrument provided that where conditions of service of, for instance, senior nursing officers had been the subject of negotiations by a negotiating body (a normal civil service Whitley Council) and had been approved by the Secretary of State, then Mr. Walsh's contract should include those conditions, I doubt whether it can be said that Mr. Walsh's conditions of service were "fortified by statute" in the sense meant by Lord Wilberforce. It could have been different had Mr. Walsh's claim been that in some respects his contract with the appellants had not incorporated the agreed conditions: but that is not his claim in the present proceedings which is merely that his employers failed to comply with some of such conditions, express or implied.

48. If one seeks to apply the considerations to which Lord Wilberforce referred in ***Malloch's*** case, certainly the appellants are a public authority. I doubt, however, whether one should properly say, in the present context, that as a senior nursing officer Mr. Walsh held a public position: whether he did or not, it was only "fortified by statute', to the extent I have indicated. Having regard to the detailed terms of Mr. Walsh's contract with the appellants, I do not think that the considerations which determine whether he was validly dismissed do go beyond that contract. I respectfully see no reason why those considerations in the circumstances of the instant case require to be tested broadly on arguments of public policy. The fundamental issues are whether the appellants had grounds to dismiss Mr. Walsh summarily and whether they did so in accordance with his detailed terms and conditions of service.

49. For all these reasons I am driven to differ respectfully from the conclusion of the learned judge below. I do not think that there is any element of "public" or "administrative" law in this case rendering it susceptible to or suitable for proceedings for judicial review under Order 53- On the contrary, there is in my opinion nothing in this case which takes it out of the "ordinary" (by which one intends no disrespect to either side) employer employee unfair dismissal dispute, one which could and should long ago have been relatively cheaply determined by an experienced industrial tribunal. It follows that in my opinion Mr. Walsh's application was a misuse of Order 53.

50. For the reasons given by the Master of the Rolls, I agree that in the light of the limited nature of the relief claimed by Mr. Walsh in his applications there is no scope to apply Order 53, rule 9(5) in this case. Even if there were, in the exercise of my discretion I for my part would not so order. With all respect to the learned judge, I think that the issues between Mr. Walsh and the appellant require precise identification, which cannot just be done in the context of the extensive affidavits and documentation before us. Further, I doubt very much whether the issues once defined can then be sufficiently determined merely by the cross-examination of Mr. Walsh and Miss Cooper on their respective affidavits. I think it very probable that other oral evidence will be required satisfactorily to determine the defined issues.

51. Finally, save as I have already adverted to any of them in this judgment, I too express no view on any of the other rulings of the learned judge below.

52. I therefore agree that this appeal should be allowed and that Mr. Walsh's application for judicial review should be dismissed.

LORD JUSTICE PURCHAS:

53. The point central to this appeal arises out of the second of a number of preliminary points decided by Mr. Justice Hodgson on an application under R.S.C. Order 53 for judicial review by way of certiorari. The learned judge decided the preliminary points, albeit somewhat reluctantly, at the request of Mr. Morison who appeared then and still appears for the Health Authority but with the concurrence of Mr. Bowyer who appears for the applicant. The question was whether ***"this application should be dismissed as an abuse of process".*** By whatever language the preliminary point is described, it involves a denial of the particular form of justice sought at the hands of the court by one party upon the application of another. A party inviting the court to take this draconian step assumes a heavy burden. He must, in my judgment, establish on primary facts where in dispute assumed in favour of the other party that there is no reasonably arguable case to be made to justify the court granting the relief sought.

54. It was necessary in order to succeed for the authority to establish that the applicant, Mr. Walsh, had no cause of action which it could be argued was capable of being made the subject of an application under Order 53. Provided that there is an arguable case for seeking relief under Order 53, upon an application to dismiss the application as being an abuse of the process of the court it is not, in my judgment, of assistance to consider alternative courses of action open to the applicant even if from certain aspects the alternative remedies thereby available might appear to produce a more attractive result. Order 53 talks about "remedies" rather than courses of action:

"53/1. Cases appropriate for application for judicial review. (0.53 r.l).

