

In the High Court of Fiji
at Suva
Civil Jurisdiction
Judicial Review No.07 of 2018

State
v
Public Service Disciplinary Tribunal
Respondent
Permanent Secretary for Economy
Interested party
Ex parte: Mohammed Faiyaz
Applicant

Counsel: Mr N.Sharma with Mr D. Nair for the applicant
Ms S. Taukei for the interested party
Ms S. Lata represented the respondent
Date of hearing: 16th August, 2019
Date of Judgment: 25th October, 2019

Judgment

1. The applicant seeks an order of certiorari to quash the decision of the respondent of 31st July, 2018, finding him guilty of disciplinary charges of breach of the Public Service Code of Conduct, of storing illicit material on his desktop and a declaration that the decision is null and void and of no effect.
2. I granted the applicant leave to apply for judicial review on the basis that the grounds raised on breach of natural justice, the decision was improper, irrational and unreasonable raised an arguable case, which needs to be investigated at the substantive hearing.
3. On 10th June, 2019, Mr Nair, counsel for the applicant stated that he had no objection to the application of the Permanent Secretary for Economy to be joined as an Interested party.

4. The grounds upon which the applicant seeks relief are as follows:
- a) *That the Respondent acted unfairly and unreasonably by failing to uphold that the five charges laid against the applicant lacked the fundamental elements of the date the alleged misconduct was committed.*
 - b) *That the Respondent exceeded its jurisdiction and further abused its powers by providing bias finding of guilt on the defective charges.*
 - c) *That the Respondent exceeded its jurisdiction by contradicting its policy the PSDT Circular No. 2 dated 30th April, 2014 which at clause 9.0 adopted a time frame of three months in the finalization of the disciplinary action which is consistent with section 15(3) of the Constitution of the Republic of Fiji.*
 - d) *That the Respondent acted irrationally by shifting the burden of proof upon the applicant when the onus vested upon the prosecution who was prosecuting on behalf of the Ministry of Economy.*
 - e) *That the applicant was denied the due process of natural justice when the investigation report and the documentary evidence which the Respondent relied upon was not disclosed prior to the hearing of the charges.*
 - f) *That the Respondent acted contrary to the legitimate expectation of the applicant by not being independent and impartial.*
 - g) *That the irregular decision making process of the Respondent and its subsequent decision is susceptible to Judicial Review as there is no further right of remedy and the consequences of the original decision is of considerable seriousness to the Applicant, that only the inherent jurisdiction of the High Court can provide the appropriate relief.*

The determination

5. Mr Nair limited his arguments to the matters on which I granted leave.
6. The first contention was that that the respondent failed to uphold that the five charges lacked the fundamental elements of the date the alleged misconduct was committed. The respondent, in *Ministry of Education v Sagar Sharma*,(PSDT Case No 22/2017) held that particulars of charges must be given.
7. In that case, a school bursar was charged for two acts of misconduct. The first count was for not signing the attendance register. The second was for misappropriating government funds for personal gain. The Tribunal held that in respect of the first count, all the details required for the employee to understand the allegation were given, viz, the dates he failed to sign in and out, but the second count did not contain sufficient particulars.

8. In my view, the facts in *Sagar Sharma*,(supra) are not comparable. That case was concerned with misappropriation of funds. The dates of the acts of misappropriation are material elements in a charge of that nature, as stated in the impugned decision.
9. In the instant case, the charge sheet referred to one “**INCIDENT**”, viz, that the applicant “..whilst employed as System Analyst/Programmer committed disciplinary offences within the meaning of Section 6 and 7 of the Public Service Act 1999 and reported by the IT Audit at the Ministry,.. **allegedly stored illicit (pornographic pictures/videos) material on your desktop** which was detected on 3 December 2015 and 5 December 2015, respectively.”(emphasis added).
10. The five charges that followed contained the same particulars of offence, viz, that he “allegedly stored illicit(pornographic pictures/videos) material on your desktop”.
11. There is no requirement for a formal charge to be framed as in a criminal case, as stated in *PSC v Kotobalavu*,(Civil Appeal no. ABU0031 of 2004S) or where fraud is alleged.
12. In *Kotobalavu* case, as cited by Mr Nair, the employee was charged with a multiplicity of charges. The Court found that the charges had been brought without “alleging in each case, a breach of a distinct paragraph of s.6, with information of the kind being provided as a particular of the breach, then, no doubt, they would have been good at law.”.
13. Tucker LJ in *Russel v Duke of Norfolk*, [1949] 1 All ER 109 at pg 118 stated:

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and so forth.
14. Natural justice requires that the charge brings to the notice of the party the substance of what is alleged against him.

