GHANSHYAM PRASAD

A **v.**

THE ATTORNEY GENERAL

[HIGH COURT, 1993 (Scott J) 28 September]

Civil Jurisdiction

B *Public Service- compulsory retirement on grounds of ill-health-medical board-requirements of natural justice governing procedure- Public Service Commission Regulations 1987 (Decree 10/87) regulation 31.*

The Plaintiff had been compulsorily retired from the Public Service on the grounds of ill-health. The High Court examined the relevant regulations
C governing such retirements and HELD: that the rules of natural justice required that the proposed retiree be given an adequate opportunity to be heard by the Medical Board before a final recommendation to retire was made.

Cases cited:

Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180
D *Davy v Spelthorne BC* [1984] AC 262 278
FPSA v PSC and Attorney-General (Suva High Court 72/85)
FPS Appeal Board v Mahendra Singh (FCA 53/81)
Nemani Naisole & Anor v Attorney-General (FCA 47/90)
O'Reilly v Mackman [1982] 3 All ER 1124
R v. Reading JJ ex. p. S.W. Meat Co. (1992) 4 Adm. L.R. 401
Ridge v Baldwin [1964] AC 40
E *Roy v Kensington and Chelsea FPC* [1992] 2 WLR 239
Suttling v Director General of Education [1985] 3 NSWLR 427

Action for declaratory Judgment in the High Court.

V. Kapadia for the Plaintiffs
F *A. Cope* for the Defendant

Scott J:

The first Plaintiff had for some years worked as an established civil servant latterly holding the position of clerical officer at the Ministry of Rural Development and Rural Housing (the Ministry).

G In February 1989 having succumbed to a peripheral vascular ailment he travelled to Australia on approved sick leave for medical treatment. In Australia his left leg was amputated above the knee. He returned to Fiji and went back to work on 1 June 1989.

On 14 June he attended a medical examination by a Medical Board appointed by the Public Service Commission (PSC) under the provisions of Regulation 31 of the Public Service Commission Regulations 1987 (Decree 10/87) (the Regulations). The Report of the Medical Board was exhibited to an affidavit made by the Director of Industrial Relations at the PSC, Taina Tagicakibau, filed in these proceedings on the 31 July 1991 but was not apparently previously made available to the Plaintiffs or their legal advisers.

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The Medical Board which was made up of Drs. V. Etika and W. Korwa reported that the 1st Plaintiff was suffering from a progressive vaso constrictive disease which did not appear to be reversible, which had already resulted in one amputation, which was having a deleterious affect on his second leg, the condition of which was described as being precarious and which had altogether substantially impaired "his ability, as regards suitability and fitness to continue in the service".

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On 4 September 1989 the 1st Plaintiff received a letter from the Permanent Secretary to the Ministry advising him that having taken into account the recommendation of the Medical Board and the provisions of Regulation 31(4) the PSC had decided that he was to be retired from the Public Service on medical grounds with effect from 15 September, 1989 (see Annexure A to Plaintiff's Affidavit filed 30 May 1991).

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After correspondence between the Plaintiffs and the PSC a Trade Dispute was reported pursuant to the provisions of the Trade Disputes Act - Cap.97. The Dispute was accepted by the Permanent Secretary for Employment and Industrial Relations on 4 January 1990. Apparently four rounds of conciliation meetings were held under the procedures laid down by the Act (see paragraph 23 of Taina Tagicakibau's Affidavit) but the outcome of those proceedings was not revealed to me. Nothing however turns on this point which was not the subject of submissions by either side.

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On 30 May 1991 the Plaintiffs commenced proceedings in this court by way of Originating Summons seeking inter alia a declaration that the 1st Plaintiff's retirement by the PSC was unlawful, arbitrary and unreasonable.

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On 27 November 1991 and again on 2 June 1993 after attempts to settle the matter had failed I heard the 1st Plaintiff who also produced a number of medical reports by consent (Exhibits 1 - 5). These medical reports were additional to those annexed to the 1st Plaintiff's supporting Affidavit, already referred to, filed on 30 May 1991 (see Annexures I and J).

The only matter of substance raised by the 1st Plaintiff in his oral evidence which was additional to his Affidavit evidence was his description of the proceedings at the Medical Board.

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According to the Plaintiff he was only examined by Dr Etika. Although Dr.

Korwa whom he knew, was present at the clinic on that day he was not examined by him. This evidence was not challenged.

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At the conclusion of the hearing both Counsel agreed to file written submissions. Mr. Kapadia filed his submissions on 21 June 1993, they were answered by Mr. Cope on 12 August and a reply was filed by Mr. Kapadia on 15 September.

