IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 53 of 1981

Between:

FIJI PUBLIC SERVICE APPEAL BOARD — Appellant

and

MAHENDRA SINGH s/o Daulat Singh — Respondent

A. Rabo for the Appellant.
D.C. Maharaj & D.K. Jamnadas for the Respondent.

Date of Hearing: 29th March, 1982.
Delivery of Judgment: 2nd April, 1982.

JUDGMENT OF HENRY, J.A.

Respondent is a public servant employed by the Government of Fiji. He was an applicant for promotion to office as Principal Collector of Customs and was provisionally so appointed under the prescribed procedure for promotion in the public service. An appeal against such promotion by one Nanji Velji, an unsuccessful applicant, was allowed. Nanji Velji was duly appointed and the provisional appointment of respondent was cancelled.

Respondent filed an application in the Supreme Court to quash the decision. The grounds were:-

"4. (1) The applicant was entitled to be heard during the said appeal and make appropriate representation and give evidence in support of his case and such opportunity

was never given to him.

(2) The Public Service Appeal Board acted in breach of natural justice in that it heard evidence or received evidence from two persons, namely, Mr. L.J. Gardner, Comptroller of Customs & Excise and Uttam Chandra, Deputy Secretary for Finance without giving the applicant any opportunity to be present and to cross-examine these witnesses, to be heard during their evidence, or to make any representations on their evidence. Up to this day, the applicant is ignorant of what transpired during this deliberation."

It is common ground that respondent was not given an opportunity to cross-examine the said witnesses whose evidence was given in his absence. The first ground was not dealt with in the Supreme Court and was not pursued in this Court. On that basis the Supreme Court made the following order:-

" It is ordered that the decision of the Public Service Appeal Board be quashed and the appeal reheard before another Board with different members from those who constituted the first Board of Appeal. "

The order for a re-hearing is clearly outside the jurisdiction of the Supreme Court. The appeal authority is a body appointed by the relevant Minister under statutory power namely, section 13 of the Public Service Act (Cap. 74, Ed. 1978). No Court has power to direct the Minister how to constitute the appeal authority. The sole question now is whether the learned Judge erred in law when he ordered the quashing of the said decision.

Employment in the Civil Service, now called the Public Service, has, by the common law, come under a special category. A public servant can be appointed and promoted at the will of the Crown but, irrespective of rank or title, dismissal is at will. In Ridge v. Baldwin [1964] A.C.40, p.65; [1963] 2 All E.R. 66, 71, Lord Reid said:-

" Then there are many cases where a man holds an office at pleasure. Apart from judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure and this has even been held to apply to a colonial judge (Terrell v. Secretary of State /1953/ 2 All E.R. 490; /1953/ 2 Q.B. 482. It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason. "

It is now commonplace for Governments to enact a statutory code of law controlling the appointment, promotion, discipline and dismissal of public servants. This is so in Fiji. Under the Constitution (Articles 104 and 105) a body called the "Public Service Commission " has been established with defined special powers. Under Article 105 Parliament is empowered to provide for appeals from decisions of the Commission to such person or authority as Parliament may prescribe.

For the sake of convenient reference the relevant legislation will be referred to as follows:-

(1) The Public Service Act (Cap. 74 Ed.1978) which will be called "the Act".

(2) The Public Service Commission Statutory Regulations which will be called the "Statutory Regulations", and,

(3) The Public Service Commission Constitution Regulations which will be called "The Constitution Regulations".

By Part III of the Constitution Regulations provisions have been enacted for appointment, confirmation of appointment, and promotion in the public service. These powers are conferred on the Commission. In particular Regulation 11, which is relevant to the present pleadings,

provides for promotions and sideways transfer to vacancies. Vacancies are notified in a prescribed manner. An officer, qualified for the post, may make an application under Regulation 11.

