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R. *v.* PUBLIC SERVICE APPEAL BOARD

ex parte

ABDUL HANIF

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[SUPREME COURT, Kearsley, J.—Lautoka 12 September 1986]

Civil Jurisdiction

(Natural Justice—Public Service Commission—Natural justice rules do not apply to "appeal" to Public Service Appeal Board—certiorari—failure to consider (signaficant) material may bring about lack of jurisdiction—decision may be quashed.)

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N. Dean—for the Applicant.
A. Qetaki, for the Public Service Appeal Board
S. P. Sharma amicus curiae

Application by Abdul Hanif for certiorari to quash a decision of the Public Service Board and a declaration that the proceedings before the Public Service Appeal Board were a nullity.

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The Applicant was provisionally appointed to the position of Laboratory Superintendant; then Mr Bale Naigulevu and Mr Kurai Teruka appealed to the Board established pursuant to the Public Service Act (Cap. 74) (PSA) s.13. The appeal of the latter was dismissed. Mr Naigulevu's appeal was upheld, as a consequence of which he was appointed to the position to which Mr Abdul Hanif had been provisionally appointed.

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It appeard that it had been discovered that contrary to usual practice the personal file of Mr Bale Naigulevu had not been available to the Board when it considered the matter. The Court expressed the opinion that if that the file had been so available to the Board before reaching its decision it may well have dismissed his appeal.

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Held: The remedy of certiorari is not limited to the proceedings of Tribunals required to act judicially (see e.g. *O'Reilley v. Mackman* (1982) 3 W.L.R. 1096 at p. 1104).

If a party entitled to natural justice in proceedings before a Tribunal is denied natural justice certiorari may lie to quash its decision. But in the proceedings, for
G which s.14 of the P.S.A. made provision a provisional appointee was not entitled to the rules of natural justice. *(Fiji Public Service Appeal Board v. Mahendra Singh* F.C.A. Civ. App. 53/1981). The Board's decision could be regarded as beyond jurisdiction *(Reg. v. Southampton Justices, exparte Green* (1976) Q.B. 11 at p.21 per Lord Denning) in that it failed to take into account matters it should have taken into account.

Order for certiorari quashing Board's decision.

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Cases Referred to:

Public Service Appeal Board v. Mahendra Singh, FCA Civ. App. No. 53 of 1981.
O'Reilly v. Mackman (1982) 3 W.L.R. 1096
Associated Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 K.B. 223
R. v. Southampton Justices, ex parte Green (1976) Q.B. 11
R. v. Public Service Appeal Board, ex parte Michael Thoman, Judicial Review No. 3 of 1984 (Lautoka).
R. v. Leyland Justices, ex parte Hawthorn (1979) 1 All E.R. 209.
R. v. Blundeston Prison Board of Visitors, ex parte Fox-Taylor (1982) 1 All E.R. 646.

KEARSLEY, J.

Judgment

This is an application for certiorari to quash a decision of the Public Service Appeal Board and for a declaration that the proceedings before the Appeal Board were a nullity.

As this involves the promotion of an officer in the public service I think I should outline briefly my understanding of the rights of public servants in relation to promotion.

At common law a public servant may be appointed, promoted and dismissed at will, without regard to natural justice. That common law position has been altered to some extent (but only to that extent) by section 105 of the Constitution of Fiji, the Public Service Act (Cap. 74) and the regulations made thereunder.

That legislation places the promotion of officers in the public service in the hands of the Public Service Commission.

Regulation 11 of the Public Service Commission (Constitution) Regulations provides that in the event of two or more officers being available for the same post preference shall be given by the Commission to the officer who in its opinion has the most merit and that, if merits are equal, regard shall be had to length of continuous service.

Section 13 of the Act establishes the Public Service Appeal Board.

Section 14(1)*(a)* entitles an officer to appeal to the Appeal Board against the promotion of any other officer to any position for which the appellant has applied if his appointment would have involved his own promotion. Proviso (i) to that subsection reads:

"(i) an appeal under this section must be confined to the merits of the appellant for promotion to the position, and must not extend to those of any other person for promotion or appointment to the position."

