SANERIVI (LAFI) v PUBLIC SERVICE COMMISSION

Public Service Appeal Board Apia
Lussick ACJ
23, 24, 25 March 1992, 30 March 1992

ADMINISTRATIVE LAW - Appeal against dismissal in Public Service - Failure to seek permission for activities or supply reports over incidents - whether the appellant was negligent, careless, inefficient and incompetent - improper conduct - official capacity and bringing Public Service into disrepute - denial of natural justice not made out - S32 requires no interpretation - general penalty imposed.

S32(i) Public Service Act - Proof of either of two allegations is sufficient to constitute an offence under S32(i).

Madden v State Services Commission [1971] NZLR 1086.

- if a statute is clear then it must be followed and there is no room for engrafting upon legislation a new and improved system.

Bourke v State Services Commission [1978] 1NZLR 633.

HELD: Charges upheld. Appeal disallowed and penalty confirmed.

CASES CITED:

- Madden v State Services Commission (1971) NZLR 1086)
- Lama Vaga v Police
- Bourke v State Services Commission (1978) 1 NZLR 633

LEGISLATION:

- Public Service Act 1977; S 32, 34

Enari for Appellant
Aikman for Public Service Commission

Cur adv vult

DECISION

The charges against the Appellant are fully set out in the memorandum to him dated 9 November, 1990, from the Director of Education.

The decision appealed against is set out in a memorandum from the Secretary dated 27 February, 1991.

It is convenient to deal with the charges in the order followed in those document.

Pursuant to Section 34 Public Service Act 1977 the Appellant was charged with three major offences against Section 32.

CHARGE 1 - against Section 32(b)

This charge was founded on four separate allegations:

(a) That on 20 September 1990 the Appellant closed the College and staff and students attended a funeral without the permission of the Director.

It is common ground that the staff and students did in fact attend a funeral without the Director's permission.

The Appellant contends however, that the matter was within his discretion. He admits that he had previously received a Departmental Instruction dated 2 July 1990. That document referred to two previous occasions on which the Appellant had failed to obtain the necessary approval before taking students and staff away from the College and it clearly and unambiguously reminded him that such activity required the prior approval of the Director. There is no possibility that a residual discretion in favour of the Principal can be read into that document. Nevertheless, on the occasion mentioned, the Appellant again took the staff and pupils away from the College without permission. This, of course, was the very type of activity which the Instruction of 2 July 1990 was intended to prevent. The Departmental policy was not a new one. There had been an earlier Instruction dated 17 July 1985 in the same clear terms. It is hard to imagine that the Appellant would not have been familiar with this policy because he had been appointed a teacher at Avele as long ago as 1978. A disturbing aspect is that the Appellant still does not seem to appreciate the principle involved. He went to some lengths in his evidence to point out the merit of what he did in taking the School to the funeral, as if that is of some relevance. What he fails or refuses to see is that, no matter how worthy the cause, he does not have a discretion to disregard instructions from the Director.

We are satisfied that the Appellant deliberately disobeyed and/or disregarded a Departmental instruction which was binding on him, and that the Commission was correct in its finding.

(b) That between 30 October and 1 November 1990 the Appellant failed to submit a report as requested on certain damage to a school building.

The Appellant did not in fact submit this report until 22nd November, 1990.

The incident concerned was a serious one involving, amongst other things, major damage to the School. The Appellant said in his evidence in Chief that "if I was asked three times (for a report) then it never registered". He does not deny being asked for a report but he explains that he was engaged with other aspects of the incident to which he gave priority. As the Director explained in his evidence, all that was required at that stage was a preliminary report which would not have taken much time. The Vice Principal would have been available to take care of the other matters to enable the Appellant to prepare the report. It must have been obvious to the Appellant that the matter was serious and that a report warranted some priority. There is no real reason why the time could not have been found. If a hastily prepared report were found to be deficient in some respect then at worst, he may have had to prepare another report, but in the meantime he would have complied with the Director's request.

