

BUTO, FUNIFAKA, MANATA, TEKULU, TION, TOZAKA AND HIELE -v- THE
ATTORNEY GENERAL

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 194 of 1990
Hearing: 2 November 1990
Judgment: 26 November 1990

T. Kama for the Plaintiffs
F. Kabui for the Defendant

WARD CJ: It has apparently been the intention of the Government for some time now to alter the employment of Permanent Secretaries to fixed term contracts. At the same time it was intended to improve their terms and conditions. During 1990 a number of meetings were held at which the Permanent Secretaries were asked their views about the proposed arrangement. All the Plaintiffs were Permanent Secretaries at the time.

Exactly what was discussed at each meeting is not agreed by the parties but it is clear that at a meeting as early as 21st February they were advised of the scheme and asked their comments and, on 3rd May at another meeting, a committee of three Permanent Secretaries was set up to advise the Secretary to the Prime Minister. That committee included the Second Plaintiff as chairman and the Seventh Plaintiff as one of the members.

Clearly such a scheme would necessarily involve termination of the Permanent Secretaries' employment to allow re-employment under the new terms and it is equally clear that, whatever the Government's intention, the Plaintiffs all believed, for most of the period of negotiation, they were going to be taken on under those new terms. Whilst that was a reasonable hope, I do not feel on the evidence that this was ever held out to them in those terms.

However, during this time, a submission was made to the Public Service Commission and, at a meeting of the Commission on 13th February, it considered retiring four of the Permanent Secretaries, including the First and Second Plaintiffs, under section 9 of the Pensions Act because they had reached the retirement age. It finally resolved that three should be so retired but deferred its decision on the First Plaintiff. This is minuted as 42/90.

Following a further submission on 13th August by the Under Secretary of the Public Service Division, Ben Newyear, relating to the remaining Permanent Secretaries, the Public Service Commission met on 14th August and decided to approve the retirement of the remaining twelve Permanent Secretaries under section 7(1)(a)(iv) of the Pensions Act. This is recorded in minute 629/90. At the same meeting it resolved that the new posts of the Permanent Secretaries on contract should be advertised.

On 23rd August, the twelve Permanent Secretaries received the following letter from Newyear:-

"re: RETIREMENT NOTICE

I have to inform you that following Cabinet's decision to recruit Permanent Secretaries on Contract, the Public Service Commission has on 14.8.90 decided to retire you in accordance with the provision of s.7(1)(a)(iv) of the Pensions Act in order to facilitate such recruitment.

The decision of the Commission takes effect from 25th September 1990 which date the appointment of new Permanent Secretaries is expected to take effect. You are also required to vacate office on that day (25.9.90) as your current appointment will cease to have effect.

Your frozen pension benefits plus the appropriate notice of termination and any unutilised earned leave will be paid to you, as soon as His Excellency the Governor General has given his approval.

With regard to the recruitment of new Permanent Secretaries, you are free to apply should you wish to do so provided your application is submitted to Secretary to Prime Minister, Prime Minister's Office on or before 4pm Thursday 6th September 1990.

I shall write to you again to advise on the payment of your retirement benefits."

On the 24th September, the day before that termination date, they each received the following letter from Newyear:

"Due to the delay in processing the appointments of new Permanent Secretaries Public Service Commission has advised that you do not vacate the office of Permanent Secretaries until you are further advised.

Please disregard my letter of 23rd of August 1990."

The delay referred to was because the Public Service Division had received a legal opinion from one of the lawyers in the Attorney General's chambers, Reginald Teutao, which conflicted with an earlier advice of the Attorney General on whether section 7 of the Pensions Act gave a right to terminate the Permanent Secretaries' employment.

When the Prime Minister's Office first received that advice, Newyear had written to the Chairman, Public Service Commission, on 21st September, pointing out the difference of opinion and continuing -

"As you know Sir, the position at moment is that existing Permanent Secretaries have been advised to cease to hold office on Tuesday 25th September 1990 which date it is expected the Commission will appoint new Permanent Secretaries on contract.

