IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0003 OF 1998S
(High Court Civil Action No.089 of 1987)

BETWEEN:

SHERINA BEGUM KHAN

Appellant

AND:

THE PERMANENT SECRETARY FOR PUBLIC SERVICE COMMISSION — *First Respondent*
DIRECTOR OF IMMIGRATION — *Second Respondent*
ATTORNEY-GENERAL OF FIJI — *Third Respondent*

Coram: The Hon. Mr Justice Jai Ram Reddy, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Mr Justice Ian Sheppard, Justice of Appeal

Hearing: Wednesday, 3 May 2000, Suva

Counsel: Messrs. I. Fa and R. Prasad for the Appellant
Messrs. D. Singh and E.B.S. Tuiloma for the Respondents

Date of Judgment: Friday, 12 May 2000

JUDGMENT OF THE COURT

The appellant had been employed for seven years by the Department of Immigration and was dismissed on 23 January 1998 when she held a position as an Immigration Inspector. Her application for judicial review of that decision, citing the three respondents, was refused by Pathik J in the High Court at Suva on 9 November 1998, against which she now appeals. In review applications of this nature the Court is not sitting on appeal against a decision, but only to ensure that it was arrived at according to law, and that proper procedures were followed, and that appropriate principles of natural justice and fairness were observed.

A brief account of the background to her dismissal will be helpful in assessing her complaint that proper procedures were not followed by the respondents and that principles of natural

justice requiring a fair hearing were not observed. In May 1996 three Pakistani nationals were found to be using Fiji passports carrying their respective photos, but falsely bearing the names of Fiji nationals with details from their birth certificates. Further enquiries revealed that three others had obtained similarly false passports by using the names and birth certificates of Fijians; and that on an application by one of them (in the name of Mohammed Feroz) the appellant had endorsed a false statement that he was personally known to her. It was also believed that she had extracted confidential information from the Department's computer and passed it on to two acquaintances, Messrs Rahmat Ali and Ashok Kumar, thereby enabling them to apply for the false passports concerned.

Following police enquiries into these matters the appellant was charged with counts of abuse of office and of making a false declaration, contrary to ss.111 and 312 respectively of the Penal Code. She pleaded not guilty. On condition that she give evidence for the State against another accused, she was granted immunity from prosecution, and was discharged on all counts on 3 February 1997 when they were withdrawn. However, because of the unavailability of prosecution witnesses, the case against the other accused was abandoned and she was not called on to give evidence, but her immunity was confirmed.

As a result of the laying of the criminal charges, the appellant was interdicted by the Commission on 18 September 1996 in terms of Reg 42(1)(b) of the Public Service Commission (Constitution) Regulations 1990 ("the Regulations") - i.e. her employment was suspended without salary. After the withdrawal of those charges the Director laid disciplinary charges against her, constituting what he considered a "major offence" within the meaning of Reg. 41. Three of these

charges related to the false endorsement on Mohammed Feroz's passport application that he was personally known to her. This conduct was alleged to be an offence under each of three separate provisions of Reg. 36 which can be summarised as follows for present purposes. It was described in Charge 1 as an offence under sub- reg. (a) namely, by a wilful act or omission, failing to comply with the requirements of the Immigration Department (the word "wilful" was omitted from the description of the offence in the charge). In Charge 2, it was described as an offence under sub-reg.(b) of disregarding a lawful order or instruction and in Charge 3 as an offence under sub-reg. (d) in being negligent, careless, indolent, inefficient or incompetent in the discharge of her duties.

The next two Charges (4 and 5) alleged the disclosure of confidential information, contrary to the provisions of Reg. 36 (i) and (l). The final Charge 6 under sub-reg. (t) described her as guilty by the foregoing actions of improper conduct in her official capacity, adversely affecting the performance of her duties and bringing the Public Service into disrepute.