Regulation 15(i) of the Public Service Commission (Constitution) Regulations reads:

A "15.—(1)—Every appointment or promotion which is subject to a right of appeal by any oficer under the provisions of section 14 of the Act, shall be provisonal until all appeals lodged in respect thereof have been duly determined, or if no appeal is lodged, until the time for the lodging of appeals has expired."

Section 14(5) of the Act reads:

B "(5) The Appeal Board may allow or disallow any appeal and the Commission shall implement the decision of the Appeal Board. Where an appeal made under the provisions of paragraph *(a)* of subsection (1) is allowed by the Appeal Board the Commission shall forthwith appoint the successful appellant to the position."

In *Fiji Public Service Appeal Board v. Mahendra Singh,* F.C.A. Civ. App. No. 53 of
C 1981, Henry J.A. after considering the provisions to which I have referred said at p. 6:

"From these provisions it is clear that, once an appeal has been lodged, the provisional appointee and the appellant are both seeking appointment to the post. The successful applicant will be determined by the result of the appeal. If an appellant succeeds he will be appointed, if the appeal is dismissed, then the provisional appointee is appointed to the post. The status of each is the same—each
D is an applicant for the post, neither has an entitlement or right to it, nor appointment is made except by the decision of the Appeal Board implemented by the Commission when the result of the appeal has been determined."

and at page 8:

"Accordingly, the completing applicants for a position may be the immediate
E appellant, any other appellant, and, the provisional appointee. To determine who has the most merit obviously requires the Appeal Board to consider the merits of every such person."

Thus when (as in the present case) there are two appellants, the Appeal Board would appear to be *under a statutory duty* to consider which of the competing applicants, i.e. the provisional appointee and the two appellants, has the most merit. That, indeed,
F would appear to be its main duty, the appeal being from the Commission's earlier decision on that very question.

Henry J.A. went on to decide, with the concurrence of his learned brother judges, that the provisional appointee had no more right to be heard in the appeal proceedings than the Act gave him, i.e. the entitlement given by section 14(8) *(b)* "to be heard by the Board in such manner as the Board thinks fit", and at p.13 he said *"The*
G *so called rules of natural justice do not apply"* (My emphasis).

By parity of reasoning it must, I think, be said that an *appellant* has no more rights than those given by the legislation and that he, too, cannot call in aid the rules of natural justice.

I respectfully state my understanding of the *ratio decidendi* of the Court of Appeal and its consequences as follows. An appeal to the Appeal Board under section 14 is not a true
H appeal. The word "appeal" is, in the context of the section, a misnomer. When it is entertaining an appeal under that section the Appeal Board is merely exercising on behalf of the Crown the right of the Crown to promote at will. That being so, natural justice does not apply, and a party to the appeal, whether he be the provisional appointee or an appellant, has no rights in the appeal proceedings other than those conferred by the relevant legislation.

It appears in the present case that Mr Abdul Hanif was provisionally appointed to the position of Laboratory Superintendent, following which Mr Bale Naigulevu and Mr Kurai Teruka appealed to the Appeal Board under section 14. The appeal of Mr Kurai Teruka was dismissed by Mr Bale Naigulevu's appeal was upheld as a consequence of which he was appointed to the position to which Mr Abdul Hanif had been provisionally appointed. A

The Secretary of the Appeal Board, cross examined before me, told a startling story. He said that, before the hearing of the appeal of Mr Bale Naigulevu, he had, in accordance with usual practice, asked the Ministry of Health to let the Appeal Board have all personal files relating to Mr Bale Naigulevu. As a result of that request he received PF 1817 Mr Bale Naigulevu's *personal* file. He specifically asked the Acting Personel Officer at the Ministry of Health if they had a *confidential* personal file on Mr Bale Naigulevu and was told that they did not. It is normal practice for the Appeal Board to have before it an applicant's confidential personal file, if there is one. However such a file is not kept in respect of every public servant. After the appeal had been determined, and after a letter had been received from a certain government pathologist expressing shock and dismay at Mr Bale Naigulevu's appointment, the Secretary received Mr Bale Naigulevu's confidential personal file, CPF 1817 (I assume he received it from the Ministry). In that confidential file he found certain documents copies of which, he agreed, are annexed to Mr Abdul Hanif's affidavit sworn on 22nd May 1984 and filed in these proceedings. B C D

Having perused that material I do not hesitate to say that the Appeal Board may have dismissed Mr Bale Naigulevu's appeal if it had, in accordance with normal practice, received and perused the file before reaching its decision. That is putting it mildly. It is no wonder that the pathologist wrote expressing shock and dismay.

