IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox, Nyarangi JJA & Platt Ag JA)

CIVIL APPEAL NO 109 OF 1984

Between

PETER OKECH KADAMAS.....APPELLANT

JOHN MONDAY OLOO.....APPELLANT

AND

MUNICIPALITY OF KISUMU.....RESPONDENT

(Appeal from the High Court at Kisumu, Schofield J)

JUDGMENT

November 29, 1985, **Hancox JA** delivered the following Judgment.

The two appellants in this case Peter Okech Kadamas and John Monday Oloo, were respectively employed by the Municipal Council of Kisumu (The Council) as Clerical Officers, Kadamas being promoted to Grade V on November 15, 1979 and Oloo being a Clerical Officer Grade VIII. In March, 1981, it appears that there were irregularities in claims under the Medical Reimbursement Scheme and the two appellants were suspended from duty on the 20th of that month in connection therewith.

At a special meeting of the Finance Staff and General Purposes Committee of the Council on June 3, 1981, the Town Treasurer stated that Kadamas had been involved in auditing the three fraudulent medical claims on the agenda for the meeting and that in one instance he had himself made a claim for Kshs 161.90, when the copy receipt at the Chemist's recorded only Kshs 14.30. In addition Kadamas was suspected of being responsible for several missing cash sale receipts. Oloo was also said to have been involved in the three claims by accelerating their processing and payment.

Accordingly, the Committee recommended that each appellant be dismissed with effect from the date of his suspension on March 20. Both of them were apparently afforded an opportunity of being heard and each wrote subsequently to the council denying the accusations.

The Kenya Local Government Workers Union took up the appellants' case with the Ministry of Labour who appointed an investigator under section 7(1) of the Trade Disputes Act, cap 234. His findings are embodied in the letter to the Secretary General of the Union and to the council dated January 20, 1983. It does not appear that the investigator's findings are binding on the parties to the trade dispute, or are capable of enforcement, under the statute, in contrast to a decision of the Industrial Court under section 17, which is the next step in this part of the machinery set up by the Act for the conciliation and

settlement of trade disputes.

The investigator found, in effect, that neither appellant had admitted the accusations made against him, and advised that in the absence of satisfactory proof against them each should be reinstated. Accordingly, at that which is recorded as being a Heads of Department Meeting of the council on October 7, 1983 it was:

> "MOVED, SECONDED AND RESOLVED:
>
> i) That considering the advice from both the Ministry of Labour and the Federation of Kenya Employers M/ s Peter Oketch Kadamas and John Monday Oduor Oloo be reinstated with immediate effect.
>
> ii) That the acting Town Clerk be authorized to conclusively negotiate with them the terms of their reinstatement."

To my mind there could hardly be a greater indication that the appellants' reinstatement had the approval of, and was authorised by, the full council, than that recorded resolution. It was implemented by the acting Town Clerk in his letters to both appellants on the October 13, in terms which included their transfer to a different department, which terms were unequivocally accepted by the appellants in their respective letters in reply of the October 13 and 15.

There was therefore a clear and definite offer and acceptance in each case and all would have been well, at least from the appellants' point of view had not the Finance, Staff and General Purposes Committee met again on December 28, 1983, and "recommended"

> "that the earlier decision of the council to summarily dismiss the two members of staff be reaffirmed".

The reason given for the reaffirmation of the appellants' dismissals, despite that which seems to have been a unanimous recommendation, not only of the Ministry, but of the Federation of Kenya Employers (The councils' adviser on labour matters), was that the council's earlier decision to reinstate them had been taken while it was, as it were, in abeyance, having been dissolved for the purposes of the 1983 Local Government Elections by a letter emanating from the Ministry of Local Government on July 6,1983. I observe, however, that under section 12(3) of the Local Government Act, cap 265, each Municipality, under its appropriate name, is stated to be a body corporate with perpetual succession. It would not therefore seem that the purported dissolution would have any effect, as the members of the committee seem to have thought on the December 28, on the validity of the resolution of the October 7.

The appellants, or at any rate their legal adviser, acted with expedition, and sought leave to apply for an order of prohibition under, I presume, Order 53 rules 1(1) and 1(2) and 1(3) of the Civil Procedure Rules, though at no stage in the record is it indicated that the application was heard in chambers (as rule 1(2) requires), and that it was granted. The application for the order itself was filed on January 20, 1984, and the judge (Schofield J) heard argument from both sides on the matter. On July 6, 1984, he delivered his order dismissing the application on the grounds that prohibition did not lie for the enforcement of a private right which (he held) the appellants were seeking in this case.

This issue does not seem to have been specifically canvassed in their opposing arguments by Mr.. Omondi, who has appeared for the appellants throughout, or by Mr.. Behan, who then appeared for the council in the High Court. Mr.. Behan concentrated on two questions: first, as to whether prohibition would lie to restrain an act which had not yet taken place (since all that had occurred was a recommendation in committee, which was not binding on the Council). This was the submission before Chesoni J, (as he then was) in *Hebtulla Properties Ltd v Electro-Services and The Business Premises Rent Tribunal*, High Court civil Case 336 of 1978, in which the Tribunal had refused to hear counsel for the landlord on a preliminary objection to its jurisdiction and proceeded to hear the merits of the case, which hearing had, however, not been concluded at the date of the application for prohibition. Secondly,

he submitted that prohibition would not go to restrain the council as it could not be said to have performed any judicial act, as it is indicated by the passages cited from Halsbury's Law of England, 3rd edition volume II at paragraphs 114 and 115, which are to this effect. It was only in his replying submission that Mr.. Omondi touched on the question of private rights, and it was then that reference was made to Civil Appeal 29 of 1983, *The Republic v Kisumu County Council and Melktzedek Mindo.* This was an application for mandamus, and turned on the question of whether the Kisumu County Council could be compelled to transfer Plot 8 Kombewa Market to one Getura Odhiambo. Schofield J, held that the County Council was in the same position as any private owner of the plot would have been and that no public duty was involved. He refused the application on that ground and this court upheld his decision, adding that no court should properly be asked to exercise the discretionary power, assuming it had the power, to force the council to take sides in a matrimonial property dispute.