Mr. Kapadia submits that the whole procedure leading up to the 1st Plaintiff's dismissal was most unfair. He suggests-

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(i) that the term "ill health" referred to in the Regulations does not apply to his client who though disabled is not on the evidence in fact suffering from ill health;

(ii) that the Medical Board appointed by the PSC was not properly constituted;

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(iii) that the 1st Plaintiff was never told that he was being examined by a Medical Board with a view to an assessment of his ability to continue in the Public Service being made; and

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(iv) that the Plaintiffs were not given an opportunity to make any representation either to the Medical Board or to the PSC before the decision to retire was taken.

In answer, Mr. Cope, relying on O'Reilly v Mackman [1982] 3 All ER 1124 first submitted that the matters complained of were essentially within the realm of public law and therefore the Plaintiffs' method of instituting the proceedings was defective. They should, he argued have been brought by way of Judicial Review. Secondly, he rejected the suggestion that the Medical Board was improperly constituted pointing out that there was no requirement that it should consist of more than one member. Thirdly, he argued that given the Board's unequivocal recommendations there was no need for the PSC to conduct any further enquiries and that accordingly the PSC had no alternative but "forthwith to give the (1st Plaintiff) notice of retirement" (see Regulation 31(4)). He pointed out that Regulation 31 makes no provision for any hearing before the PSC's decision is taken. Finally, Mr. Cope suggested that even though the medical evidence now before the court supports the view that the 1st Plaintiff is as a matter of fact now able satisfactorily to discharge the duties of a clerical officer such evidence is beside the point. The issue, Mr. Cope argued, is not what view may now be formed on the basis of medical evidence now available but what conclusion the PSC should properly have reached given the report of the Medical Board. Given that the Medical Board had found that the 1st Plaintiff was unfit for further service and given the mandatory terms of Regulations 31(4) it was submitted that the PSC had no alternative but to retire the 1st Plaintiff.

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It will be convenient to take the procedural point first. On 6 September 1993 during the course of further oral submissions I indicated that I did not warm to this argument. While in some cases the circumstances are such that to use a particular procedure will result in a serious disadvantage to one of the parties concerned (see e.g. R. v Reading JJ ex. p. S.W. Meat Co. (1992) 4 Adm. L.R. 401) I do not think that this is such a case. Procedural objections should normally be taken at the very earliest stage in proceedings, not at their conclusion. Prior to filing his submissions Mr. Cope did not raise the point. Mr. Kapadia referred me to Nemani Naisole and another v Attorney-General (FCA 47/90), a case involving dismissal from the Public Service which had been begun by way of Originating Summons without any objection apparently having been taken either by the Defendant or by the Court.

As was stated by Lord Wilberforce in Davy v Spelthorne BC [1984] AC 262, 278:-

> "We have not yet reached a point at which a mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts: to permit this would be to create a dual system of law with the rigidity and procedural hardship for Plaintiffs which it was the purpose of the recent reforms to remove."

In Roy v Kensington and Chelsea and Westminister Family Practitioner Committee [1992] 2 WLR 239 Lord Lowry, with whom the rest of their Lordships agreed, said:-

> "It seems to me that unless the procedure adopted by the moving party is ill-suited to disposition of the question at issue there is much to be said in favour of the proposition that a court having a jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of proceedings."

With both these dicta I respectfully agree. The Defendant's procedural submission fails.

The next point falling for consideration is the meaning of "ill health". With respect I do not think this was one of Mr Kapadia's strongest points. In the first place it is quite clear to me that the basis of the Medical Board's recommendation was not the mere fact of amputation but the perceived degenerative nature of the 1st Plaintiff's disease. Secondly, it seems merely a matter of common sense that a person whose ability to perform his work has been seriously affected by eg. multiple amputations but who is at the time of examination actually in good health in the sense of not suffering from any disease falls within the ambit of Regulation 31. A definition of the term "ill health" might with advantage appear in Regulation 2 but to my mind the purpose of Regulation 31 is clear, namely to allow for the compulsory retirement of

Civil Servants on medical grounds (see Regulation 26 (a) (iii) and (b) (iii)).

