

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 53 OF 1992

(High Court Civil Action No. 581 of 1988)

BETWEEN:

THE FIJIAN AFFAIRS BOARD

Appellant
(Original Defendant)

and

KOLINIO BUIBOTO MATALAU

Respondent
(Original Plaintiff)

Mr John Semisi for the Appellant
Mr Tevita Fa for the Respondent

Date of Hearing: 12th August, 1993
Delivery of Judgment: 9th November, 1993

JUDGMENT OF THE COURT

This is an appeal against certain Declarations and Orders made by Byrne J. in the High Court on 11 September, 1992 in favour of the Respondent.

Background

The Respondent was at all relevant times an employee of the Fijian Affairs Board the Appellant in this appeal. He commenced his employment with the Board on 1st May, 1964. At the material time he had risen to the rank of Roko Tui and was posted to Ra province pursuant to a decision taken by the Board on 26th June, 1984 and approved by the Minister (see Exhibit KBM 31 at p.67 of the Record). The post of Roko Tui is the senior executive position in a province. Section 12 of the Fijian Affairs Act says, inter alia, that 'the Minister may, with the advice of the Board, appoint rokos of provinces'. The Board is a statutory authority governed by the Fijian Affairs Act Cap 120. Its Chairman is the Minister for Fijian Affairs. It is common ground that in the day to day affairs of the Board the Permanent Secretary in the Ministry of Fijian Affairs functions as the Chief Executive Officer of the Board.

Respondent's letter to Prime Minister

On 5.5.1987 the Respondent wrote a 'confidential and personal letter' direct to the then Prime Minister and Minister for Fijian Affairs Dr Bavadra (Exhibit KBM 1 at p.19 of the Record). In this letter he outlined, amongst other things, a number of his grievances relating to his employment.

On 10.6.87 the Respondent wrote to the Permanent Secretary asking to be released on study leave.

By letter dated 10.7.87 the Permanent Secretary advised him that his application could not be approved and added 'even if it was possible to release you, you are still under disciplinary action and that would need to be resolved before any consideration can be given to your request'.

Disciplinary Charge

On 24th August, 1987 the Respondent received a letter from the Permanent Secretary of the Fijian Affairs, dated 18.8.87. In it the Permanent Secretary says, inter alia:

'3. I have because of this decided that you be charged as follows:-

"That you KOLINIO MATALAU, Roko Tui Ra, through your written communication, dated 5 May 1987, to the then Prime Minister and Minister for Fijian Affairs, was insubordinate and that you disobeyed lawful instructions by writing direct to the then Prime Minister and Minister for Fijian Affairs and not through the Permanent Secretary for Fijian Affairs."

4. You are required to submit to me your explanation within 21 days of receipt of this letter and to show cause why you should not be severely disciplined.' (See Exhibit KBM 4 at p.34.)

At the time when the Respondent received this letter he was already, as noted earlier, on another disciplinary charge.

Respondent's letter of conditional resignation

On 13th August, 1987 the Respondent wrote a letter to Ratu Josua Toganivalu, Adviser on Fijian Affairs, u.f.s. Permanent

Secretary.

In this letter the Respondent again applied for study leave and reiterated some of his grievances. The relevant portions of the letter were:

"STUDY LEAVE WITHOUT PAY AND OR RESIGNATION W.E.F. 21/9/87

Respectfully submit my humble application for the above for your most urgent favourable consideration, please.

...

In the event of my resigning from the service of the Board, if this step is to be taken as a last resort, then I wish to state my deep appreciation for the assistance the Board has given me in the past and I pray that we will forge ahead as a race in all aspects of development in the future." (see Ex KBM 18, p.49 of the Record).

Permanent Secretary's initial reply

Towards the end of August 1987 the Respondent received the following reply dated 21st August 1987 from the Permanent Secretary:

"I refer to your letter dated 13 August, 1987 which was addressed to the Adviser for Fijian Affairs.

Your request for study leave will be considered when the disciplinary actions against you are disposed off - my memorandum No.CPF.1051-2 dated 23.4.87 and 18.8.87 refers - and you should therefore ensure that your explanations to these charges are forwarded to me as soon as possible.