I may therefore be forgiven for saying that the question of whether the council had engaged in the performance of a public duty or not only came in this case as a sidewind at the proceedings in the High Court. Nevertheless that as the gravamen of the decision of which the appellants now complain. It is, accordingly, in my view, that issue upon which this court should concentrate in this appeal. As I read them, the issue of whether or not there was a breach of a public duty is embraced by grounds 1 to 3 of the memorandum of appeal.

Reference was made in the course of Mr. Omondi's submissions to *R v Postmaster General, Ex parte Carmichael* [1928] 1 KB 291, in which it turned out that the wrong medical officer had certified that the applicant was not suffering from an industrial disease. The order of the Secretary of State had provided that the Post Office Medical Officer in whose charge the workman was placed should be the certifying surgeon for the purpose of the Workmen's Compensation Act, 1925, and not the Chief Medical Officer to the Post Office, who had in fact examined the applicant and issued the certificate. It was held that the issuing of the purported certificate was in the nature of a judicial act and was therefore a fit subject for *certiorari*.

Mr. Omondi cited *Mrs.Carmichael's case* as authority for the proposition that the court could come to the aid of the appellants for interference with their rights just as the Kings Bench Divisional Court came to the aid of Mrs.Carmichael. The learned judge's only reference to it was that the certificate affected her rights under the Workman's Compensation Act, which was a public matter, which thus distinguished it from the present case. I do not think *Mrs.Carmichael's case* decided, one way or the other, that the matter there being considered was of a public or a private nature, for no submissions were made to the court in that regard: merely that the Chief Medical Officer was not the proper officer to sign the certificate so that it could be brought up and quashed.

Another authority to which we were referred was *The Queen v The London County Council, Ex parte Akkersdyk* [1892] 1 QB 190, in which a committee of the London County Council recommended that a licence for music and dancing on the applicant's premises should be refused. An application for the licence was then made before the full council, which included four members of the committee. It was held that this was a violation of the rule that no person should be plaintiff or prosecutor as well as judge in the same case. So, here, Mr. Omondi submitted that the thirteen council members of the committee which sat on December 28, 1983, would form the majority of nineteen members constituting the full council which would decide on the recommendation.

There is no evidence or judicially noticeable material before us as to who were the members of the council at the material time, save for the unilateral letter sent in to the court after the conclusion of the hearing. References were made by counsel to section 91 and 92 of the Local Government Act as to the powers of the council to appoint committees and to the duties of the Finance Committee, and it was queried as to what business the Finance Committee had in purporting to deal with staff matters. The interest of the Finance Committee, which is also a staff and General Purpose Committee, is in my opinion clear. There was suspicion, and more than that, that a number of clerical officers were involved in a racket involving the submission and approval of false medical claims. This would result in serious financial loss to the council. The Finance Committee, whatever other functions it has as well, would therefore be vigilant to prevent such frauds in the future. But whether it could in what might be thought a high handed

manner consider and reverse a decision of its parent body, the full council, after the industrial mechanism for conciliation had resulted in the appellants' reinstatement, is, of course the subject of the decision in this case.

The full statement in support of the application for leave and the respective contentions of the applicants through their counsel, Mr. Omondi, in support thereof, and of the matters advanced in their joint memorandum of appeal, have already been fully narrated by Nyarangi JA, whose judgment I have had the advantage of reading in draft. He has also set out the succinct, but nevertheless effective, submissions of Mr. Menezes, who replied on behalf of the council.

I find myself in full agreement with Mr. Menezes that the committee's resolution of December 28, 1983 would, if it were acted upon, be capable of reversing the resolution for reinstatement which had taken place. Whether "dissolved" or not the council was *sui juris*, a corporate body, and capable of making decisions; however is it an act of such a nature which is susceptible of restraint by a prerogative order? The fact that the employer is a body corporate, sustained by public funds and contributions does not in my opinion, *ipso facto*, render the rights it has and the duties which it owes to its employees as of a public nature. They are ordinary private civil rights of contract between an employer and his employee.

Why should an individual who is the employee of a public body be clothed with these exceptional legal rights? They are exceptional because, as everyone very well knows, the ordinary litigant has to go through the due process of the courts, suffer its delays and so on. Prohibition is, on the other hand, often a speedy procedure. Leave can be applied for *ex parte*, and once obtained, the parties go before the court on a notice of motion with agreed, or virtually agreed, facts.

As regards the requirement that the act sought to be restrained should be of a public nature the case of *R v East Berkshire Health Authority, Ex parte Walsh* [1984] 3 WLR 818, provides a recent illustration. This was an application for *certiorari* by an employee of a public body namely a senior nursing office of the East Berkshire Health Authority, whose services were terminated by the District Nursing Officer, on the recommendation of a committee of inquiry. He then took two parallel steps. First, as here, he set in motion the appropriate industrial dispute procedure. Secondly, he applied for *certiorari* to quash his dismissal and any subsequent appellate proceedings thereto. In relation to the preliminary point raised by the health authority that the judicial review proceedings were incompetent, as relating to a matter of private law. Sir John Donaldson said at page 824:

> "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 Borough Council* [1984] AC 262, 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 on principles as upon remedies. On the other hand, to concentrate on remedies would in the present context involve a degree of circuity 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.

The 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 in particular *Malloch's case*, that Mr. Walsh's relationship to the health authority 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'.

The 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 RSC Ord 53), rule 9(5)."

The Master of the Rolls then continued:

"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 v Aberdeen Corporation* at page 1582). 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.

I have therefore to consider whether and to what extent the applicant's complaint involve an element of public law sufficient to attract public law remedies whether in the form of *certiorari* or a declaration.

.....

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 reinstatement or reengagement and so on. Parliament can underpin the position of 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 thus to 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."

The Court of Appeal therefore unanimously held that the writ of *certiorari* did not apply to the applicant in that case. I should mention that in the same publication, *R v Secretary of State for Home Department Ex parte Benwell* [1984] 3 All ER which report appears at page 854, a prison officer had been dismissed for allegedly taking part in derogatory references to the governor of Dartmoor Prison and for refusing to attend a meeting with the regional director in consequence. He sought *certiorari* which was granted by Hodgson J (who had been overruled in *Ex parte Walsh* (*supra*), ten days earlier and who distinguished *Ex parte Walsh* on the basis that the applicant had no private law rights as regards the prison service, and had not entered the Service under a contract of employment. The Home Secretary's duty to apply the Code of Discipline was a public one in which he had an interest.

Accordingly *certiorari* lay. That case, has, so far, not been reported on appeal.

