IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 23 of 1985.

Between:

MANOA BALE Appellant

- and -

PUBLIC SERVICE APPEALS BOARD Respondent

Mr. A. R. Matabalavu for the Appellant
Mr. A. K. Singh for the Promotee
Dr. A. Singh for Appeals Board

Date of Hearing : 10th July, 1985

Delivery of Judgment : 20th July, 1985

JUDGMENT OF THE COURT

SPEIGHT, VP

This is an appeal against a dismissal by Kermode J. of a motion before him for an order for Judicial Review of a decision of the Public Service Appeals Board given, as far as the record shows, on the 25th May, 1984. A brief history of the matter is as follows.

The Public Service Commission in Official Circular No. 1/83 of 15th January, 1983 advertised a number of vacancies for posts within the Public Service. In the introductory part of the advertisement it was stated :

"QUALIFICATIONS : All applicants should note that candidates must be qualified in terms of the advertisements at the time applications close." The particular post with which we are concerned was advertised as follows:-

"MINISTRY OF HEALTH AND SOCIAL WELFARE

CHIEF HEALTH INSPECTOR

Responsible to the Permanent Secretary for Health and Social Welfare in planning co-ordination and supervision of environmental health activities of the Ministry of Health and Social Welfare. Advisor on all public health matters to Government Ministries, Departments, Local Government and Rural Local Authorities, Statutory Bodies and Private Enterprises.

Qualifications : Must hold a diploma from the Royal Society of Health, London or degree in Environmental Sciences or equivalent qualification. Post-graduate experience or qualification in environmental sciences is essential. Must possess wide experience in public health administration, public health legislation and public health engineering."

Pursuant to that advertisement the present appellant Mr. Bale and five other members of the Public Service applied for the position. The Public Service Commission provisionally appointed one of those applicants Mr. D. R. Dass. The present appellant Mr. Bale appealed to the respondent Public Service Appeals Board in accordance with section 14 of the Public Service Act Cap. 74. We do not reproduce that except for two relevant subsections:

"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 -

(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:

Provided that -

(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."

and subsection (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."

Paragraph (1) to the proviso of Subsection (1)(a) is a little puzzling but no doubt works satisfactorily. The appellant is entitled to canvass before the Board his own merits. He cannot contrast them with the merits of the provisional appointee or of any other applicant, doubtless to prevent proceedings being unduly protracted and to stop invideous personal comparisons. It is of some relevance to matters to be discussed later that this subsection assumes that in dealing with the appeal, the Board will itself consult its record to ascertain the qualifications of the provisional appointee, for otherwise it would not be able to determine the merit of the appeal. So it is

implicit that the Board will have before it and will examine the Commission's records including in particular the details concerning the provisional appointee.

Of more importance for present purposes is subsection (11) which provides, as do so many statutes concerning the powers of administrative bodies, that, in so far as the statute can achieve it, the decision of the Board is final. This is what is commonly referred to as a privative clause - that is it is aimed at depriving an unsuccessful party from having recourse to the ordinary courts by way of appeal.

The recent history of the development of Administrative Law abounds with reports of cases where attempts have been made - often successfully - to remove such matters into the Superior Courts by way of the prerogative writs - notwithstanding the apparent intention of the statute to bar such a course.

This power, now often exercised, is derived from the general supervisory role which originally the Court of King's Bench, and now the Supreme and High Courts, have always had to oversee and control the conduct of affairs in inferior tribunals.

As all modern lawyers now know, the method of testing the validity of the decision complained of is not by examining the correctness or otherwise of the conclusion which has been reached - for that question has been excluded - but by asking

whether the tribunal has exceeded its jurisdiction in reaching the challenged conclusion and hence its entire proceedings have been a nullity. Jurisdiction in its elementary concept is regarded as power or authority of a tribunal or court to enter upon an enquiry. But the more sophisticated approach of the Law Lords in Anisminic Ltd v. The Foreign Compensation Commission (1969) 2 AC 147 has taught us that there is a further enquiry before the provisions of a privative clause can be held to deny an aggrieved party - namely the additional question is asked, still in the field of jurisdiction, :

> "Has the authority been acting in a matter properly committed to it, has it properly understood its function and has it directed its consideration to the matters committed to it?".