A letter detailing these charges was sent to the appellant on 3 November 1997, and she was given 14 days to state whether she admitted or denied them, together with any other written explanation to enable proper consideration to be given. She was also advised that if she failed to state in writing whether she admitted or denied the charges within that period, she would be deemed to have admitted them; in this event the Commission, after further investigation or enquiry, could impose the penalties in Reg. 51. This letter was sent in compliance with the provisions of Reg. 41 dealing with disciplinary procedures for major offences as follows:-

> *"41. - (1) If a Permanent Secretary or Head of Department, or any officer acting properly with the authority of the Permanent Secretary or Head of Department has reason to believe that an officer of his Ministry or*

Department has committed a disciplinary offence which the Permanent Secretary or Head of Department regards as a major offence (or one of a series of minor offences which should be treated as a major offence) he shall charge the officer with having committed the alleged offence and shall forthwith serve the officer with a written copy of the charge against him and the particulars of the alleged offence, in which event the following provisions of this regulation will apply.

(2) The officer charged shall by notice in writing be required to state in writing within a reasonable time to be specified in such notice whether he admits or denies the charge and shall be allowed to give the Permanent Secretary or Head of Department an explanation if he so wishes.

(3) Where an officer fails to state in writing under sub-regulation (2) whether he admits or denies the charge, he shall be deemed to have admitted the charge.

(4) The Permanent Secretary or Head of Department shall require those persons who have direct knowledge of the allegation to make written statements concerning it.

(5) The Permanent Secretary or Head of Department shall forthwith forward to the Commission the original statements and relevant documents, and a copy of the charge and of any reply thereto, together with his own report on the matter and the Commission shall thereupon proceed to consider and determine the matter.

(6) If the truth of the charge is admitted by the officer concerned, or if the Commission after consideration of the reports and documents submitted to it under sub-regulation (5) and after such further investigation or inquiry as it considers necessary, is satisfied as to the truth of the charge it may, after taking into account the service record of the officer, impose any of the penalties specified in regulation 51.

(7) [Provision for recovery of damage or loss - not relevant].

(8) Where the Commission is not satisfied as to the truth of the charge it shall appoint a disciplinary tribunal in accordance with regulation 44."

The appellant responded to the charges on 14 November 1997 stating that she totally disagreed with and denied them. However, in respect of the Charge No.1 relating to her endorsement that Mohammed Feroz was known to her, she explained that she had mistakenly written

that "the applicant" was known to her, when she meant to state that "the witness" to his application, namely Ashok Kumar, was known to her, and she repeated this in response to Charges 2 and 3. This explanation could be regarded as an admission of the careless conduct alleged in the third Charge but not of the more serious defaults alleged in Charges 1 and 2. No admission of any kind could be spelt out of her denials of Charges 4, 5 and 6.

On 23 January 1998 the Director wrote advising her that in accordance with the powers delegated to him (a matter to which we refer later) and as recommended by the Departmental Staff Board, she was dismissed from the service forthwith in accordance with Reg 51(1)(a) of the Regulations, which specified dismissal as one of the penalties which could be imposed. She issued the present motion for Judicial Review of this decision, seeking certiorari to quash it along with declarations that she had been denied natural justice; that there was a failure to comply with the requirements of Reg 41(1) of the Regulations and that the decision to dismiss her was biased and pre-determined. There were claims for unquantified damages and costs.

The issues in the High Court were stated by Pathik J. to be procedural impropriety and denial of natural justice. He said there was a clear admission of guilt, and hence no need to hunt for any other information relating to the offence. He thought the Director had exercised his discretion quite properly, adding that the appellant could not have succeeded, even if there had been a hearing. Generally for those reasons he concluded that there had been no denial of natural justice in failing to grant one. He added that in immigration cases mistakes of this nature invariably lead to dismissal. With respect the absence of any evidence or authority supporting that proposition renders it unconvincing, and it should not be regarded as relevant to the exercise of a discretion

about the selection of an appropriate penalty.

It is plain that in reaching these conclusions His Lordship had in mind only the appellant's admission of carelessness in responding to the first three Charges. However, the Director's affidavit makes it clear that matters were not so straightforward. He deposed to receiving the appellant's reply to the charges, and relevant documents from the Commissioner of Police, including the transcript of a lengthy interview which took place before she was charged with the criminal offences, in which she admitted falsely endorsing the passport application and disclosing confidential information. A copy was exhibited.