If the decision in this case turned wholly on whether or not the act sought to be restrained (namely whether or not to proceed with the resolution of December 28, 1983) was an infringement of the appellants 'public law', as opposed to their 'private law', rights, I should be inclined to take the view that it was governed by the principles enunciated by the Master of the Rolls in *Ex parte Walsh.*

However, it will be observed that the inception of the passages from that case which I have ventured to set out, Sir John Donaldson MR. said, at 824 of the report:

> "As the authority to seek to have the proceedings dismissed *in limine*, if they are to succeed they can only do so on the basis that, accepting all the applicant'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 ... of the procedure of the court under RSC Ord 53."

It follows from this passage, I think, that it was incumbent on the council to satisfy the judge *in limine* that the order of prohibition did not lie, and that the question of whether the rights were of a public or private law nature were not the only criteria in this respect.

There were considerable factual differences between the situation obtaining in *Ex parte Walsh* and those in the instant case. The terms had been nationally agreed and had received the seal of approval of Whitley Council. His application for judicial review was to bring up and quash his dismissal by the district nursing officer, whereas in the instant case the termination of the services of the two applicants by the council had itself been reversed (true, after certain industrial and Ministerial steps had been taken) and was therefore no longer effective. So the judge was faced with the situation at a different stage in that which may be compendiously termed as the dismissal proceedings from that which confronted the court in *Ex parte Walsh.* Whether the dismissal of the appellants in this case was rightly reversed was, of course, challenged by the Finance, Staff and General Purposes Committee. But were they entitled so to challenge it, and, moreover, to challenge it in the way that they did, namely by the lesser body reversing the greater? Furthermore, that recommendation was bound to lead to justifiable fears (once they came to know about it) on the part of the appellants that, no matter what they did or said, or what representations they made, thenceforth those would be to no avail. In other words they would be denied a further hearing on that which, as far as they were concerned until December 28, 1983, had already been settled in their favour. These fears were stressed by Mr. Omondi during the course of his submissions, and in my view he was right to do so.

What greater infringement of a person's public law rights could there be than that which occurred here? The appellants, some thought wrongly, had had their dismissals set aside. A body within the council, but subordinate to it, then purported to reaffirm their dismissals. That to my mind is a glaring infringement of a citizen's ordinary right to fair treatment. Whatever the nature of the earlier rights which were affected by the termination of the applicant's services on June 3, 1981, it seems to me that the rights which they had acquired by December, 1983, namely to be reinstated on the terms that had been agreed, must be capable of enforcement, in the sense of restraining the council from acting on the resolution. No other course would , in my judgment, meet the justice of the case.

It follows that, in my opinion, the judge took too narrow a view of the appellants' rights which had been infringed, and that this was not a case in which it should have been decided at the outset that prohibition did not lie.

I would therefore allow the appeal and set aside the order of Schofield J, of July 6, 1984. It would seem an unnecessary protraction of the proceedings to send the case back for further hearing of the prohibition application, being, as I said, of the views which I have expressed above. I would therefore grant the order in the terms sought by the applicants in the High Court. I would award the costs of the appeal, and of the hearing in the High Court to the applicants. As Nyarangi JA, and Platt Ag JA are of the same opinion it is so ordered.

Nyarangi JA. The facts giving rise to this action present no novelty; they afford a typical example of quarrels and disputes between newly elected councillors of local authorities in Kenya and employees of those local authorities. The statement of facts of the appellants drawn and filed on January 10, 1984 by Mr. Omondi on behalf of the appellants was not challenged by the respondent council save for the view that at the time the statement was filed, the appellants were still employees of the council. The statement is as follows:-

> "1) John Oduor Oloo and Kadamas are the applicants herein and presently both of us are employees of the respondents.

2) On the June 13, 1981, John Oduor Oloo and Kadamas were dismissed from the respondent's services on the ground that they were involved in some fraudulent medical claims. A copy of letter addressed to Oloo that was similar to mine is annexed and "PO 1".

3) The matter became a trade dispute under the Trade Disputes Act between the respondents and our Trade Union, the Kenya Local Government Workers Union in which the Minister recommended that Oloo and Kadamas be reinstated. A copy of the Minister's recommendation is annexed and marked "PO 2".

4) On the strength of Minister's recommendation above mentioned and the strength of the advice received from the Federation of Kenya Employers (an organization of which the respondent is a member, the letter of which is annexed and marked "PO 3") the respondent by resolution dated October 7, 1983 reinstated both John Oduor Oloo and myself. A copy of the said minutes is annexed and marked "PO 4".

5) As a result of the local government's elections in September, 1983, the respondent council was dissolved and its powers bestowed on the respondent's heads of departments as per the circular of whose copy is annexed and marked "PO 5".

6) On October 13, 1983 on the strength of the resolution passed on the meeting of October 7, 1983 above referred to letters of reinstatement were addressed to us a copy of which is annexed and marked "PO 6".

7) The dispute was thus settled in accordance with the Act.

8) Suddenly, without any cause, at the respondent's Finance, Staff and General Purposes Committee under its minutes No 21 purported to reverse the respondent's resolution and to recommend that John Oduor Oloo and Kadamas be dismissed.

9) The said committee had no legal authority so to act.

10) The said resolution to be effective is subject to the respondent's confirmation to be effected at any time now.

11) The said resolution of December 28, 1983, was not in accordance of the rules of natural justice in that we were not heard in the matter.

Relief sought:

i) Leave to apply for the order of prohibition against the respondent not to proceed with the said resolution.

ii) Any other relief at the discretion of this honourable court.

iii) Costs of this application."

I would prefer that statement to the judge's statement contained in the order, the subject matter of this appeal.

The judge did not, quite properly, go into merits of the case but held that prohibition did not lie in the case. In the opinion of the judge, an order of prohibition does not lie except to courts or to the other persons and bodies having legal authority to decide issues affecting the rights of persons and expected to act judicially. The judge added:

"It cannot be doubted that in certain of its functions the respondent may make decisions affecting the rights of subjects ie members of the public generally, but in the present case the respondent is

acting in its private capacity as an employer of certain individuals and is not dealing with questions of a public nature ..."