(1) An application for -
(a) an order of mandamus, prohibition or certiorari, or
(b) an injunction under section 9 of the Administration of Justice (Miscellaneous Provisions) Act 1938 restraining a person from acting in any office in which he is not entitled to act,

shall be made by way of an application for judicial review in accordance with the provisions of this Order.
(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (l)(b)) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to -
(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,
(b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
(c) all the circumstances of the case,

it would be just and convenient for the declaration or injunction to be granted on an application for judicial review."

"53/9 (5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ; and Order 28, rule 8, shall apply as if, in the case of an application made by motion, it had been made by summons."

55. In order to resolve the question, it is necessary to decide (a) what exactly were the remedies sought by the applicant; and (b) were those remedies ones in respect of which a claim could properly be made under Order 53, even if other relief could have been obtained by another process. As the Master of the Rolls has said, Mr. Walsh first sought an order of prohibition, later pursued as an order of certiorari; but only mentioned in general terms relief by way of declaration not specified. Subsequently during the course of the appeal a document was produced defining in some detail the declaration sought.

56. The remedy sought by the applicant arose out of the terms of his contract of employment with the authority. This much is clear, and further there is no doubt that those terms came into existence against a statutory background created by the National Health Acts and subordinate legislation imposing, inter alia, terms of employment agreed in the Whitley Council. To this extent the contract of employment could be said to have lacked freedom of negotiation normally available in a private contract of employment, and to have been influenced, if not controlled, by statutory powers. Further, as Mr. Bowyer submits, the applicant's complaints, which for the purposes of the trial of the preliminary issue must be assumed to be established, were that he was dismissed from that employment in conditions which amounted to a breach of the rules of natural justice and in particular a failure to observe the doctrine of ***"audi alteram partem***". As the learned judge said at page 10A of the judgment, in referring to part of the speech of Lord Reid in ***Malloch v. Aberdeen Corporation*** (1971) 1 WLR 1578: *"What he wants is to obtain from the courts a recognition of the position precisely envisaged by Lord Reid in* ***Malloch v. Aberdeen Corporation*** *(1971) 1 W.L.R. 1578."*

57. He referred to the following extract from the speech of Lord Reid at page 1584D: *"If, then, the respondents were in breach of duty in denying the appellant a hearing, what is his remedy? It was argued that it would not be right to reduce the resolution of dismissal because that would involve the reinstatement of the appellant ... in effect granting specific implement of his contract of employment which the law does not permit. But that would not be the effect. There would be no reinstatement. The result would be to hold that the appellant's contract of employment had never been terminated and it would be open to the respondents at any time hereafter to dismiss him if they chose to do so and did so in a lawful manner. Unless they chose to do that the appellant's contract of employment would continue.*

Then it was said that the proper remedy would be damages. But in my view, if an employer fails to take the preliminary steps which the law regards as essential he has no power to dismiss and any purported dismissal is a nullity. We were not referred to any case where a dismissal after failure to afford a hearing which the law required to be afforded was held to be anything but null and void."

Later in his judgment the learned judge said at page 14G: *"The applicant is an officer of a profession recognised as a profession by Parliament. He is employed by a Public Authority for public purposes. The actual relationship was technically brought about by legislation but, more importantly, the terms of the relationship between the applicant and the respondent Authority were imposed by a statutory process, particularly as to discipline and dismissal. That shows clearly, in my judgment, the public interest in the relationship."*

58. In saying this the learned judge appears to have had in mind the persons appointed to a position of public status (see the reference to the speeches of Lord Reid and Lord Wilberforce in ***Malloch's*** case at pages 1582G and 1595H already cited in the judgment of the Master of the Rolls).

59. I have no difficulty following the reasoning and approach of the learned judge on the first aspect. Clearly one of the main objects of the applicant in applying for judicial review was to establish that his purported dismissal by the authority was in breach of the terms of his employment importing, as they must, an obligation to carry out their own dismissal procedures according to the rules of natural justice. However, with very great respect to the learned judge, I cannot follow the relevance in the particular context of this case of "the public interest in the relationship."

