

**THE STATE**

v.

**THE PUBLIC SERVICE COMMISSION**

**ex parte  
AMENATAVE TAWAKE**

[HIGH COURT, 1999 (Byrne J), 27 May]

Revisional Jurisdiction

*Public Service- General Orders- failure to convey substance of Annual Confidential Report- whether G.O. 215 mandatory or directory- Public Service Decree 40/1990 Section 10.*

The Applicant sought judicial review of a decision not to promote him. He argued that he had not been given an opportunity to rebut criticisms of him contained in Annual Confidential Reports as was required by General Orders. The Court dismissed the motion and HELD: (i) G.O. 215 was merely directory and (ii) the failure to comply with G.O. 215 had made no difference to his promotion prospects.

Cases cited:

*Anuradha Charan v. PSC & Ors* – Civ. App. 2/92 (FCA Repts 93/661)

*Celik (Ali) and Celik (Hanife) v. Secretary of State for the Home Department* (1991) Imm. A.R. 8, C.A.

*Coney v. Choyce* [1975] 1 WLR 422.

*Malloch v. Aberdeen Corporation* [1971] AC 1578

*Ram Karan Cheta v. Attorney-General* – Civ. App. 56/76 (FCA Repts 77/463)

*Regina v. Ministry of Defence ex parte Murray* TLR 17-12-1997

Motion for judicial review in the High Court.

*T. Savu* for Applicant

*S. Kumar* for Respondent

**Byrne J:**

The Applicant has been employed in various capacities by the Government of Fiji since the 15th of January 1972 first as an unestablished staff until the 4th of March 1975 when he became a Civil Servant.

Early in 1995 he was appointed the Stores Officer II (Stock Control Section) of the Government Supplies Department until on the 10th of April 1996 he was appointed Acting Stores Officer I (Despatch) Government Pharmacy until the 8th of August 1997 when he was relieved of that position and another person Mr. Mitieli Maraiwai was promoted to the substantive position of Stores Officer I (Despatch) Government Pharmacy.

By leave which I granted on the 26th of June 1998 the Applicant seeks Judicial Review of the decision to appoint Mr. Maraiwai.

A I granted leave on one question only namely whether the failure of the Respondent, which is not denied, to comply with General Order 215 of the Public Service Commission General Orders rendered the decision to appoint Mr. Maraiwai a nullity. I took written submissions on the question.

B General Order 215 is part of a section of the General Orders dealing with Confidential Reports and reads as follows:-

C “Communication of Reports to Officers - Confidential Reports will not be shown to the Officers on whom they are written. But the substance of the report made on an Officer’s work or conduct included in a report will be conveyed to him by the Officer instructed to do so, and this will be done at an interview, to be followed by a brief memorandum, a copy of which will be attached to the report. Before any Reporting Officer begins to fill in a report, he must study the current Circular instructions on procedure. Communications to an Officer of this nature should, if at all possible, be couched in sympathetic terms and with the object of encouraging and enabling him to overcome his shortcomings.”

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In support of his application the Applicant has filed two affidavits, the first sworn on the 3rd of October 1997 in support of his application for leave to apply for Judicial Review and the second sworn on the 11th of March 1998 in support of his Motion for review.

E An affidavit opposing the Applicant’s application was sworn by Umesh Chand an Administrative Officer in the Ministry of Finance and that Ministry’s representative on the Government Supplies Department Staff Board which prepared a report on applications for the vacancy of Stores Officer I (Despatch).

F The burden of the Applicant’s case is that because he was not granted his rights under General Order 215 he was unable to refute two adverse reports made against him which he says prevented him from being appointed to the position now held by Mr. Maraiwai.

G He applies for certiorari to quash the decision to appoint Mr. Maraiwai, an order of mandamus directing the Government Supplies Staff Board to properly fill in the Annual Confidential Report (ACR); an order of mandamus directing the Commissioner, Ministry for Finance to recommend to the Public Service Commission that the Applicant is fit for promotion to the position of Stores Officer I, and an order of mandamus directing the Public Service Commission to appoint the Applicant to that position. He also seeks a declaration that the Public Service Commission has acted in breach of the rules of natural justice in failing to appoint him to the position.

In response to the Applicant's affidavit the Respondent in its affidavit states that after advertising the vacancy for Stores Officer I a total of fourteen applications were received. The Staff Board then considered the applications and prepared a report for the Permanent Secretary for Finance. That report, a copy of which is annexed to the Respondent's affidavit, gives personal particulars about the various Applicants for the position and makes comments on each Applicant giving a brief history of their previous employment.

