IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0016 OF 1998S
(High Court Civil Action No.HBJ0021/96S)

BETWEEN:

THE PERMANENT SECRETARY FOR PUBLIC SERVICE COMMISSION
-AND-
THE PERMANENT SECRETARY FOR EDUCATION, WOMEN AND CULTURE

Appellants

AND:

LEPANI MATEA

Respondent

Coram: **The Rt. Hon. Sir Maurice Casey, Justice of Appeal**
The Hon. Mr. Justice R. Savage, Justice of Appeal
The Hon. Mr. Justice J.D. Dillon, Justice of Appeal

Hearing: **27 May 1998**

Counsel: **Mr.D. Singh for the Appellants**
Mr. A. Seru and Ms. V. Lutu for the Respondent

Date of Judgment: **29 May 1998**

JUDGMENT OF THE COURT

This is an appeal from the Judgment of Byrne J. given in the High Court at Suva on the 18th March 1998 on an application for judicial review. The respondent, Lepani Mata, sought a review of the decision of the Public Service Commission made on the 28th May 1996 dismissing him from the Public Service. The decision was communicated to him in a memorandum dated the 30th May 1996.

The respondent according to his affidavit evidence was a school teacher in the Public Service. He had commenced his teaching career in January 1979 and since then had taught in various schools in Fiji. At the time of his dismissal he was on temporary posting from Rishikul Primary School, Nasinu, to the Suva Muslim Primary School, Nabua. He was at that time the joint owner, with his brother, of a taxi. At about 6 a.m. on the 1st April 1995, which he states was a Saturday and not during the course of his duties, he drove the vehicle from a garage, to which he had taken it the day before for repairs, intending to take it home to deliver it to his brother so that he could commence his commercial run. The brother had a permit to drive and operate the taxi. The appellant while driving the taxi lost control of the vehicle and struck a pedestrian, who died. On the 4th April 1995 he was charged in the Nausori Magistrate's Court with causing death by dangerous driving contrary to section 238 of the Penal Code Cap. 17, and also with driving a motor vehicle of a class other than one he was authorised to drive, contrary to sections 23(1) and 85 of the Traffic Act Cap.176. He pleaded guilty to both charges and was thereupon convicted and sentenced to nine months imprisonment, suspended for two years on the causing death by dangerous driving charge and fined the sum of $500, in default four months imprisonment on the other charge. He was also disqualified from obtaining or being in possession of a driving licence for eighteen months.

As noted earlier, the memorandum of dismissal was given to the respondent on the 30th May 1996, more than a year after his conviction. The affidavit filed on behalf of the appellant said that the respondent's case was dealt with by a Senior Assistant Secretary in the Education department who had since retired so there could only be speculation as to the reason for the delay. The file may have been put away inadvertently, it was suggested.

The memorandum of dismissal served upon the appellant was in the following terms:

> *"At its meeting held on 20.05.96 the Public Service Commission noted that*
>
> *(1) On 11.04.95 in the Nausori Magistrates Court you were convicted of causing death by dangerous driving - contrary to section 238 of the Penal Code cap. 17.*
>
> ***(2) You were sentenced to 9 months imprisonment (suspended for 2 years), fined $500 in default 4 months imprisonment and disqualified from holding or obtaining a driving licence for 18 months.***
>
> ***(3) The charge arose when on 1.04.95 at 6.00 a.m. whilst you were driving your taxi registration number AN 307 on Kuku Bau Road, without obtaining the prior permission of the Secretary for the Public Service as required by GO312, you fell asleep as a result of which your taxi went off the road and hit a pedestrian namely Mastaki s/o Hussain who died due to injuries he sustained from the accident.***
>
> ***In consideration of the foregoing and pursuant to the provisions of Regulation 54 of the Public Service Commission (Constitution) Regulations, 1990 the Public Service Commission decided that you should be and you are hereby dismissed from the service forthwith.***
>
> ***Arrangements are being made to serve this memorandum on you by Friday 31.05.96 which will be your last day at work."***

It may be noted in passing that this memorandum gives the day of the respondent's conviction as 11 April 1995 while the affidavits of the appellant refer to it as the 4th April; whichever date is correct it does not affect the issues raised in this appeal.

Byrne J. had given the respondent leave to apply for judicial review on two grounds:

(1) whether the penalty imposed on the appellant was too severe, or,

(2) whether before imposing the penalty of dismissal the respondents should have given the appellant an opportunity to be heard on the question of penalty.