60. There is a danger of confusing the rights with their appropriate remedies enjoyed by an employee arising out of a private contract of employment with the performance by a public body of the duties imposed upon it as part of the statutory terms under which it exercises its powers. The former are appropriate for private remedies inter partes whether by action in the High Court or in the appropriate statutory tribunal, whilst the latter are subject to the supervisory powers of the court under Order 53. This distinction was emphasised by both Lord Fraser of Tullybelton and Lord Wilberforce in ***Davy v. Spelthorne Borough Council*** (1984) 1 AC 262. Although this case, like the case of ***O'Reilly v. Mackman*** (1983) 2 AC 237 was dealing with what my Lords have referred to as the "obverse situation" to that which arises in the instant appeal, the following extracts from the speeches are, in my judgment, of assistance per Lord Fraser at pages 273B-274F (with parts omitted):

61. "The appellants accept that there are, of course, many claims against public authorities which involve asserting rights purely of private law, and which can be pursued in an ordinary action. They accept also that if a question as to the validity of the enforcement notice had arisen incidentally in an action to which they, the appellants, were not parties, it could properly have been decided in the High Court - for example, if it had arisen as a preliminary issue in an action by the respondent against his solicitors for negligence. But Mr. Sullivan maintained that, when there is an issue between a citizen and a public authority which involves determining whether the citizen can challenge a public notice or order, the only way to decide the issue is by way of procedure under Order 53.

62. Although the argument was presented most persuasively, it is in my view not well founded. The present proceedings, so far as they consist of a claim for damages for negligence, appear to me to be simply an ordinary action for tort. They do not raise any issue of public law as a live issue. I cannot improve upon the words of Fox, L.J. in the Court of Appeal when he said (1983) 81 L.G.R. 580,596: *'I do not think that the negligence claim is concerned with "the infringement of rights to which [the plaintiff] was entitled for protection under public law" to use Lord Diplock's words in* ***O'Reilly v. Mackman*** *(1983) 2 A.C. 237, 285. The claim, in my opinion, is concerned with the alleged infringement of the plaintiff's rights at common law. Those rights are not even peripheral to a public law claim. They are the essence of the entire claim, so far as negligence is concerned.'*

63. It follows that in my opinion they do not fall within the scope of the general rule laid down in ***O'Reilly v. Mackman.*** The present proceedings may be contrasted with ***Cocks v. Thanet District Council*** (1983) 2 A.C. 286, which was decided in this House on the same day as ***O'Reilly v. Mackman.*** In ***Cocks v. Thanet District Council***, the House held that the general rule stated in ***O'Reilly v. Mackman*** applied (and I quote the headnote) *'where a plaintiff was obliged to impugn a public authority's determination as a condition precedent to enforcing a statutory private law right'. In that case, the plaintiff had to impugn a decision of the housing authority, to the effect that he was intentionally homeless, as a condition precedent to establishing the existence of a private law right to be provided with accommodation. ...*

64. That explanation points the contrast with the present case, where the validity of the enforcement notice is not now challenged, and no public authority or third party is being kept in suspense on that matter. ***Procedure under Order 53 would in my view be entirely inappropriate in this case."*** (emphasis supplied).

65. Per Lord Wilberforce, page 276A-278E (with parts omitted): *"The second point is the substantial one. For proper appreciation it is necessary to define the claim to which it relates. As pleaded (and for the purpose of this appeal we are only concerned with the pleading and not its substance or merits) it is that the appellant council owed to the respondent plaintiff a duty of care in, through its officers, advising him as to his planning application; that the council was negligent in so advising him; that by reason of this negligence he suffered damage, namely the loss of a chance of successfully appealing against the enforcement notice served upon him by the council. Though this was initially one of several claims, it now stands on its own, and should be judged as an independent and separate action. ...*

The relevant statute to the present case is the Supreme Court Act 1981, section 31, and the relevant statutory rules those contained in R.S.C., Ord. 53 dating from 1977. These lay down the conditions under the procedure by which the courts can be asked to review the actions or omissions of (inter alia) statutory bodies, persons acting under statute, and inferior courts. Before a proceeding at common law can be said to be an abuse of process, it must, at least, be shown (1) that the claim in question <u>could</u> be brought by way of judicial review (2) that it <u>should</u> be brought by way of judicial review. ;

In fact neither of the requirements which I have mentioned above is met.