It would be unnecessarily burdensome to repeat again the often quoted water-shed opinions of their Lordships in the Anisminic Case except to refer to Lord Reid at p. 171 where he said :

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith.

> It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on something which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

In the present case the submission on behalf of this appellant is simply this, that despite the provisions of section 14(11) the Commission and therefore the Board exceeded its jurisdiction because:-

(a) the job qualifications were a prerequisite to the applicant's right to be heard as a candidate;

(b) Mr. Dass did not have one of the qualifications;

(c) by entertaining an application from him the Commission, and hence the Board on appeal, went outside their jurisdiction for he was not a person entitled to apply.

We will discuss the question of qualifications later, but for present purposes it can be noted that the appellant has not challenged the clear evidence that Mr. Dass had a Diploma from the Royal Society of Health (the first

requirement) and also possessed wide experience in Public Health Administration (the third requirement). The submission is that he did not have the second requirement namely "Post Graduate experience or qualification in environmental sciences.

For the purposes of the matter at present under discussion we will assume that Mr. Dass lacked that particular qualification but we will have more to say on this later. It has already been noted that the Public Service Commission's advertisement set out the necessary qualifications which an applicant must have if he is to succeed. We do not have the record of the Public Service Commission hearing, nor of the Appeals Board review of it, but as Mr. Dass applied and presumably set out his qualifications and experience, he must have been accepted as a person fitting the specification. Hence it must be assumed that the Commission and in turn the Board decided that he was within the description. As we have already said the provisions of section 14(1) indicate that in considering an appeal the Board will obviously be obliged to take into account the particulars of the provisional appointee, when examining the contesting merit contended for by the appellant. The question is this : if we accept for a moment that the Commission and the Board were wrong in deciding that Mr. Dass's qualifications and experience fulfilled the specific requirements, does that mean that jurisdiction has been exceeded? In our view it does not. If the Board wrongly

thought that the correct interpretation of the job specification covered the details concerning Mr. Dass that was an error which did not go to jurisdiction in the extended meaning given to that word by Lord Reid in the passage we have cited. In particular the last sentence in the passage of the speech of Lord Reid covers this point, but it can be more clearly illustrated by examination of two subsequent cases, namely Pearlman v. Harrow School (CA) (1979) 1 QB 56 and In Recal Communications Ltd. (H of L) (1981) AC 374.

In Pearlman's case leasehold tenants were entitled to purchase the freehold if the rateable value of the property was not more than £1500. The house in question had been revalued at £1597 so that Mr. Pearlman could not claim freeholding in rights. But under a section of the Leasehold Reform Act the rateable value could be adjusted to take into account tenant's improvements by way of "work amounting to structural alteration, extension or addition."

Mr. Pearlman during his occupancy had scrapped the heating system in the house and had installed modern central heating and this had involved substantial work. The question was whether the new installation was a "structural alteration". Under the Act the decision as to rateable value was to be determined by a County Court Judge, and section 107 of the County Courts Act of 1959 provided not only that there was no appeal but also that proceedings could not be removed by

"appeal, motion, certiorari or otherwise into any other court whatever...". The County Court Judge held that the work was not structural, hence no deduction could be made from the rateable value and Mr. Pearlman's valuation was therefore too high to enable him to exercise the right of freeholding. He applied to the Divisional Court for certiorari to quash the County Court order but this was refused. He appealed to the Court of Appeal. In a majority judgment Lord Denning M.R. and Eveleigh L.J. held that the Judge had misconstrued the meanings of the words "structural alteration" and in doing so he had erred in law, and that this error was reviewable and constituted a deprivation of jurisdiction. Accordingly the appeal was allowed and the County Court order was quashed. Lord Denning said:

> "no court of tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it."