In view of the little time left and more so the conflicting legal advice tendered, I consider it imperative that the Commission immediately consider the following:-

- (a) delay the appointment of new PS's to a later date;
- (b) consider and process retirement of Permanent Secretaries under PSC Regulation 73(a) and (c);
- (c) advise His Excellency the Governor General to hold on to the granting of Pension awards until further advised by Commission;
- (d) advise existing Permanent Secretaries, to continue working until informed to vacate.

The above consideration should only be taken if the Commission is satisfied that the retirements of PSs done earlier was only to grant them their frozen pensions and that such retirement can only be effective if they were terminated/retired from the public service under the relevant PSC Regulations.

In PSD, we are satisfied that the views expressed by Mr Teutao and Permanent Secretaries are valid.

With regard to the period of notice of 30 days required under Regulation 76 of the PSC Regulations, I think the Permanent Secretaries have had adequate notification of their retirements through various meetings they've had with Secretary to Prime Minister since July 1990. In addition the PSs, except 2 have all applied for new Permanent Secretaries posts therefore I don't think a further notification of 30 days would make any difference as some of them are ready to get their benefits whilst others are expected to be reappointed back into the service.

In these circumstances I don't think a miscarriage of justice will have been done if PSC decides to terminate Permanent Secretaries.

In the event that Public Service Commission decides to retire Permanent Secretaries only the following will be affected:-

- (1) Under PSC Regulation 73(a); Mr Leonard Maenu'u, Mr Philip Funifaka and Mr Daniel Ho'ota.
- (2) Under PSC Regulation 73(c); Mr Milner Tozaka, Mr James Saliga, Mr Wilson Ifunaoa, Mr Solomon Manata, Mr George Hiele, Mr Gina Tekulu, Mr Wainga Tion, Mr Geoffrey Siapu, Mr Daniel buto and Mr Stephen Danitofea.

In the case of Messrs Milton Sibisopere and Mathias Pepena they appear to have been lawfully terminated."

As a result, the Public Service Commission held a special meeting at 9.00 am on 24th September to consider the submission and decided -

- "(a) Taking into consideration the administrative work involved in the processing of appointment of new Permanent Secretaries, that the existing Permanent Secretaries be advised to remain in their positions until such a date agreeable to the Hon. Prime Minister, on which date is expected to make known the appointment of successful applicants for the new contractual Permanent Secretary posts;
- (b) Under PSC Regulations 73(a), that Messrs L. Maenu'u, P. Funifaka and D. Ho'ota be retired after reaching the minimum prescribed retirement ages of 45 years, without having to voluntarily apply for retirement. This decision is additional to the PSC decision made in PSC Minute 42/90.
- (c) Under PSC Regulations 73(c), Messrs M. Tozaka, J. Saliga, W. Ifunaoa, S. Manata, G. Hiele, G. Tekulu, W. Tion, G. Siapu, D. buto and S. Danitofea be retired prematurely to facilitate improvements in the Public Service. This decision supersedes PSC decision made in PSC Minute 629/90 (i), but does not affect PSC decision made in PSC Minute 686/90.

- (d) That the period of notice of 30 days required be waived or dispensed with in view of the fact that the Permanent Secretaries have had substantial due notice of this issue.
- (e) That HE the Governor General be advised to hold on to the granting of Pension Awards until he is further advised by the Commission."

At 3.00 pm on the same day, the Permanent Secretaries went to a meeting at the Cabinet office with Newyear and Teutao when the latter said he would advise that the Public Service Commission should rescind its earlier decision and start afresh the proper procedures under Public Service Regulations 73 and 76. As can be seen, that advice was late because the Public Service Commission had already met that morning. Whether Newyear knew or not, he did not mention it at the meeting. As the meeting of the Commission had been the result of a submission from Newyear, it seems most likely he knew the meeting had taken place. If he did, he did not mention it to the meeting and he should have done.