We are satisfied that such request was deliberately disregarded and we agree with the Commission's finding.

(c) That on 26 October 1990 the Appellant participated with some students in a song competition during school hours without the Director's consent.

We repeat our comments in Charge 1(a) above in relation to previous Departmental instructions.

The Appellant considers that the contest was part of school activities not requiring approval. Very many activities can be brought under the heading of "school activities" but it is difficult to understand why the Appellant would believe that this was a school activity of the type that would not require approval, particularly in view of the Director's letter to him of 2 July 1990, which specifies that "any activity that may involve teachers and pupils movement away from their normal location requires a request and approval from the Director of Education". Competing in a public song contest was not an activity which had previously formed part of the normal school curriculum. It certainly warranted being placed before the Director for his decision.

Again, the Board is satisfied that the Appellant deliberately disregarded standing instructions.

(d) That the Appellant failed to submit a report as requested about an incident in July 1990 involving some Avele students.

The Appellant in fact did not submit the written report until 22 November 1990.

The Appellant's explanation is that prior to being asked for the report, he attended a meeting at the request of the Minister, the Director also being present, and that the incident was discussed at this meeting. He admits that he was later handed a letter requesting a report, but thought that he had already complied with this because of what was said at the meeting.

The Appellant is no novice to Public Service practices. If one receives correspondence then it is normal procedure to reply by correspondence. Leaving that aside, the fact was that he received a written request after he had left the meeting, not before. Clearly, therefore, some kind of reply was called for. There was no good reason to assume that he had already complied with a request received only after a meeting had taken place. As things stood, he was the recipient of a written request from the Director to which he had not yet replied. Surely this consideration should have prompted him to at least enquire whether a report was still necessary. A simple telephone call to the Director would have clarified his position. The onus was upon him to at least do something about the letter he had been handed. Instead, he did nothing at all.

Again, the Board agrees with the Commission's finding.

CHARGE 2 - against Section 32(c)

That the Appellant, as Principal of Avele College, was negligent, careless, inefficient and incompetent.

Two very serious incidents were cited by the Director in bringing this charge.

In the first incident, some Avele students competed in an athletic meeting at Apia Park on a Friday night in July, 1990. After the meeting, an incident occurred in which stones were thrown and two St. Joseph's students ended up in hospital. Police were called in and some students were arrested.

The Avele students went to the athletic meeting without any teacher to control them. The Appellant denies any responsibility for their conduct and claims that the incident occurred outside of school hours and that the students were competing as individuals and not representatives of Avele College. He said of the letter sent to the College inviting students to compete that: "there was no responsibility given to colleges and clubs in the letter. It said individuals". That apparently was sufficient for the Appellant to wash his hands of any responsibility. Students from Avele College did compete at the meeting and, although the Appellant is not prepared to admit it, those students to all intents and purposes were representing Avele College. The Appellant himself admitted in cross-examination that the students competed in Avele singlets and that, to the outside world, it was the School that was on show.

Brother Kevin, Acting Principal of St. Joseph's College, said that he had received a similar letter of invitation and that a teacher had accompanied the St. Joseph's College team to the athletic meeting. He said that as far as he was concerned the Avele students were representing Avele College.

It must have been obvious to the Appellant that despite the terms of the invitation, a group of athletes appearing in Avele singlets would be taken by the public as representing the school. The Appellant himself speaks of the "overly aggressive behaviour" of Avele boys in general, yet he made no arrangements for a teacher to accompany this group to the athletic meeting in order to control them. He seems to think that a Principal's duty to his pupils ends at the school gate, or at 1:40 p.m. when classes finish. He does not see that he was neglectful of his duties in not making any arrangements at all. As it happened, there was not one teacher from Avele College prepared to go along to the meeting of his own accord to give support to the boys. This sad lack of commitment is a poor reflection on the Appellant's administration.