Your notice of resignation cannot be considered until the actions referred to above are completed." (See Ex KBM 20 at p.53.)

The Respondent wrote to the Permanent Secretary on 10.9.87 (see Ex KBM 21 at p.54). Although in his letter of 10.9.87 the Respondent refers to "your memorandum CPF 1051-1 of 28/8/87" it is obvious that he is referring to the Permanent Secretary's letter of 21.8.87 (Exhibit KBM 20).

In his letter the Respondent says that he 'cannot work with people who have double standards as I always speak my mind openly for the better'.

The penultimate paragraph of his letter reads as follows:

"As I now have a Legal Adviser known to you, I will continue to listen to him from now onwards as this matter is getting serious from day to day. If he advises me that the months notice already given to quit is sufficient then I have no alternative but to leave. In that case then you will have to find a suitable replacement for me here."

Respondent's application to withdraw resignation

On 16th September, 1987 the Respondent posted a letter addressed to the Governor General of Fiji applying to "withdraw my resignation w.e.f. 21.9.87". This letter was sent through the "Adviser and Permanent Secretary, Ministry of Fijian Affairs".

Permanent Secretary's purported acceptance of resignation

In the meantime the Permanent Secretary caused a letter of acceptance of resignation to be hand-delivered to the Respondent just before midnight on 16th September, 1987. It is common ground that the letter of withdrawal reached its destination after the letter of acceptance was received by the Respondent. The first two paragraphs of the Permanent Secretary's letter of acceptance dated 16/9/87 read as follows:

" I refer to your letter referenced CPF.53 dated 25.08.87, and in particular, your notice of intention to resign from the Service of the Fijian Affairs Board with effect from 21 September, 1987.

2. After consultation with the Adviser for Fijian Affairs, Ratu Josua Toganivalu, I am to inform that your resignation has been accepted. " (See Ex KBM 24 at p.59 of the Record.)

On 29.9.87 the Permanent Secretary again wrote to the Respondent as follows:

MEMORANDUM

From Permanent Secretary, Fijian Affairs Phone No 24 086
 to Mr K B Matalau, Roko Tui Ra File No CPF.1051-1
RESIGNATION Date 29.9.87.

(Your reference.....)

I refer to my letter to you No. CPF 1051-1 dated 16.09.87 and to your representation to His Excellency the Governor-General dated 16.09.87 on this subject.

His Excellency has considered your submission and has advised that my acceptance of your notice of resignation should stand.

You should therefore proceed on 24 working days terminal leave with effect from Monday 05.10.87. This leave will expire on 10.11.87 and your resignation will therefore be effective from 11.11.87.

Mr J. Kidia, accompanied by an officer from the Central Fijian Treasury will be in your office on Wednesday, 30th September 1987 for handing over purposes.

(J.N. Guivalu)
Permanent Secretary, Fijian Affairs

c.c:A.C.A.

Manager, Bank of New Zealand - Suva & Tavua

Manager, National Bank of Fiji - Suva & Rakiraki "

(See Ex KBM 29 at page 64 of the Record.)

Commencement of proceedings in High Court

On 26th August 1988 the Respondent commenced proceedings in the High Court by way of originating summons seeking the following declarations:

- a) that the acceptance of the applicant's resignation against his wishes after it was withdrawn before the stipulated date 21st September, 1987 was unfair, malicious and contrary to law and in violation of the principles of natural justice and in the given circumstances amount to unfair and unlawful dismissal from the Fijian Affairs Board as a Roko;
- b) that the applicant's purported dismissal was null, void and of no effect and that he is still a "Roko" in the employment of the Fijian Affairs Board;

or alternatively

- c) damages equivalent to 10 years salary at the rate of \$16,185-45 per annum;
- d) interests at the rate of 13 1/2% from 11th November, 1987 till the date of judgment;
- e) costs of this action;
- f) such further and/or other relief this Honourable Court may seem just.

The application was supported by the Respondent's affidavit. The then Permanent Secretary of the Fijian Affairs Board Dr Wainiqolo filed an affidavit in opposition. The matter was heard by Byrne J. who gave judgment in favour of the Respondent after hearing him on oath. There was no appearance by the Board's counsel at the hearing of the summons on 5th March, 1992 and 8th of September, 1992 and no explanations were given to the trial judge, Mr Justice Byrne, for the absence.

