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

CIVIL APPEAL NO.ABU0072 OF 1998S
(High Court Judicial Review No.0023 of 1996)

BETWEEN:

SAT NARAYAN PAL

Appellant

AND:

PUBLIC SERVICE COMMISSION

Respondent

Coram: The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Mr Justice Gordon Ward, Justice of Appeal
The Hon. Mr Justice John E. Byrne, Judge of Appeal

Hearing: Thursday, 23rd November 2000, Suva

Counsel: Mr J.K.L. Maharaj for the Appellant
Mr S. Kumar for the Respondent

Date of Judgment: Friday, 1st December 2000

JUDGMENT OF THE COURT

This is an appeal from the refusal of Fatiaki J. to order certiorari in relation to the dismissal of the appellant by the respondent.

The appellant had been a public servant since 1969. In September 1975 he was appointed Examiner and, later, Inspector of Weights and Measures in the Ministry of Trade and Commerce. In May 1995 he was charged with twelve disciplinary offences allegedly committed in May and November 1994. Together they amounted to allegations of serious misconduct in the manner in which he had carried out his duties. The charging letter referred to an investigation by the Department of Fair Trading and Consumer Affairs. It set out the charges and concluded with the warning:

> "Please be advised that pursuant to Regulation 40(3) of the Public Service Commission (Constitution) Regulations 1990, if you fail to state in writing whether you admit or deny any of the above charges within the time

specified, you shall be deemed to have admitted these charges. Should this occur and I am satisfied that the offence has been proved after considering any explanation and evidence bearing on the alleged offence, I may proceed to penalise you in terms of Regulation 51."

It was signed by the Permanent Secretary for Commerce, Industry, Trade and Public Enterprises.

On 11 May 1995, the appellant submitted a seven-page typescript reply to the charges.

The matter was then referred to the respondent Ministry.

On 17 May the respondent wrote that the appellant was interdicted from that date without salary. That order of interdiction was part of the application to Fatiaki J. He quashed that part of the PSC decision and we are not concerned with it in this appeal.

Following representations on his behalf by the Public Service Association and a request that the charges be heard by a disciplinary tribunal, the appellant received a letter from the Chairman of the tribunal advising him of the dates both of a pre-trial hearing and of the hearing itself.

The hearing before the tribunal took place in April 1996 and continued over a number of days. Evidence was taken from sixteen witnesses including the appellant. The appellant was represented by counsel who, at the end, submitted lengthy written submissions.

By a letter dated 26 June 1996 the PSC informed the appellant he had been dismissed. It is short:

"DISMISSAL

The Public Service Commission at its meeting held today has decided that you be and are hereby dismissed from the service with effect from 17/05/95

pursuant to regulation 51(1)(a) of the Public Service Commission (Constitution) Regulations 1990."

On 24 September 1996, he sought and was granted leave to apply for judicial review. The hearing was before Fatiaki J on 11 May and 7 July 1998 and judgment handed down on 21 August 1998.

The grounds advanced in the application for judicial review traversed almost every possible ground for seeking review. However, Fatiaki J wisely distilled from them three main grounds upon which the remedy was sought. The first related to the interdiction without salary. The remaining grounds were:

"2. That the disciplinary tribunal was not impartial; and

3. That the dismissal of the applicant was unduly harsh in all the circumstances."

Both were rejected by the learned judge save that he ruled the Commission had no power to make the dismissal retrospective as it had purported to do in its letter of 26 June.

Four grounds of appeal were originally filed in this Court but they have been extensively modified and may now be summarised as follows:

1 (a) - That the appellant was prejudiced by not being shown a copy of the tribunal report;

(b) - That the learned judge accepted the decision of the tribunal without ascertaining whether it had followed the proper quasi-judicial process;

2 – That the respondent failed to comply with the requirement, in Regulation 50(2), that it shall inform the officer of its findings and penalty;

2B – That the PSC failed to give the appellant an opportunity to be heard before deciding the appropriate penalty in breach of the rules of natural justice;

3. - That the learned judge failed to apply the correct test of bias in relation to the composition of the tribunal; and

4. – That the learned judge wrongly took account of an earlier disciplinary offence and allowed it to influence his decision on the penalty.

Ground 1(a) can be disposed of shortly, as it was by the judge. He referred to Regulation 48:

"48(1) The disciplinary tribunal shall make a report to the Commission and the report shall contain its findings of fact and an expression of opinion as to the meaning and value of the facts found.

(2) The disciplinary tribunal shall not disclose the contents of the report made under sub regulation (1) to the officer charged or to any officer not authorised by the Commission to receive such report.

(3) An officer who contravenes this regulation is guilty of misconduct."

He then correctly found that, in the absence of the PSC's authorisation, the disciplinary tribunal's rejection of the appellant's request for a copy of the report "was both justified and inevitable".

We agree with that conclusion. As the report arose from a hearing at which the appellant was present, we see no prejudice in the refusal to show it to him.