On 25th September there was a further meeting of all the Permanent Secretaries in which they expressed serious misgivings at the situation and considered that the Public Service Commission was blindly carrying out the wishes of the Prime Minister. They agreed that the First and Second Plaintiffs should be their spokesmen and should seek legal advice. Present at that meeting was the Secretary to Prime Minister. He was in a difficult position because his post was one of those being considered but he also must have known of the Commission meeting on 24th. He did not mention it and I view such a lack of frankness inappropriate when dealing with such senior public officers.

On 26th September the Public Service Commission met and appointed the new Permanent Secretaries. The minute (726/90) records:

"Following responses to Vacancy Notices to the public on appointment of Permanent Secretaries on contractual basis, the commission by waiving Section 24 of the PSC Regulations regarding composition of Panels, interviewed all applicants who could avail themselves on 19th, 29th and 21st September, 1990 in the Public Service Commission Conference Room."

Fifteen were then appointed including six former Permanent Secretaries.

The next day, 27th September, the Permanent Secretaries were given a letter from Newyear:

Re: TERMINATION OF APPOINTMENT AS PERMANENT SECRETARY

Further to my letter ref. F 13/2/2 of 24/9/90 I wish to advise you that as the new Permanent Secretaries have been appointed by Public Service Commission with the concurrence of the Prime Minister under section 138(1) of the Constitution, your appointment as Permanent Secretary has therefore come to an end as of today.

On behalf of the Government of Solomon Islands I wish to sincerely thank you for the past services you rendered to the Government as a public officer and especially as Permanent Secretary.

I wish you all the best in your future endeavours."

That letter was unfortunately phrased because it gave no explanation of the true grounds of termination. The letter of 24 September referred to had resulted from the termination letter of 23 August which had purported to retire them under section 7(1)(a)(iv). Between 23rd August and 27th September the Prime Minister's Office and the Public Service Commission had recognised the use of section 7(1)(a)(iv) was wrong, had corrected it and had retired the Permanent Secretaries under regulation 73. It would be reasonable to expect the Permanent Secretaries to be informed of those facts however embarrassing that may have been to those who made the errors.

This lack of frankness Newyear is reflected in a letter also dated 27th September to the First Plaintiff's solicitor sent by Newyear in response to a letter pointing out the error in the use of section 7(1)(a)(iv).

"I wish to advise that according to legal advice rendered by Mr R. Teutao of the Attorney General's chambers the Government had duly complied with the relevant provisions of the Pensions Act, PSC Regulations 1979 and General Orders prior to submission being made to Public Service Commission to retire all 15 Permanent Secretaries under the Public Service Commission Regulations 1979. Accordingly it is the Government's view that Public Service Commission too has legally retired the 15 Permanent Secretaries in the exercise of its powers under the Constitution.

In view of the matters aforesaid Government will not go back to Public Service Commission to revoke its decision which gave rise to the retirement of the 15 Permanent Secretaries so as to facilitate the recruitment of new Permanent Secretaries under fixed term contract.

If you believe that Government and Public Service Commission have erred in law on matters of substance or procedure as regards the handling of the whole exercise, you are welcome to take the issue to court."

How much easier it would have been simply to acknowledge the mistake with good grace and point out exactly what had happened so everyone know where they stood rather than challenge them to take it to Court.

The Plaintiffs are seven of the Permanent Secretaries who were not appointed under the new terms. Some have deposed to the fact that they applied and were interviewed but felt the interviews were a mere formality and the decision not to employ them had already been made.

They now seek the following orders:

2. It be declared that:-

- (a) The Defendant, the Permanent Secretary in-charge of the Public Service, or any person authorised to make recommendation to the Public Service Commission, had failed to fairly consider the reasons for the proposed action to terminate or retire the Plaintiffs as required under the provisions of Regulation 76 of the Public Service Regulations 1979 when Cabinet issue directions for such action.