Subsections (2) and (3) Regulation 11 of the Constitution Regulations are important. They provide:-

> "11.(2) In the event of two or more officers being available for the same post, and account having been taken of the provisions of paragraphs (a) and (b) of subsection (9) of section 105 of the Constitution, preference shall be given to that officer who, in the opinion of the Commission, has the most merit for appointment to the post.
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> (3) For the purposes of this regulation, the merit of an officer for promotion shall be determined by his -
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> (a) personal qualities, characteristics, and attributes relevant to the post to be filled; and
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> (b) Work, experience and competence shown in performance of duties previously carried out by him where these can be related to the post to be filled; and
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> (c) relevant educational or other qualifications:
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> Provided that, where two or more officers who are applicants for a vacancy are adjudged to be equal in merit for promotion having regard to the matters specified in paragraph (2) and in the foregoing provisions of this paragraph regard shall be given to the length of continuous permanent service of each officer. "

A special code for appeals by public servants in relation to their service has been enacted. Under section 13 of the Act a body called the Public Service Appeal Board has been established. It will be referred to as "the Appeal Board". Part III of the Statutory Regulations governs the procedure of the Appeal Board. No provision in these regulations will require any elaboration for the purpose of this judgment.

The extent and manner in which the Fiji Government has surrendered its common law right to appoint and dismiss any public servant at will is set out in the Act and regulations earlier named. Generally, section 14 of the Act provides for rights of appeal by officers appointed by the Commission. Appointment, of course, includes promotion.

Section 14(1)(a)(i) of the Act is the statutory provision granting the right of appeal relevant to the present case. It provides:-

> "14.(1) Subject to the provisions of subsection (2), every officer, other than an officer on probation, appointed by the Commission shall have a right of appeal to the Appeal Board in accordance with this section against -
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> (a) the promotion of any officer, or the appointment of any person who is not an officer, to any position in the Public Service for which the appellant had applied, if (in either case) the appointment of the appellant to that position would have involved his own promotion:
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> Provided that -
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> (i) an appeal under this section must be confined to the merits of the appellant for promotion to the position, and must not extend to those of any other person for promotion or appointment to the position; "

It is important to keep firmly in mind the status of the respective parties. Regulation 15(1) of the Constitution Regulations applies. It reads:-

> "15.(1) Every appointment or promotion which is subject to a right of appeal by any officer under the provisions of section 14 of the Act, shall be provisional until all appeals lodged in respect thereof have been duly determined, or if no appeal is lodged, until the time for the lodging of appeals has expired. "

No appointment to the post is made until the decision of the Appeal Board has been given. This is

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provided for in section 14 subsection 5 of the Act which reads:-

> "14.(5) The Appeal Board may allow or disallow any appeal and the Commission shall implement the decision of the Appeal Board. Where an appeal made under the provisions of paragraph (a) of subsection (1) is allowed by the Appeal Board, the commission shall forthwith appoint the successful appellant to the position. "

From these provisions it is clear that, once an appeal has been lodged, the provisional appointee and the appellant are both seeking appointment to the post. The successful applicant will be determined by the result of the appeal. If an appellant succeeds he will be appointed, if the appeal is dismissed, then the provisional appointee is appointed to the post. The status of each is the same - each is an applicant for the post, neither has any entitlement or right to it, no appointment is made except by the decision of the Appeal Board implemented by the Commission when the result of the appeal has been determined. The only right is that vested in an unsuccessful applicant who may appeal, and, if he does, then the State does not exercise its prerogative to appoint or promote a public servant to a post except through the Appeal Board. There is no denial of any privilege or any interest or interference with any right of respondent. There is only an exercise by the State, through its statutory tribunals, of its right to determine the manner in which a public servant will be appointed to an office. The prescribed procedure for appointment is being followed and neither the unsuccessful applicant nor the provisional appointee has any right or claim to the appointment other than through the process laid down by the statutory provisions.

The question is whether or not in the events which happened there has been either a breach of the statutory right of respondent to be heard, or, that the decision of the Appeal Board has been arrived at by a procedure which offends against the principles of natural justice and thus putting the decision outside the decision making authority

of the Appeal Board: vide Attorney-General v. Ryan P.C. [1980] A.C. 718 at p.725; [1980] 2 W.L.R. 143 at p. 152 G. This question requires a careful consideration of the legislature by which the State, through the statutory bodies entrusted with the power to appoint, to see whether or not (a) the statutory procedure has been followed, and (b) the principles of natural justice apply, and, if so, whether they have been observed.