High Court's decision

The concluding part of Byrne J.'s judgment delivered on 11th September, 1992 reads as follows:

' In my judgment the combined effect of Sections 4, 12 and 14 is to vest the responsibility for making decisions affecting the appointment of Rokos or Fijian Magistrates in the Board only and there is no evidence before me that the Board ever considered the Applicant's position. It appears from the letter of the Permanent Secretary for Fijian Affairs of the 16th of September 1987 that the Secretary had communicated with the Adviser for Fijian Affairs but not the Board itself. The constitution of the Board is set out in regulation 2 of the Subsidiary Legislation namely, the Minister, 18 Fijian Members of the House of the Representatives and 2 Members of the Great Council of Chiefs.

For these reasons I declare that the Respondent's purported acceptance of the Applicant's resignation by the Permanent Secretary for Fijian Affairs and the Adviser for Fijian Affairs was invalid in that this resignation could only have been accepted by the Fijian Affairs Board.

I therefore further declare that the Applicant is still a "Roko" in the employment of the Respondent.

I also order that the Respondent pay the Applicant his costs of these proceedings to be taxed if not agreed. '

Board's appeal

The Board has appealed to this Court against Justice Byrne's judgment on a number of grounds. At the hearing of this appeal Mr John Semisi who appeared for the Board submitted that the appeal really turned on ground (3) which reads as follows:

"3. THAT the learned Judge erred in law in accepting the Respondent counsel's argument on the 8th day of September 1992 that it was immaterial as to when the Respondent's letter of withdrawal of his resignation was received by the Appellant Board because the Board had never made any decision affecting the Respondent and that under the Fijian Affairs Act Cap 120 only the Board could do so."

The Appellant's case

In short, the Appellant's case is that the learned Judge erred in holding that the acceptance of the letter of resignation by the Permanent Secretary was invalid because he had no power to accept it. There is no dispute that the purported acceptance was communicated to the Respondent before his letter of withdrawal was received by the Permanent Secretary. Mr Semisi submitted that the Respondent's employment was validly terminated because his offer to resign was accepted by the Permanent Secretary before the Respondent's endeavour to withdraw it.

On the question of the Permanent Secretary's powers Mr Semisi argued -

"that under the Act, the Board is charged with the fundamental responsibility to device policy decisions concerning the Board and that the daily administrative matters which includes disciplining staff is vested in the Permanent Secretary. The Board like any other Statutory Boards does not get involved itself nor does it have powers to deal with the administration of the Statutory Organisation. It is the Chief Executive and in this case the Permanent Secretary of the Board who handles such matters."

(All quotations are as they appear in the record of proceedings or in written submissions.)

The Standing Orders

In support of his argument he then drew our attention to Order 25 of the Standing Orders made by the Board. It is common ground that these Orders were in force at the relevant time and were indeed put in as an exhibit (KBM 32 at p.68) by the Respondent himself.

Section 10(b) (Section 11(b) under Cap 100) empowers the Board to make Standing Orders regulating the engagement, salaries, conditions of service, dismissals, superannuation and all other matters relating to employment of persons in its service.

Orders 23, 24, 25 and 26 read as follows:

"23. Controlling officers will report in writing to the Secretary should in their opinion disciplinary action be necessary.

24. On receipt of such report the Secretary will inform the officer in writing of the alleged offence and require a written explanation from the officer concerned within 21 days.

25. The Secretary may then, after such enquiry as he may deem necessary, decide on such disciplinary action as he may deem necessary. This may involve reprimand, deferment or stoppage of increments, demotion or dismissal, suspension, fine or surcharge.

26. An Officer who has been disciplined may appeal to the Board."
(See KBM 32 at p.72.)

In the Standing Orders "Secretary" means the Permanent Secretary for Fijian Affairs & Rural Development (see Order 2).

Standing Order 4 provides -

"4. Where it is necessary to apply a condition not included herein, the condition applicable in the circumstances to the Public Service for Public Officers and unestablished employees will normally apply."

