IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0038 OF 1996
(Judicial Review No. 16 of 1994)

BETWEEN:

THE PERMANENT SECRETARY FOR PUBLIC SERVICE COMMISSION
THE PERMANENT SECRETARY FOR EDUCATION

APPELLANTS

-and-

EPELI LAGILOA

RESPONDENT

Mr. S. Kumar for the Appellants
Mr. I. Fa for the Respondent

Date and Place of Hearing	:	21 November 1997, Suva
Date of Delivery of Judgment	:	28 November 1997

JUDGMENT OF THE COURT

This is an appeal from a judgment of the High Court of Fiji (Pathik J) delivered on 28 June 1996. The orders against which the appeal is brought were entered on 10 July 1996. The orders were that certiorari go to quash the decision of the Public Service Commission to dismiss the respondent to the appeal (the applicant at first instance) from service with the Government of Fiji from 29 June 1994 and that the respondent be

reinstated forthwith on full salary and be paid arrears of salary from the date of termination to the date of reinstatement. There was also an order that the appellants (the then respondents) pay the respondent's costs of the action.

Hereafter the first appellant will be referred to as "the Commission" and the second appellant as "the Education Department".

The dismissal was purported to be made pursuant to the provisions of regulation 41 of the **Public Service Commission (Constitution) Regulations** 1990 ("the Regulations"). The Regulations were made pursuant to s.157 of the **Constitution**. Section 126 of the **Constitution** established the Commission.

Regulation 41 is headed "Major offences" and is as follows:-

> *"41.-(1) If a Permanent Secretary or Head of Department, or any officer acting properly with the authority of the Permanent Secretary or Head of Department has reason to believe that an officer of his Ministry or Department has committed a disciplinary offence which the Permanent Secretary or Head of Department regards as a major offence (or one of a series of minor offences which should be treated as a major offence) he shall charge the officer with having committed the alleged offence and shall forthwith serve the officer with a written copy of the charge against him and the particulars of the alleged offence in which event the following provisions of this regulation will apply.*
>
> *(2) The officer charged shall by notice in writing be required to state in writing within a reasonable time to be specified in such notice whether he admits or denies the charge and shall be allowed to give the Permanent*

Secretary or Head of Department an explanation if he so wishes.

(3) Where an officer fails to state in writing under sub-regulation (2) whether he admits or denies the charge, he shall be deemed to have admitted the charge.

(4) The Permanent Secretary or Head of Department shall require those persons who have direct knowledge of the allegation to make written statements concerning it.

(5) The Permanent Secretary or Head of Department shall forthwith forward to the Commission the original statements and relevant documents and a copy of the charge and of any reply thereto together with his own report on the matter and the Commission shall thereupon proceed to consider and determine the matter.

(6) If the truth of the charge is admitted by the officer concerned, or if the Commission after consideration of the reports and documents submitted to it under sub-regulation (5) and after such further investigation or inquiry as it considers necessary is satisfied as to the truth of the charge it may after taking into account the service record of the officer impose any of the penalties specified in regulation 51.

(7) If any charge is established under the provisions of this regulation and the Commission is satisfied that any act, omission or default involved in that finding resulted in ascertained or assessable damage to property or loss to the Government of Fiji the Commission may recommend to the Permanent Secretary for Finance that, in addition to any penalty that may lawfully be imposed under regulation 51 recovery of an amount not exceeding the amount of such damage or loss be effected by the Minister responsible for Finance under the powers vested in him by virtue of section 63 of the Finance Act, 1981.

(8) Where the Commission is not satisfied as to the truth of the charge it shall appoint a disciplinary tribunal in accordance with regulation 44."

There are other relevant regulations. Part V in which regulation 41 is found is headed "Discipline". Regulation 36 provides for disciplinary offences. Relevantly it provides that an officer commits a disciplinary offence for the purpose of disciplinary proceedings who is guilty of any improper conduct in his official capacity, or of any other improper conduct which is likely to affect adversely the performance of his duties or is likely to bring the Public Service into disrepute or be prejudicial to the conduct of the Public Service; see regulation 36(t).