There is no right of general appeal in which the rival applicants are entitled to be heard on the question of who is to be appointed. The State, through its legislature, has seen fit to define clearly the subject matter of an appeal and the procedure which must be followed. Neither applicant has any greater entitlement to the position than that which has been conceded to him and made available by the relevant legislation. As earlier stated, by Regulation 11 (2) and (3) of the Constitution Regulations preference shall be given to the officer who in the opinion of the Commission has the most merit for appointment. Merit is determined by the criteria set out in subsection (2). The appeal is from that decision. By section 14(1)(a)(i) of the Act the appeal must be confined to the merits of the applicant for promotion and must not extend to the merits of any other person for promotion, or appointment. Thus the appeal is confined to a very narrow and well-defined issue and does not determine the question which the Appeal Board has to determine, namely, who is the officer who has "most merit" for the appointment.

Section 14 subsection (9) is important. It reads:-

> "14.(9). Appeals affecting more than one appellant shall not be heard together, unless the Appeal Board so directs. "

Thus there may be more than one appeal in respect of the appointment, and, if so, they must be heard separately

unless the Appeal Board directs that they be heard together. Accordingly, the competing applicants for a position may be the immediate appellant, any other appellant, and, the provisional appointee. To determine who has the most merit obviously requires the Appeal Board to consider the merits of every such person. The immediate appellant has no right to extend his appeal to the merits of any other appellant or of the provisional appointee. He does not know their case and has no right to be heard on their respective merits. No appointment has been finally made and respondent has no right entitlement or other claim to such appointment until the statutory process by the hearing of appeals has been concluded and then the appointment is the result of a decision by the Appeal Board.

When the appeal has, or all the appeals, if more than one, have been heard the powers of the Appeal Board are set out in section 14 subsection (5) of the Act. These provisions have been set out earlier in this judgment. Until a decision is given under section 14(5) no appointment has been made to the post, only a provisional appointment, subject to appeals, has been made. Such a provisional appointment confers no right or entitlement on the part of the provisional appointee other than that which is provided for in the relevant statutory provisions.

It is trite law that the State may delegate its power of appointment to such extent and in such manner as it thinks fit. Except to the extent that the power is so granted by statute or other instrument, no public servant or any other person has any right or entitlement other than that which has been expressly delegated. It is completely within the absolute discretion of the State to decide what rights, if any, it will confer on its public servants in respect of promotion to another post so the question is what rights has the State, by the relevant statutory and other provisions, granted to public servants

to entitle them to promotion. The right or entitlement must be clearly spelt out otherwise the common law right to appoint (or promote) at will remains. I turn, therefore, to examine the legislation to ascertain the extent to which the State has surrendered its common law rights and conferred rights on its public servants to be appointed to a vacancy which involves promotion in the public service.

A right of appeal is granted only to an unsuccessful applicant for promotion. There may be more than one appeal according to the number of unsuccessful applicants who may wish to appeal and if so, such appeals must, unless the Appeal Board otherwise, be heard separately. The legislature therefore envisages and provides for more than one appeal.

The appeal is strictly confined to the merits of the appellant who is forbidden to traverse the merits of any other applicant. That is to say, he cannot traverse the merits, evidence or any other matter referable to the respondent. Nor can he do so in relation to any other appellant. The appointment of any other appellant for promotion is not in issue nor is that of the respondent. What is to be heard are the merits of appellant in so far as they are a factor to be considered in making the appointment. This is not a true appeal at all - a matter which must be borne in mind in considering the extent to which the State has delegated its common law right and the extent to which it will permit any applicant for promotion to be heard.

It is in this context that the legislature has turned to the question of what right, if any, it will confer on a successful applicant who has gained a provisional appointment subject to the outcome of any appeal. As in the case of an appellant, the right of any provisional appointee is also strictly limited. Appeal is a creature of statute and confers no greater rights than those given by the statute. Moreover the State

may limit the right it desires to create in favour of a provisional appointee, that is to say, the extent to which the State will permit a servant to be heard on an application for promotion by any other public servant. In truth the use of the term "appeal" is a misnomer. It is no more than an inquiry into the merits of a particular applicant and does not embrace the whole question of appointment which the Appeal Board has to decide on the whole of the relevant information which it is entitled to consider.