Secretary's appointment and powers

We are satisfied that the Permanent Secretary for the Fijian Affairs & Rural Development is, for purposes of implementing the relevant provisions of the Standing Orders, the Board's Secretary and Agent. He clearly has powers to deal with disciplinary

matters on receipt of report in writing from "Controlling Officers". But the matter before us is not a disciplinary matter as envisaged by Order 25 of the Standing Orders nor is it a case of removal of a roko under Section 14(2) of Cap 120. Section 14(2) reads as follows:

" 14.-(2) If the Minister is of opinion that there are grounds for considering the removal of a roko or Fijian magistrate from office, or the imposition of a penalty by way of fine, reduction of salary or reprimand, he may refer the matter to the Board for inquiry, at which the roko or magistrate shall be entitled to be heard, and may thereafter make such order as he considers just."

How is the Permanent Secretary appointed the Board's Secretary?

We are here concerned with resignation by a roko and the purported acceptance of that resignation by the Secretary. We were not told how or under what authority the Permanent Secretary, who is appointed by the Public Service Commission and is a public officer, also becomes for all purposes Secretary, agent or Chief Executive of the Board which is a statutory body. It has been established in Fiji that employees of statutory bodies like 'The Consumer Council of Fiji' are not public servants, i.e. are not employees in the Public Service (see *Catherine Verma v. The Consumer Council of Fiji*, Fiji Court of Appeal Civil Appeal No. 51 of 1980). Order 4 of the Standing Orders which we have already quoted is of no assistance to us as there is nothing in the General Orders of the Public Service Commission in force in 1987 which bears on the question of authority to accept resignation. G.O. 221 which was in force in 1987 read as follows:

"Resignation

- 221.-(a) *Officers who have been confirmed to the pensionable establishment must, if they wish to resign give not less than one month's notice of their intention, in order that other arrangements may be made for the filling of their posts. An officer who resigns without giving one month's notice may be required to pay one month's salary in lieu of notice.*
- (b) *Officers serving on contract should, if they wish to resign before the ordinary term of their contract, give such notice as is required by the terms of their contract.*
- (c) *On resignation, an officer forfeits all the rights and privileges of his office, save as otherwise provided in these General Orders."*

Where does the Permanent Secretary derive his power from?

We are told, the parties agree and we accept, that in practice the Permanent Secretary does function as the Chief Executive of the Board. Apart from the question of his appointment we asked Counsel to assist us as to where the Secretary derives his power from to accept a resignation from a roko and unilaterally act on it although it is in evidence that he consulted the Adviser on Fijian Affairs. But this is immaterial.

Appointment of Rokos

At this point it would be useful to remind ourselves that the appointing authority for Rokos is the Minister who "may, with the advice of the Board, appoint rokos of provinces" (see Section 12 of the Act). It could, however, be argued that since the

Minister is also the Chairman of the Board 'may' should be read "shall". In any case whether it is the Minister or in reality the Board which is the appointing authority, we have not been referred to any evidence of delegation of authority or legal provision which empowers the Secretary to accept and act on a resignation by a Roko. There is no doubt that once appointed the Roko becomes an employee of the Board.

There might be no quarrel on the question of authority if the Secretary had accepted the resignation on instructions of the Board.

Was power delegated?

We take the view that the employing authority was the proper body to accept a resignation and thereafter the implementation of the consequences flowing from such resignation would fall on the Chief Executive's lap, unless of course power is or has been properly delegated to another body or person or there is legal authority for such body or person to accept a resignation. But we have not been referred to any evidence with regard to such delegation of authority or to any provision authorising the Permanent Secretary to accept the resignation of a Roko.

The fact that discipline, including the power to dismiss (Order 25) is expressly conferred on the Secretary but resignation is not - may be a significant pointer to the fact

that at the material time the Secretary had no powers in this area and was not intended to have any.

With regard to delegation of statutory powers of a Minister the following provisions of the Interpretation Act Cap 7 also provide some pointers:

" (2) Where, by or under any Act, any functions are conferred upon, vested in or delegated to any Minister, it shall be lawful for the Minister to delegate such functions to any Assistant Minister or public officer. (Amended by Order[†] 4th November 1970.) "

(3) Such delegation as aforesaid shall be signified by notice in the Gazette and may be made subject to such conditions, exceptions or qualifications as are specified in such notice.