Regulation 37 provides that an officer who has alleged to have committed a disciplinary offence is liable to disciplinary proceedings in accordance with the procedure prescribed in the regulations. Regulation 40 provides for minor offences and, as mentioned, regulation 41 for major offences. It is to be observed that the provisions of regulation 41(8) require the Commission, where it is not satisfied as to the truth of the charge mentioned in regulation 41(1), to appoint a disciplinary tribunal in accordance with regulation 44. That regulation provides for the appointment of disciplinary tribunals. Regulation 44(1) says that, where an officer charged with an alleged disciplinary offence denies the charge, and the Commission is not satisfied in terms of regulation 41(8) as to the truth of the charge, the Commission shall appoint a disciplinary tribunal to hear the evidence and find the facts. Provisions are made in regulation 44(2) for the constitution of a tribunal. Regulation 44(4) provides that it shall be the or duty of every officer appointed under the regulation, to hear the evidence, find the facts and make a report to the Commission within 28 days, or within such extended time as the Commission may approve. Regulation 45 provides for witnesses and regulation 46 for

the procedure at a hearing. The hearing is to be held in private. Evidence may be taken on oath or affirmation. The officer shall be summoned to appear at the hearing and shall be given full opportunity to defend himself. The officer is entitled to be assisted in the presentation of his case and is entitled to cross-examine witnesses called in support of the case against him. No documentary evidence shall be adduced against the officer unless he has previously been supplied with a copy thereof or been given access thereto.

In the present case the provisions of regulation 41(8) were not invoked because the Commission was apparently satisfied as to the truth of the charge. The charge was notified to the respondent by a letter dated 11 February 1994. The letter was signed by Mr. Naidu as Permanent Secretary for Education, Science & Technology. Mr. Naidu said that it had been brought to his attention by the Dawasamu Old Scholars Association of Dawasamu that the respondent had misappropriated $10,000 of the Association's funds and converted them to his personal use some time between 1984 and 1993. The letter referred to the fact that Mr. Naidu had a copy of a judgment dated 29 November 1993 from the Magistrate's Court in Suva ordering the respondent to pay $10,000 to the Association together with $60.00 costs. The letter said, "As such you have committed an offence under Public Service Commission (Constitution) Regulations, 1990 in which you have converted the trust money kept under your custody to your personal use".

Mr. Naidu said that he had decided to institute disciplinary proceedings against the respondent for committing a major offence under regulation 41 of the regulations. The charge was then detailed and was in the following form:-

> ***"That you, Mr Epeli Ligaloa, whilst being a civil servant in the teaching profession with the Ministry of Education, Science & Technology committed an offence under Regulation 36(t) of the Public Service Commission (Constitution) Regulations, 1990 in which you betrayed the trust placed in you by Dawasamu Old Scholars Association and converted the Associations ten thousand dollars ($10,000) kept under trust in your custody to your personal use. You have thus displayed an improper conduct which is likely to affect adversely the performance of your duties and is likely to bring the Public Service into disrepute or be prejudicial to the conduct of the Public Service."***

The letter continued with a reference to regulation 41(2) of the Regulations and pointed out that the respondent was required to state in writing within 14 days of receipt of the letter whether he admitted or denied the charge. He was told that he was able to give such explanation as he thought would enable proper consideration to be given to the charge made against him. Reference was also made to regulation 41(3). He was told that if he failed to state in writing whether he admitted or denied the charge then, pursuant to that regulation, he would be deemed to have admitted it in which case one or more of the penalties specified in regulation 51(1) of the regulations might be imposed upon him by the Commission. Regulation 51(1)(a) provides that one of the penalties that may be imposed is "dismissal, that is termination of appointment".

The respondent replied to Mr. Naidu's letter on 22 February 1994. He thus replied within the period of 14 days provided for in the regulation. In his letter, he acknowledged receipt of the letter of 11 February 1994 and said that he wished to enlighten Mr. Naidu on "a few points" in the hope that the charge laid against him would be put into proper perspective. He said that he had not committed a criminal offence as

alleged in the letter. He said that the Association came under the jurisdiction of the "vanua" of Dawasamu, "and apparently sir, my vanua clearly understands that I have not misappropriated the inflated $10,000" of the Association's funds. He said, however, that he wished to bring to Mr. Naidu's notice that he had used $2,000 of the Association's funds to pay for an operation upon his daughter in New Zealand in 1990. He said that this had not been done secretly but had been done in full consultation with his "vanua which later endorsed" his full repayments.