The crux of the present appeal lies in the words of section 14(8)(b) which provides:-

> "14.(8)(b) At the hearing of the appeal, the officer against whose promotion or appointment the appeal has been lodged shall be entitled to be heard by the Board in such a manner as the Board thinks fit as if he were a respondent in the appeal and such officer may also be represented or assisted by a barrister and solicitor or by another officer. "

By this section the legislature has delegated to the Appeal Board the common law right of the State to promote a public servant at will, the power to decide in its discretion the extent to which a provisional appointee may be heard in an appeal by any other applicant for promotion. The legislature could deny him any right at all to be heard and no court could intervene. However, the legislature has conferred on the Appeal Board the power to determine the entitlement of a provisional appointee to be heard. This may appear to be a limitation on what are the normal rights of a respondent in an appeal but it is to be remembered that the question of his merits is not a subject matter of the limited appeal by an unsuccessful applicant although, of course, they are highly relevant in the final decision which the Appeal Board will make.

The Appeal Board is not making a final decision - it is merely in the process of hearing the merits of the respective public servants still entitled to be considered

for promotion. It is not unduly harsh or unfair or unjust to limit the extent to which a respondent might, from his protected position regarding his own merits, be restricted in his right to be heard on the limited question of the merits of an unsuccessful applicant. If there be any unfairness it is on the side of an appellant who has been deprived of any right at all to be heard on the merits of any other applicant who, in a sense, is his opponent or opposite party in the contest for promotion. Further by subsection (6) an onus is placed on an appellant yet he is debarred from considering the merits of any other public servant concerned in the final appointment to be made by the Appeal Board.

In R. v. Gaming Board for Great Britain, ex parte Beraim and Khaida (1970) 2 Q.B. 417 at page 430, B.C. Lord Denning M.R. said:-

> ".....It is not possible to lay down rules as to when the principle of natural justice are to apply, nor as to their scope and extent. Everything depends on the subject matter. "

The subject matter in the instant case is a statutory enactment which precisely defines the right of audience of a respondent who has no right, no entitlement and no claim to the contested promotion to the post other than a right to contend for appointment in accordance with the statutory concessions made by the State modifying or qualifying the prerogative right of the State to appoint or promote a public servant at will. In my opinion the Appeal Board acted precisely within the mandate delegated to it by the legislature to hold an inquiry into the merits of Nanji Velji. It is nothing to the point that it is called an appeal nor must the use of that term lead one into the realms of rights usually associated with a true appeal on the final question of who, out of the various applicants has "the most merit". That is not in issue in a hearing which is confined to the merits of one applicant only to the exclusion of the relative merits of

any other potential appointee.

The legislature has in clear terms set out the limit of the rights of an unsuccessful applicant to be heard on the question of appointment on promotion to a vacant post. It has likewise provided for a limitation on the right of a provisional appointee to be heard when the merits of an unsuccessful applicant has availed himself of the "appeal provisions". The limitation in the latter event is in the form of an unfettered discretion vested in the Appeal Board to decide to what extent it thinks fit the successful provisional appointee ought to be heard. There is, in my view, no room for the courts to intervene by way of defining how the Appeal Board ought to exercise such a discretion so as to enlarge the statutory right of a provisional appointee to be heard. The circumstances in any appeal may vary greatly from appeal to appeal in a manner impossible to foresee. The legislature has, in those circumstances, clothed the Appeal Board with a discretion to decide the question of hearing a respondent as it thinks fit according to the particular circumstances of any matter arising on the appeal.

In Durayappah v. Fernando [1967] 2 A.C. 337 when dealing with the right to be heard their Lordships said at p. 348:-

> " These various formulae are introductory of the matter to be considered and are given little guidance upon the question of audi alteram partem. The statute can make itself clear upon this point and if it does cadit quaestio. If it does not then the principle stated by Byles J. in Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180, 194 must be applied. He said:
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> > ' A long course of decisions, beginning with Dr. Bentley's case (1723) 1 Stra. 557; 8 Mod. Rep. 148, and ending with some very recent cases, establish, that, although there are no positive words in the statute requiring that the party shall be heard, the justice of the cmmon law will supply the omission of the legislature.' "

In the present legislation the statute, in the passage I have underlined, has made itself clear as to the extent of the right of audience. So the statute must prevail and there is no room to supply an omission by qualifying or extending the words of the statute.