The relief sought was rejected and the two aggrieved council employees appeal to this court contending that the Finance and General Purposes Committee of the respondent, in passing the material resolution, acted contrary to the Trade Disputes Act, and exceeded its powers in disregarding the decision of the heads of departments, that the judge erred in holding that the suggested dismissal of the appellants was a matter of private contract between the parties, that there was error in the judge's view as to the circumstances in which an order of prohibition lies and in holding that it had not been shown that the respondent proposed to decide the matter without involving the appellants, and erred further in failure to consider that even if the appellants were heard a recommendation made outside the jurisdiction and contrary to natural justice would not be rectified and in holding that the appellants still had a chance to be heard when an agreement had been breached as a consequence of which it would have been nugatory for the appellants to wait until they were heard or not heard.

Arguing the first ground of appeal, Mr. Omondi said that the service contract between the appellants and the council was affected by the Trade Disputes Act, (the Act) cap 234, which provides for a collective agreement superimposed on the service contract, that on December 28, 1983, when the committee made its recommendation there was no dispute between the parties but that there had been a dispute between the parties in 1981 when the appellants challenged their dismissal as a result of which the Minister of Labour appointed a commission whose recommendation was tantamount to an agreement under section 9 of the Act which agreement the council accepted, thus resolving the dispute upon which the appellants resumed work. On the second ground, Mr. Omondi submitted that the judge erred in equating the rights of the appellants in the action to individual rights. On the fourth ground Mr. Omondi's contention was that a defective decision having been taken, the council would be prejudiced by that decision especially as the committee which made the recommendation was composed of the 13 members who made the recommendation out of total of 19 council members. The presence of the 13 members in any committee was enough to vitiate the proceedings.

Under ground five, Mr. Omondi argued that the judge misdirected himself in holding that the appellants still had a chance to be heard thereby implying that the appellants whose rights were being violated should have waited the final decision of the council. Lastly, Mr. Omondi observed that having proper regard to sections 246 and 268 of the Local Government Act cap 265, the administrative circular dated July 6, 1983 which was the basis of the decision of the heads of departments of the council should be presumed to have lawfully delegated powers to the Heads.

In reply Mr. Menezes for the council emphasized the corporate nature of the council and said that the acts of October 13, 1983 and of December 28, 1983 were acts of the council, that the committee which recommended the dismissal had been appointed pursuant to section 92(1) of the Local Government Act and that the appellants should have filed an action for declaration or for reinstatement or for damages or they should have invoked the Trade Disputes Act. Mr. Menezes stated that at the time the application was made, the appellants were still working for the council, no agenda had been served on them to show that the council would discuss the recommendation made by the committee and that it was not inevitable that the appellants would be dismissed as no notice to that effect had been served. The council had not decided on the matter and it could not in those circumstances be said that there was any departure from rules of natural justice. Mr. Menezes thought that until the full council met, it was premature for the application to be made and that the correct remedy would have been to file a suit to ask for an order of injunction. Mr. Menezes said the presence of and participation in the council meeting of the 13 members would not necessarily prejudice the appellants, that prohibition should not be granted when there are other remedies, that there was no demand made to the council by the appellants and therefore that the application should be dismissed with costs.

After the appellants challenged the recommendation of the Finance, Staff and General Purposes Committee (the committee) that the earlier decision of the council to summarily dismiss them be reaffirmed, the Minister of Labour invoked section 7(1) of the Trade Disputes Act and appointed the investigator whose recommendations were made to the parties on January 20, 1983. The council accepted

the recommendation that the appellants be reinstated in their employment without loss of any benefits and informed the appellants, in writing, on October 13, 1983 on which day the second appellant (Oloo) accepted the council's terms for reinstatement. The other appellant accepted the terms on October 15, 1983. Each party was thereafter required under section 9 secure that a copy of the terms of the agreement of reinstatement was lodged with the Minister consequent upon settlement of the trade dispute vide section 7(4) of the Act.

On December 28, 1983, when the committee recommended summary dismissal of the appellants no dispute existed or was apprehended. None of the provisions of Part II of the Trade Disputes Act which cover reporting of trade disputes had been invoked. So the committee was resurrecting the 1981 dismissal, despite the reinstatement, and asking the council to effect it. But, under the Trade Disputes Act, once there is an agreement it appears it is beyond the powers of the parties to abrogate. The committee were, by so recommending, asking the council to infringe the provisions of a statute. The judge considered none of this.

The foregoing notwithstanding, the decisive question is whether the judge was right in deciding that prohibition does not here lie because only individual rights of appellants were affected rather than rights of a body of persons.

Prohibition lies not only for excess of or absence of jurisdiction, but also for departure from rules of natural justice; *Halsbury's Laws of England*, 4th edition, vol. 1 para 130 page 138. The High Court in deciding whether or not to grant an order of prohibition would not be fettered by the availability of an alternative remedy. Prohibition may issue against a local authority: See eg *R v LCC* [1931] 2 KB 215.

In *R v Electricity Commissioners* [1924] 1 KB 171, Bankes LJ at page 192 observed that the real question was whether the principles already laid down in reference to the power and duty of courts to issue writs of prohibition applied to the Electricity Commissioners, then a body of recent creation. The learned Lord Justice continued:

> "It has, however, always been the boast of... common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances."

Atkin LJ, at page 205 noted that the writs of prohibition and *certiorari* deal with questions of excessive jurisdiction and that;

> "the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized, as Courts of Justice..."

and therefore that,

> "whether any body of persons having legal authority to determine questions affecting the right of subjects, and having a duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

This view of Atkins LJ, was broadened by the House of Lords in *O'Reilly v Mackman & ors and other cases* [1982] 3 All ER 1124 per Lord Diplock at page 1131 – 1132 by excluding Atkins LJ's limitation of the bodies of persons to whom the prerogative writs might issue to those:

> "having a duty to act judicially."

See also Judicial Review of Administrative Action by de Smith, 2nd edition at page 389.

In *The King v Postmaster-General* [1928] l KB 291, an individual, Mrs. Ethel Carmichael successfully applied for *certiorari* to go to quash a pretended certificate which was issued by a medical officer other than the one under whose charge the applicant had been placed. And, in the *Queen v LCC Ex parte Ferwenia*, [1892] 1 QB 190 the London County Council delegated to a committee of their body the

hearing of an application for music and dancing licences. The committee by a majority rejected an application for a licence. The applicant thereupon applied to the council for a licence. During the hearing by the council some of the members of the committee were present, but did not vote. They had, however, instructed counsel to represent them before the council and oppose the application for licence. Smith J said that an adjudication in which gentlemen had acted both as judges and accusers could not be upheld.