The respondent said that he would like to state that as President of the Association, he fully understood his obligations to the people because of his standing within his community. He said that he felt that he had done nothing to betray the trust of his people. He also said that his action in helping his daughter had been a matter of life and death. The next line, which is at the bottom of the first page of the letter appears to be missing from the photocopies of the letter in the appeal books and from the exhibit itself which is also a photocopy.

On the next page, the letter continued, "All the same, the 'vanua' of Dawasamu in fully observing the grounds of my action fully accepted my intention of using the money, accepted my traditional apologies, endorsed and witnessed my promise to repay the outstanding money. These are all stated in the attached letter of Ratu Peni V. Waqa, the traditional head of the vanua of Dawasamu to the magistrate court, Suva and this so far has given the needed consolation that my family and I rightly deserve". The respondent said that he wished to bring to Mr. Naidu's notice that all along during his career he had

always tried to bring repute to the teaching profession and to the communities which he had served. He concluded by saying that he had not "indulged" his family or himself in any criminal conduct and wished to caution Mr. Naidu in the implementation of any disciplinary action simply because of its implications.

The letter from the Ratu does not appear to have been tendered.

It is to be observed that the respondent denied that he had misappropriated the $10,000 referred to in the charge. He gave an explanation of how he came to use $2,000 of the Association's money for a particular purpose and referred to the fact that this had been done with the knowledge of the vanua.

It is common ground that the respondent heard no more of the matter until he received a letter dated 29 June 1994 from the Secretary for the Public Service. Under a heading "Dismissal", that letter said that the Commission at its meeting held that day had considered the charges against the respondent and had decided that he should be and was thereby dismissed from the Service in accordance with s.51(1)(a) of the regulations.

One of the questions which this appeal raises for decision is whether the provisions of the regulations which follow regulation 41(2) were observed by the Commission. Reference was made in the correspondence to regulation 41(3) which provides that, where an officer fails to state in writing whether he admits or denies the charge, he shall be deemed to have admitted the charge. It was submitted on behalf of

the appellants that the respondent had not denied the charge. But, in our opinion, a fair reading of the letter written by the respondent on 22 February 1994 discloses that he did in fact deny the charge. He said, "I have not misappropriated the inflated $10,000 of the Dawasamu Old Scholars Association Fund". It is true that he goes on to speak of the use by him of the $2,000 of the Association's Funds in circumstances which have been mentioned. He made it clear that this had been referred to the vanua and that arrangements were in place for the money to be repaid. In the remainder of the letter he denied any criminal or other improper conduct. There may be a question whether this was a correct view of the matter but it was clear from the terms of the balance of the letter that the respondent was not admitting the charge. He contended that he had not engaged in any improper conduct. The case therefore was not a case within regulation 41(3). He was not to be deemed to have admitted the charge because in substance he had denied it.

Regulation 41(4) required the Permanent Secretary or Head of Department to require those persons who had direct knowledge of the allegation to make written statements concerning it. So far as the evidence discloses, no such written statements were called for and the provisions of regulation 41(4) were not observed. In written submissions made on behalf of the appellants, counsel said that, having before it the complaint, the disciplinary charge, the respondent's reply and the judgment of the Suva Magistrate's Court, the Commission was satisfied as to the truth of the charge and "to comply with regulation 41(4) would have prolonged their decision".

Counsel for the appellants said that the Education Department had complied with regulation 41(5) and forwarded to the Commission the original statements and relevant documents together with a copy of the charge, the respondent's reply and its own report on the matter. The first appellant thereafter proceeded to consider and deliberate on the matter. In passing we mention that it is not clear to us what statements are being referred to. Certainly it was common ground that no statements were served on the respondent. There is, of course, no express requirement in the Regulations that that be done. That is a matter to which we shall return. The Commission decided the matter and under regulation 51(1)(a) of the Regulations dismissed the respondent. Counsel submitted that the appellants had adequately followed the procedures that were required to be followed.