Even if I am wrong section 14 subsection 11 requires consideration. It provides:-

> "14.(11). Proceedings before the Appeal Board shall not be held bad for want of form. No appeal shall lie from any decision of the Appeal Board, and, except on the ground of lack of jurisdiction other than for want of form, no proceedings or decision of the Appeal Board shall be liable to be challenged, reviewed, quashed, or called in question in any Court. "

The determination of the entitlement of a provisional appointee to be heard has been expressly conferred by the statute to be "as the Appeal Board thinks fit". Such a determination is precisely within the express jurisdiction of the Appeal Board so section 14(11) applies. The so-called rules of natural justice do not apply. The State, through the legislature has defined the right of a provisional appointee to be heard on the merits of any other applicant for promotion albeit that it is in the form of an unfettered discretion vested in the Appeal Board. Apart from this legislation, a public servant has no right, no entitlement, no claim to promotion. He is not deprived of any right however widely that term may be extended. There is no encroachment on anything he can call a right, privilege, entitlement, claim or the like or on any other matter which in the numerous cases, has been a basis for intervention by the Courts. All that the legislature has done is to qualify or modify its common law right to appoint or promote at will. Beyond the express terms of that qualification or modification of its common law right, no right or entitlement has been conferred on any public servant.

The right of appeal is strictly limited to one facet of the ultimate decision on appointment. The right of another public servant to participate in the appeal of any other applicant has also been expressly limited by the statutory provision.

No case has been cited which involves parallel legislation. Other cases on different facts are not of any assistance particularly since the instant case is one of construing a statute which grants a privilege, not enjoyed at common law. The words of the statute are clear and unambiguous.

The jurisdiction granted to the Appeal Board has been exercised within its terms. The Appeal Board has decided the question of the extent to which it thought fit that respondent should be heard and the Court in my judgment has no right to interfere by imposing any condition on the Appeal Board as to how it should exercise its unfettered statutory discretion to decide that point. The Appeal Board has acted precisely within the mandate conferred on it by statute. In doing so it has not deprived respondent of any right entitlement claim or other thing in respect of his employment or promotion in his employment which is the subject matter of the question in issue.

Lord Reid said in Wiseman v. Borneman (1971) A.C. 297, 308:-

> ".....only where it is clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation. "

The purpose of the legislation is clear. On the question of its undoubted right to appoint (promote) at will it has conferred on public servants a limited right to appeal and to be heard on appeal. No Court is entitled to add to the statutory provision a greater right of audience in any

specific appeal made on the general process of decision of the Appeal Board, than that given in unambiguous words in the statute.

Although it is not relevant to the question of statutory interpretation, it is convenient to illustrate the statement that I have earlier made, namely, that each appeal, if there be more than one, is only a facet of the final decision made on appointment. The Secretary of the Appeal Board deposed as follows:

> "7. Prior to the actual hearing of any one particular appeal by the Board and during the hearing, the Board only has access to certain confidential documents and records. These documents and records include the following:-
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> (a) Annual Confidential Report File.
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> (b) (Confidential) Personal File.
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> (c) (Confidential) Submissions and Recommendations for Promotion by the Head of the Department.
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> (d) (Confidential) Submissions and Recommendations from the Officers' Ministry.
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> (e) (Confidential) Submissions and Recommendations of the Secretary to the Public Service Commission to the Commission itself.
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> (f) Public Service Commission Personal File.
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> Thus also where the appeal concerns a provisional promotion, neither the appellant nor the provisional promotee has access toany of the records described in (a) to (f) above. Of course no officer has access to any of such records in normal (non-appeal) situations.
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> 8. Where the appeal relates to provisional promotion, the Board takes cognisance of particularly regulation 11(2) and (3) of the Public Service Commission (Constitution Regulations) 1974. So that in deciding whether or not to allow the appeal the Board considers all of the material evidence submitted to and from the totality of such evidence the Board initially and in essence decides between the appellant and the provisional promotee using merit alone as the criterion for its choice. If the Board adjudge that the provisional promotee and the appellant are equal in merit, that is they cannot be separated for the position on merit alone,

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then regard is to be given not to seniority but to the length of continuous permanent service in accordance with the proviso to regulation 11(3) of the Regulations. "

He also deposed to the procedure adopted by the Chairman at the hearing. It is not in the interests of the public service or of the State that open confrontation between the competing suppliant officers should take place or that information confidential to the employer should be made available. There is a limited concession, not enjoyed by employees generally, which should be considered as I have already construed it.

I would allow the appeal and quash the order of the Supreme Court and dismiss the action and order respondent to pay the costs of appeal and costs in the Supreme Court, to be fixed by the Registrar if necessary.

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JUDGE OF APPEAL