

420
IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA.

CORAM : MANN C.J.

PUBLIC SERVICE (PAPUA AND NEW GUINEA) ORDINANCE
1963-1965.

DECISION OF AN APPEAL BOARD CONSTITUTED TO HEAR
AND DETERMINE AN APPEAL BY MAKEU-OPA, AN OFFICER
OF THE DEPARTMENT OF TRADE AND INDUSTRY.

The Appeal Board comprised the Chief Justice, (appointed by the Administrator); W. A. Lalor Esq., (representative of the Division to which the appellant belongs); and Thomas Baha Ritako, (an officer appointed by the Administrator).

The Appeal Board sat at the Supreme Court building in Port Moresby on Monday, 15th May, and Tuesday, 16th May, to hear and determine the appeal. The Appeal Board took into account the matters required by the Public Service Ordinance and Regulations, including the previous record of the officer. Mr. Madgwick appeared for the appellant and Mr. McKinnon appeared for the Department of Trade and Industry.

The Board, having made a thorough investigation reports and recommends as follows :

Our conclusions upon the evidence set out on the file are :

(1) The Department of Trade and Industry has mistaken its duties and responsibilities with respect to questions of discipline in relation to the appellant, and has adopted procedures conducive to a denial of natural justice towards the officer in relation to the alleged offences.

(2) The Department in seeking to up-hold its reputation, instituted charges against the appellant without sufficient investigation of the facts, and in order to secure the dismissal of the appellant from the Public Service; and without sufficiently taking into account the fundamental importance to its reputation and otherwise of making certain that any proceedings brought against the appellant were conducted strictly

in accord with the legal requirements of natural justice.

(3) The decision of the Director is not a valid determination and was wrong in law.

Before dealing with the facts relevant to the charges brought, it is appropriate that we should say something about the circumstances affecting the appellant at the time of the alleged commission of the offences. It is in the light of these circumstances that a tribunal should approach the relevant facts. This is not a criminal court, and the duty of the Board is not to decide one way or the other whether the appellant committed, or stood in jeopardy of conviction for, a criminal offence. The Board's function is to decide whether an officer has committed the offence charged under Section 61 of the Public Service Ordinance.

Looking at the file it appears that the appellant was awarded a studentship for study in Australia and became a temporary officer of the Public Service in 1960. He was employed as a Junior Co-operatives Officer. He was awarded an Apex Scholarship later in 1961 and went to Queensland again, where he applied to become a Cadet Education Officer and was transferred to the Department of Education in 1963, where he passed some of the subjects but did not qualify for a certificate. In 1964 he was involved in some trouble concerning behaviour which does not appear to us to have any bearing on the present enquiry.

In 1964 the appellant was appointed a Business Advisory Officer in the Department of Trade and Industry, an appointment which carried a salary of £420-£600 for a local officer. At the time of this appointment the appellant's salary was £379, and according to the reconstituted salary scale, his new salary was computed at £420 plus a special allowance of £459, to bring up the total to £879.

Although the appellant was the senior officer and was left solely in charge of the Department's Business Advisory Service in Lae, whilst his senior officer was away on leave, the appellant did not qualify for a Higher Duties Allowance because the salary for a local officer on the new scale for the position which

he was holding in an acting capacity was only £328. It appears that until he gains by promotion a position carrying a salary of £379 or more, he cannot hope for allowances of this nature.

On the 1st July, 1965, a letter was written to the appellant by the Business Advisory Officer at Lae. The letter informs the appellant that he has committed certain acts in relation to other people's money. The letter went on to say :

"(2) The matter mentioned in (a) above is simply stealing, whilst (b) is illegally dealing with monies belonging to other people.

(3) The Chief of Division has instructed me to report to the Police any future instances of such stealing.

(4) Business Advisory Officers are in a position of trust. Abuse of this position will not be tolerated."

We did not have before us the facts relating to the matters raised in this letter, but it seems to us that the question whether a prosecution should be launched in what is thought to be a clear case, is one on which the Department should seek proper legal advice and should not be made the subject of a threat. An officer endorsed on the file a note addressed to the Director to the effect that the matter called for action beyond the Business Advisory Officer at Lae, but so far as appears nothing was done.

The Board notes that although Counsel for the Director was requested to place before the Board any instructions issued by the Department defining conduct which would be regarded as improper in the circumstances of the officer's profession, no such instructions were produced to the Board and it can only be assumed that none was issued. The incident set out above would appear to stress the necessity for clear instructions defining the conduct which might be regarded as improper for officers holding these positions.