In the course of his reasons for judgment, the primary judge said that the respondent had begun his civil service career as an assistant teacher in 1970. At the time of his dismissal he held the post of Acting Vice Principal at the Lautoka Teachers College. He was promoted to that post on 25 March 1994 after serving for about 24 years. The offence with which the respondent was charged was understandably treated as a major offence. It involves serious allegations against him. The termination of the respondent's employment has had grave implications for him and for his family.

Objectively speaking, the respondent, notwithstanding the terms of his letter written in answer to the charge which was served upon him, has not been given any opportunity of cross-examining witnesses whose evidence was relied upon by the Commission, giving evidence himself, calling other witnesses or making any submissions

or explanation other than that which is contained in his letter. It seems clear enough, and this emerged in the course of the submissions or counsel for the appellant, that the Commission and the Education Department regarded the matter as foreclosed by the judgment which was obtained against the respondent in the Magistrates Court. That was why, so it would appear, the Commission was of the view that it was unnecessary to refer the matter to a disciplinary tribunal pursuant to the provisions of regulation 41(8). As we have concluded, however, the respondent's letter was a denial of the charge. This is plain on a fair reading of it. Importantly, the respondent denied having misappropriated the Association's funds. Neither the Commission nor the Education Department was a party to the judgment which was recovered and could only have known about the circumstances which led to its being entered on the basis of information given to them by others.

We have referred to the fact that no statements were served upon the respondent. We are uncertain whether statements were in fact obtained. We were told in the course of the hearing of the appeal that the Department had prepared a report which had gone to the Commission. The report was accompanied by other documents but was regarded as confidential. It has never been shown to the respondent and it was not tendered during the hearing at first instance. Accordingly, we have no knowledge of the contents of it and are only aware that it exists because of what counsel told us. As mentioned during the hearing, the report could have been tendered by the Commission at the hearing, assuming it were relevant, on a confidential basis. If it were appropriate for the Court to have done so, an order that the confidentiality of the report be preserved could have been made so

that its contents would only have been known to the parties and their legal representatives. Each of them would then have been under an obligation to maintain its confidentiality. We emphasise that, not having the report before us, we have had to decide the case as if no such report existed. There is no other course which we can follow.

Regulation 41 confers a number of tasks and duties upon the Secretary of the Department and the Commission. The Secretary must charge the officer whose conduct is being called into question by notice in writing. It must require the officer to state within a reasonable time whether he admits or denies the charge. Regulation 41(4) provides that the Secretary of the Department is to require those persons who have direct knowledge of the allegation made against the officer to make written statements concerning it. That provision appears to apply whether an officer admits or denies the offence and irrespective of whether he answers the charge. The regulation does not say that statements will only be required in cases where there is an admission. In this case that is by the way because there was no admission. The statements and relevant documents must then be forwarded to the Commission which is obliged thereupon to proceed to consider and determine the matter.

The duties of the Commission involve it in determining whether it is satisfied as to the truth of the charge in which case it may act. But it is to be noted that regulation 41(6) provides that it may only do this after it has made such further investigation or inquiry as it considers necessary. In the present case it appears that it did not think it was

necessary, firstly because it regarded the letter written by the respondent as an admission of guilt and secondly because of the existence of the judgment. If the Commission is not satisfied as to the truth of a charge it is obliged, pursuant to regulation 41(8), to appoint a disciplinary tribunal in accordance with regulation 44.

Counsel for the appellants approached the matter on the basis that the statute having been complied with, the Commission was well entitled to take the course which it did. In particular he asserted that the Commission was not bound to hear the respondent on the question whether the charge had been made out or, in the event that it found that it was, on the question of the appropriate penalty to be imposed. This approach overlooks well known authority on the principles which apply to the construction of statutes such as this. Some of the authorities are referred to by Gibbs J in **Salemi v MacKellar** [No.2] (1977) 137 CLR 396, a decision of the High Court of Australia. His Honour said (at 419):-

> ***"There is nothing technical about the principles of natural justice. It is sometimes said, or suggested, that those principles apply only to proceedings which are judicial or quasi-judicial, or where there is a duty to act judicially. To state the rule in that way seems to me to be unduly restrictive and misleading. It is at least clear that when the power which is being exercised is a statutory one, it is not necessary to be able to find in the words of the statute itself a duty to hear the party affected or otherwise to act judicially. To repeat the well-known words of Byles J in Cooper v Wandsworth Board of Works [(1863) 14 C.B. (N.S.) 180 at p.194; 143 E.R. 414 at p.420], "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". As Lord Reid said in Ridge v. Baldwin [[1964] A.C. 40, at p.76], it may be***

