

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 33 OF 1989

(High Court Judicial Review No. 3 of 1989)

BETWEEN:PUBLIC SERVICE COMMISSIONAPPELLANT

-and-

ANIL PRAKASH KARANRESPONDENT

Mr. A. Cope for the Appellant
Mr. G. P. Shankar for the Respondent

Date of Hearing : 29th April, 1993
Date of Delivery of Judgment : 30th June, 1993

JUDGMENT OF THE COURT

When the relevant facts of this matter are set out, what appears to us to be the only problem is clearly exposed. The case was presented to and decided by the High Court on affidavit evidence. In addition to sworn evidence there were annexed to the affidavits a number of documents. There does not seem to be any contest about what happened. The contest is about what inferences should be drawn from what facts there are, and whether the appellant was entitled to act as it did.

The respondent is and was an engineer. He was and is, at least at the time he commenced his High Court action in 1989, employed by the appellant Commission. It appears that his permanent status or grading was, at times material to these proceedings, as Engineer. He was appointed as Acting Senior

Engineer (Water) (a higher grade) at Suva on 13th February 1986. He was transferred to Lautoka with effect from 7th July 1987, but he was not appointed Acting Senior Engineer (Water) there. However, he continued to act in such a capacity apparently; at least he was paid a salary as if he were holding such a position (record p 34).

It is appropriate to pause here to note that in what manner or by what document, if any, the respondent was appointed Acting Senior Engineer (Water) is not in evidence. The only evidence is that he was so appointed while in Suva, and was not when he was moved to Lautoka. We have worked on that basis.

The respondent was granted nine working days annual leave from 3rd November 1987, due to resume duties on 17th November. He spent his leave in Canada. It is not disputed that he proceeded overseas on 27th October, six days before his leave was due. He did not resume duties on 17th November, but on 21st December 1987, some 34 days after the due date. On the due date, 17th November 1987 he sent what he describes as a telex, but which was actually a cable, from Canada to the Divisional Engineer Western (Division) which read (record p 11):-

*"Please shorten vacation on pro rata basis.
Advise Mrs Karan about when I resume duty.
Regards."*

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If this was meant to be a request to take vacation leave pursuant to some general order applicable to public servants, it is not denied that it required the prior approval of the Commission, which was not obtained. In the view that we take this is probably not material. More material is the fact that he had, before leaving, left no address where he could be contacted, did not put one on the telex or cable, and his wife did not know where he was. The Divisional Engineer sent the message on to the Permanent Secretary. The respondent says "no reply was received on the said request". Well, "no one knew where he could be reached.

On 14th December 1987 the respondent rang to say that he would be resuming duties before 25th December. Before this, on 2nd December, instructions had been given to write to the respondent and inform him that he should resume duties on or before 31st December or he would be assumed to have ceased his employment with the Commission (record p 25). However, as no one knew where he was, this could not be done (record pp 35, 25). It does not seem to be in dispute that when he rang on 14th December he was told that he should be back at work by 31st December at the latest (record p 15).

The respondent resumed duties on 21st December 1987 and was paid the salary he was previously receiving as an Acting Senior Engineer (Water). On or about 26th February 1988 he was sent the following missive from the Secretary, Public Service Commission (record p 13):-

"ABSENCE WITHOUT LEAVE

In November 1987, the Acting Permanent Secretary for Works and Transport had granted you approval to proceed on nine (9) days local leave with effect from 3.11.87. You were scheduled to have resumed duty after your leave on 17.11.87 but failed to do so. In fact, you were absent without leave for a total of 34 Consecutive days from 17.11.87 to 20.12.87.

You should provide this office with explanation for your unauthorised absence and to show cause why disciplinary action should not be instituted against you.

We would expect a prompt reply and to be channelled through your permanent Secretary, please."

The respondent replied in a memorandum dated 29th March 1988 (record p 15):-

"During my leave from 3rd to 17th November, 1987 I visited Canada. This was approved by D.E.W. vide memo DEW:SF10/71 of 21/10/87.

While on leave, I had requested via telex on 11th November 1987 for my tour to be shortened and I be given my vacation leave due to certain unforeseen personal problems.

On telephone contact from Canada, I was informed by the S.A.S. Mr. S. Kumar from our Head Office that I should be back at work by 31/12/87 at the latest. However, I informed him that I was returning on 20/12/87 and would be resuming duty from 21/12/87.

Thus, I had then resumed duty on 21/12/87 following my leave as per memo DEW:SF10/71 of 22/12/87 and have been receiving full acting allowance since then.

However, as far I am aware all leave taken by me has been approved and therefore there is no question of absence without leave as has been misconstrued.

I hope that this will set the records straight."

There is evidence to the effect that in the week commencing 24th March 1988 the salary of the respondent was reduced to the level of that of engineer (the acting allowance was stopped), and that recovery action was commenced. This does not seem to accord with other evidence; it probably does not matter so far as these reasons for judgment are concerned. The respondent, in his proceedings, did not seek reimbursement of the amount that had been recovered from him, but the Judge made an order to that effect.