15. In my judgment, the charges, in the instant case, fulfill that requirement. The applicant was charged under each count with a breach of a distinct paragraph of section 6. There was clear specification of the duty breached, unlike in *Kotobalavu* case (*supra*). There was no necessity to give particulars of dates, in view of the nature of the alleged singular charge.
16. Wade, *Administrative Law*, (7th Ed) at pg 519 states :
- There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice.* (footnotes omitted)
17. In my judgment, the applicant has not been prejudiced by the dates not being specified.
18. The ground that the respondent acted unfairly, unreasonably, exceeded its jurisdiction and abused its powers fails.
19. Mr Nair said that it is not disputed that the investigation report was provided to the applicant. He submitted that the Information Technology Centre,(ITC) was not involved in the investigation nor the Audit Report relied on by the respondent. The Audit Report provides a complete answer to that contention.
20. The Audit Report, in its Introduction states that on 3rd December, 2015, ITC received instructions to carry out checks on a desktop computer. A team from ITC, Makereta Gavidu,(Principal Analyst) and three others were appointed to carry out the investigations. On 6th December, 2015, a separate team was mobilized to carry out the audit and compile a report.
21. The impugned decision provides that Makereta Gavidu, in her evidence explained in detail the manner the investigation was conducted. The folder containing the illicit pictures was found in the profile folders of the applicant's computer. He admitted that the computer allocated to him was //finsuvapc001. The folder was accessed by him.

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22. The evidence disclosed that the folder had been created in 2011, during the applicant's period of employment in the Ministry.
23. In my judgment, the burden of proof was on him to establish that he was not responsible for storing the material found on his official computer. He did not deny that his room was locked, but did not explain how his computer could be access by anyone else, as stated in the impugned decision.
24. Finally, the applicant complains that the respondent's decision was improper, irrational and unreasonable, as the Tribunal relied on an enlarged coloured photograph, which was not part of the disclosures of the investigation report. It is contended that influenced the decision of the respondent and was a denial of natural justice.
25. Here again, I see nothing unfair. As Ms Taukei, counsel for the interested party pointed out, the picture was already contained in page 19 of the investigation report. Ms Gavidi, in her evidence had made special reference to pages 18 and 19 of the investigation report. The impugned decision states that in "*the course of examination in chief of this witness an enlargement of page 19 was referred to and this document clearly shows that there have been phonographic pictures in the employee's profile folders*".
26. In my judgment, the decision that the applicant and no one else could have stored the illicit materials on his computer was not unreasonable. The decision is *Wednesbury* reasonable.
27. Lord Templeman in *Reg. v Inland Revenue Commissioners, Ex parte Preston* (1985) AC 835 at 862 stated :
- Judicial Review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers.*

28. Pathik J in *State v Acting Divisional Engineer Northern and Attorney-General of Fiji, ex-parte Mog Nand*, [1999] FJHC 112; HBJ 2 of 1998 L(5th October, 1999) said:

*The Court is required to consider whether the "process" by which the decision was reached is authorised or valid. The basic question is whether the decision-maker has acted intra vires or within the discretion conferred reasonably and fairly.....
It is the decision-making process which the courts will look closely and the ultimate decision to ascertain whether the decision-maker has acted fairly.*

29. Pathik J stated that the essential function of judicial review, as Lord Hailsham L.C. declared in *Chief Constable of North Wales Police v Evans*, (1982) 1 WLR 1155 at 160 is to "to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matter in question".

30. In the present case, the applicant gave evidence. He was given an opportunity to defend himself.

31. I find that there are no merits in any of the grounds for judicial review.

32. The application is dismissed. I make no order as to costs.

33. **Order**

(a) The application for judicial review is dismissed.

(b) I make no order as to costs.



A.L.B. Brito-Mutunayagam
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Judge
25th October, 2019