> *possible "to infer a judicial element from the nature of the power" in the case.*
> .....
>
> *The question whether the principles of natural justice must be applied, and if so what those principles require, depends on the circumstances of each case. In the case of a statutory power, the question will depend on the true construction of the statutory provision in light of the common law principles (cf. Durayappah v. Fernando [1967] 2 A.C., 337 at p.350)"*

In similar vein is the dictum of Barwick C.J. in **Heatley v Tasmanian Racing and Gaming Commission** (1977) 137 C.L.R. 487. The Chief Justice said (at 491):-

> *"In Twist v Randwick Municipal Council [(1976) 136 C.L.R. 106], I described the action of the court when deciding that the repository of the power was so bound to observe natural justice as a process of supplementing the legislation where the court was of opinion that such a course was not inconsistent with the terms of the statute. More recently, in Salemi v MacKellar [No.2] (Salemi's Case), I have emphasized that the court's function in this connexion is to construe a statute by which the power is granted and to educe the qualification of the power by construction of the statute. The court thus, if it is of opinion that the statute properly construed does require, though not expressly but implicitly, the observance of natural justice, does supplement the express language of the statute by effecting the qualification of the grant of power."*

In our opinion, there can be no doubt that, upon the proper construction of the Regulations, the rules of natural justice apply in relation to the exercise by the Commission of at least some of its powers under regulation 41. It must be remembered that it is setting in train a procedure whereby a member of the service may be found to be guilty of a major offence and punished accordingly. In the present case the Commission

was dealing with an officer who, so far as the record discloses, had not been guilty of any previous misconduct and who had been in the service of the Department of Education for 24 years. The Commission apparently agreed with the Department that the respondent had not denied the charge, and accordingly, was deemed by regulation 41(3) to have admitted it. That of course was a fundamental error which in essence goes to the heart of what was done by the Department and the Commission in the case. Then the Permanent Secretary of the Department does not, at least so far as the evidence discloses, appear to have obtained statements from those with direct knowledge of the allegation or indeed from anyone else. The Commission did not require them. That was another breach of the provision but, in some circumstances, that may have been overlooked because one would be inclined to give the provision a directory construction which would mean that a failure to comply with it might not lead to invalidity if there were circumstances which existed to suggest that there would be no purpose in obtaining such statements. But that is not this case.

So the Commission came to its task with only the letter written by the respondent in answer to the charge before it, took the view that the charge was admitted in the letter, approached the matter by regarding the judgment which had been obtained as reinforcement for this view and proceeded to determine that the respondent was guilty. That being its view, it had a second task which was to determine what penalty should be imposed. Again the respondent was not given an opportunity of being heard. As mentioned, he heard nothing between the time of his letter denying the charge and the receipt by him of the letter notifying him that he had been dismissed.

The applicable provision is so much of regulation 41(6) as provides that, if the Commission after consideration of the reports and documents submitted to it under subregulation (5) and after such further investigation or inquiry as it considers necessary, is satisfied as to the truth of the charge it may proceed to the imposition of a penalty. In our opinion the Commission, if it were minded to take this course was bound to give the respondent an opportunity of being heard both on the question whether or not the charge had been established and on the question of penalty. The words to the effect that the Commission was bound to afford the respondent an opportunity of being heard are not to be found, at least expressly, in the regulation. But in accordance with the principles expounded by the judges in the two passages which have been cited, the law required the Commission to administer its statute on the basis that the rules of natural justice applied.

It is appropriate to mention at this point that, before the hearing of the appeal commenced, the Commission sought leave to lead fresh evidence. The evidence went to the question whether the respondent had in fact misappropriated moneys from the Association. Having heard argument on the question, we announced that we had decided to dismiss the Commission's notice of motion dated 5 September 1997 because the evidence which was sought to be led was irrelevant to the question which we had to decide. It needs to be clear that the task of a Court in a matter such as this is not to determine the merits or substance of the matter. The Court's task is to see whether or not a public body such as the Commission has proceeded regularly, that is according to law. If it has not, the Court will set aside what has been done. But the Court, although it may

find it useful to know the background of the matter, is not concerned to determine merits. That is not its province. Its province in the review of administrative action is to ensure that proper procedures have been followed and applied.