By memorandum dated 25th July 1988 the respondent expressed his "grievance on my victimization of promotion to Senior Engineer (Water)", and sought to be promoted to or confirmed in that position (record p 16). Although the Commission did not reply, it said that that was because his case was under consideration. He received a memorandum dated 12th October 1988 as follows (record p 18):-

"DEEMED RESIGNATION AND REAPPOINTMENT"

At its meeting held on 6 October 1988, the Commission in view of your continued absence from duty without leave with effect from 17/11/87 had decided that you should and you are, hereby deemed to have resigned from the service with effect from 17/11/87.

However, the Commission has also decided that you be reappointed as Engineer (Water) with effect from 21/12/87.

From that date you will be paid salary as follows:

(i) with effect from 21.12.87

- \$9,265 per annum in the grade CS03:
\$9,265 - \$11,552 (15% pay reduction)

(ii) with effect from 1.7.88

- \$9,820 per annum in the grade CS03:
\$9,820 - \$12,245 (6% pay restoration)"

By memorandum dated 3rd November 1988 the Commission informed the respondent that as a result he had been overpaid \$2059. By a later memorandum, dated 17th January 1989 (record p 21), the respondent was informed that this was a miscalculation and that the proper figure was \$1,585.44.

The respondent commenced proceedings on 21st April 1989. He sought the issue of a writ of certiorari to quash the decision in the document "Deemed Resignation and Appointment", by which no doubt is meant the decision of the Commission of 6th October 1988. He also sought a declaration that he was entitled to hold the post of Senior Engineer (Water) from 13th February 1986, and that he be paid a commensurate salary and benefits.

In a decision given on 1st September 1989 the trial Judge granted a writ of certiorari to quash the decision entitled "Deemed Resignation and Reappointment" dated 12th October 1988 (it should have been the decision of 6th October 1988), and refused to make a declaration that the respondent was entitled to hold the post of Senior Engineer (Water) from 13th February 1986 and be paid a commensurate salary; although it was not sought, he made the following order and declaration (record p 51):-

"....that the Applicant continues to be an Acting Senior Engineer (Water) as from 13th day of February, 1986 subject to the Commission's decision, and that he be paid commensurate salary resulting in reimbursing the salary recovered as over-payment and payment of lost salary is granted."

The Commission appealed to this Court only against the order and declaration that the respondent continued to be an Acting Senior Engineer (Water) as from 13th February 1986, and that he be paid a commensurate salary accordingly. There may have been further grounds of appeal filed which sought to raise delay in the making of the application to the High Court by the plaintiff, and a ground that the declaration made by the Judge referred to above had not been sought by the respondent. As to the first matter, as far as we can ascertain the matter was not raised before the Judge, where it should have been if it was to be relied on, it was not dealt with by His Lordship, and it was not raised before us. As to the second matter for reasons that will appear, it ceases to have any relevance.

The respondent cross-appealed. Quite incorrectly, he sought a declaration that "the Respondent is entitled to hold the post of the Senior Engineer (Water) from 13.2.86, and then went on to seek an order for interest.

Turning first to the declaration which the Judge refused to make, and even treating the so called cross-appeal as an appeal from his refusal, it is perfectly clear that the Judge was

correct in reaching the conclusion that he did, and that any challenge to his decision on this aspect must fail.

The Court was being asked to say that the respondent was entitled to promotion to a substantive position of Senior Engineer (Water) because he was acting in that capacity from 1986. As the Judge in effect said, that is simply asking the Court to substitute itself for the proper body that deals with procedures for promotion within the public service. There is no way in which the Court would be entitled to do so, and, as the Judge said, that is the function of another body. It is unnecessary to spend any time on this aspect.

It appears from the grounds of appeal that the Commission is not seeking to appeal from the decision of the Judge to order the issue of a writ of certiorari to quash the decision of the Commission, made on 6th October 1988, to deem that the respondent had resigned with effect from 17th November 1987, and to re-appoint him with effect from 21st December 1987. This aspect need not therefore be further considered so far as concerns any order from this Court. It is relevant, as will appear.

That only leaves the question of whether the respondent continued to be an Acting Senior Engineer (Water) as from 13th February 1986, was hence entitled to be paid a commensurate salary and a reimbursement of what had been deducted and, presumably, payment of what had not been but should have been

paid to him as the holder of such an office. That was, as we have said, a declaration that had not been sought by the respondent.

This raises a number of matters. First of all the respondent "continued" to be paid at the Acting Senior Engineer rate from 13th February 1986 to 7th July 1987; presumably no deductions have been made in respect of this period. Secondly, the trial Judge said, in his reasons for judgment, that the respondent "continues to be Acting Senior Engineer (Water), as from 13th February 1986 subject to what the Commission decides". The formal order is "continues to be an Acting Senior Engineer (Water) as from 13th day of February, 1986 subject to the Commission's decision..." There is no indication at all what he intended to mean by these expressions.