A The next point is the constitution of the Medical Board. Once again there is unfortunately no definition of the term either in the Decree or the regulations. It would be better if there were, this being the usual practice (see eg. Section 31 of the Public Service Act - Repealed - Cap. 74 and Sections 3 & 4 of the Public Health Act- Cap. 111) as well as for the avoidance of doubt. There being no definition of the term Medical Board I am of the view that Mr. Cope's B suggestion that such a Board need only consist of one member is well taken even though dictionary definitions of the word "Board" (see Shorter Oxford Dictionary, and Blacks Law Dictionary, 15th Edition) certainly suggest that in normal parlance a Board would have more than one member. In the present case suffice is to say that I am not satisfied that Mr. Kapadia had demonstrated either that the Board was not properly constituted or that there was any requirement that the patient be examined by all members of the Board. Whether C or not the Medical Board in this case followed reasonably adequate procedures is however a point to which I will return.

The next question is the relevance of the medical evidence other than the report of the Medical Board placed before the Court. The matters complained of took place in June and September 1989. All the medical reports placed in evidence D by the 1st Plaintiff post-date that time with the exception of Exhibit 2. It seems to me therefore that the inescapable conclusion must be that, with the exception of Exhibit 2, they are not relevant to the decision taken by the PSC which is what is being impugned. Whether however they are of any relevance to the way in which the Regulation should be applied is another point to which I shall also return.

E There remains the central issue which really lies at the heart of this case and which may be expressed thus: when applying the Regulation 31 procedure to what extent is a civil servant (an officer) entitled to be given a hearing? In other words, do the rules of natural justice and in particular the requirement *audi alteram partem* apply when the PSC is considering compulsory retirement on medical grounds? It is an important question and not one which I have F found easy to answer.

Mr. Cope's position was that the Fiji Court of Appeal in FPS Appeal Board v Mahendra Singh (FCA 53/81) had followed the House of Lords in Ridge v Baldwin [1964] AC 40 by confirming that an officer in Fiji holds office during the pleasure of the Crown (see further authorities referred to in Chitty on Contracts 26th Edition Paragraph 710) and that accordingly such an officer "has no right to be heard before he is dismissed" (per Lord Reid).

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Mr. Kapadia on the other hand relied on FPSA v PSC and Attorney General (Suva High Court 72/85) in which Cullinan J had held at page 13:-

"I am satisfied ..... that the public officer in Fiji does not

> serve at will, that his service may not be terminated at will and that thus, as far as the officer himself is concerned, contractual rights arise from such service"

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On page 43 of the same judgement Cullinan J had also referred to the "Commission's duty to act fairly".

A further complication is introduced by the fact that since the 1982 Judgment of the FCA Fiji has become a Republic. This raises the question how far decisions predicated on the common law doctrine of crown privilege can now be held to apply in Fiji.

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I was unfortunately not addressed on this issue but my own research suggests that the doctrine of the employment of public servants at will operates independently of the Crown. As explained by Kirby P in Suttling v Director General of Education [1985] 3 NSWLR 427 at 439:-

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> "The principle promotes the ultimate control of elected government over employees which a contractual right to a position diminish or effectively frustrate. The principle is defensive of democracy in guarding the right of incoming governments speedily to redirect resources and personnel as managed by the people. They may do so without crippling penalties, delays and inconvenience involved in adjusting the the multitude of private claims or employers asserting their common law personal "contracts" to hold posts to which they have been assigned by an outgoing government or replaced officials"

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Examination of the circumstances and judgment in Mahendra Singh's case (supra) reveals that the FCA allowed the appeal not merely because it relied on the principle of appointment at will or pleasure but because it determined first that the appeal procedure formally contained in the Public Service Act amounted to a complete and comprehensive delegation by the State of its common law right to promote (and therefore by implication to terminate the employment of) civil servants and secondly because the Act specifically gave a discretion to the Appeals Board to determine the extent and the manner in which an applicant would be allowed to be heard.

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What then is the position in the present case?

Ever since Ridge v Baldwin (supra) the presumption has been that the rules of natural justice and in particular the right to be heard apply wherever a person or body has a legal authority to determine a question affecting the rights of individuals.

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Public servants come into a special category since the principle of employment at pleasure prevents the automatic operation of the rules of natural justice