Should the decision of the Appeal Board be quashed by order of certiorari? That decision may well have been wrong, but that is not the test of the availability of certiorari. Rather the test is whether the decision was beyond the jurisdiction of the Appeal Board. I must bear in mind, as much as I may wish to set aside the decision in the interests of justice, that I am not exercising an appellate function but an entirely different function, that of judicial review under Order 53. E

Certiorari is no longer limited to the proceedings of tribunals which are under a duty to act judicially. In *O'Reilly v. Mackman* (1982) 3 W.L.R. 1096 at 1104 Lord Diplock extended the range of certiorari to the decisions of any person or body of persons having legal authority to make decisions affecting the rights or obligations of citizens. Moreover there is ample authority in the judgment of Lord Green M.R. in *Associated Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 K.B. 223 at 229 and the judgment of Lord Denning M.R. in *R. v. Southampton Justices, ex parte Green* (1976) Q.B. 11 at 21 that if a tribunal fails to take into account matters which it should take into account, or vice versa, it steps outside its jurisdiction. On that authority I quashed a decision of the Appeal Board in *R. v. Public Service Appeal Board, ex parte Michael Thoman,* Judicial Review No. 3 of 1984 (Lautoka). But, mind you, in that case the material which the Appeal Board failed to consider was before the board, "crying out for consideration" as I put it. F G

A In the present case the material in question was, through no apparent fault of the Appeal Board or its Secretary, not available for consideration. Not every public servant is the subject of a confidential personal file. The Appeal Board no doubt accepted the advice of the Ministry that there was no confidential personal file in relation to Mr Bale Naigulevu and there is no apparent cause for criticising the Board on the score.

B Counsel for Mr Abdul Hanif, Mr Noor Dean, has cited *R. v. Leyland Justices ex parte Hawthorn* (1979) 1 All E.R. 209 and *R. v. Blundeston Prison Board of Visitors, ex parte Fox-Taylor* (1982) 1 All E.R. 646. As a amicus curiae, Mr S. P. Sharma of the Attorney-General's Office has suggested that they may be distinguishable.

In the first of those cases, the prosecution failed to notify the defence in the course of a
C trial before justices of the peace, of the existence of two witnesses whose evidence might have been helpful to the defence. In the second case, when a prisoner was charged with an offence against prison discipline before the board of visitors, the prison authorities failed to notify the prisoner of the existence of a witness who could have given evidence in support of his evidence. In each case the tribunal, through no fault on its part, did not consider material evidence. In each case it was held by the Court that this amounted to a denial of natural justice

D In the first case, dealing with the fact that the denial of natural justice was not the fault of the tribunal, Lord Widgery C. J. said at 210–211:

> "Certainly if it were the fault of the justices that this additional evidentiary information was not passed on, no difficulty would arise. But the problem, and one can put it in a sentence, is that certiorari in respect of breach of the rules of natural justice is primarily a remedy sought on account of an error of the
> E tribunal, and here, of course, we are not concerned with an error of the tribunal: we are concerned with an error of the police prosecutors. Consequently, amongst the arguments to which we have listened an argument has been that this is not a certiorari case at all on any of the accepted grounds.
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> We have given this careful thought over the short adjournment because it is a difficult case in that the consequences of the decision either way have their
> F unattractive features. However, if fraud, collusion, perjury and such like matters not affecting the tribunal themselves justify an application for certiorari to quash the conviction, if all those matters are to have that effect, then we cannot say that the failure of the prosecutor which in this case has prevented the tribunal from giving the defendant a fair trial should not rank in the same category."

G That, surely, is clear authority for saying that, if a partly entitled to natural justice in proceedings before a tribunal is denied natural justice, certiorari lies to quash the tribunal's decision even if the denial of natural justice is not the fault of the tribunal. There can be little doubt that Mr Abdul Hanif, through no apparent fault of the Appeal Board, was denied natural justice. But, as I understand Spring J. A. to have held, with the concurrence of his learned brother judges, in *Mahendra Singh* (supra) a provisional appointee is not entitled to the benefit of the rules natural justice in an
H appeal under section 14 and the Appeal Board is not under any duty to give effect to those rules.