The Director said that on receiving the appellant's reply to the charges, he appointed a Staff Board to assess them and to make recommendations for appropriate action. The Board held a meeting on 1 December 1997 and presented its submission to him and to the Permanent Secretary for Home Affairs and Immigration. It found her guilty on all six Charges and recommended her dismissal. The Permanent Secretary signified his concurrence, and the Director forwarded the submission to the Secretary for the Public Service with a request that it be placed before the Commission's meeting of 10 December 1997. There is no evidence of any action or determination by the Commission.

The Director deposed that after receiving the submission from the Staff Board and upon the appellant's clarification of the facts in her reply to the charges, he was satisfied they were established and that in the circumstances nothing more could be gained by requiring statements from other officers. (This was doubtless in acknowledgement of the obligation cast on him by Reg 41(4)

to require written statements from those persons having direct knowledge of the allegations). He added that he believed the appellant was fully aware of the case against her, and had been given a chance to reply to the charges, "in which she had expressly outlined that she did endorse the note." Accordingly he said there was no dispute of facts or any conflicting issue of credibility that would have mandated an oral hearing and he believed nothing more would have been obtained by conducting one.

He also pointed out that by reason of the delegation of powers to him by the Public Service Commission under Legal Notice 138 he was no longer required to forward the relevant particulars to the Commission in accordance with Reg 41(5), and that he he had the powers to appoint, transfer and discipline officers in the Department. He said that, after a careful examination of the facts, he dismissed the appeal, referring to both the false endorsement and the disclosure of confidential information resulting in the issue of passports to illegal immigrants.. He concluded by pointing out that there is no requirement in the Regulations for the applicant to be heard in mitigation of penalty.

Issues on Appeal

1. Previous Acquittal

Pathik J. rejected a submission that the appellant's discharge on the criminal counts amounted to an acquittal, precluding punishment under the disciplinary provisions for substantially the same Charges (Reg. 53). In spite of Mr Fa's submissions in this Court, we are satisfied His Lordship was correct on this point. As we said in Jitoko v Permanent Secretary for Education and Technology and Anor (CA 71/1997; 14 May 1999) "acquittal" implies that a true legal trial has taken

place. Here there was none, nor were there any circumstances similar to those in Jitoko warranting the treatment of the appellant's discharge, based solely on immunity, as an acquittal for the purposes of Reg. 53.

2. Delegation

The question of delegation of the Commission's powers to the Director by Legal Notice 138 of 1997 was raised during argument. This notice was given pursuant to s.127(3) of the 1990 Constitution enabling the Commiisison to delegate to any public officer or class of public officer the powers given to it by section (1), which included that of exercising disciplinary control over persons holding or acting in public office. By the first para. (a) of the notice, Permanent Secretaries and Heads of Department (which would include the Director) were given the Commission's powers to make appointments, promotions and transfers, and to discipline, in respect of all occupational groups, with certain exceptions apparently not relevant here. Para. 2 of the order further authorised the delegate to do a number of specific acts falling within those powers, including in the case of disciplinary matters suspension under Reg. 39; interdiction under Reg.42; the appointment of a disciplinary tribunal under Reg. 44; and the imposition of penalties under Reg. 51.

We are satisfied that these specific powers were not intended to be exclusionary as Mr Fa submitted; they are given in furtherance of and ancilliary to the general disciplinary power delegated in para (a), from which it is evident that the Commission has passed over all its disciplinary powers exercisable in this case under the Regulations to the Director. Accordingly he must be taken to have acted with due authority in dealing with the charges, determining their truth, and imposing the penalty.

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3. *Consideration of the Charges*

Charges (1), (2) and (3) would appear to have been laid in the alternative. They deal with the appellant's single act of misconduct in falsely endorsing Feroz's passport application, and charge it as offending ranging in seriousness from wilful failure to comply (Reg. 36(a)); disregard of instructions (Reg. 36(b)); and carelessness etc. (Reg. 36(d)). Logically she could not be guilty of all three; wilful failure and disobedience might stand together, as they contain the mental element of deliberation, but this is lacking in the requirement of the third charge.