(Mahendra Singh's case- supra). But where the State has by statute voluntarily accepted encumbrances upon its prerogative those statutes may be examined to establish the precise rights of persons affected by them. The importance of this latter point cannot be over-emphasised since as pointed out by Henry JA in Mahendra Singh's case (supra) if the particular statute in question specifically deals with the right to be heard then that is the end of the question. But if it does not then on the principle affirmed in Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180 and reaffirmed in Ridge v Baldwin (supra) "The justice of the Common Law will supply the omission of the Legislature" Regulation 31 can properly be compared with Part V of the Regulations which deals with discipline. Both procedures may result in an officer losing his job but apart from this similarity the contrast between the two procedures could hardly be more pronounced. Part V sets out an elaborate procedure which has to be followed before an officer can be dismissed for indiscipline. It includes provisions for the appointment of a disciplinary tribunal (Regulation 43), precise procedures to be followed at the hearing (Regulation 45) and the manner in which the tribunal must report (Regulation 47). Where dismissal occurs there is a right of appeal (Public Service Order 1987 Part III). The procedures before the Appeal Board are set out in extenso in Sections 10, 11, and 12 of the Order. None of these protective procedures so elaborately set out appear in Regulation 31 and yet the consequences of a decision by the PSC adverse to the officer are precisely the same: unemployment. As I see it this is a classic situation where the justice of the Common Law should supply the omission of the legislature. The only question is whether there is any reason for it not to do so. In my opinion examination of Regulation 31 demonstrates that there is not.

Regulation 31 (1) is uncontroversial except in so far as the term "Medical Board" is not defined. As already explained in my view it should be. Furthermore the Board should among other things obviously be sufficiently qualified to report on the particular ill health from which the officer is said to be suffering and should naturally be impartial.

Regulation 31 (2) merely requires an officer to undergo a Medical Board when so required by the PSC. In my view the rules of natural justice which are necessarily imported by this Regulation require at the very least that a Civil Servant be advised (as appears not to have been the case) that he is being required to attend the Medical Board with a view to a decision being taken as to his future. He should be clearly told what is at stake and should be given an opportunity to present his case, including medical reports (such as Exhibit 2) from his own doctor, to the Medical Board prior to the preparation of its report. If the officer wishes he should be entitled to be assisted in the presentation of his case to the Board (c. f. Regulation 45 (l) (d))

The examination by the Medical Board should, it ought to go without saying, be conducted with scrupulous conscientiousness. On the evidence before me it may seriously be doubted whether in this case it was. It seems that Dr. Korwa

merely relied on what Dr. Etika told him while Dr. Etika's opinion embodied in the report is hardly consistent with his remarks and prognosis contained in Exhibit 1 dated a mere two months later which reads:- A

> "He may be able to perform in the office as a clerk but at a physical disadvantage."

Whether the disadvantage is that of the 1st Plaintiff or of the Public Service is not made clear. B

Given Exhibit 2 which directly contradicts the Medical Board's Report by finding no active processes i.e. likelihood of future degeneration and that all the medical reports tendered in evidence including one from a specialist vascular surgeon are unanimously of the view that the first Plaintiff on examination was perfectly well enough to discharge his clerical duties it is hard to avoid the conclusion that the Medical Board simply got it wrong. C

Regulation 31(3) provides that the contents of the Report shall not be made known to the officer or to any other officer, person or body except with the permission of the PSC. I do not know whether the 1st Plaintiff ever asked to see the Report before it went to the PSC, although my impression is that he did not (see paragraph 4.02 of 1st Plaintiff's submissions filed 21 June 1933). D While I accept that there are good grounds for not generally releasing the contents of a Report containing the results of a private medical examination I am of the view that any Report containing a recommendation for retirement should always as a matter of strict routine be released to the officer. Once again this is simply the fair thing to do and is no way excluded by the statute or regulations.

Regulation 31 (4) contains the very important preamble:- E

> "unless the Commission considers it necessary to institute or cause to be instituted further enquiry into any matter bearing on the officers capacity....."

Mr. Cope submitted that there was nothing on the face of the Report to cause F the PSC to make further inquiries. With respect, I could not agree less. In my opinion the reverse was the case. This man's livelihood was at stake. Natural justice and fairness require the PSC to inform every officer whenever a Report adverse to his continued employment is presented to them. There is nothing in the statute to exclude such a practice, there is on the contrary provision for it contained in the preamble above quoted. Why in justice should a man who has committed disciplinary offences have an elaborate right of appeal whereas a G totally innocent man who has merely had the misfortune to succumb to illness may be forced out of the service without even knowing what condition it is being said that he is suffering from?

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Courts cannot change Statutes or Regulations but since the dawn of decency the justice of the Common Law has supplied the omission of the Legislature. I am satisfied that in the present case the decision taken by the PSC that the 1st Plaintiff be compulsory retired was unlawful, arbitary and unreasonable and I so declare.

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In the expectation that some amicable settlement will now be reached between the parties I propose to make no further order at the stage but will adjourn the matter for two months to enable the parties to confer. I will hear counsel at a suitable date for mention.

(Declaration pronouced)

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