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The Report on Mr. Tawake concludes with this paragraph:

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"Mr. Tawake has passed the Trade Tests III, II and I and has a service of 21 years. Mr. Tawake's Annual Confidential Report ratings for 1994 is Good, Fitted for Promotion for 1995, Good, Highly Fitted for Promotion and for 1996, Fair, Not Yet Fitted for Promotion."

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The report on the successful Applicant Maraiwai concludes with these words:

"The rating for 1995 was Satisfactory, Fitted for Promotion and for 1996, Good, Fitted for Promotion."

It should be added for the purpose of completeness that whereas the Applicant had been employed in the Public Service for some 25 years Mr. Maraiwai had been employed for only 6 years and is 2 years older than the Applicant.

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Three other annexures to the Respondent's affidavit are relevant. The first is a Memorandum dated 27th of March 1995 from the Acting Controller of Government Supplies to the Applicant dealing with his work performance and I quote it in full omitting formal parts:

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"I have discussed with you about your work performance following a verbal report received from your superior officer in the Ministry of Health. You have been a Stores Officer II for almost five years and you are eligible for advancement to a higher post.

Unfortunately, you cannot be considered for further progression unless you have shown a marked improvement in your work performance and attitude. Meanwhile it would be necessary to transfer you to a new locality. This will give me an opportunity to closely observe your performance.

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You should, therefore, make a genuine effort to produce a high standard of work and also a change of work attitude and be advised that your performance will be reviewed after six months."

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Less than two months later on the 18th of May 1995 the Acting Controller of Government Supplies sent another memorandum to the Applicant which is headed "Concern". It is desirable to quote this memorandum also omitting formal parts.

It reads:

A "I refer to your memorandum referenced EDP 18115H of 09/05/5.

Your allegation against the Senior Administrative Officer for unfairly administering your transfer is not true. Please be advised that discussions regarding staff matters including transfers of officers are done by the Staff Board in my presence.

B In your case, your transfer from the Ministry of Health was initiated by that Ministry. Arrangement was immediately made to post you to the Department of Mineral Resources, but our proposal did not eventuate as a result of the strong objection by the Permanent Secretary for Lands and Mineral Resources.

C Other efforts were made later to post you elsewhere, but with no success. Finally it was decided that you be temporarily posted to the Headquarters pending decision on your permanent posting when opportunity arises.

D Meanwhile, it would be advisable that you should concentrate on your work and try to improve your performance as was stressed in my letter of 27/03/95."

The third annexure is the Memorandum from the Government Chief Pharmacist dated 4th December 1996 to the Controller of Government Supplies. Attached to the memorandum is a 2-page document called performance appraisal of Mr. Tawake. I quote from it the following paragraphs:

E "The supervision role is not being undertaken effectively. Mr. Tawake is frequently absent from his work station and supervision cannot be achieved in the absence of the supervisor.

F Mr. Tawake does not have the desired rapport with staff to extract desired work outcomes. His approach is usually aggressive and lacks personnel management skills. In monthly meetings with the packing staff (unestablished), concern has been raised about the aggressive nature of Mr. Tawake's personality.

G Mr. Tawake is not a suitable role model for his staff and therefore, it is difficult to extract discipline from his staff given his personal performance. He does not command the respect of his subordinates.

Relationship with Senior Staff: Mr. Tawake is a member of the Senior Staff committee at Government Pharmacy and contributes his ideas whenever the opportunity arises. He generally works well with other staff.

Ability to Carry-out Instructions: Any job-related instructions given to Mr. Tawake have been carried-out efficiently.

General Conduct: Concern has been raised with Mr. Tawake regarding his frequent absences from work. In particular, his use of sole Government Pharmacy transport without liaising with the Executive Officer which has caused transport difficulties at Government Pharmacy. These issues have been raised verbally with Mr. Tawake on several occasions with little improvement.

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Apart from this, his general conduct is deemed to be satisfactory.”

Although it is common ground that the Applicant could not be allowed to see the memorandum of the 4th of December 1996 I have no doubt, and he does not deny it, that he saw the memoranda of the 27th of March and 18th of May 1995. It thus must have been obvious to him that his work was not giving satisfaction to his employer and he was invited in the clearest terms to improve his performance. I am entitled to assume in view of the appointment of Mr. Maraiwai that the Respondent was not satisfied that the Applicant had improved his work performance.

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In his affidavit of the 3rd of October 1997 the Applicant annexes various reports of Government Pharmacy Senior Staff Meetings which the Applicant attended from the 7th of May 1996 to 1st of July 1997. The Applicant remarks that in none of these reports was there any adverse criticism of him by his senior colleagues. I do not find this surprising for the simple reason that it would be unlikely that staff members of equal status would criticise one of their colleagues on the way he performed his work. More to the point I think is the remark in the Performance Appraisal about his relationship with ordinary staff. Of course the Applicant may not have known of this or if he did may deny the allegations against him. This is part of his argument on the failure by the Respondent to comply with Order 215.