[†] See Legal Notice No. 112 of 1970.

* See Legal Notice No. 118 of 1970. "

Similarly, the Secretary for the Public Service Commission, whose method of appointment is prescribed, exercises considerable authority delegated to him by the Commission under statutory powers of delegation.

Resignation a matter of significance

In our view resignation is a topic of sufficient importance to warrant special provisions especially when a senior officer of the level of a Roko is involved. A recent promulgated Regulation gives support to our view, although the Regulation in question refers to the resignation of a member of the Council of Chiefs. By virtue of Regulation 12 of the Fijian Affairs (Great Council of Chiefs) Regulations 1993 (Legal Notice No. 29) "The Permanent

Secretary of Fijian Affairs shall be ex-officio clerk to the Council." And Regulation 5 of these Regulation says that - "A member other than ex-officio members may resign their membership of the Council by writing under his hand and such resignation take effect, upon receipt of notice by the Clerk to the Council."

We also note that since 1989 the Permanent Secretary is now styled as "Clerk to the Board", where relevant in the Fijian Affairs Regulations.

Was notice of resignation rejected?

Even if we were to infer or assume that the Secretary had the power to accept the Respondent's resignation and that this is a case of offer and acceptance in contract, the nature of reply he received from the Secretary on 21.8.87 (Ex KBM 20 quoted at p.4 of our judgment) appears to indicate that the notice or offer of resignation was not accepted. Indeed one might argue that there was a counter offer or proposition nullifying the Respondent's offer. We drew attention of both Counsel to this matter. Whilst Mr Fa seized it with vigour as an alternative argument to his contention that the Secretary could not accept the letter of resignation before 21.9.87, Mr Semisi made no submissions on it. However, we do not find it necessary to explore this aspect any further.

Counsel for the Appellant had ample opportunity to research

and satisfy us that the Secretary had the power to accept the resignation and that this the Secretary did unequivocally. The Appellant has failed to discharge the onus that lay on it and this appeal therefore must be dismissed.

Some observations

However, before we dispose of this appeal there are a few observations we feel we should make.

The first is that we found it remarkable that the Permanent Secretary found it necessary to cause his purported letter of acceptance of resignation to be delivered to the Respondent just before midnight.

The second is in regard to Mr Fa's suggestion that his client's offer was not capable of being accepted before 21st September, 1987. This is clearly wrong, if the matter lay in contract. Thirdly, we feel that we should say that the Secretary (if properly appointed) obviously must have power to make day to day decisions relating to innumerable matters, in doing so he would be clearly acting as the Board's agent, and the absence of any precise delegation or statutory power must not be conclusive of the fact that he does not have the particular power. Our decision is based solely on the evidence in this case and what was put before us. In a case with such serious consequences as this (and see for example the consequences in G.O. 221), we do not feel inclined to infer anything when nothing to enable us to make a proper inference was put before the Court.

Nature of the Order

The fourth matter that has exercised our mind is the nature

of the declaration made in the lower Court. Bearing in mind the long period that has elapsed since the Respondent actually ceased functioning as a Roko and having regard to his age and the intervening events we feel that the substantive declaration should be modified to take the realities of the situation into account.

Court's Orders

In the outcome therefore the Orders of the Court are as follows:

- (a) That the declaration made by Byrne J. "that the Applicant is still a "Roko" in the employment of the Respondent" (now Appellant) be substituted by the following declarations:

"Declare that the employment of the Respondent was not terminated by or as a result of the Permanent Secretary's memorandum dated 16th September, 1993."

- (b) That the appeal is dismissed with costs to the Respondent.

Michael Helsham

 Mr Justice Michael Helsham
President, Fiji Court of Appeal

Moti Tikaram

 Sir Moti Tikaram
Resident Justice of Appeal

Mari Kapi

 Sir Mari Kapi
Judge of Appeal

Pursuant to its inherent powers the Court amends the date shown
in its declaration as 16th September 1993 to 16th September 1987.

Michael M. Helsham

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

Sir Moti Tikaram

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Sir Moti Tikaram
Resident Justice of Appeal

10th November 1993