The learned judge quoted a passage from the judgment of Cotton LJ, in *Leeson v General Council of Medical Education,* 43 Ch D at p 379 in which he said,

> "Of course, the rule is very plain that no man can be plaintiff, or prosecutor, in any action, and at the same time sit in judgment to decide in that particular case - either in his own case, or in any case, where he brings forward the accusation or complaint on which the order is made."

Mr. Menezes cited the decision in the District Commissioner, *Kiambu v R and Others, Ex parte Ethan Njau* [1960] EA 109, for his submission that the appellants had not requested the council for a hearing and that a prerequisite for this application was an enquiry by the appellants. The correct view is, however, that as a general rule a distinct demand for action and an unequivocal outright refusal is a prerequisite for the grant of an order of *mandamus*. The general rule has no application for grant of orders or prohibition and *certiorari*. And, whereas courts will, as a general rule, and in the exercise of their discretion refuse an order of *mandamus* when there is an alternative specific remedy at law which is equally convenient and beneficial, prohibition lies even when there is an alternative remedy.

The decision in *The Republic v Director-General of EA Railway Corporation Ex parte Kagwa* was on an application for an order of *mandamus*. *Masaka District Growers Co-op Union v Mumpiwakoma Growers Co-op Society* [1968] EA 258 did not say that a party who fears or who has reason to believe that an irregularity against rules of natural justice affecting a matter concerning him could not form a basis for an application for an order of prohibition. The appellants' main worry was that the council was about to consider whether or not to dismiss them on a recommendation made in excess of jurisdiction and without reference to them. It could not be reasonably said that the complaint of the appellants was of a minor character. My understanding of the judgment in *Heptulla Properties Limited v Electro-Services & Equipment Ltd* High Court Miscellaneous Civil Case No 336 of 1978 (unreported) is that there the basis for granting an order of prohibition was kept in sight all the way.

It is clear that the whole weight of authority supports the view that the applicants could apply for an order of a prohibition to issue, that prohibition lies, and that the council has a duty to ensure fair play all round. The council could not reasonably contend that the applicants should have waited for the final decision of the council before moving the High Court to issue an order of prohibition. Also, it is irrelevant to the application that there were other remedies available to the applicants. All that apart, I entertain serious doubt if the committee could properly make a recommendation to the council as a result of which the council might have to reverse its earlier decision to reinstate the appellants, thereby making nonsense of the settlement of the dispute under the Act. The decision in *R v East Berkshire Health Authority Ex parte Walsh* [1984] 3 All ER 425, is distinguishable from the position in this appeal and in my judgment has no relevance. In the *East Berkshire Health Authority case,* the applicant was employed under a contract of employment which under the National Health Service (Remuneration and conditions of service) Regulation 1974 *incorporated terms and conditions which were negotiated by a recognized negotiating body* and approved by the relevant English minister (the emphasis is mine).

That is to say the contract was pursuant to a UK statute and consequently, whether dismissal from employment by the Health Authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal. In this action, the Kenyan Minister had invoked a provision of a local statute, the Trade Disputes Act and appointed an investigator whose recommendation was accepted and acted on by the parties. The appellants sought an order of prohibition directed at the council, before they were dismissed, to stop the council from engaging in deliberations intended to breach the settlement worked out by the negotiator. The appellants as employees of the council were in a class of employees who could be dismissed only if there was something against them to warrant dismissal: *Ridge v Baldwin* [1963] 2 All ER 66 at 71. They wanted to know what there was against them. Hence the

application to stop the council from considering whether or not to dismiss them before they were heard. Unlike the applicant in the *East Berkshire Health Authority case*, there were no special statutory restrictions on dismissal which propped up their employment. All the three judgments in the *East Berkshire Health Authority* case discussed the remedy of judicial review having regard to relevant English legislation which is not in *pari materia* with the Trade Disputes Act and are therefore of no assistance in this appeal.

The appellants as officials of the council had:

> "No right to acquire any part of the authority's stock of information whether or not confidential ..."

"They had a need to know" per: Lord Brightman in *City of Birmingham DC v O and Another* [1983] l All ER 497 at page 505. The council frustrated the appellants' "need to know" by making the recommendation behind the appellants' backs and so contrary to rules of natural justice.

I would allow the appeal, set aside the order made on July 6, 1984, in Civil Application No 3 of 1984 and order that an order of prohibition be directed at the council to prohibit the Finance, Staff and General Purposes Committee from continuing with this matter and also to the full council from entertaining in any manner the recommendation of the committee. Iwould give the costs of this appeal and the costs of the hearing in the High Court to the appellants.

Platt Ag JA. The Municipal Council of Kisumu dismissed the present appellants, Mr. Kadamas and Mr. Oloo, from their service with the council, on June 13, 1981. The matter became a trade dispute under the Trade Disputes Act (cap 234), between the council and the Kenya Local Government Workers' Union. In the course of reconciliation proceedings the minister recommended the reinstatement of the appellants, a matter which had the support of the Federation of Kenya Employers. That recommendation was signified on January 20, 1983 by letter to the council.

As a result of the Local Government Elections in September, 1983, the council was dissolved and its powers bestowed on the respondent council's Heads of Department. The latter body met in a meeting on October 7, 1983 and the following resolution was passed:-

> **"39. Review of Dismissal Cases:**
>
> With reference to minute No 34 of the committee members considered the dismissal cases of Messrs Peter Okech Kadamas and John Monday Oloo in details. They considered the recommendation from the Ministry of Labour which advised the council to reinstate the two dismissed members of staff. They also put into account the advice from the Federation of Kenya Employers to the effect that the gentlemen be reinstated. On the above premises, members unanimously resolved that Messrs Peter Oketch Kadamas and John Monday Oduor Oloo be reinstated but the acting Town Clerk be asked to conclusively negotiate with them the terms of their reinstatement.
>
> **Moved, Seconded and Resolved:**
>
> i) That considering the advice from both the Ministry of Labour and the Federation of Kenya Employers Messrs Peter Okech Kadamas and John Monday Oduor Oloo be reinstated with immediate effect; and
>
> ii) That the acting Town Clerk be authorized to conclusively negotiate with them the terms of their reinstatement."