Putting aside, with great reluctance, the rules of natural justice, I turn to the question whether the Appeal Board's decision in favour of Mr Bale Naigulevu was

beyond its jurisdiction simply because it did not consider the material in his confidential personal file. A

In *R. v. Southampton Justices ex parte Green* (supra) Mrs Green had stood surety for the appearance of her husband in the sum of $3,000 and he had failed to appear. The justices ordered that she must forfeit the whole of the $3,000 and gave her only two months in which to pay. Because they had failed to inquire into the extent to which she was to blame for her husband's non-appearance and because they had taken into account the irrelevant fact that B the husband had money from the sale of a boat of which he was the sole owner, it was decided that certiorari should issue a quash the justice's order. Lord Denning, M. R. said, a page 21:

> "This case comes within the category of 'want of jurisdiction'. The scope of this category is very wide, as is shown by *Anisminic Ltd. v. Foreign Compensation Commission* (1969) 2 A.C. 147, where Lord Pearce said, at p. 195: C
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> > 'Lack of jurisdiction may arise in various ways..... while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it my take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction.'
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> Applying these words, it seems to me that *if the justices fail to take into account matters which they should take into account, or vice versa, they step outside their jurisdiction*.....the D justices failed to consider the culpability of Mrs Green, as they ought to have done—and they took into consideration the husband's boat—when they ought not to have done. The justices did fall into error and their decision must be set aside." (The emphasis is mine).

As I have already said, in *R. v. Public Service Appeal Board, ex parte Michael Thoman* E (supra) I made an order of certiorari to quash a decision of the Appeal Board on the ground that it had failed to consider material it should have considered in making its decision. But that material was before the board when it made its decision. Can the present case be distinguished in principle by the facts that Mr Bale Naigulevu's confidential personal file was not before the board and that the board was not aware of the existence of that file?

My answer is that I do not see how such a distinction can reasonably be drawn. In both F *R. v. Leyland Justices etc.* (supra) and *R. v. Blundeston Prison Visitors etc.* (supra) there was denial of natural justice which, albeit without fault on the part of the tribunal, amounted to excess of jurisdiction. That was pointed out by Phillips J. in the latter case. Dealing with the argument of counsel for the tribunal that there had been no failure by the tribunal going to jurisdiction, his Lordship said in the last paragraph of his judgment:

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> "....and what he says is this. Certiorari in cases of the kind is based on a failure by the adjudicating body. As has been pointed out, there has been no failure by the board of visitors. The failure as I have found is by the authorities of the prison. Therefore, it can be said it would be pushing certiorari very far, he would say too far, away from its essential base, which must be a failure of the adjudicating authority going to jurisdiction. The answer to that, I think, is that that is pre- H cisely what the Divisional Court in *Leyland* did, justifying it for reasons I have given. In effect, as I understand what is said is this: that albeit the failure was by the prosecution in that case it led to a failure of the process of the adjudicating

A justices, albeit they were not responsible for it, nor did they cause it. But none the less, proceedings before them were vitiated and their jurisdiction impugned."

If denial of natural justice without fault on the part of the tribunal amounts to excess of jurisdiction. I cannot see why non-consideration of important material without fault on the part of the tribunal should not amount to excess of jurisdiction.

B The Appeal Board was under a statutory duty to decide whether Mr Abdul Hanif or Mr Bale Naigulevu had the greater merit. In deciding that Mr Bale Naigulevu's merit was the greater, the Board failed, albeit innocently, to take into account material which, if considered, may well have caused it to decide otherwise. In my view, the authorities I have cited fully justify Mr Abdul Hanif's application. There should be an order to certioriri to quash the Appeal Board's decision and I order accordingly.

C The effect o that order is that Mr Bale Naigulevu's appointment, being based on an ultra vires decision of the Appeal Board, is itself ultra vires. Mr Abdul Hanif reverts to the position of provisional appointee.

Mr Bale Naigulevu's appeal should now proceed, if he wishes to pursue it. If the appeal proceeds, I trust that due consideration will be given by the board to matters D that should be taken into account including the contents of Mr Bale Naigulevu's personal file.

Order for certiorari.