The incident was continued on the following Monday morning with a fight at the bus terminal at the market, when other schools joined in. Two police officers later visited the school and were asked by the Appellant to address the school and issue warnings against future occurrences. It must have been apparent to the Appellant at this stage, if not before, that serious problems in discipline were surfacing and that a stronger hand with the students would need to be taken. It is futile for the Appellant to put the blame on the parents. There is more to education than learning from books. The standard of conduct imposed at school will influence the pupil's behaviour outside of school. The authority of a school teacher, while it exists, is the same as that of a parent. When a parent sends his child to school he delegates to the Principal his own authority so far as is necessary for the child's welfare, and so far as is necessary to

maintain discipline with regard to the child's interests and those of the school as a whole. The bad behaviour of the Avele College boys during this serious incident was detrimental to the reputation of the College, and it is therefore astounding that no really effective scheme for an improvement of discipline was thereafter implemented, nor was any system set up whereby the Principal or a teacher with delegated authority could be available when needed. The Appellant had gone away for the weekend and did not learn of the incident, in which some of his students had been taken into custody by the Police, until the following Monday morning. Brother Kevin, on the other hand, was informed of the incident very soon afterwards and he was then able to speak to the St. Joseph's College students involved in the fight and visit the boys who had been taken to hospital. In other words, he was available to deal with the situation where needed.

An even more serious incident followed in October 1990. Some students were staying at the school on a Friday night. Due to what can only be described as poor administration, no provision had been made to feed them, with the result that they had to leave the school grounds to go searching for food. Once again there was no visible presence of any teacher to supervise the boys. They were eventually fed at the house of a Church Minister and were on their way back to the College when they were stoned by some Vaoala youths.

The following Friday night, the Avele boys in retaliation attacked Vaoala village, throwing stones and burning down a fale. Astonishingly, the Appellant was still at the College when this happened yet knew nothing about it. The next morning, while the Appellant was still there, Police arrived and arrested some students. This was known by one of the staff members who lived no more than fifty yards from the Appellant, yet the Appellant left for Lefaga later that morning still not knowing anything about the incident. Despite the lessons to be learned from the previous incident in July, there was still no plan in place to cope with important matters affecting the school in circumstances such as this. No instructions had been issued obliging staff to notify the Appellant should unexpected eventualities arise affecting the school. Furthermore, a responsible teacher should have been appointed to supervise the students staying in the College that night.

The only person apparently on duty was the night watchman, and he could not have been expected to supervise students. In the absence of some person in authority at such times, the College is virtually left to run itself, and this is just not acceptable.

Had a system been set up whereby in the Principal's absence another teacher stood in his place or was given the duty of notifying him in cases of importance, then the retaliatory raid

on the school on the Saturday night, resulting in very substantial damage, may well have been averted. A delegation from Vaoala came to the school earlier in the day but was unable to find the Principal or anyone in authority. Had someone been there, as should have been the case, the dispute might well have been settled at that stage.

It is quite clear that with the Appellant as Principal, serious disciplinary problems existed which damaged the reputation of the College. According to the Director, at the beginning of the 1991 school year, 91 students had been selected for Avele College, but only 22 accepted. Some parents told him that their children had gone to school only to be beaten up by the older students and were afraid to return. Other parents expressed concern about the lack of discipline at the College and opted to send their children to junior secondary schools instead. (It is significant that this situation was not repeated for the 1992 school year, with the College now under the control of the Acting Principal).

Considering the Appellant's own disdainful attitude towards those to whom he is accountable, it is not surprising that the children under his control displayed a similar lack of respect for authority.

The picture painted by the charges heard by this Board is of a Principal who acts as a law unto himself, disobeying Departmental instructions despite warnings, ignoring the Director's requests for written reports, and publicly committing the name of the school to a political campaign without consulting those who ought to have been consulted. (This is dealt with in Charge 3). As a result of his irresponsibility and lack of administrative skills the school has at times been left to run itself, and it was during one of these times that the students ran wild, attacking a nearby village and destroying a fale. This provoked a retaliatory attack causing major damage to the school, conservatively assessed at $60,000.00.