- (b) The Public Service Commission had failed to fairly consider the reason for termination or pre-mature retirement of the Plaintiffs before making its decision to terminate or retire the Plaintiffs.
 - (c) The Plaintiffs are, subject to the proper exercise of powers of the Public Service Commission entitled pursuant to the provisions of Regulation 76 of the Public Service Commission Regulations 1979 to the right to make representations to the proposed action to terminate or prematurely retire them from their employment.
 - (d) The Public Service Commission's decision on 14th day of August, 1990 and communicated to the Plaintiffs on 23rd day of August, 1990 to terminate or prematurely retire the Plaintiffs from their employment under section 7(1)(a)(iv) of the Pensions Act (Cap.110) was wrong.
 - (e) The decision of the Public Service Commission on 14th August, 1990 to compulsorily retire the Plaintiffs under the provisions of section 7(1)(a)(iv) as read together with section 9 of the Pensions Act was wrong since the officers ceased to be pensionable officers pursuant to section 7A (1)(a) of the Pensions Act and also the Public Service Commission Regulations supersedes the Act.
 - (f) The Public Service Commission's subsequent decision on 27th day of September, 1990 to correct the error on the face of the record as disclosed in the Notice of Retirement dated 23rd August, 1990 by relying on the provisions of Regulations 73 and 76 of the Public Service Commission Regulations 1979 amounts to an abuse of the process and therefore null and void.
3. In the event that the declarations sought in paragraph 2(c), (d) and (f) above is made an order of certiorari the decisions of the Public Service Commission on 14th August, 1990 and 27th September, 1990 be null and void.
4. In the event that the declaration sought in paragraph 2(d) above is made an Order of Mandamus the First Defendant and the Public Service Commission:-
- (a) re-instate the Plaintiffs to their respective posts.

- (b) and/or further in the alternative should the Defendant and the Public Service Commission do desire to proceed against the Plaintiffs:
- (i) the Defendant to act fairly in making any recommendation to the Public Service Commission to retire or terminate the employment of the Plaintiffs as required under Regulations 73 and 76 of the Public Service Commission Regulations 1979.
 - (ii) The Public Service Commission to comply with the audi alteram partem rule or to allow the Plaintiffs representations on the recommendation for the retirement or termination of their employment as required in Regulation 76 of the Public Service Commission Regulation 1979.
 - (iii) and/or further and in alternative to comply with the provisions of section 9 as read together with section 7(1)(a)(iv) of the Pensions Act (Cap. 110) in relation to the compulsory retirement of those Plaintiffs who are in the material time pensionable officers.
 - (iv) and/or further and in alternative not to comply with the provisions of section 9 as read together with sections 7(1)(a)(iv) and 7A(1)(a) of the Pensions Act in relation to the Plaintiffs who retired under special circumstances in 1976 and ceased to be pensionable officers.

5. And further declare that the Public Service Commission had ceased to act impartially and independently as required under section 137(4) of the Solomon Islands Constitution when it allowed itself to be subject to direction and control from Cabinet.

Affidavits have been filed by each of the plaintiffs, the Chairman of the Public Service Commission, the Secretary to Cabinet (who also held that post under the old terms), the Attorney General and some other officers in relation to the payment of salaries in lieu of notice.

The plaintiffs seek to raise a number of issues of law but I feel the main issues as disclosed on the affidavits are clear. The matters that are important to resolve this case are the Public Service Commission decision on 14th August to terminate the Plaintiffs' employment under section 7(1)(a)(iv) of the Pensions Act and the letter of 23rd August notifying the Plaintiffs of that fact, the letter of 24th September telling them to disregard the earlier letter and the meeting

of the Public Service Commission the same day in which it was decided to terminate the Plaintiffs under regulation 73 and to waive the period of notice under regulation 76.

Section 7 of the Pensions Act, so far as it is relevant, provides:

7. (1) No pension, gratuity or other allowance shall be granted under this Ordinance to any officer except on his retirement from the public service in one of the following cases -
- (a) if he retires from public service under the Government of the Solomon Islands -
 - (iv) on compulsory retirement for the purpose of facilitating improvement in the organisation of the department to which he belonged, by which greater efficiency or economy may be effected;"

It is apparent the section does not give the power to terminate the officers' employment but simply provides for the payment of pension to the officers when they are so retired.

The power to remove public officer rests in the Public Service Commission by section 116 of the Constitution and it is accepted, it seems, by both parties that there is a power compulsorily to retire public servants in the circumstances set out in Regulation 73.