However Geoffrey Lane L.J. (as he then was) wrote a strong dissenting judgment. He agreed with the others that the County Court Judge had misconstrued the meaning of the words "structural alteration" but held that even though this was an error of law it was the matter committed to the County Court for decision. In other words the judge had asked himself the right question, even though all the learned Lords Justice disagreed with the answer. A passage in his judgment at p. 74 reads:-

> "The only circumstances in which this court can correct what is to my mind the error of the judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of "structural alteration".

and again at p. 76 he said :

> "The Judge is considering the words in the Schedule which he ought to consider. He is not embarking on some unauthorised or extraneous or irrelevant exercise. All he has done is to come to what appears to this court to be a wrong conclusion upon a difficult question. It seems to me that, if this judge is acting outside his jurisdiction, so then is every judge who comes to a wrong decision on a point of law. Accordingly, I take the view that no form of certiorari is available to the tenant."

This question of what comprises excess of jurisdiction was considered by the House of Lords in re Racal Communications Ltd (1981) AC 374 and by the Privy Council in South East Asia Firebricks v. The Non Metallic Mineral Products Employees Union (1981) AC 363. A total of 7 Law Lords were occupied in one or other of those two cases and the dissenting judgment of Lane L.J. in Pearlman was accepted by all as definitive of the law in this regard, and it was held in both cases that the majority view in Pearlman was erroneous. Lord Lane's exposition of the law must now be taken as authoritative.

The issue here posed is identical with that in Pearlman. It is apparent that the Public Service Commission and the Appeals Board must have directed their attention to the

advertisement and the listed qualifications, including the question of whether or not Mr. Dass had post graduate experience in environmental sciences. We have, as part of the record, the written submissions made to the Board by Mr. Bale in support of his appeal and they include his statement of his own qualifications in that respect and [in breach of section 14(1)] criticism at paragraph 4.6 of Mr. Dass's alleged lack of such qualification. He said

> "This official requirement is essential. You cannot go without it - Mr. Dass has not got the post graduate experience or qualification which is a pre-requisite."

and he detailed the respects in which, so he claimed, Mr. Dass's experience fell short. From this it is apparent that the Appeal Board had its attention directed to the correct question. Assuming for the moment that as a matter of law we would differ from the Board's interpretation of the meaning of the qualification required, the decisions of the Privy Council and the House of Lords make it clear that this is not a case where the administrative tribunal has exceeded its jurisdiction, but has answered, rightly or wrongly, a question properly before it. For this reason alone the present appeal must be dismissed.

Least however the present appellant feels that he has lost on a technicality of law in this complicated field, we add that we believe there is substance in Mr.

Singh's submission on behalf of Mr. Dass, that he did indeed measure up to the qualification required of having "post graduate experience in environmental sciences". It was conceded that Mr. Dass held a diploma and in the context of the advertisement that phrase seems to us to mean experience subsequent to obtaining a diploma.

The question then was whether Mr. Dass's experience was in the field of the environmental sciences. This could cover a multitude of topics. Every tree that grows, every flower that blows and every stream that flows is part of the environment. No candidate could be expected to be experienced in all these fields of knowledge, but in the context of this advertisement it would seem that environmental sciences would comprehend the various aspects covered by the study and management of public health in the environmental context. Indeed in Mr. Bale's submissions to the Appeals Board to be found at paragraph 3.2 and following, he gave details of his experience in environmental health. He set himself as qualified in this area by reciting various post held as an Assistant Health Inspector and a Divisional Health Inspector and similar appointments. He also claimed other experiences which qualified him in the field.

As we have stated, we have not the full details of Mr. Dass's career but it is apparent that the Appeals Board did; and we are informed from the Bar that, by

consent, Kermode J. was presented with and invited to inspect the Appeals Board record. In particular it is noted that in supplementary submission by Mr. Matabalavu dated 8.11.84 the minutes of the Appeals Board hearing state that a representative of the Ministry of Health Dr. Mataitoga drew the Board's attention to the fact that all the appellants including Mr. Dass met the qualification requirements. This shows the Board considered them, and in his judgment the learned Judge has recited the experience in the Public Health field of Mr. Dass - particularly as Acting Chief Health Inspector - the same type of experience as Mr. Bale was referring to, and he held that this showed that Mr. Dass had experience in this field. We close therefore by saying that even were the law not as we have demonstrated it to be, this appeal would fail on its factual basis - for there was sufficient evidence to show that Mr. Dass did have the specified qualifications for an applicant for the position, as Kermode J. held.

The appeal is dismissed with costs to be taxed if not agreed.

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Vice-President

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Judge of Appeal

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Judge of Appeal