First (and it is here that I venture to differ to some extent from the judgment of Cumming-Bruce L.J. in the Court of Appeal), this claim, treated as it must be as a claim for damages for negligence, could not, in my opinion, be pursued by way of judicial review under R.S.C., Ord. 53.

This proposition can be established in two steps. First, the right to award damages conferred by Ord. 53, r.7 is by its terms linked to an application for judicial review. Unless judicial review would lie, damages cannot be given. Secondly, an action for judicial review in respect of alleged negligence is not 'appropriate' within the meaning of Ord. 53, r.l."

66. (Lord Wilberforce here quotes an extract from the speech of Lord Scarman in ***R. v. Inland Revenue Commissioners, ex parte National Federation of Self- Employed and Small Businesses Ltd.*** (1982) A.C. 617). ***"So, since no prerogative writ, or order, in relation to the present claim could be sought, since, consequently, no declaration or injunction could be asked for, no right to judicial review exists under rule 1, and no consequential claim for damages can be made under rule 7.*** (emphasis supplied).

67. Secondly, and even assuming that this claim could in some way be brought under the procedure of judicial review, there is no ground, in my opinion, upon which it can be said that it should only be so brought. Order 53 does not state that the procedure which it authorised was the only procedure which could be followed in cases where it applied. (In this it followed the recommendation of the Law Commission). So prima facie the rule implies that the plaintiff may choose the court and the procedure which suits him best. The onus lies upon the defendant to show that in doing so he is abusing the court's procedure."

68. In my judgment it is difficult to see how private rights with appropriate remedies arising from a contract involving a pure master and servant relationship can be distinguished from private rights arising in tort such as that considered in ***Davy v. Spelthorne Borough Council***. In my judgment the enquiry ought to be directed towards the rights alleged to be infringed and the remedies sought rather than the status enjoyed, qua contract or appointment, by the applicant. In this regard I respectfully agree with what has been said by Lord Justice May about the passage he cited from the judgment at page 29B. If the remedy sought is a purely private contractual remedy, then it is difficult to see how such a remedy could attract the supervisory powers of the court which were originally limited to the issue of prerogative writs.

69. The question which arises is: Has the position been altered as a result of the post-1977 framing of Order 53, the provisions of section 31 of the Supreme Court Act 1981 and the general development of administrative law described in the speech of Lord Diplock in ***O'Reilly v. Mackman*** (1983) 2 AC 237 and the speech of Lord Scarman in ***R. v. Inland Revenue Commissioners, ex parte Rossminster Ltd.*** (1980) AC 952 at pages 1025-1026?

70. The instant case is, as has already been said, the obverse position to that considered in the case of ***O'Reilly v. Mackman.*** In that case their Lordships' House held that where there was an arguable case that a public right was being infringed the remedy should be sought by way of judicial review rather than by action. Two reasons for this were (1) it would not be just to avoid the protection offered to public bodies under the Order 53 procedure by proceedings by way of writ, and (2) that if in the event it transpired that the appropriate course to have taken was by way of writ, then the court had powers under Order 53, rule 9(5), to order that the application could proceed as if started by writ. See per Lord Diplock at page 283H:

"So Order 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged upon the hearing of the application, can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under rule 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ."