"73 This Part deals with premature retirement and termination of employment of permanent officers, not otherwise provided for in these Regulations.

Namely:

- (a) Retirement after reaching the minimum prescribed retirement age, other than voluntary retirement.
- (b) Premature retirement in the public interest.
- (c) Premature retirement to facilitate improvements in Government organisation.
- (d) Termination of employment because of redundancy.
- (e) Premature retirement on medical grounds."

Regulation 76 provides for the period of notice waived by the Public Service Commission on 24th September.

"76. Any recommendation for the retirement or termination of employment of an officer in accordance with paragraph 73 shall be made to or by the Secretary for the Public Service who, if he is satisfied that such action should be taken, shall advise the officer concerned stating the reasons for the proposed action. Thirty days shall be allowed for the officer to make any representations and thereafter the case shall be submitted to the Commission for decision, together with any representations the officer may have made."

The Defendants' case here is that the retirement of the Plaintiffs was under Regulation 73(a) in the case of the First and Second Plaintiffs and Regulation 73(c) in the case of the remaining five Plaintiffs. The Plaintiffs acknowledge that

but complain they were not given the notice stipulated in Regulation 76 and therefore were unable to make submissions.

The Defendants' answer is that although Regulation 76 requires thirty days notice to enable the Plaintiffs to make representations, these officers effectively had that notice because they had been consulted for some months about the scheme as a whole. In addition, they were given a clear month's specific notice by the letter of 23rd August and at least two did make submissions following receipt of that letter.

Unfortunately for the Defendants, that misses the point of Regulation 76.

The representations by the officer relate to the recommendation for retirement under Regulation 73. That cannot cover the type of discussions in which the Permanent Secretaries were involved earlier in the years over the future terms and conditions. Even more important to the Plaintiffs' case is the fact that Regulation 76 relates to the period before the case is submitted to the Public Service Commission. The regulation is formulated to allow the officer to make representations which are then to be submitted to the Commission so they may be considered by it together with the recommendation of the Secretary to the Public Service. The period of time after the letter of 23rd August does not apply because the Commission had already made its decision. Any representations made after that would have been pointless.

The advice from the Secretary to the Public Service to the officer should be of the action proposed and the reasons for it. In this case they were being informed, by the letter of 23 August, of a fait accompli. It is significant that the two plaintiffs who did make representations after receiving the letter of 23rd August were arguing simply that section 7(1)(a)(iv) did not give the power to terminate and were not making representations why they should not be compulsorily retired under regulation 73.

Much of the Plaintiffs' complaint stems from the belief that this whole process was "fixed". They suggested the Prime Minister was simply telling the Public Service Commission what he wanted and it was implementing it without any proper consideration. I do not feel the evidence supports that but it is easy to see how that feeling arose.

The Government made a decision to change the Permanent Secretaries to fixed term contracts and, sensibly, discussed it with the existing Permanent Secretaries. It is clear the Government intended to consider them for re-employment but in competition with other applicants. The Plaintiffs suggest this was not made clear to them. I am unable to decide that point on the affidavits before me.

What is apparent is that the Government was anxious to complete the process and were working to remove the Permanent Secretaries from the public service at the same time as they were discussing the new arrangements.

It is important to remember they were dealing with some of the most senior officers in the Public Service. They all held very responsible posts and had been in the Public Service for many years. The Government did not suggest that any were being dismissed nor did they suggest any had not been doing their job properly. Had that been the reason a different procedure would have been followed. The reason for the retirements was either because they had reached the required age or to facilitate improvements in Government organisation and did not criticise the way they had performed their duties previously.