We are driven to the conclusion that in finding all three charges proved, the Director acted unreasonably in the well- known Wednesbury sense (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223) - namely, that the decision was one which no reasonable decision-maker properly directing himself or herself, could have reached, and it must therefore be regarded as invalid. Accordingly, the findings of guilt on Charges 1-3 must be quashed and remitted to the Director for reconsideration,. In that event he would be entitled to accept the appellant's admission of carelessly endorsing the application and find Charge 3 proved, but he is not obliged to do so. However, if he does so find, the alternative charges 1 and 2 would have to be dismissed. On the other hand, if he decided not to accept the admission of carelessness at the outset and proceeded to consider the more serious charges first, on the basis that the appellant had admitted making the false endorsement, he would have to assess the credibility of her explanation for doing so. As we make clear later, the dictates of natural justice require that she should have a hearing on this. Again, a finding that any one of the charges was proved as a result would necessarily lead to dismissal of the other two.

The Director appointed a Staff Board to assess the charges. We see nothing wrong in his using his department's resources in this way to assist in determining their truth and the assessment of any penalty, so long as it is made clear that the decisions reached are his own after due deliberation, and that he did not merely rubber-stamp the Board's conclusions. We think he has dealt with this adequately in his affidavit, thus answering the allegations of bias and pre-determination raised in the application, though not advanced as a ground of appeal.

3. Reports

Under Reg. 41(4)) the Director must require those persons who have direct knowledge of the allegation to make written statements concerning it. This applies whether or not the officer charged has admitted or denied the allegation. We find it difficult to see what could be gained from such statements in this case where the Director had the appellant's very full police statement. In Public Service Commission and Anor. v. Lagiloa (CA38/96; 28 November 1997) it was suggested that this provision could be given a directory construction, so that failure to comply would not necessarily lead to invalidity in such circumstances. We are satisfied that this approach is correct in the present case.

The record of the police interview made available to the Director could not be classified as a statement of the kind required under Reg. 41(4), but we can see no objection to his having access to it, since it was directly relevant to the charges and constituted a foundation for his reason to believe disciplinary offences had been committed, which is a condition to laying charges under Reg. 41(1). He would also have been entitled to it as part of the investigation to be conducted in terms of sub-reg.(6).

It seems obvious that the statements are to be "required" only from persons amenable to such orders by the Director, and neither the police nor the persons said to be associated with the appellant in the alleged false passport operation fall within that category. The persons must also have "direct" knowledge of the allegations and it is difficult to envisage anyone other than her accomplices having this. However, this is a matter of judgment for the Director, and we are not persuaded that there has been any material failure to comply with Reg. 41(4).

In the light of the delegation of the Commission's powers to him, we think the Director was correct in his assumption that he was no longer required to forward relevant particulars to the Commission for it to make a decision. This would now be pointless. But he did advise it of the Staff Board's submission in his letter of 3 December 1997 referred to above, which would have enabled the Commission to intervene if it thought revocation of the delegation under para.4 of the notice was warranted.

5. Natural Justice

Under this heading it was submitted that the appellant should have been told about the statements obtained by the Director and given the opportunity to comment on them. Allied to this was the claim that she was entitled to a fair hearing on the charges and on penalty.

There is a substantial body of authority in Fiji dealing with the obligation to apply principles of fairness and natural justice in the administration of disciplinary proceedings of this kind having serious consequences for the person charged. There should now be no need to quote from decisions in other jurisdictions, except perhaps to emphasise or illustrate a particular feature. For

present purposes it is sufficient for us to cite the following extract from p.10 of this Court's judgment in Public Service Commission v. Lepani Matea (CA 16/98; 29 May 1998):-

> *"The requirement that a person be given a fair opportunity to be heard before a body determines a matter that affects him adversely is so fundamental to any civilised legal system that it is to be presumed that the legislative body intended that a failure to observe it would render the decision null and void. If there are no words in the instrument setting up the deciding body requiring that such a person be heard the common law will supply the omission. It will imply the right to be given a fair opportunity to be heard. While the legislative body may exclude, limit or displace the rule it must be done clearly and expressly by words of plain intendment. The intention must be made unambiguously clear. Finally we add that what is a fair hearing will depend upon the circumstances of each case; it does not mean that in every case a right of personal appearance must be given."*