In 1965 the appellant wrote to ask for a transfer to a place where he could have accommodation

provided for him at a lower rent. He had only European standard accommodation available at a higher cost.

On Folio 107 of the personal File is a form dealing with an application by the appellant for an Adult Matriculation Course at the Administrative College. Although the Personnel Officer rated the applicant's capacity as "adequate" and his command of English as "good", the recommendation of the Departmental Head states that in view of the three years subsidised studies, plus an unsatisfactory broken period at Teachers' College, he could not recommend further subsidised studies unless there were inadequate applicants of a suitable standard. By what appears to be an addendum the following is added :

".....to utilise the College. My Business Advisory Service cannot afford to release this officer."

We do not regard this as a very satisfactory recommendation.

The appellant was transferred to Rabaul in 1966 and by the 27th April of that year it was clear that he was in quite serious financial difficulties. On that date the Principal Business Advisory Officer wrote to him about some cheques which he had cashed and which would have been dishonoured except for special financial arrangements which had been made, presumably by the Department. The principles mentioned in the letter are sound enough, but it appears that the Department's motive for writing to the appellant arose from the circumstances that he had cashed the cheques with local business people who were receiving advice and assistance from the Department's office at Rabaul.

By October 1966, it is clear that the reputation of the appellant was beginning to suffer and that the Head of the Department was beginning to lose the inclination to help him or recommend him for further training.

On January 3rd, 1967, the Business Advisory Officer at Rabaul sent a long confidential report to the Principal Business Advisory Officer in Port Moresby.

The report discloses in detail a number of acts on the part of the appellant suggesting dishonesty or impropriety on his part. The main concern indicated is that the appellant's dealings were with clients of the Department. It was known that the appellant was in financial difficulties and his Senior Officer includes in his report a statement of the debts owing. Apart from one or two minor inaccuracies in the information available to the officer at this time, the report seems to set out the instances fairly. The appellant was apparently given the opportunity of reading the report.

The Chief of Division called for an immediate investigation and directed that the Police be asked to make an immediate investigation. This seems to us to be the right course for the Department to have taken, and the confidential report by the Chief of Division to the Director seems to us to be fair in every way.

A further report was sent by the Officer-in-charge of the Business Advisory Section in Rabaul to his Chief of Division on the 24th January. The report is in every way fair and shows that the officer was diligent and effective in his handling of the situation. The Chief of Division took the view that the Public Service Commissioner should be approached with a view to terminating the appellant's employment, and the Director endorsed a directive that appropriate action be taken to have the appellant removed from the Service.

In his statement dated 3rd January, 1967, the appellant frankly and in detail admitted that he had done certain things. At this stage there were no charges formally drawn up, but he admitted what he had done in relation to the various complaints set out in his superior officer's first report.

The formal charges were drawn up and they amounted to four charges, expressed as follows :

"THAT the said M. CPA on or about the fourteenth day of September, 1966, was guilty of disgraceful conduct in that he, in his official capacity misappropriated the sum of \$7.58 from the Rabuana Trade Store of the New Britain District; and

THAT the said M. CPA on or about the sixteenth day of November, 1966, was guilty of disgraceful conduct in that he in his official capacity falsely pretended that two personal cheques totalling \$30 which he presented to the Tavui No.2 Group in the New Britain District were supported by cash at the Bank knowing full well that this was not so; and

THAT the said M. CPA on or about the twelfth day of December, 1966, was guilty of improper conduct in that he removed a \$30 transistor radio from the Rabuana Trade Store in the New Britain District on a \$15 deposit but by his subsequent actions indicated that no further payment would be effected; and

THAT the said M. CPA on or about the twelfth day of December, 1966, was guilty of disgraceful conduct in that he obtained a cheque for \$20 from the Tamairik Trade Store on the pretext of purchasing account books and providing petty cash with the balance, and retained \$16.20 for his personal use."

In response to this the appellant on the 21st February wrote to the Director setting out the following admissions :

- "1. From a cheque for \$20 drawn by the Rabuana Trade Store to purchase account books and provide Petty Cash, I did take \$7.58 in late September or early October, 1966. I made my action known to the two Students in the office, Basanu and Tainole, and intended paying the money back.
2. In Mid-October, 1966 I cashed two personal cheques, totalling \$30, with Apelis Tulian of Tavui No. 2 Group. I told Apelis that I was short of cash and asked him to hold the cheques until there were funds in the Bank to meet them.
3. About mid-December, 1966, I did obtain a \$30 transistor radio from Victor, the storeman, Rabuana Trade Store. My own radio had broken down and I was keen to listen to the finals of the South Pacific Games. I took the radio on approval and lodged a deposit of \$15 to show good faith.
4. On 12th December, 1966, I obtained a \$20 note from the Tamairik Trade Store. This was to purchase account books, with the balance being used for Petty Cash. I lost the \$20 but paid \$3.80 out of my own pocket for Cash Sale Summaries for the Store. I intended to repay the balance of \$16.20, but the matter was reported to my superior before I had a chance to do this."