I would suggest that, in such circumstances, the Government should be especially careful to deal with them fairly and properly but, as the time passed and they discovered they had been given incorrect legal advice, they seemed determined to get rid of the plaintiffs in as short a time as possible in order to keep to their original timetable. Such an exercise should have been carefully prepared and executed following the proper procedures. The consultations with the Permanent Secretaries should have been frank and open. Instead the Court has been presented with a picture of something not far short of double talk by the Prime Minister's Office. On the same day as Newyear is telling the Permanent Secretaries the whole process is to be held up, the Public Service Commission is meeting to consider a submission to go ahead. The letter of 27th September did not attempt to mention the true reason for the dismissal so the Plaintiffs could not know whether regulation 76 was relevant. The impression given by the events of August and September is that the Prime Minister's Office seemed so anxious to press for its decisions to be implemented that they only looked afterwards for the means whereby they could be covered by the law.

In the middle of this was the Public Service Commission. The evidence shows it took the view, correctly, that the Government was entitled to decide on policy matters and it must conduct itself in accordance with that. At the same time it was aware of its independent role and, indeed, questioned some of the recommendations of the Prime Minister's Office but it was clearly under considerable pressure. It was trying to implement the Government's policy by the proper procedures but the timetable set was inflexible. Unfortunately it allowed the continuous pressure to push them into acting too quickly. It was also in the position of relying on the Prime Minister's Office for legal advice which turned out to be incorrect. The result was that it made a serious mistake when it reached the decision on 24th September and waived the requirements of Regulation 76. All these decisions were matters of considerable importance and I accept the Commission realised that but, even when it raised queries, the matters were being

pushed ahead. It would have been wiser, in the circumstances that occurred in September, to have taken a little more time so it could stand back and look at the whole situation. The Government had passed on incorrect legal advice to it. It had every right to call a pause to reconsider the position. That it followed the earlier legal advice is no criticism of it and it does not mean it was blindly carrying out the wishes of the Prime Minister as has been suggested. The declarations sought in paragraph 2(a), 2(b) and 5 are based on that suggestion.

I do not feel the evidence before the Court shows the Commission ceased to act impartially or independently. Its decisions accorded with Government policy but there is no evidence to suggest it reached those decisions by improper means or as the result of orders from the Prime Minister. The minutes suggest the matters were discussed and considered properly in contrast to the attitude shown by the letters from the officers in the Prime Minister's Office. Their submissions to the Commission were couched in terms that suggested they felt those decisions were simply to be approved by the Commission. Despite this the Commission attempted to keep within the law but, as I have pointed out, they allowed the pressure to push it into mistakes.

I do not feel there is evidence on which I can make the declarations sought in 2a, 2(b) and 5 and I refuse them.

As I have already ruled, the Plaintiffs were entitled to make submissions and the mistake by the Commission prevented that. I make the declaration in 2 (c).

The declarations in 2(d) and 2(e) relate to the error in relation to the Pension Act. That error has already been corrected by the Commission. I do not feel the declarations are necessary and decline to make them.

The declaration in 2(f) refers to the decision of the Commission to terminate the Plaintiff's employment under regulation 73 in order to correct the earlier error. I cannot accept that, in itself, amounts in any way to an abuse of the process. As I have said, it made a fundamental error of law but the attempt to correct it once it was discovered was proper. I refuse the declaration in 2(f).

Paragraphs 3 and 4 seek orders of certiorari and mandamus. The Court has the power to make such orders and, in view of the declaration in 2(c), such orders will lie.

I make the order of certiorari. The decision of the Public Service Commission on 24th September to terminate the Plaintiffs under Regulation 73 is removed into this Court and quashed.

Mandamus is sought on two grounds. I have considered them but the Court must look to the reality of the situation here. The Government has already made and implemented a

policy to place Permanent Secretaries on fixed term contracts. That was a decision it was perfectly entitled to make and about which it held a number of discussions with the people who then held the posts. In accordance with that policy, the Public Service Commission has terminated the employment under the old terms of all Permanent Secretaries by compulsory retirement. That, or a similar step, was always envisaged. The Public Service Commission has also appointed new Permanent Secretaries after considering a number of applications in excess of the available positions and those applications included all but one of the Plaintiffs.

If the Court was to order mandamus in the terms of paragraph 4(a), the Government would immediately and quite reasonably take steps to retire them. Nothing would be achieved except for a temporary confusion amongst all the Permanent Secretaries.