In the face of serious disciplinary problems, the Appellant was prepared to complacently sit back and blame the parents or the aggressive spirit of Avele College, instead of working to implement an improved system which would show some positive effects. Events must have shown him that whatever measures he may have thus far taken (if any) were simply not adequate. Despite all that has happened, he still denies any responsibility for the lack of discipline in the school.

We agree with the Commission's findings that the Appellant was negligent, careless, inefficient, and incompetent in the discharge of his duties.

CHARGE 3 - against Section 32(i)

Although this charge has been framed by the Director as a single charge, in reality two separate charges are involved, i.e. that the Appellant was guilty of improper conduct in his official capacity (an offence in itself) and that the Appellant was guilty of improper conduct which brings the Public service into disrepute (which is another offence). Proof of either allegation is sufficient to constitute an offence under Section 32(i).

(See for example Madden v State Services Commission [1971] NZLR 1086).

The Appellant claims in his reply to the charges that "the College's song or participation in the competition was in no way an outright expression of opposition to universal suffrage neither was it a political campaign against Government policies", and he asserted in his sworn evidence that the song was not necessarily the view of the College.

Here are some of the words of the song: "However, leave it to you to choose Samoa, but Avele's advice is - matais are sufficient for the elections". "Avele petitions your voice to be: Matais only for the elections". It can be seen from these words that, contrary to what the Appellant claims, the views put forward are very clearly expressed to be those of Avele College itself.

The song concludes with these words: "Vote NO - that is my true message". Throughout the song there are warnings that if universal suffrage is voted in, disastrous consequences will follow: relations between parents and children will be badly affected, there will be conflict with the faaSamoa, children may be driven to suicide and Samoa could return to bloodshed. In the face of this, for the Appellant to claim that there is no outright expression of opposition to universal suffrage can only be regarded as fatuous.

There is clear evidence, even from the Appellant's own witnesses, that the competition was part of a political campaign organised by a group of matais strongly opposed to universal suffrage. There is no doubt that the Appellant arranged for the school to take part in the competition without requesting the approval of the Director. He should have done so. A Departmental Direction dated 26 February 1990 was sent to all school principals. It reads, in part, that any matters affecting the school which needed to be broadcast on the radio or in the press for the information of the public can only be approved by the Director. It follows that if the Director's approval was required before any matter affecting the school could be broadcast to the public, then approval would certainly be required for the much more serious enterprise of entering the school in a public competition as part of a political campaign. The Appellant, at best,

displayed an appalling lack of judgment in entering the school in the competition and taking them there during school hours, all without permission of any kind. It is useless for him to say that the views expressed in the song were not necessarily those of the College. The song very clearly says they were. The only conclusion the public could draw from all of this was that a Government school was coming out strongly against universal suffrage. Counsel for the appellant argued that every person has Constitutional rights to the freedom of speech. That proposition has never been doubted. The school, however, in entering and performing in the competition was not representing the views of individuals to the public, but the collective view of Avele College as a whole, and there was no entitlement to do this.

The Reverend Vaiao Eteuati, Director of Wesley College, who gave evidence on behalf of the Appellant, said that his pupils and staff as individuals were free to express views on universal suffrage, but the school could not express an opinion without approval of the Board of Education. Another Principal, Leaula Tavitā Amosa, who also gave evidence in the Appellant's case, quite positively stated that the song competition was part of a political campaign. The Appellant argues that there was at that time no Government policy on universal suffrage. On this point, we prefer the evidence of the Director of Education who said that from listening to Parliament it was very clear right from the beginning that the Government was favouring universal suffrage. However, it matters little whether Avele College came out against or in favour of universal suffrage. The important consideration is that the Principal of a Government school allowed the students and the name of Avele College to be exploited by a political faction. What the school did was to take part in a political campaign in such a way as to be seen by the public as supporting one side of a very serious political issue.