In consequence of that resolution, the acting Town Clerk negotiated the terms which he set out in letters dated October 13, 1983 addressed to both appellants. They accepted the terms by their replying letters of the same date. The dispute was then apparently settled; but two months later after elections, the Finance,

Staff and General Purposes Committee recommended that the original dismissal be reaffirmed. The minute says that it was unanimously recommended that the earlier decision of the council to dismiss summarily the two members of staff be reaffirmed.

That decision was taken despite the fact that the acting Town Clerk advised the committee that reinstatement had been recommended by both the Ministry of Labour and the Federation of Kenya Employers, and that since reinstatement the two employees concerned had committed no new offences. The result was that the Finance, Staff and General Purposes Committee put that resolution to the council, and since the committee was composed of the Chairman, the Mayor and eleven other councilors, it was legitimately queried whether the council could do other than accept it. It was said that the full council was composed of nineteen councilors. If that be so then it must be considered probable that on the mere basis of voting power, the committee members would sway the council.

In this situation the appellants prayed for an order of prohibition to issue to the council to stop the process recommended by the Finance, Staff and General Purposes Committee. The grounds upon which the proposed order was to be made was that the committee had no legal authority to act as it did and that its resolution of December 28, 1983, infringed the rules of natural justice in that the appellants were not heard in the matter.

The learned judge declined to issue the order sought. His reasoning appears to embrace three salient points. First, an order prohibition, he said, only lay to courts and to other persons and bodies having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially. He relied on a statement to this effect in Halsbury's Laws of England, 3rd edition volume XI paragraph 112. But without quite determining any of the issues raised by this rubric, the learned judge passed on to decide, the second issue, that what the committee had resolved upon, was a matter between itself in its private capacity as an employer and its employees. No question of public law arose. He thought that this was so even though industrial relations are regulated by statute. Finally, the learned judge acknowledged that prohibition also lay for departures from the rules of natural justice. As the appellants found that they had not been given a hearing before the relevant committee, they feared that they would not be given a hearing before the full council. But there was nothing on record to show that the full council would do any such thing. So there had been no breach of the rules of natural justice as yet.

In this appeal to this court all these reasons were challenged by Mr. Omondi, while Mr. Menezes supported the decision. In the latter's submissions account must be taken of the discretionary nature of the order asked for especially when other remedies were available. Secondly, it was stressed that this was a matter which was private to the parties concerned and indeed still incohate. It was only a recommendation of the committee and not yet a decision of the council.

It is clear that the first task of this court is to determine the general nature of the order of prohibition. Inasmuch as the learned judge relied upon the statement of the law in Halsbury's Laws of England, 3rd edition, it is of interest to observe what authorities were relied upon there. They were *R v Electricity Commissioners*, [1924] 1 KB 171 which was approved of in *R v Minister of Health Ex parte Davis*, [1929] 1 KB 619. Those decisions, disposed of two arguments, one before the learned judge and one before this court. To begin with, while the ancient writ of prohibition was used by the King's Courts to restrain inferior courts from exceeding their jurisdiction, the operation of the writs has extended to control the proceedings of bodies which do not claim to be courts. The argument before the learned judge that the council was not a court, was beside the point. Atkin LJ (as he then was) went on to make his famous observation in the *Electricity Commissioners' Case*, that was repeated in Halsbury:

> "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

But to answer one of the arguments which arose in this court, it was pointed out that prohibition could be invoked at an earlier stage than *certiorari*.

> "If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on *certiorari*, I think that prohibition will lie to restrain it from exceeding its jurisdiction" (per Atkin LJ).

Bankes LJ, in the same case, explained that objection had been taken that the application had been premature, the matter still being only in its opening stage. But that did not matter. Once the process of exercising excessive jurisdiction had begun, it could be stopped. Indeed in both the *Electricity Commissioners' Case* and *Davis' Case* an initial process was prohibited. Therefore if prohibition lies at all in the present case, it can issue at this stage, it being unnecessary to wait for the full council's answer, and then for the appellants to suffer dismissal before the situation is to be remedied.

The debate must then move on to the general terms of the modern order of prohibition. The phrase which may have attracted the learned judge, was Atkin LJ's limitation – "having the duty to act judicially". In 1982 in - *O'Reilly v Mackman*, [1982] 3 All ER 1129 Lord Diplock had this to say:-

> "It will be noted that I have broadened the much cited description by Atkin LJ in *R v Electricity Commissioners* (etc) of bodies of persons subject to the supervisory jurisdiction of the High Court by prerogative remedies (which in 1924 then took the form of the prerogative writs of mandamus, prohibition, *certiorari* and *quo waaranto*) by excluding Atkin LJ's limitation of bodies of persons to whom the prerogative writs might issue, to those having a duty to act judicially.
>
> For the next forty years this phrase gave rise to many attempts, with varying success, to draw subtle distinctions between decisions that were quasi-judicial and those that were administrative only. But the relevance of arguments of this kind was destroyed by the decision of this house in *Ridge v Baldwin*, [1964] AC 40. Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decisions either for error of law in reaching it, or for failure to act fairly towards the person who will be adversely affected if the decision of failing to observe either one or other of the two fundamental rights accorded to him of the rules of natural justice or fairness, viz: to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made."

The decisions which Lord Diplock had described were those concerning applicants who wished to challenge the lawfulness of a determination of a statutory tribunal or any other body of persons having legal authority to determine questions affecting the common law or statutory rights and obligations, of other persons as individuals.

Lord Denning in the "Discipline of Law" has described the development with regard to natural justice (see pages 88-93). It does not matter now whether the body acts in a judicial or administrative capacity (see the *Padfield case* [1968] AC 997 and the decisions which followed). The emphasis now is on fair administration (per Lord Parker CJ, in *Re HK (an infant)* [1967] 2 QB 617).

The result is that the learned judge was led astray by counsel into forming too narrow a view of the scope of prohibition. All that was to be decided in this case was:

> 1) Whether the council had legal authority to determine questions affecting the rights of these appellants;
>
> 2) Whether the council erred in law by exceeding its jurisdiction; and 3) Whether it acted unfairly within the relevant rules of natural justice.

One can say categorically that volume XI of 3rd edition of *Halsbury's Law of England* should no longer be used on this topic. It is out of date in England; it is also out of date in Kenya. For a number of years now the decisions in *Padfield's Case* and *Ridge v Baldwin* have been adopted in Kenya and there is no

longer any need to distinguish between judicial and administrative acts (per Simpson J in the *Minister of Agriculture's case* Miscellaneous Civil Application No 58 of 1979 (not reported).