If the Court grants mandamus in terms of 4(b) and sets everything back, as it were, to 24th September, the effect would be to put the Plaintiffs through an exercise that would be meaningless because the Public Service Commission would simply endorse the present position; not in a sense of unfairness but of reality.

Although the procedures under regulation 76 were not complied with, the Public Service Commission reached a decision to retire the Permanent Secretaries and that decision was in accordance with the overall plan the Permanent Secretaries had discussed for some time. I accept the Public Service Commission acted in good faith even though it made a mistake when it reached that decision. It had twice considered the matter, once under section 7(1)(a)(iv) and once under regulation 73. Of course, they did not have the representations of the Plaintiffs and that was a breach both of the regulations and of natural justice but the effect of the breach was not great. As all had agreed termination in some form was a necessary part of the procedure and as the plaintiffs had been able to express their views in general previously, it is hard to envisage exactly what further representations they could have made if given a further thirty days.

It is not hard to see that the real grievance of the Plaintiffs is not so much the termination but the fact they were not re-appointed. Whether they were specifically told this might happen or not, they must have realised it was possible as soon as the new posts were advertised for general application. Despite their reservations about the selection process, the evidence before me does not demonstrate it was not carried out properly. A Permanent Secretary who had done his job for many years without criticism or failure naturally would hope to be re-appointed. When he is not he, understandably, may feel the decision was made on improper grounds but he does not know the exact qualities the Commission is seeking in the new Permanent Secretaries nor

does he know what skills and qualifications are offered by the other applicants with whom he is in competition.

Bearing all that in mind, if I were to order mandamus in the terms of paragraph 4(b) the result would be, no doubt, that the Secretary to Public Service would immediately advise them of the intention to terminate them under regulation 73 and thirty days later the Public Service Commission would terminate them.

In those circumstances I feel it would be better if I could make an order that would produce the same result without forcing the Commission to make what would be a hollow decision. That would be to order the Commission simply to terminate the Plaintiffs' appointments by compulsory retirement under regulation 73 at a date thirty days from this judgment. However, when mandamus is ordered, it must normally be an order to carry out the normal procedures. If I made such an order, I would be directing them to act in an unprocedural way. Equally I feel it might amount to an unwarranted and possibly unconstitutional interference with their discretion. I have sought counsels' view on that and they are agreed I must simply order the Public Service Commission to treat the case in the proper way.

I therefore order mandamus that the Public Service Commission consider the retirement of the Plaintiffs in the proper way according to Regulations 73 and 76. I order it be taken that the Secretary to the Public Service Commission has today informed the Plaintiffs of the intention to retire them compulsorily and the thirty day period therefore runs from today. Any representations the plaintiffs wish to make must be submitted to the Public Service Commission at the end of that period and the question is then to be considered by the Commission.

As I have already stated, the Public Service Commission has considered the matter twice and unless there is some totally unexpected matter raised, I have no doubt the retirements will be ordered. Therefore I make it clear the real effect of this will simply be to give the plaintiffs approximately three months salary depending on the final date of the Public Service decision.

Two of the Plaintiffs fall into a slightly different category in terms of the reappointment procedure. The first Plaintiff did not apply to be reappointed because he was willing to stand on his view that the reference to section 7(1)(a)(iv) was incorrect. The third Plaintiff applied but was unable to attend an interview because he was abroad at the time on official duties. He was never given an interview although he was told he would have one and, again, I feel this was the result of the pressure being exerted on the Commission to adhere to the original timetable.

In both cases, I feel the officers are entitled to have that rectified although this Court does not know the present situation regarding vacancies and so the exercise may be pointless at present. If the first Plaintiff wishes to apply for appointment under the new terms, he should be able to do so and I direct the Public Service Commission to consider it in terms of any present or possible vacancy. In the case of the third Plaintiff, he should, if he wishes still to do so, be given an interview and the Public Service Commission must then consider his case afresh in the same manner as that of the first Plaintiff.

Clearly the Defendant must pay the Plaintiffs' costs.

(F.G.R. Ward)
CHIEF JUSTICE