Ground 1(b) was not urged before us and it is difficult to see any reason why the learned judge should have considered the process at the tribunal hearing. In fact the record suggests a full hearing was held and the experienced counsel for the appellant concluded his written submissions with thanks to the tribunal and the department "for the opportunity to be heard fairly at the inquiry". No particular complaint was raised before us and we reject this ground.

Grounds 2 challenges the form of the information given to the appellant in the letter of 26 June 1996. Regulation 50 (1) requires that the Commission, after consideration of the report of the tribunal, shall exonerate, dismiss or impose some other penalty on the officer.

Sub regulation (2) provides:

> "(2) The Commission shall as soon as possible after the hearing of the charge inform the officer in writing of its findings and the penalty imposed upon him."

The notice in writing informed him of the Commission's decision in relation to the penalty but made no mention of the finding. Mr Kumar for the respondent argues, with some force, that it was all too clear that the finding must have been that he had committed these offences and that was why the most severe penalty was imposed.

We would accept that argument could apply in many cases but aspects of this case raised by ground 2B require us to return to this later.

By ground 2B, the appellant complains that he was not given an opportunity to address the Commission on penalty and this was a breach of natural justice. The authorities in this Court and the Supreme Court on this are clear. The judgments in the cases of *The Permanent Secretary for the Public Service Commission and another v Lagiloa, Civil appeal 38 of 1996,* and *The Permanent Secretary for the Public Service Commission and another v Matea, Civil appeal 16 of 1998,* have stated that, where the person's livelihood is at stake, it is a breach of natural justice if he is not given the right to be heard.

It was summarised by this court in Matea's case;

> "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 on the circumstances of each case; it does not mean that in every case right of personal appearance must be given."

On appeal by the PSC, the Supreme Court held:

"...the appeal on such a question is virtually hopeless. There are numerous authorities establishing, at common law, that where someone's livelihood is at stake that person is entitled to a fair opportunity of a hearing unless the relevant legislation has clearly excluded it."

The question in the present case therefore is not whether there was a right to be heard but whether such a right was provided.

Counsel for the respondent points out that the appellant was able to put his case to the tribunal. Moreover, the lawyer representing him clearly anticipated the possible need to mitigate the penalty at that stage and, at the conclusion of his written submission, referred to sentence. It is suggested that this provided a reasonable opportunity to be heard.

It is appropriate to set out that passage of counsel's submission because it is clear that, whilst it is certainly an attempt to mitigate the possible penalty, it is also part of the plea that the appellant is not guilty of the offences charged. The manner in which it is suggested the tribunal should determine the appropriate sentence is based on the possibility some of the charges would not be made out.

"Even if there is found to be some very technical breaches by Narayan which he firmly denies, it is respectfully submitted that they do not warrant dismissal or demotion since his claims that he has done everything in total good faith and that none of the traders involved has been harmed or prejudiced in any

way by his involvement are not inconsistent with the totality of the evidence adduced even by the department. Narayan has been badly prejudiced and embarrassed and harassed by the apparent determination on the part of the department to 'throw the books' at him. One incident resulted in 8 separate charges. Many exaggerations contained in the charges were proven to be wrong by the department's own witnesses. He has been charged for acts he is entitled by law to do. Narayan has suffered enough humiliation and hardship through these misguided and high-handed official actions against him. No public officer deserves this type of treatment from his own peers."

It must be remembered that the report of the tribunal is sent to the Commission with the tribunal's findings of fact and its opinion as to the meaning and value of the facts found. On the basis of that report, the Commission decides the truth or otherwise of the charges and, if he is guilty, the penalty.

In a case such as this with a number of charges, what may be the appropriate penalty will relate to the number and nature of the offences made out. The mitigation set out above is clearly based on the contention that some at least of the offences had not been made out. The matters that would be relevant in mitigation following a finding of guilt on, say, two relatively technical offences are likely to be very different from those that would be needed following findings of guilt on all the charges. In the latter case, it is clear that result is likely to have a considerable effect on his livelihood and the appellant should have been given an opportunity to address the Commission.

The Commission has to exercise its discretion as to whether the penalty is likely to affect the officer's livelihood and the manner in which such discretion is exercised is a matter the courts may examine on judicial review.

Unfortunately, like this Court, Fatiaki J had no way of knowing. The written information sent to the appellant referred, as has already been stated in relation to ground 2, only to penalty and not to the findings. We do not know if the penalty resulted from a finding that the appellant was guilty of only one of the offences or of all of them. It cannot simply be assumed that, as the penalty ordered was the most severe available to the

Commission, it must have found him guilty of them all.

In those circumstances, the court was not in a position of being able to say that the appellant was properly deprived of the right under the rules of natural justice to address the Commission and the appeal must be allowed on that ground.

It should be pointed out that this point was not argued before Fatiaki J. The case urged before him was that the penalty was not appropriate. It was an argument about the merit of the decision and would not therefore have been a proper case for exercise of the court's power of review. The learned judge recognised that point but in order to be fair to the appellant, he applied the Wednesbury test but concluded that the decision to dismiss the appellant was not unreasonable in terms of that test. Had the matter been raised in the form in which it was presented to this Court he may have reached a different conclusion.