71. It is on the basis of this extract with which I respectfully concur that, in my judgment, this appeal can only succeed if Mr. Morison shows not merely that there would be a remedy either in the industrial tribunal under the Employment Protection (Consolidation) Act 1978 or by way of writ seeking damages for wrongful dismissal or a declaration in an action in the Queen's Bench Division but must further establish that the applicant did not have an arguable case for saying that he had a remedy for infringement of a right enjoyed by him in respect of which he was entitled to protection in public or administrative law.

72. In the instant case Mr. Walsh has started by summons under Order 53 and this it is submitted is in accordance with the spirit and intent of the extract from the speech of Lord Diplock which I have just cited. Therefore, Mr. Bowyer contends that at the very least Mr. Walsh should be allowed to proceed to a full trial of the issues raised and if these disclose that only private rights are involved then the court can exercise the power granted under Order 53, rule 9(5). Subject to the point made by Mr. Morison that Order 53, rule 9(5), only applies to remedies available under Order 53, rule 1, I would not dissent from this proposition. But it must first be established that there is an arguable case for a remedy under Order 53 and if it can be shown that no relief is being sought which could come within Order 53, rule 1, then the authority's application for the determination of the preliminary point must succeed.

73. In order that there should be a remedy sought by the applicant which makes available to him the relief granted by Order 53, it is clear that there must be something more than a mere private contractual right upon which the court's supervisory functions can be focussed. Section 31 of the Supreme Court Act 1981, although recognising the wider remedies available under Order 53, is no statutory justification for extending the area of jurisdiction beyond that of a supervisory function which is to be directed in relation to remedies sought against public or similar authorities whose actions under their statutory or other powers call for the court's intervention.

74. At one stage during the argument, it appeared that Mr. Walsh's complaint of being unlawfully dismissed by Miss Cooper depended upon an attack on the validity of the "*personnel policy document*" issued under cover of the authority's letter dated the 14th May, 1976 and referred to in the judgment of the Master of the Rolls. This provided a system of delegation of powers of dismissal to senior officers of the authority in respect of other officers junior to them by two degrees of rank and that it was being argued that this was in contravention of the provisions of section XXXIV of the Whitley Council Agreement. Indeed a declaration to this effect was included in the document produced by Mr. Bowyer. In his reply Mr. Morison stated without any demurral by Mr. Bowyer that. Mr. Walsh did not fall within the category of "*more senior grades*" referred to in that section. Moreover the *"vires"* of the personnel policy document had at no stage in the past been attacked by Mr. Walsh or those acting upon his behalf.

75. As has been indicated by the Master of the Rolls, the applicant did not attack the validity of that personnel document on the basis that it was ultra vires the powers of the authority; but merely alleged that his dismissal was unlawful in detail mainly because he had not had a proper opportunity of being heard in his own defence and that his dismissal could only be effected by the authority itself. Had the attack been upon the authority's policy of delegation of powers of dismissal, then, for my part, I would not have been able to say that the authority had established within the strict criteria involved that the application under Order 53 was an abuse of the process of the court. If the breach of the rules of natural justice upon which Mr. Walsh relied involved wholly or in part a failure by the Health Authority to comply with the statutory powers and duties imposed upon it, then in my judgment the learned judge would have been right to have rejected the authority's case on the preliminary point.

76. However, in my judgment, the relationship between the applicant and the Health Authority was one which fell within the category of "*pure master and servant*" although the powers of the authority to negotiate terms with their employees were limited indirectly by statute and subordinate legislation. Any breach of those terms of which Mr. Walsh complains related solely to the private contractual relationship between the Health Authority and him and did not involve any wrongful discharge by the Health Authority of the rights or duties imposed upon it qua Health Authority. The rules of natural justice may well be imported into a private contractual relationship, vide the category of employee/master relationship envisaged in the first of the three categories described by Lord Reid in ***Ridge v. Baldwin*** (1964) AC 40 to which the Master of the Rolls has already referred but in such circumstances they would go solely to the question of rights and duties involved in the performance of the contract of employment itself. The manner in which the authority terminated, or purported to terminate, Mr. Walsh's contract of employment related to their conduct as employers in a pure master and servant context and not to the performance of their duties, or exercise of their powers as an authority providing a health service for the public at large. The importation by direct reference or by implication into a context of employment of the rules of natural justice does not of itself import the necessary element of public interest which would convert the case from the first category envisaged by Lord Reid into one in which there was an element of public interest created as a result of status of the individual or the protection or support of his position as a public officer. With great respect to the learned judge, it is this distinction which seems to have escaped him in the extract from his judgment which I have cited earlier in this judgment. It is important to remember that the three categories of employment described by Lord Reid in ***Ridge v. Baldwin*** and referred to in ***Malloch v. Aberdeen Corporation*** were directed to the question of the right to be heard and not to the procedural question which is central to the Instant appeal.