What is appropriate in terms of natural justice depends on the circumstances of the case. Although she denied Charge 3 relating to the false endorsement, the appellant effectively admitted it in her formal reply to the charges and acknowledged she was careless. Accordingly there would be no need to afford her a hearing before finding that charge proved. She also denied charges 4 and 5 relating to disclosure of confidential information, but admitted this conduct on her police interview. If the record of that interview in the Director's possession was reliable and the admissions in it were true (matters we discuss below) then he was entitled to find her guilty of these charges without a hearing also. She added explanations for her conduct which would be relevant to penalty. The final Charge 6, that the foregoing conduct had brought the Public Service into disrepute, is not one that readily lends itself to resolution at a hearing; it is largely a quesiton of inference, and the appellant made vigorous representations on it in her reply. We think there was no failure of natural justice in not giving her a further opportunity to make submissions,

Turning to the record of the police interview, we say at once that it appears to have been conducted with scrupulous fairness, and the appellant signed an acknowledgment that she had read it and that it was a correct record. Nevertheless, and contrary to His Lordship's view, we think that she should have been told the Director had the record, and supplied with a copy if she had asked for it. Natural justice requires that a person accused of misconduct carrying substantial penalties should be told the nature of the case against him or her and given the opportunity to answer it. The case relied on by His Lordship (R. v. Secretary of State, ex parte Mughal [1974] 1 QB 313) was one in which information of a very different kind had been withheld and it did not constitute an admission of an offence. In the present case the appellant may have been able to establish that the damaging admissions she was reported to have made were not true. However, after the Director's affidavit had been filed in these proceedings, she knew he had the record of her interview, but did nothing to challenge or contradict its contents by affidavit in the High Court or in the appeal. The granting of relief is discretionary, and in these circumstances we are not disposed to quash the decision on account of this non-disclosure.

6. Penalty

It is now beyond dispute that a person found guilty of a disciplinary offence carrying substantial penalties should be heard on the question of penalty, unless the case is one of those rare ones in which the outcome is a foregone conclusion - see Public Service Commisison v. Lepani Matea (Sup. Ct. 9/1998S; 10 March 1999, and Public Service Commission v. Lagiloa. In spite of His Lordship's view about the inevitability of dismissal, we do not accept that submissions in mitigation would have no realistic prospect of affecting the severity of the appellant's punishment. We are satisfied that the Director's decision dismissing her must be quashed for this reason, but we

hasten to add that this is solely because of the failure to allow a hearing, and we are not to be understood as disagreeing with the penalty imposed. We would add that reasons should be given for any findings of guilt or the imposition of a penalty in major offences. They need only be brief, but the officer concerned is entitled in fairness to know why the decision was reached, and reasons may also be necessary to enable a reviewing Court to deal with any challenge.

Result

1. The appeal is allowed and the orders made in the High Court are set aside.

2. The application for Judicial Review is granted as follows:

   (a) The finding that the appellant is guilty of Charges 1, 2 and 3 set out in the second respondent's letter to her of 3 November 1997 is quashed and the second respondent is directed to determine their truth in accordance with Reg. 41(6) of the Public Service (Constitution) Regulations 1990 and with this Judgment.

   (b) The second respondent's decision of 23 January 1998 dismissing the appellant is quashed and he is directed to determine and impose an appropriate penalty under Reg. 51 of the said Regulations after giving the appellant the opportunity to be heard thereon in terms of this Judgment.

3. The other declarations and orders (except as to costs) sought in the application are refused. For the removal of doubt it is declared that the appellant's interdiction under Reg. 42 of the said Regulations stands pending final disposal of the disciplinary proceedings.

4. The appellant will have $2,500 to cover her costs and disbursements in this Court and the High Court.

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Mr Justice Jai Ram Reddy
President

.....
Sir Maurice Casey
Justice of Appeal

FIJI COURT OF APPEAL

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Mr Justice Ian Sheppard
Justice of Appeal

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