The letter then explained the circumstances under which the appellant had acted and the effect that they had had on him at the time. He asked for a further opportunity

and promised not to do the wrong thing again.

The next step was for the Administrative Officer to prepare a "SUMMARY OF CONSIDERATIONS BY ADMINISTRATIVE OFFICER FOLLOWING AN ADMISSION BY MR. M. CPA OF THE TRUTH OF CHARGES LAID UNDER THE PUBLIC SERVICE ORDINANCE." It is first to be noted that the appellant made no such admission, as is referred to in the heading of this document. The admissions made were specific and must be considered in their own terms. The Director of the Department had already decided that the appellant should be dismissed and this may well have had an influence on the recommendations of the Administrative Officer, because he would undoubtedly have been expected to reach the conclusion that he did. We do not challenge for a moment the good faith of the Administrative Officer, but we think that he did not sufficiently realise that another view of the case was open and should be considered.

By the time the file with the material disclosed on it reached the Director for his decision, the whole question raised by the charges had already been decided, so that there was for all practical purposes little or no possibility that the Director would make a decision in favour of the appellant, or even an adverse decision more favourable than one involving dismissal.

Our view of the charges is as follows :

(1) The actions of the appellant in receiving and cashing the cheque for \$20 to purchase books of account and to provide petty cash appear in every way to be proper. Apparently the balance available for petty cash was \$7.58 and it is not clear at what point of time, or over what period of time, the appellant made use of this money on his own behalf. There would appear to be no doubt that the appellant converted this money to his own use and was, therefore, liable in a civil action to re-pay it. But on a criminal charge for theft of money the necessary element of intent is a complex of intentions, and it was not necessary for the Department to determine whether the intent which existed in fact was a criminal intent. The important thing is that the appellant is not now charged with a criminal offence, and for the purpose of these proceedings the defence indicated above

would tend to up-hold the honesty of the appellant, even though he committed at least a civil wrong in using the money. The Director would have been fully justified in holding that in the circumstances this was behaviour which one would expect a Public Service Officer not to commit and ^{we} do not for a moment suggest that it should be condoned. We also appreciate that any such practice resorted to commonly would give rise to a very sorry state of affairs which would have to be corrected, and officers indulging in such a practice would need to be given express directions and, if necessary, proceedings would need to be taken in cases of disobedience. We appreciate all these things, and the need for strict regularity in the handling of money, but we do not think that at the level at which the appellant committed these acts, and having regard to the circumstances, the appellation of a serious offence involving disgraceful conduct is justified. We would classify this as a minor offence in the circumstances and impose a nominal penalty of 10s/-d. so that his financial position will not be made substantially worse than it is.

(2) This is a charge of disgraceful conduct in that the appellant falsely pretended that two personal cheques were supported by cash at the bank. It appears to us that in arriving at his conclusions that the Administrative Officer made the error of applying what was thought to be the criminal law which would be appropriate to determine whether or not the appellant should be convicted of a criminal charge of false pretences. Again this is not the question. So far as the criminal law is concerned, neither at Common Law nor under the Police Offences Ordinance can a person be convicted of offences involving false pretences if at the time he honestly believed that a cheque tendered by him so as to constitute the pretence would, in the ordinary course of business, be met on presentation for payment.

The way in which such offences sometimes appear in Territory legislation is misleading. For example, Section 41 of the Police Offences Ordinance, (New Guinea), refers to the substantive act of passing a cheque which is not paid on presentation as constituting the offence, but at the end of the section is a provision excusing the act if the person accused can prove that he had

no intention to defraud. This re-statement of the offence is designed to shift the onus of proof on to the person charged, but lack of reasonable grounds, or an actual intent to defraud, is still a necessary ingredient of the offence.

The fact that the appellant was dealing with "clients" of the Department seems to us to be irrelevant, certainly an officer should avoid embarrassing personal transactions with people with whom he deals officially; but in the Territory it is often difficult to find satisfactory alternatives.