In his judgment he considered these two grounds and reached the conclusion that the respondent succeeded on both. He accordingly determined that an order of certiorari go to remove into the High Court, and quashed, the decision to dismiss the applicant and further ordered that he should be reinstated.

The appellant appealed. His submissions were based on two broad propositions:

(1) That the respondent was not charged with a disciplinary offence under the Public Service Commission (Constitution) Regulations 1990 but was dismissed under Regulation 54 which expressly states that where an officer is convicted in any court of a criminal charge the Commission may dismiss the officer without the institution of any disciplinary proceedings under the Regulations.

(2) That Regulation 54 does not require that the officer concerned be given the right to be heard before the imposition of the penalty.

We consider these two submissions and the respondent's reply to them.

Part V of the Public Service Commission (Constitution) Regulations 1990 deals with discipline within the Service. These Regulations are made by the Public Service Commisison under delegated powers given by section 157 of the Constitution. Regulation 36 sets out what constitutes a disciplinary offence for the purpose of disciplinary proceedings. There are sub paragraphs (a) to (u) which list these offences. Any offence under these provisions may be categorised as minor or major, no doubt according to the circumstances of the particular case, by the Permanent Secretary or Head of Department of the officer involved and whose duty it shall then be to charge the officer with having committed the offence. A detailed procedure is laid down for each category of offence. A later Regulation (No.52) in this Part V provides that where criminal proceedings have been instituted against an officer in any court the Commission shall not take proceedings against him on any grounds arising out of the criminal charge until the matter has been dealt with by the Courts. Regulations 53 and 54 then deal with the position if he is acquitted or convicted. In this case the Commission relied upon Reg. 54 which is in the following terms.

> *"54. If an officer is convicted in any court of a criminal charge, the Commission may consider the relevant proceedings on such charge and if it is of the opinion that the officer ought to be dismissed or subjected to some lesser punishment in respect of the offence of which he has been convicted the Commission may thereupon dismiss or otherwise punish the officer without the institution of any disciplinary proceedings under these Regulations."*

There does not seem to be any doubt that the respondent came within the terms of this regulation. He was convicted of a criminal charge in respect of the dangerous driving. There may be some doubt as to whether the other charge on which he was convicted

amounted to a criminal conviction but we need not determine that. Attention should however, be drawn to the terms of the Commission's memorandum of dismissal set out earlier in this judgment. It asserts in paragraph (3) that the respondent, among other things, was "driving (his) taxi......... without obtaining the prior permission of the Secretary of the Public Service as required by GO 312........" (G.O. are General Orders made by the Commission to prescribe the terms and conditions of service and generally to regulate the service). This would appear to suggest that a disciplinary offence was being alleged, apart from the criminal conviction, and if that was the case then plainly the earlier provisions of Part V in relation to disciplinary offences would apply. However, it seems clear, and counsel accept, that this was not so and the matter is to be considered solely on the basis of the criminal conviction. We accordingly accept the appellants' first submission that the respondent was not charged with a disciplinary offence and that Regulation 54 applies. We did not understand the respondent to challenge that.

We now consider his second submission that the Commission was not required to give the respondent an opportunity to be heard before imposing the penalty of dismissal. In effect the appellant submitted that the Regulation effectively provided that in the circumstances of a criminal conviction the officer was not entitled to be heard. He submitted that Regulation 54 clearly dispenses with any right to a hearing and contends that to require a hearing is contrary to the terms of the Regulation.

The appellant also submitted that the Public Service Commission (Constitution) Regulations 1990 constituted a complete code for dealing with discipline within the Public Service and when read as a whole lead to the conclusion that Regulation 54 does not confer any

entitlement for an officer to be heard. He emphasised the last words of the Regulation, "without the institution of any disciplinary proceedings under these Regulations" and, it appeared to us, treated them as if they meant without giving him (the officer) an opportunity first to be heard. We are, however, of the view that the words do not mean that. They mean what they say: "without the institution of disciplinary proceedings under the Regulations" and no more than that. It might well be that sometimes the conduct in question would amount to a criminal offence triable in a civil court as well as being a disciplinary offence under the Public Service Commission (Constitution) Regulations 1990. In such case, if criminal proceedings were commenced the Commission was prohibited under Regulation 52 from taking proceedings against the officer until the criminal courts had determined the matter; Regulation 53 provided for the situation when there had been an acquittal and Regulation 54 when there had been a conviction. We think the last words in Regulation 54 must thus be read according to their literal terms.

Mr Singh also submited that when reading the disciplinary provisions in the Regulations as a whole it had to be noted that provision for an opportunity to be heard had been given in respect of the determination of major and minor offences but no such provision had been made in respect of matters under Regulation 54. It followed, he submitted, that none was intended and so should not be implied.

Ms Lutu, who presented the submissions for the respondent, submitted in reply that though Regulation 54 was silent upon the question of an opportunity to be heard being given

to an officer to whom Regulation 54 applied, it should be implied. She submitted that this was in accord with the principle that any statutory provision which precludes the decision-making body from the principles of natural justice must be unambiguously clear. It was not unambiguously clear in Regulation 54. Further, that when one considered the seriousness or gravity of the consequences which could be suffered by the officer - he could be dismissed, with the consequence that his career was terminated and his income stopped, with possibly disastrous results to himself and his family - the need for a right to be heard became even more apparent.

There have been many cases of high authority where the principles applicable in deciding whether a court should imply that the rules of natural justice apply to a statutory or other provision. Both Counsel referred to some of them, or others, in their submissions. It will be sufficient to refer to three of the cases which in our view deal with the issues that arise in this case.

A broad and general statement is contained in the speech of Lord Diplock in O'Reilly v. Mackman (1982) 2 AC 237. The other four law lords all agreed with Lord Diplock who said at p.276:

> ***"But the requirement that a person who is charged with having done something which, if proved to the satisfaction of a statutory tribunal, has consequences that will, or may, affect him adversely, should be given a fair opportunity of hearing what is alleged aginst him and of presenting his own case, is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement."***

In Pratt v. Wanganui Education Board and Others (1977) 1 NZLR 476 per Somers J. at 486:-

> *"In Durayappah v. Fernando [1967] 2 AC 337; [1967] 2 All ER 152 Lord Upjoin said on 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 CBNS 180, 194, must be applied.*
>
> *He Said:*
>
> > ***"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, yet the justice of the common law will supply the omission of the legislature'" [1967] 2 AC 337, 348).***
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> ***See, too, Ridge v. Baldwin [1964] AC 40, 73; [1963] 2 All ER 66,76, per Lord Reid (on the cognate topic of administrative interference with private rights). In Wiseman v. Borneman [1971] AC 297; [1969] 3 All ER 275 Lord Wilberforce said:***
>
> > ***"...... the legislature may certainly exclude or limit the application of the general rules. But it has always been insisted that this must be done, clearly and expressly.***
> >
> > ***"Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment.'***
> >
> > ***(Commissioner of Police v. Tanos (1958) 98 CLR 383, 396, per Dixon CJ and Webb J)" ibid, 318; 285-286."***

Lastly, in Twist v. Randwick Municipal Council (1976) 136 CLR 106 Barwick CJ said at p.109:

> *"But the legislature may displace the rule and provide for the exercise of such a power without any opportunity being afforded the affected person to oppose its exercise. However if that is the legislative intention it must be made unambiguously clear.*

> *In the event that the legislation does not clearly preclude such a course, the court will, as it were, itself supplement the legislation by insisting that the statutory powers are to be exercised only after an appropriate opportunity has been afforded the subject whose person or property is the subject of the exercise of the statutory power."*

These cases may thus be summarised broadly speaking as follows: The requirement that a person be given a fair opportunity to be heard before a body determines a matter that affects him adversely is so fundamental to any civilised legal system that it is to be presumed that the legislative body intended that a failure to observe it would render the decision null and void. If there are no words in the instrument setting up the deciding body requiring that such a person be heard the common law will supply the omission. It will imply the right to be given a fair opportunity to be heard. While the legislative body may exclude, limit or displace the rule it must be done clearly and expressly by words of plain intendment. The intention must be made unambiguously clear. Finally we add that what is a fair hearing will depend upon the circumstances of each case; it does not mean that in every case a right of personal appearance must be given.

After much consideration we find we are unable to accept Mr Singh's submission. In our view, when Part V of the regulations are read as a whole, or when Regulation 54 is read by itself, it is by no means unambiguously clear that it was intended that an officer to whom Regulation 54 applied was not to be given an opportunity to be heard. This is to some extent, and inevitably, a subjective judgment reached upon a consideration of the language and form of the regulations, but the conclusion is re-inforced by reference to other factors. It is correct, as Mr Singh submitted, that the regulations relating to the determination of

major and minor disciplinary offences make express provision for some opportunity to be heard in some circumstances. It does not follow that because some provision was made in those cases, and no provision was made in Regulation 54, that it was clearly intended that no opportunity should be given in Regulation 54 cases. The major and minor offences procedure is first concerned with the question of whether the offence is admitted or denied, and if denied how it is to determined; the Regulation 54 procedure is not concerned with the question of whether the offence was committed or not for that issue has been determined by the Criminal Court. The major and minor offence procedure gives relatively restricted opportunities to be heard and it is significant that in Permanent Secretary for Public Service Commission and Anor v. Epeli Lagiloa (Civil Appeal No. ABU0038 of 1996), an unreported judgment of this Court, it was held (p14-16) that the rules of natural justice would be implied in Regulation 41, the major offences provision. The rights to be heard that were given under that regulation were held to be not sufficient and further rights to be heard were to be implied. It follows that no useful inference can be drawn from the major and minor offences procedure to support the submission that no right to be heard was intended under Regulation 54.

We think too, that Ms Lutu was right in her submission that the seriousness or gravity of the power, and the consequences of its exercise upon the officer concerned, point to the need to imply the right to be given an opportunity to be heard. As Somers J. said in Pratt v Wanganui Education Board (supra) at p.486:

> ***"But I think the gravity of the decision is such that a right to be heard is to be imported. That I think, is to recognise that the duty to act judicially may be inferred from the very nature of the power exerciseable."***

We are therefore satisfied that a right to be given an opportunity to be heard must be implied in Regulation 54. We add, in passing, that this is the same conclusion that was arrived at by *Byrne J.* in the court below.

Before dealing with the last issue raised by this appeal we refer briefly to one aspect of the judgment in the court below. *Byrne J.* expressed the view that the Respondent's dismissal was too harsh a punishment. He said he would follow the Court of Appeal decision in R v Barnsley Metropolitan Borough Council. Ex Parte Hook (1976) 1 WLR 1052 and grant certiorari to quash the decision. In that case the court had been concerned with the termination of a stall-holder's licence in a borough market for alleged misconduct. The Court of Appeal, *Denning M.R.. Scarman L.J.* and *Sir John Pennycuick* held there had been a breach of natural justice and so quashed the termination decision. *Lord Denning,* however, also said that the court could interfere if a punishment is altogether excessive and out of proportion to the occasion. It may be noted that neither *Scarman L.J.* nor *Sir John Pennycuick* referred to the excessive nature of the penalty as a ground for certiorari. We think that it is important to remember what many cases of high authority have determined - and they have been emphasised in the past by this Court - that judicial review is what it says, namely, a judicial review and not an appeal. The function of the Court is to ensure that the body subject to the review has acted within its jurisdiction, has directed itself properly as to the law applicable and applied that law accordingly. It must, too, observe the requirements of procedural fairness to the extent that they apply in the particular case. What it must not do is to determine the merits of the matter, or substitute its opinion for that of the body concerned upon the merits. This means, of course, that it cannot substitute its opinion for that of

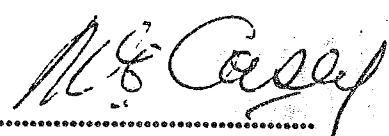
the body concerned on the matter of penalty. If a penalty is imposed that is so severe, or so out of proportion to the offending, that no reasonable body would have imposed it, then a court may quash it on judicial review. This is on the basis that it would be an error of law in that the law does not authorise the imposition of such a penalty. But the penalty has to be so severe and so out of proportion that no reasonable body could impose it. Short of that standard the Court cannot interfere. We do not think that can be said of the penalty in this case.

The last matter raised on this appeal relates to the form of order made in the High Court. There was the certiorari order, and we think that is correct and should stand, but there was also an order that the Respondent be re-instated and paid all entitlements. The question of such an order was canvassed in The Permanent Secretary for the Public Service Commission and Anor. v Epeli Lagiloa (supra) and it was held to be inappropriate. It is clear that since the dismissal decision has been quashed by the order for certiorari the dismissal decision has no effect; it is null and void. It follows that the Respondent is still employed by the Appellant and has been since the date of the purported, but ineffective, decision.

Both counsel accepted the reinstatement order was inappropriate and it will accordingly be deleted.

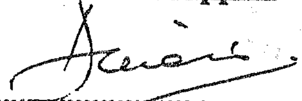
The appeal is accordingly dismissed save that the judgment of the High Court is varied by deleting the order for re-instatement.

The Respondent is entitled to costs which are fixed at $600, and disbursements, to be fixed by the Registrar if the parties cannot agree.



Sir Maurice Casey
Justice of Appeal

Mr. Justice Savage
Justice of Appeal



Mr. Justice Dillon
Justice of Appeal

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