The uncontested facts are (i) that the respondent was appointed Acting Senior Engineer (Water) while he was based in Suva with effect from 13th February 1986, (ii) that he was not appointed Acting Senior Engineer (Water) when he was transferred to Lautoka with effect from 7th July 1987, (iii) that notwithstanding this he performed the duties of a Senior Engineer (Water) after his transfer to Lautoka and did so at least up to the latter part of 1988 and up to the time of swearing his affidavit of 21st April 1989 (record p 9), (iv) that he was paid the salary of an Acting Senior Engineer (Water) at least up to March 1988, and probably longer, (v) that the Commission did not

seek repayment of the Acting Senior Engineer salary paid to him up to 17th November 1987 (he had been at Lautoka since July) and (vi) that in the memorandum of 12th October 1988 it purported to "reappoint" him as engineer after a deemed resignation.

Now it seems to us that the position is very simple. The "deemed" resignation and appointment were quashed. We pause here to note that there was before the Judge a Public Service Regulation, reg. 33 which apparently "deems" an officer who is AWL in certain circumstances to have resigned, unless the Commission otherwise determines (record p 43). There may have been other material bearing on this aspect before him, and certain orders were put before us as to why the Commission might have been entitled to take the action that it did. But the Judge decided otherwise, quashed the decision, and there is no appeal from that. We simply proceed as we are entitled to do, on the basis that there was no resignation and reappointment, "deemed" or otherwise.

What is important is that it is that "deemed" action which resulted in the reduction of salary of the respondent. Whether the Commission might have been entitled to take disciplinary action of some other kind, and if so what, is a matter for speculation only. It did not take any such action. The only disciplinary action taken was the deemed resignation and reappointment action. The reduction in salary was consequent upon the so called reappointment as an engineer, a grade which

carried a lesser salary. If, as is the case here, that goes out the window, then there was no disciplinary action taken directed to salary as such, even assuming that the Commission had power to impose a penalty of reducing salary for such an offence, and assuming, without deciding, that it would, on the facts of this case, have been open to it to take this action. It simply did not do this. It purported to do something which, as a consequence, would have caused a reduction in salary, and that something did not come off. We do not believe that it is open to it now to assert that part of that disciplinary action, which has been set aside, can nevertheless be given effect to. The Commission never purported to suggest that even if the deemed resignation and reappointment was invalid, it had independently taken disciplinary action and reduced the salary. It simply did not do so.

It may be that the Judge reached the decision to quash the deemed resignation and reappointment on the basis that the leave which had been taken by the respondent had in fact been approved. On our part we doubt whether, if that was the finding of fact, it could stand in the light of the evidence. On this appeal it is not necessary to make any finding because, rightly or wrongly, the exercise which had the end result of a cancellation of the respondent's salary for a period followed by a reduction of it has been set aside and there is no appeal from that. The respondent is entitled to be treated as if it had never occurred. Whether a finding of fact in connection with that by the High

Court, if there was such a finding, would now prevent the Commission from recovering from the respondent the amount paid to him for the period when he was Acting Senior Engineer does not arise for decision here.

The result is that no action of any sort has been validly taken against the respondent. On the evidence, and in the light of the order made to quash the deemed resignation and reappointment action, nothing has happened to affect the right of the respondent to be paid the proper salary for what he was doing up to 17th November 1987 and thenceforth.

We do not feel that we should endorse the declaration and order made by the Judge at first instance. May be by the use of the words in the order to which we have already drawn attention his Lordship was giving expression to a concept that the Commission might have some rights to recovery, perhaps other action, and was seeking to preserve them. If so, we would certainly not wish to do anything to interfere with that, and by removing the declaration we will have done nothing to interfere with that. We have made it clear that so far as salary is concerned, nothing has happened to alter the salary entitlement of the respondent as it was at 17th November 1987. There having been no disciplinary action (effective) taken against him, he would prima facie be entitled to go on receiving what he had been up to that date. He went on doing the same job.

If we dismiss the appeal and the cross appeal and vacate and discharge the order and declaration relating to the position of the respondent and its commensurate salary, then this will enable the parties to give effect to our decision that no change occurred to the situation of the plaintiff on and after the 17th November 1987 consequent upon being absent without leave as the result of any action yet taken by the Commission.

It can be inferred that we believe that the respondent was never given any permission to be absent after his authorised 9 days of leave expired, nor did he have authority to do so.

It is not suggested that the cross appeal prolonged the hearing before this Court nor increased the costs. Even though we propose to vacate the order of the Judge to which we have referred, the Commission has failed in this appeal. There does not seem to have been any order to costs made in the Court below.

The order of the Court will be:

Order that the order and declaration that the Applicant continues to be an Acting Senior Engineer (Water) as from 13th day of February, 1986 subject to the Commission's decision, and

that he be paid commensurate salary resulting in reimbursing the salary recovered as over-payment and payment of lost salary is granted, be vacated and discharged.

Appeal and cross appeal dismissed. Order the appellant to pay the respondent's costs of the appeal.

Michael Helsham

 Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

Moti Tikaram

 Sir Moti Tikaram
Resident Justice of Appeal

Peter Quilliam

 Sir Peter Quilliam
Justice of Appeal