77. However, Mr. Morison also submitted that an applicant should only be allowed to apply under Order 53 if there was ***no other remedy*** available to him. As part of this submission he proposed the attractive but, in my judgment, fallacious, argument that the Queen having provided through Parliament a special statutory tribunal under the Employment Protection Acts she would not be likely to grant relief in the same situation by way of prerogative writ or its successor relief under Order 53. It is clear, in my mind, that in cases where the remedies sought by the applicant stem both from a public law source, in the sense that that word is normally used, and also from a breach of private rights or indeed where there is room for argument as to whether or not a breach of a public right giving rise to the particular remedy in the hands of the applicant is involved, then the court will entertain an application under Order 53. This is clear from the speech of Lord Diplock at page 283H to which I have already referred.

78. It is important, in my judgment, to distinguish the two concepts involved. The first is the well-debated problem as to whether or not an obligation to obey the rules of natural justice in master and servant cases encapsulated in the expression "audi alteram partem" is imported into a contract of employment. The second is whether that invokes of necessity the supervisory powers of the court. As the Master of the Rolls has pointed out, the cases of ***Ridge*** and ***Malloch*** were not concerned with the second concept as a critical factor. ***Ridge*** involved an action commenced by writ. ***Malloch*** was concerned with the Scottish remedy of production and reduction which, whilst having much in common with certiorari, was not confined to claims based upon public or administrative law but was also available to those pursuing claims in private law. With great respect to him, in making his comment at page 11A of the judgment: *"I should be sorry to think that the courts in England cannot provide this applicant with the same remedy if his grounds are established."* the learned judge may have overlooked this distinction.

79. There was a good deal of argument on the question of whether the dismissal itself terminated the contract of employment as well as ending the employment itself. However, within the restricted ambit of the present enquiry, I cannot, for my part, see how these matters which may well be of importance on the trial of the substantive issues can be critical to the consideration of the preliminary issue with which the learned judge was concerned.

80. At the end of the day I find myself returning to the basic question, did the remedies sought by Mr. Walsh arise solely out of a private right in contract between him and the authority or upon some breach of the public duty placed upon that authority which related to the exercise of the powers granted by statute to them to engage and dismiss him in the course of providing a national service to the public?

81. In my judgment there is no arguable case which can be mounted upon the facts disclosed even if they are all assumed in favour of the applicant to the effect that the remedies sought by Mr. Walsh stem from a breach which can be related to any right arising out of the public rights and duties enjoyed by or imposed upon the Health Authority. The only remedies sought by Mr. Walsh arise solely cut of his contract of employment with them as opposed to any public duty imposed upon the Health Authority.

82. For these reasons I agree that this appeal should be allowed. There was no element in the remedies sought by the applicant under Order 53 which raised an arguable case under which a remedy of the nature envisaged by Order 53 could be claimed. I also agree for the reasons already given by the Master of the Rolls that this is not a proper case in which the applicant should be permitted to proceed as if a writ had been issued under Order 53, rule 9(5).

(Order: Appeal allowed with costs here and below not to be enforced without the leave of the court. Legal aid taxation of respondent's costs. Application for leave to appeal to the House of Lords refused**).**

MR. THOMAS MORISON, Q.C. and MR. M. BAKER (instructed by Messrs. J. Tickle & Co.) appeared on behalf of the Appellant Health Authority.