(3) The transaction concerning the transistor radio was very unsatisfactory. The appellant has given his reasons for entering into the transaction and these show a great deal of weakness of mind on his part when he is in an adverse position. We think that the transaction was misunderstood and we think that the appellant's explanation that he did not intend to purchase the radio should be accepted. He was apparently borrowing it and leaving \$15 as a deposit for safe keeping and in case of damage whilst in his possession. We do not think that there is any warrant for inferring that the non-payment of the balance of the purchase price makes the situation any worse. The circumstances do not appear to have been fully investigated and we think that the recommendation to the Director is erroneous in holding that subsequent non-payment negated the recognised earlier acts of good faith, and especially that this altered the appellant's position by leaving him open to a charge which was apparently regarded as some kind of retrospective theft.

(4) We think that here the conclusion is erroneous also, and must be based on inferences from facts which do not clearly support the conclusion. The accused strongly denies that he used the money himself and states that he only took \$20 because there was no other money at the store. He expressed the intention of bringing back the balance and was prevented from doing so when the \$20 was stolen. Perhaps the appellant was careless and lacking somewhat in efficiency, but it seems to us that there is nothing culpable of a disgraceful nature involved in this.

We think that we should point out that in the present conditions existing throughout the Territory very special care should be taken in dealing with matters of discipline. We think that it might be helpful to the Service as a whole if Mr. Ord, the Psychologist, were to be taken into consultation so that a better understanding might be reached of the economic and other forces bearing on the human material in the Service. The appellant may be typical of many others. He appears to be capable of doing good work, of undertaking responsibilities and of winning the respect of his superior officers. We know that he has tended to lapse at times. He has had some disappointment from failure in some of his examinations. He has had great disappointment from the reduction of salary scales, the effect of which must be to deny him any chance of getting into a more advantageous position. His prospects of promotion must now appear to be slight, in spite of the fact that he has been in a key position in a department which is grossly under-staffed and in which, under more normal conditions, he could expect to rise rapidly as a result of a large influx of new staff.

Whilst in Australia at school he found himself enjoying a much higher standard of living than he had ever experienced before and he apparently associated with Australians there without feeling any attitude of class discrimination. He accepted this new way of life and apparently converted his thinking to it. Having returned to New Guinea he finds that conditions and attitudes are very different. He obviously cannot afford on his present salary to live at a Territorial European standard, although he has done his best to do so even to the extent of employing a servant to look after his home.

In this kind of situation it is inevitable that officers such as the appellant will get into a position where they are living from day to day on a very fine margin of solvency and will constantly feel the lack of money. Drinking and smoking will have to be consciously avoided and they will feel this very keenly. Class distinction in the Territory is everywhere obvious and people of all races are intensely concerned about questions of status.

It is when these growing pressures produce an observable loss of morale that the senior officers of any Department must show not only skill and efficiency but, above all, wisdom and understanding. There are many indications that in the present case the officers concerned tried to save the appellant from his own folly, but this does not seem to be enough. It left the appellant in the same position, and it left him without hope. The application of further force in the shape of discipline when the officer's morale is already broken down is obviously likely to break his spirit altogether; and it seems to us that the Department's determination to have him dismissed from the Service is a recognition, consciously or otherwise, of its inability to make it possible for him to continue his career with credit to the Service. Unless these problems can be overcome, and unless the average Local Officer working at the same level can perform his duties cheerfully and with enthusiasm, the same situation is likely to be found right throughout the Service.

If instead of some ameliorating or encouraging step the Service is going to apply the hard rule of discipline, it must do so strictly in accordance with the Ordinance and with strict regard to the rights of the officer concerned. Although the statutory offence which applies in the present case is not within the jurisdiction of the Criminal Court, it is described in the Ordinance as an offence, and penalties are provided for, some of which are extremely severe, and are such as to impose under present conditions real hardship upon an officer who is already in a position of severity. The only justification for this offence to be heard in what amounts to a private tribunal is that special considerations are thought to apply to questions of conduct within the Public Service. These do not include any notion that the tribunals should depart in any way from the strict standards or the rule as to the onus of proof which are imposed on the Criminal Courts by law.

SUMMARY OF FINDINGS :-

Charge 1 : The decision of the Director is varied by imposing a fine of 10s/-d. for a minor offence.

Charges 2 - 4 : Decision of the Director
annulled.

Mansbourn
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Wm. L. L. L.
.....

Politeness
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Supreme Court Chambers.
Port Moresby.

5th June, 1967.