Whether it is proper for a Government school to recommend particular political views to the public - or particular religious views for that matter - is of necessity a difficult and delicate question which ought to be decided with reference to the interests of the children, the parents, the teachers, the department, the Public Service, the Government, the public itself and of course, the merits of the case under review. As a starting point, any specific matter for consideration should be presented to the Director, who is in turn responsible to the Minister. This is in accordance not only with Departmental instructions but with common sense. In the present case, the Principal, in passing over the people who ought to have been consulted, was guilty of highly improper conduct in his official capacity.

Furthermore, he should have given the boys who were members of the choir, and their parents, the opportunity to decide for themselves whether or not they wished to be identified in public

as supporting the political campaign of the organisers of the competition. As Principal, the appellant was in a very strong position of influence in relation to these boys and it is clear to us that in doing what he did he abused that position.

In our view, the evidence overwhelmingly supports the charge that the Appellant was guilty of improper conduct in his official capacity as Principal of the College.

The Commission's decision does not make it clear whether the Commission was also satisfied as to the truth of the other charge i.e. that the Appellant was guilty of improper conduct which brings the Public Service into disrepute. Once improper conduct in the Appellant's official capacity is shown, then the offence under Section 32(i) is established and it becomes unnecessary to proceed to the alternative charge. Nevertheless, we hold the view that the same facts are sufficient to establish this charge as well. Reasonable members of the public would be entitled to infer that the Appellant and his staff, all Public Servants, had used their influence as teachers to coerce guileless school pupils to engage in a political campaign. Unscrupulous behaviour such as this would certainly serve to bring the Public Service into disrepute, and the Director gave evidence that this in fact has been the effect. Therefore, although not absolutely necessary, the Board finds that the alternative offence has also been established.

Counsel for the Appellant has also made submissions on law which are set out at length in paragraphs 9 and 10 of his written submissions and which we need not set out here.

As regards paragraph 9:

No case of a denial of natural justice has been made out.

In any event, the charges are not a type of formal civil or criminal proceedings, but are brought under the disciplinary provisions of the Public Service Act, which prescribes very clearly the procedure to be followed. It is important to realise that the charging procedure is between employer and employee, not between an individual and the State.

In the present case, the procedure laid down has been closely followed with the exception of a very minor irregularity which was the fault of the Appellant's solicitors: instead of serving the Permanent Head with the Appellant's reply to the charges, the reply was served on the Commission. The only consequence of this was that the Permanent Head was slightly delayed in sending his report to the Commission.

The case of Bourke v State Services Commission [1978] 1 NZLR 633 is authority for the proposition that if a statute is clear then it must be followed and there is no room for engrafting upon legislation a new and improved system.

Counsel's submission is accordingly rejected.

As regards paragraph 10:

The authority relied on by Counsel, Lama Vaga v Police can easily be distinguished. In that case, the particular statutory provision was capable of being read either conjunctively or disjunctively, and this problem of interpretation was resolved in favour of the defendant by applying a strict construction.

In the present case no problem of interpretation arises. Section 32 of the Public Service Act is clear in its meaning. It is incapable of being read conjunctively without producing an absurd result.

This submission is also rejected.

After very carefully considering the evidence and submissions, the Public Service Board of Appeal is of the unanimous opinion that the Appellant has failed to show that the Commission was incorrect in its decision on any of the charges against the Appellant.

PENALTY

The Commission has taken a broad approach (which it is quite entitled to do) with the result that some of the charges overlap. This is of no importance because a general penalty has been imposed, rather than a separate penalty for each charge.

We cannot see how the penalty was in any way excessive. The Commission obviously gave some thought to dismissal, and in our view the charges, particularly when looked at in the aggregate, are more than sufficient to justify that course of action. However, the Commission, after all due consideration of the matters favourable to the Appellant, decided on a lesser penalty, a penalty which in our view is reasonable and lenient. Our interference is certainly not warranted.

APPEAL DISALLOWED AND PENALTY CONFIRMED.