The evidence which was sought to be led would have opened up the merits of the case. Not unnaturally the respondent had filed evidence in reply. It may be observed that the evidence which was led on behalf of the Commission and the respondent establishes that the judgment so strongly relied upon by the Commission has since being set aside by consent. The reason why it was set aside is not entirely clear from the material which is before us and it is not material for us to consider it other than to say that it would indicate that there is a substantial difference between the Commission and the respondent on the issue. The position is not clear cut.

It would seem to us that this was a case which called for the appointment of a disciplinary tribunal pursuant to regulation 41(8). There are provisions in regulation 46 concerning the procedure which is to be followed by the disciplinary tribunal. Quite plainly the tribunal is to proceed judicially. The rules of natural justice are provided for expressly in that regulation. But the respondent was not entitled to a tribunal unless the Commission decided that one should be appointed. That gave it a very substantial degree of power and provides in itself a reason why the Commission was obliged to proceed with caution taking care to see that the respondent was treated fairly.

Another matter that needs to be noted is that, if a matter proceeds as this one has, the Commission is in danger of becoming prosecutor and judge in its own cause. It is not as if it stands above the Department of Education and determines the matter objectively. It takes over once the matter is referred to it and decides what to do. That is an added reason why caution should have dictated the appointment of a tribunal and not action by the Commission itself particularly in the absence of opportunity being afforded to the respondent to put his case on either the question of guilt or of penalty.

The learned primary judge approached this matter somewhat differently from the way that we have. Eventually he came to the conclusion that it was a case where the principles in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 K.B. 223 at 233-234 applied. We do not think the matter is satisfactorily approached by the application of principles developed from that case. We would rather say that the order for certiorari made by the primary judge should not be disturbed because it is plain on the face of the material we have that the Commission has not proceeded regularly and according to law. That is because the respondent was not afforded the opportunity of being heard.

It remains to deal with the last ground of appeal which challenged the jurisdiction of the Court to make an order for reinstatement. We agree with counsel for the appellants that this order was inappropriate. The question of reinstatement would arise if the respondent had been dismissed. But the decision of the Commission that he be dismissed is, for the reasons we have given, null and void and of no effect. No doubt his Honour

wished to make it clear that the respondent had not been dismissed and continued to be entitled to be employed by the Education Department and to be entitled to the salary and other emoluments of the office which he held. We understand that the respondent has been paid up to date. We make it clear that that should continue unless there is some disturbance of the existing situation by, for example, further proceedings taken by the Department and brought to the Commission. In the meantime, however, the employment has continued unaffected by the purported action of the Commission.

In the circumstances the orders made by his Honour should be varied by omitting the order for reinstatement and, in lieu thereof, ordering that it be declared that the respondent's employment was not determined by the decision of the Commission made on 29 June 1994 and has continued since that date.

The appeal should otherwise be dismissed and the respondent should have his costs of it. Counsel for the respondent sought an order that those costs be paid on the indemnity basis. It was submitted that the appeal was so clearly misconceived that it should never have been brought. We may have had some sympathy for that view if it had not been necessary to set aside the order as to reinstatement. Although it was only a small part of the argument, that in itself justified the appeal. The costs will therefore be on the usual party and party basis.

In the result the orders of the Court are:-

1. The orders made by the High Court on 28 June 1996 be varied by omitting so much thereof as ordered the reinstatement of the respondent (the applicant in the High Court) and substituting therefor a declaration that the respondent's employment was not determined by the decision of the Commission made on the 29 June 1994 but has continued since that date unaffected by the Commission's decision.

2. The appeal be otherwise dismissed.

3. The appellants pay the respondent's costs of the appeal.

.....
Sir Maurice Casey
Judge of Appeal

.....
Mr. Justice J. D. Dillon
Judge of Appeal

.....
Mr. Justice I. F. Sheppard
Judge of Appeal