But the most important part of the *O'Reilly* decision was that it was held, that it would, as a general rule, be contrary to public policy and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action, and by this means to evade the provisions of Order 53 for the protection of such authorities. The statement was followed in *Cocks v Thanet DC* [1982] 3 All ER 1135. But this view was tempered in *Davy v Spelthorne BC* [1983] 3 All ER 278. For there, the right to sue for damages for negligent advice, was distinguished from the lost right of appeal against an enforcement order. The first was a private law right and the second a public law right. Lord Wilberforce described the importation of the words 'public law' and 'private law' (at page 285). He continued:-

> "But by an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed. Before the expression 'public law' can be used to deny a subject a right of action in positive prescription of law by statute or by statutory rules".

The result is that if a matter of public law is directly involved then in general (subject to certain exceptions) the prerogative orders should be resorted to:

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision – making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

(per Lord Diplock in *O'Reilly's case* at page 1131). But if the matter is truly a private law matter, then a civil suit would be appropriate.

At present it is not entirely easy to decide what is a private law matter as distinct from a public law matter. After *Davy v Spelthorne BC*, [1983] 3 All ER 278 further development of the distinction between these two branches of law, can be seen in the opinions of the English Court of Appeal in *R v East Berkshire Health Authority Ex parte Walsh* (1984) 3 All ER at 425. It was assumed in O'Reilly's case that with the introduction of the distinction between public and private law, a system of administrative law had been built up in England. On the other hand, in *Davy v Spelthorne BC*, [1983] 3 All ER 278, Lord Wilberforce explained, in the quotation above, that this process was far from complete. While, therefore, the formulation which the House of Lords arrived at in *O'Reilly's case*, that the prerogative writs may be issued for an error of law or failure to comply with rules of natural justice would appear to be the end of that particular chapter, a new development is in progress defining remedies as being those of private law or public law.

The essence of the *East Berkshire case* was that Mr. Walsh had been dismissed under his terms of contract, those terms having been approved by the ministry concerned; consequently the question was whether there was an element of public law involved in his dismissal. The learned trial judge perhaps understandably followed the line of thought set in train by the House of Lords in *Malloch v Aberdeen Corp* [1971] 2 All ER 1278. In the result the learned judge (Hodgson J) held that there was a sufficient element in public law for the order of *certiorari* to go to the Health Authority to quash Mr. Walsh's dismissal. Mr. Walsh had also instituted proceedings in the Industrial Tribunal for unfair dismissal and seeking compensation; but these had been stayed. In the Court of Appeal however, all three judges unanimously held that it was not a fit case for an order of *certiorari* and that Mr. Walsh must be left to his private law rights and remedies.

There are statements of Sir John Donaldson MR which might appear to elucidate the general position in the present case. They are that 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 as distinct from the holder of an office; this only makes it more likely that there will be special statutory restrictions on

dismissal or other underpinning of his employment. This was said to follow from *Malloch v Aberdeen Corp* [1971] (*supra*). It was the statutory underpinning that injected the element of public law, and it was not possible to equate public law with the interest of the public per se. On the other hand, the Master of Rolls explained that:

> "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 reinstatement or reengagement and so on. Parliament can underpin the position of public authority employees by directly restricting the field of the public authority to dismiss, thus giving the employee public 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 thus to 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".

That might seem to indicate that in general an order of reinstatement made under the Trade Disputes Act is a 'private law' matter and that a breach of such an order would not give rise to a 'public law' remedy. Another perspective was put forward by May LJ who explained at page 433:-

> "Second, 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 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 on a successful application to an industrial tribunal. As Sir John Donaldson 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 case has been adjourned pending determination of the instant proceedings for judicial review.

On successful application to an industrial tribunal alleging dismissal, the tribunal may, in its discretion, order the reinstatement of the employee; see section 69 of 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 the 1978 Act, which will in most cases exceed any damages to which the employee might have been entitled for wrongful dismissal at common law".

Then later May LJ, observed at page 434:-

> "For all those 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 a principal of law, then of course, they must be followed. As always, however, to the extent that they were really decided on their own facts they provide no precedent for later cases.
>
> 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 the resolution is an industrial tribunal. In my opinion the court should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure ..."

Purchas LJ also agreed.

It is clear now that May LJ has explained that the Master of Rolls' opinion is a distinct change of direction in English law. Lord Reid and Lord Denning had for two decades since *Ridge v Baldwin*, (mentioned by Lord Diplock above) developed a basis for the courts to review unlawful and unfair practices in which statutory employees had been treated less well than they might have been. Now we hear that the English courts are prepared to abandon this jurisdiction, not to the common law courts, but to the statutory industrial tribunals. Before the courts in Kenya blindly follow suit, it would be appropriate to pause and consider the position.

Certainly in this appeal, it would be unwise to attempt a quality judgment, such as that of May LJ in preferring litigation to go to the Industrial Court in Kenya from which there is no appeal, unlike there is in England, or perhaps more important still, in subsuming that natural justice will prevail in provisions about "unfair dismissal". In Kenya there is no exact parallel to the English "unfair dismissal". Section 15 of the Trade Disputes Act provides for reinstatement of "wrongful dismissal", and that is not quite the same thing, and does not *ipso facto* import the rules of natural justice into the meaning "wrongful". In addition, these ideas and decisions were not argued before the High Court or this court, such argument as there was, having been founded in the outmoded sentiments of the 1920's. But in so far as the learned judge in Kisumu made a start with his finding that this was a matter of "private law", the recent decisions have been out to provoke a consideration of them, and as to the direction in which administrative law in Kenya should develop. But an answer must be given to the learned judge's finding.

I would start with an up-to-date restatement of Lord Diplock's paraphrase of Lord Atkin's seminal statement in the *Electricity Commissioners' case*. It only needs a few additions and so would read:-

> "Whenever any person or body of persons has legal authority conferred by legislation to make decisions in public law, which affect the common law or statutory rights of other persons as individuals, it is amendable to the remedy of judicial review of its decision either for error of law in so acting, or for failure to act fairly towards the person who will be adversely affected, viz: by not affording him a reasonable opportunity of learning what is alleged against him of putting forward his own case in answer to it, and to the absence of personal bias against him, on the part of the person by whom the decision falls to be made".