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Notwithstanding that I can not bring myself to believe that the Applicant could not have been aware of any allegations made by ordinary staff about his behaviour at staff meetings and his alleged aggressiveness.

I have been referred to various case law and begin with the remarks of the Court of Appeal in Civil Appeal No. 56 of 1976 Ram Karan Cheta v. The Attorney-General of Fiji in its unreported judgment of the 25th of March 1977 (FCA Reps 77/463). At pages 10 to 11 the Court said this:

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“We do not find the construction of these General Orders a straight forward task. They are not, or have not been in the past, the same as regulations made under statutory authority, but are more in the nature of instructions and conditions evolved by a giant corporation for the regulation and guidance of its staff. By virtue of section 17(3) of the Public Service Act, 1974, they are part of the conditions of service, but are for the internal use, guidance, assistance and general conduct of employees. Hence we think that any purely legal approach

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A to their construction could be too cramping; considerations arising from the common sense of an employer-employee situation could well be relevant.”

In Malloch v. Aberdeen Corporation [1971] AC 1578 at page 1595 Lord Wilberforce said of the Plaintiff’s claim that he had been denied a hearing after he had been dismissed as a teacher:

B “The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain.”

In Regina v. Ministry of Defence, ex parte Murray reported in the Times Law Reports of 17th December 1997 Mr. Justice Hooper with whom Lord Bingham of Cornhill, Lord Chief Justice concurred in a separate judgment said that:

D “Judicial review was unlikely to succeed where the reasons were easily discernible albeit not expressed or where no other conclusion than that reached was realistically possible.”

In Celik (Ali) and Celik (Hanife) v. Secretary of State for the Home Department (1991) Imm. A.R. 8, C.A. referred to in CLY p.486 1991 item 1969, it was said:

E “Refusing the applications, that (1) there is no principle of law that says that unfairness can never be ignored if a fair hearing would not have made any difference to the decision taken;.....”

Staughton L.J. said:

F “Ordinarily, if there has been improper procedure, one needs to be roundly convinced that the impropriety made no difference before one should refuse to act upon it.”

G By Section 10 of the Public Service Decree No. 40 of 1990 the General Orders are said to be for the internal use, the guidance, assistance and general conduct of employees. The question I have to answer is whether General Order 215 is mandatory or merely directory so that I can treat the failure of the Respondent to comply with Order 215 as a mere irregularity.

In Coney v. Choyce [1975] 1 WLR 422 Templeman J., as he then was, had to consider whether failure to comply with various Education Act regulations rendered a decision of the Secretary of State a nullity. Templeman J. held that it did not and said at page 433:

“For the reasons which I have given, I accept that by and large, putting it shortly, the breaches of the regulations did not make any difference.”

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In this case I am satisfied that Order 215 is merely directory and that failure to comply with it by the Respondent has not rendered the decision against the Applicant a nullity. I adopt what was said by Hooper J. in Regina v. Ministry of Defence that despite the Respondent’s failure to consult with him in the manner stated in Order 215 it must have been clear to the applicant on any objective review of his work performance that the reasons why he was passed over for promotion would have been easily discernible to him and that no other conclusion than that reached was realistically possible.

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In Civil Appeal No. 2 of 1992 Anuradha Charan v. Public Service Commission and Others in its unreported judgment of the 19th of November 1993 (FCA Repts 93/661) on a case in some ways similar to the instant the Court said at pages 19 and 20:

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“Clearly the Commission must observe the proper rules and procedures in seeking and considering applications for vacancies. In so doing they must evaluate evidence of all aspects of the candidates’ abilities, qualifications and attitudes. Having done so, they are left with a discretion to decide the suitability of the candidate for the post under consideration. That discretion must include the right to decide, if based on proper grounds, that despite fulfilling all the stated qualifications, the candidate may still not be suitable. There may be many reasons why a particular person should not be appointed despite suitable qualifications on paper and there is no right of automatic appointment in the event that some other qualified person applies.”

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I am not persuaded that the failure by the Respondent to follow Order 215 was fatal to the Applicant’s prospects of promotion. I find that he had been given various warnings about his work performance and it is reasonable to conclude that this was taken into account by the Commission when refusing his application for promotion.

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I accordingly order that the application for Judicial Review is dismissed but I decline to make any order for costs.

*(Motion dismissed.)*

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