Just before he reached his conclusion, he referred to an earlier written warning to the appellant by the Commision which stated "that repetition...would be dealt with seriously which could possibly jeopardise your career in the service".

The consideration by the judge of that earlier warning is the basis of the fourth ground of appeal. It is suggested that this was not taken into account by the tribunal or the Commission and the judge, having taken it into consideration, was inevitably influenced in his decision about the appropriateness of dismissal. That he did take it into account in his decision is clear as he prefaced his conclusion about the reasonableness of the dismissal with the words:

> "In the light of the foregoing (i.e. the earlier warning) and bearing in mind the number, nature and seriousness of the charges laid against the applicant and the evidence in support thereof..."

Clearly the judge should not have considered any matter that was not before the Commission when it made its decision and there is no evidence to support or counter the contention that it had not been before the Commission. We would, however, certainly expect the Commission to be aware of such matters as Regulations 41(6) directs

it to take into account the service record of the officer when deciding the penalty.

As we have stated, we do not consider the judge's decision about the nature of the penalty was appropriate and so the possible effect of such information on that decision becomes irrelevant. This ground is rejected.

The remaining ground is ground 3. It was pointed out to the court below that the tribunal had been composed of three members one of whom was a member of the State Law Office. The appellant submits that the State Law Office "routinely advises the PSC and represents it in court proceedings. In other words, such a member was a lawyer for the PSC that was ultimately required to study the tribunal report and act on it."

There was no suggestion that the member of the tribunal had been or would be actually involved in this case. The complaint of the appellant is that there was a possibility of bias.

The learned judge dealt with it in this way:

> "The applicant's second ground challenges the impartiality of the disciplinary tribunal not on the basis of anything it said or did, or omitted to do either before or during the inquiry, but purely on the basis of its composition or membership.
>
> In particular, counsel writes:
>
> 'that one member... was employed in the State Law Office as a lawyer and as such could have sided with PSC in view of the fact that the State Law Office is the official legal arm of the PSC, thereby divesting himself of the independence and impartiality required by law...'
>
> No authority has been cited in support of such a bald statement but in any event I disagree and uphold State Counsel' submissions."

He then sets out four grounds for that decision. First, was that there were three members and they made a joint report. Second, was that the time for objection was at the outset of the tribunal hearing and no such objection had been made. Third, was that the function of the tribunal is to hear the evidence and find the facts and not to make any decisions. The final, and in the judge's words the most important, was that there "was not a shred of evidence in the applicant's affidavit sufficient to raise a question of bias on the part of the impugned member of the disciplinary tribunal as a whole in the conduct of the inquiry". He went on to point to the reference by appellant's counsel to the fair hearing.

The main thrust of the appellant's arguments is that the judge applied the wrong test by looking for evidence of actual bias. The correct test is whether a fair minded observer, knowing the facts, would apprehend or suspect that the trial was affected by bias; Amina Koya -v- The State, Supreme Court App. No.2 of 97. The first, third and final reasons the judge gave for not interfering could suggest he was looking for evidence of actual bias but we are not satisfied that was in fact the case. It could have been expressed more clearly but we would not interfere on this ground.

Even if we had considered he had applied the wrong test, we agree with the learned judge's contention that the time to object to the composition of the tribunal was at the outset of the hearing. Failure to do so by counsel may amount to a waiver of his right to object subsequently. There was no secret who was hearing the case, experienced counsel represented the appellant and the objection was not taken. Indeed, as we have already pointed out, he thanked the tribunal for the opportunity to be heard fairly. The learned judge was correct to say it was too late to raise it before him.

The result is that we allow the appeal on the ground that the learned judge erred when he evaluated the decision of the Commission on the basis of Wednesbury reasonableness. The test was whether the decision was likely to affect the appellant's livelihood and, if so, that he should have been given an opportunity to address the Commission. The learned judge referred to the number, nature and seriousness of the charges but he had no evidence, as a result of the omission of the findings from the information under regulation 50(2), whether any, or which, of those charges had been made out against the appellant.

If, as he plainly assumed, the appellant had been found to have committed them all, the penalty would have been entirely appropriate but that was an assumption he should not have made.

In those circumstances we order that the Commission's decision on penalty be set aside and that it advise the appellant of its finding on each charge and give the appellant an opportunity to address it on the penalty. Having taken these into account, it should then make a decision on the penalty.

We order the respondent shall pay costs of $1250 together with the costs of preparing the record and disbursements to be fixed by the Registrar failing agreement.

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Sir Maurice Casey
Presiding Judge

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Mr Justice Gordon Ward
Justice of Appeal

FIJI COURT OF APPEAL

.....
Mr Justice John E. Byrne
Judge of Appeal

Solicitors:

J.K.L. Maharaj Esquire, Suva for the Appellant
Office of the Attorney-General Chambers, Suva for the Respondent

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