The great question then is what is "public law". Until recently "administrative law" covered cases where a body was acting under statutory powers. It had to act within its powers; it had to understand correctly what its powers were (see *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208; *Re Racal Communications Ltd*, [1980] 2 All ER 634), it had to act fairly (*O'Reilly's case*). Now despite a statutory background, the inquiry is precisely what is being breached that is complained of. Despite the statutory power to act, has the authority only entered into a private contract, eg for service, for the sale or purchase of goods or other contracts, such as the authority must enter into to carry out its functions. In some ways this is reminiscent of the old distinction between quasi-judicial and administrative duties. Its basis is that it is undesirable for the courts to dictate to local authorities and other bodies how best they should run their affairs. But in the end it may well be as difficult to satisfactorily distinguish what is private from public as it was between quasi-judicial and administrative; and it will be of interest to observe what the English courts make of the process of injection of the "public element" into the affairs of these bodies; for it will always be a matter of choice, perhaps even policy, what factor turns out to be an injection of what factor does not. Take Mr. Walsh's situation. His contract had had incorporated into the National Health Service (Remuneration and Conditions of Service) Regulations 1974 approved by the Secretary of State for Social Services. But that apparently did not count as a statutory injection of public law, for reasons not immediately clear, except that May LJ, tribunal that such cases should in future go to the industrial tribunal. I would have thought that such conditions of service which dealt with dismissal, would have counted as statutory underpinning, and I am persuaded that any or any better statutory underpinning will ever be provided by an astute ministry in the future. Indeed I approach the decision in the *East Berkshire case* with skepticism as possibly being unsuitable to follow in Kenya at present.

But even if I were disposed to follow it, I would find it inapplicable to the circumstances of the present appeal. The appellants did not contest their first dismissal by resort to judicial review; they anticipated the ideal choice of May LJ, taking proceedings under the Trade Disputes Act, leading towards the Industrial

Court. But unlike their counterparts in England, the appellants had no new cause of action justiciable by the Industrial Court directly. They had first to take part in the filter proceedings of inquiry and reconciliation. The Minister set up an inquiry, and from the records it seems to have been a very fair inquiry, which recommended that the appellants should be reinstated. The Minister approved and put that to the council. The Federation of Kenya Employers approved. The council decided to approve. Having thus agreed to the reconciliation proposed two consequences followed. The Minister had no need thereafter to report the trade dispute to the Industrial Court, and the agreement was to be lodged with the Minister. In the event of later industrial strife, the agreement would play its part (see sections 5 to 9 and 29 of the TradeDisputes Act). The acceptance or the agreement was therefore an undertaking that the dispute was at an end and the Minister had no further steps to consider. It must be implied that the parties would abide by the agreement. If they did not, of course, industrial unrest would arise and the reconciliation procedure would be useless. It would mean starting all over afresh, and that cannot have been in the contemplation of the legislature. It is because of this that resort has been made to the courts for judicial review. This resort is made at a stage which did not fall to be considered in the *East Berkshire case*.

The council had the statutory power to employ the appellants and no doubt entered into contract of employment with them. Breaches of such contracts could no doubt be taken to the courts or to the Industrial Court. This court has not been shown the terms of those contracts but the Local Government Act does not seem to have provided any statutory underpinning to their terms of dismissal. Nevertheless, the Trade Disputes Act certainly does in connection with the reconciliation process. It provides that the Minister can arrange for reinstatement with the agreement of the parties. Once that has been agreed, the council's powers to dismiss for the alleged faults at that time would be curtailed. The council must give up its apparent right to dismiss, and instead reinstate the employees concerned. Can it be anything, but unreal to say that there has been no injection of a "public law element" into the contract between the employer council and its employees? It is clearly a situation where the minister has intervened and through his statutory powers has altered the position of the parties, in such a way that is beyond the powers of the council to lawfully alter the agreement for reinstatement. It is not suggested that the appellants had done anything wrong since the agreement to reinstate them; nor again that anything further had come to light disqualifying the agreement. The suspicion is that the elected councilors were not disposed to accept the decisions of the interim authority. But whoever represented the council, the council was statutorily bound to submit its dismissal of the appellants to inquiry and reconciliation, and having agreed to the reconciliation proposed it was bound to carry it out. As May LJ, explained so well, the common law does not admit of specific performance of contracts of service. The appellants could only be awarded the damages limited to the period of notice at common law. The reconciliation gave them much more.

It was the advantageous rights to reinstatement that arose out of the reconciliation agreement that the appellants wished to protect by judicial review, and in my judgment either under the old notions of administrative law, or the new notions of public and private law, this was a public matter in which they were entitled to seek protection. Neither the committee nor the council itself could reopen the reinstatement agreement, without giving rise to public law rights in the appellants to preserve the rights they had won in the reconciliation process under the aegis of the Minister.

Prohibition also lies to correct an excess or absence of jurisdiction. Prohibition also lies for a departure from the rules of natural justice. The council could hardly be seen to be acting fairly as will be explained presently.

It follows that the order of prohibition was properly called for by the appellants, and the last question is whether it is appropriate to grant it. Mr. Menezes sought to turn our attention to those cases where exceptional or other elements were so compelling, that discretion was exercised in not granting the order. But they do not apply here. There is no reason as why this interference should not be stopped at once. There is no reason why good sense should not prevail to allow the appellants to continue with their duties, in accordance with what would appear to have been a very well reasoned recommendation from the Minister. In comparison with the minister's actions, the committee's procedure of not calling upon the appellants, of not giving them any idea what was against them, or a chance to defend themselves, and

then building up a situation when the full council could hardly have been able to act impartially, seems to be so unfair, that it is well left behind the council. It will be recalled that in these matters it is not whether the council would act fairly, but whether it would be seen to have acted fairly (see *Re Godden* (1971) 3 All ER 20).

I would allow the appeal, and I would direct that the order of prohibition be directed to the council prohibiting it from entertaining the committee's recommendation in any way. It would grant the appellants the costs of this appeal and the costs in the High Court.

Dated and delivered at Kisumu this 24th day of June, 1985

A.R.W HANCOX

.....

JUDGE OF APPEAL

J.O NYARANGI

.....

JUDGE OF APPEAL

H.G PLATT

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR