IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0070 OF 1997S

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0070.1997 IN COURT

BETWEEN : JOSEPH NAINIMA

APPELLANT

-v-

THE ATTORNEY-GENERAL OF FIJI

RESPONDENT

Coram : The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Mr Justice Gordon Ward, Justice of Appeal
The Hon. Mr Justice Sarvada N. Sadal, Judge of Appeal

Hearing : Monday, 27th November 2000, Suva

Counsel : Mr I. Fa for the Appellant
Mr S. Kumar for the Respondent

Date of Judgment : Friday, 1st December 2000

JUDGMENT OF THE COURT

The appellant applied to the High Court for judicial review of a decision by the Public Service Commission to downgrade him one level for disciplinary offences. He sought declarations relating to the manner in which the decision had been made and, on 21 October 1997, Byrne J dismissed the application. This appeal is against that decision.

As with so many appeals in cases of judicial review, the grounds originally filed were wide ranging but, at the hearing, counsel for the appellant, Mr Isireli Fa, condensed them to three grounds:

1. That the Public Service Commission failed to follow the procedure in Regulation 41 of the Public Service Commission (Constitution) Regulations

2. That the appellant was not given a true right to be heard because:

   (a) he was not advised of evidence against him which was considered by the Commission in reaching its decision
   (b) he was not heard on penalty

3. That the Permanent Secretary instituted the investigation but had been involved in some of the events forming the basis of the charges against the appellant.

In 1993, the appellant was the Head of the Research and Development Unit of the Education Department of the Ministry of Education, Women, Culture, Science and Technology.

In January of that year, Cyclone Kina damaged a number of schools, some very extensively, and the appellant was given the responsibility of checking all requests for assistance and recommending which schools were to receive building grants. At the end of the project, following complaints from some of the schools, the Ministry conducted an investigation. That resulted in allegations that the appellant had given grants to schools without authority and had misled his superiors into giving grants to schools which did not need assistance.

As a result, five disciplinary charges were brought against him alleging over-payment or false certification that funds were needed. They were set out in a memorandum of 2 December 1994 from the Permanent Secretary of his Ministry. It advised him that the Permanent Secretary was treating the allegations as major offences and invited him to admit or deny the charges with an explanation if he so wished. He did so on 9 December and the whole matter was then forwarded to the Public Service Commission on13 March 1995.

Two months later, on 16 May, the appellant was charged with four more charges relating to the attendance register and unauthorised absence from work. Although not as serious as the earlier charges, he was advised they were being treated as major offences also. The appellant replied in writing to those charges on 23 May.

It is convenient to take the first two grounds together. Mr Fa's submission is that, although paragraph (8) of Regulation 41 requires the Commission to appoint a disciplinary tribunal only if it is not satisfied of the truth of the charge, a tribunal should be appointed in every case where there is a dispute over the facts. If there is not, he argues, the officer will never have a chance of knowing and explaining or disputing the facts upon which the Commission has decided his guilt.

Paragraph (4) requires the Permanent Secretary or Head of Department to obtain written statements from those persons who have direct knowledge of the allegation. Then, by paragraph (5) he:

".... shall forthwith forward to the Commission the original statements and relevant documents and a copy of the charge and any reply thereto together with his own report on the matter and the Commission shall there pon proceed to consider and determine the matter."

Where the answer to the charges shows they are disputed, how, Mr Fa asks, can the Commission resolve the dispute? How can it be said the officer has had a true opportunity to be heard when his answers are made prior to the taking of statements and the report of the referring officer? As it is a reply only to the particulars of the charges and is made with no knowledge of the evidence upon which the Commission actually bases its decision, how can it be considered a true answer? In those circumstances, the only fair way is to appoint a disciplinary tribunal to hear the matter.

In the present case, the argument has added force because the affidavits filed for the hearing in the court below included reference to an inquiry carried out by the Fiji Intelligence Service. The report of that inquiry was highly critical of the role played by the appellant and a copy was forwarded to the Commission with the other papers in the case for its consideration.

Mr Kumar for the respondent suggests that the appellant had an opportunity to be heard when he was invited to make his explanations to the charges on each occasion – an opportunity of which he availed himself. That was enough to satisfy the requirements of natural justice. Thereafter, the procedure laid down in the Regulations does not require any other opportunity to be heard.

The learned judge took the same view. After reviewing the steps prescribed under regulation 41, he said:

"In my view the applicant was given every opportunity to answer the charges against him and exercise his right to reply to those charges and give explanations about his conduct. For this reason alone I would dismiss his application for judicial review on the ground that he has not been denied natural justice.

It is pointless for the applicant to submit that the procedure followed by the Public Service Commission is unfair and contrary to natural justice. The fact is these Regulations are the law and it is the function of the Courts only to interpret the law but not to amend it."

Later he continued:

"As to the claim that he should have been given a chance to present his case to the tribunal under regulation 41, I disagree. In my view there was evidence on which the Commission could find the charges true and therefore not appoint a tribunal and on that footing even have dismissed the applicant under regulation 51(1)(a). It chose not to do so but imposed a less severe punishment of reduction in rank."

The right to be heard has been explained in the cases of The Permanent Secretary for the Public Service and another v Lagiloa, Civil appeal 38 of 1996 and the Permanent Secretary for the Public

Service and another v Matea, Civil appeal 16 of 1998 and Supreme Court appeal 9 of 1998. The learned judge did not have the benefit of those judgments when he decided the present case but the law as stated in those cases applied in the present case.

We do not think it is necessary to set it out again here but there is one aspect of this case that is not covered by those cases.

As has been stated, the documents forwarded to the Commission included the report from the Fiji Intelligence Service. We would suggest that should not have been so under the terms of regulation 41 (5). It is not an original statement and the reference to relevant documents clearly means documents relevant to those statements. The only report to be forwarded is the report of the Permanent Secretary and clearly does not include a report such as this.

However, our objection to the procedure followed in this case is more fundamental. The Commission was plainly supplied with documents and evidence that would have a direct bearing on its decision in this matter. The appellant had no knowledge that such a report existed nor, therefore, of its contents. When he was invited to admit or deny the charges and give any explanations, he knew only the particulars of the allegations as set out in the charges. We cannot accept that he has been given a true opportunity to reply to the allegations when he does not know the exact nature or extent of the evidence against him. As Mr Fa graphically put it, to allow the Commission to decide the case in this way is similar to trial by ambush.

In Kanda v Government of Malaya (1962) AC 322, 337, Lord Denning said;

> *"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."*

Lord Diplock later referred to it (in criticism, ironically, of Lord Denning) as:

> *"...one of the most fundamental rules of natural justice: The right...to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is."* Hadmor Productions Ltd and others v Hamilton and another (1982) 2 WLR 322,337.

In this case the inclusion of the Fiji Intelligence Service report in the papers forwarded to the Commission and the failure to inform the appellant was a fundamental breach of natural justice. It negatives any suggestion that he had been given a fair right to reply.

Counsel for the respondent points out that the penalty imposed by the Commission is very lenient and shows that the Commission cannot have taken into account the serious allegations contained in that report. We do not consider we can or should attempt to analyse the matter in this way.

The appeal must be allowed on that ground.

The remaining ground arises from the fact that the Permanent Secretary signed some of the cheques in the cases out of which the charges arose. In those circumstances, he may have been involved in the offences and should not have taken a part in the investigation.

It is a suggestion of bias; that the Permanent Secretary was in effect an adjudicator because he makes a report which may well be affected by his own involvement in the very matter upon which he is reporting.

We see no merit in this ground. The mere involvement of the Permanent Secretary in the normal procedures of the department, and we pause to point out that there is no evidence of anything more, does not, in our view, give reasonable ground to suspect or apprehend bias. This ground fails.

However, the appellant succeeds on the main ground. The decision of the Public Service Commission is set aside and it is ordered to rehear the charges. That would not necessarily require the personal appearance of the officer as has been stated in Matea's case but, in the circumstances of this case, we consider it can only be done fairly by appointing a disciplinary tribunal to hear the evidence and find the facts.

The appeal is allowed with costs of $1250 together with the costs of preparing the record and disbursements to be fixed by the Registrar if not agreed.

M E Casey
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Sir Maurice Casey
Presiding Judge

Gordon Ward
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Mr Justice Gordon Ward
Justice of Appeal

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~~Mr Justice Sarvada~~ N. Sadal
Judge of Appeal

FIJI COURT OF APPEAL

Solicitors:

I Fa Associates, Suva for the Appellant
Office of the Attorney-General Chambers, Suva for the Respondent

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