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

CIVIL APPEAL NO.ABU0082 OF 1998S
(High Court Civil Action JR No. HBC 34 of 1997S)

BETWEEN:

SOKOVETI TUIMOALA

Appellant

AND:

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

Respondents

Coram: The Hon. Mr Justice Jai Ram Reddy, President
The Hon. Mr Justice Ian Thompson, Justice of Appeal
The Hon. Mr Justice Ian Sheppard, Justice of Appeal

Hearing: Thursday, 11 May 2000, Suva

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

Date of Judgment: Friday, 12 May 2000

JUDGMENT OF THE COURT

This is an appeal from a judgment of the High Court (Pathik J.) in which the Court dismissed an application brought by the appellant for judicial review. In a memorandum dated 21 August 1997 from the Permanent Secretary for Education and Technology to the appellant it was said that on 20 August 1997 a Commissioner, Mr Hector R. Hatch, had considered three charges laid against the appellant by the Permanent Secretary for Education and Technology. The letter said that, after a careful and thorough consideration and assessment/ analysis of all the reports and documents submitted to him, Commissioner Hatch was satisfied as to the truth of the charges and did not consider it necessary to conduct any further investigation or inquiry. The memorandum said that Commissioner Hatch had found the appellant guilty as charged and that acting under the powers delegated to him by the Public Service Commission he had decided

that the appellant should be dismissed from the service with effect from 27 June 1997 in accordance with regulations 51 (1)(a) of the Public Service Commission (Constitution) Regulations 1990.

The principal ground of the application for judicial review was that the appellant had been denied natural justice or procedural fairness. Pathik J. found that there was no sign of procedural irregularity or impropriety or unfairness. He said that the respondents had complied with the procedural requirements of regulation 41 of the Regulations and had conducted a proper investigation. That conclusion is challenged on this appeal.

The appellant had been employed in the public service since 1975. From 1990 she had held the office of Principal Librarian in the Ministry of Education and Technology under the various titles of that Ministry during that period ("the Ministry"). On 25 June 1997 a letter had been sent to her by the first respondent, then called the Permanent Secretary for Education, Women and Culture, charging her with three offences against regulation 36(t) of the Regulations. It was alleged in the first charge that, contrary to Order 312(a) of the Public Service Commission's General Orders (1993), she had failed to declare to the Secretary of the Public Service her interest in a company registered as Modern Book and Library Supplies and, contrary to Orders 306(a) and 312(b), she had failed to seek and obtain the Secretary's permission "before embarking on this commercial undertaking". It was alleged in the second charge that between January 1996 and May 1997, contrary to Instruction No.7 of the Supplies and Services Instructions (1982), she had failed to keep a record of the "receipt and despatch/delivery" of books purchased from Modern Book and Library Supplies and had made declarations, and caused staff under her control to make declarations on copies of Local Purchase Orders to the effect that those books had been received and issued for use. In the third charge it was alleged that on 19 and 20 May 1997 she had issued Local Purchase Orders, for

books to a value of $1,471, that staff under her control had certified that they had been received and issued for use but that she had been able to produce for inspection on 6 June 1995 only three books to a total value of $85.85.

The provisions of Order 306 (a) of the General Orders made by the Public Service Commission in May 1993 are that officers are prohibited from engaging in any trade, or in any commercial undertaking, without the prior permission of the Secretary for the Public Service. Order 312(b) provides that no officer shall directly or indirectly acquire investments or interests of the nature mentioned in the order without the express permission of the Secretary for the Public Service. In order to ascertain the nature of the investments or interests referred to, it is necessary to have regard to Order 312 (a). Relevantly it provides that an officer shall, on appointment or during the course of his service, disclose to the Secretary for the Public Service in the prescribed form particulars of any investment or share-holding which he may possess in any commercial undertaking, or any other direct or indirect interest in such undertaking. Instruction 7 of the Supplies and Services Instructions provides that departments shall maintain a record of the receipt and disposal of all expendable public stores which shall only be disposed of in accordance with the provisions of Part X of the Instructions. Part X deals with the sale and disposal of public stores. It is unnecessary to go to the detail of that Part.

The letter of 25 June 1997 required the appellant to state in writing within fourteen days whether she admitted or denied any of the charges and informed her that she could also provide the writer with an explanation, if she wished, that, if she failed to admit or deny any of the charges within that period of fourteen days, she would be deemed to have admitted them and that, if that occurred or the Public Service Commission, "after further investigation or inquiry as it considers necessary was satisfied as to the truth of the charges, it might impose on her one or more of the penalties specified in regulation 51(1) of the Regulations.

On 8 July 1997 the appellant responded to the charges. In a lengthy letter she first "categorically" denied all the allegations contained in the three charges. She then gave an explanation of the circumstances in which, at the request of a friend who was in America and on behalf of that friend, she had registered Modern Book and Library Supplies as a business name, showing herself as the sole proprietor. She said that her functions as Principal Librarian did not include keeping records; that was the function of library assistants, and they had kept records. However, she had had to certify Local Purchase Orders and none of the staff under her control had authority to do so. She admitted preparing the two Local Purchase Orders dated 19 and 20 May 1997 as standard practice but said that all the books were received in good order and that, if they could not be located on 6 June 1997, the schools to which they had been despatched should have been asked to confirm that they had received them. She had given instructions to library assistants to despatch them; it was their function to do that, not hers.

The appellant included with her letter copies of correspondence which she alleged had passed between herself and her friend in America immediately before and shortly after she registered the business name on 28 November 1995. She also enclosed a copy of the application for registration of the business name, which showed her as the person registering the business and her address as the address at which it would be conducted, and a copy of a cancellation of the registration on 18 June 1997. Finally, she included a copy of a letter dated 6 December 1995 addressed to the Secretary of the Public Service Commission informing him of the registration of the business name and stating that she had registered it on behalf of her friend, whom she named, and that she would "in no way be directly involved in the running of the business."

Having received the appellant's letter responding to the charges, the first respondent made further inquiries. He apparently obtained statements from the library assistants who had been working under the appellant's control during the relevant period and also copies

of numerous cheques issued between January 1996 and May 1997 in favour of Modern Book and Library Supplies for books supplied on Local Purchase Orders issued by the appellant. There are no copies of the library assistants' reports in the appeal book but copies of the cheques are included and bear what appear to be the signatures of the appellant endorsing them. According to an affidavit sworn on 10 November 1997 by the first respondent's Director of Administration and Finance, the second respondent was supplied by the first respondent with "written statements from all persons who had a direct knowledge of the allegations made against the [appellant]". The deponent stated further that the respondents were not obliged by regulation 41 of the Regulations to give the appellant an opportunity to be heard orally. There is no suggestion that either of the respondents provided the appellant with copies of the cheques or of any of "the written statements from all persons who had a direct knowledge of the allegations made against the appellant", or that either of them informed her that the Commission had copies of the cheques or what was contained in the written statements. Finally there is no suggestion that she was given an opportunity to explain why she had endorsed the cheques.

The letter sent to the appellant giving her notice of her dismissal from the public service stated that on 20 August 1997 Public Service Commissioner Hector R. Hatch had considered the three charges, the fact of her interdiction from the public service, her denial of the charges and her explanation given in response to them, the statements of the staff of the Library Services of Fiji, and the first respondent's report on the subject and the appellant's service record. It said that, "after careful consideration and assessment/analysis of all the reports and documents submitted to him he had been satisfied as to the truth of the charges", did not consider it necessary to conduct any further investigation or inquiry, found her guilty as charged, decided that she should be dismissed from the public service and dismissed her.

The power of the Public Service Commission ("the Commission") to exercise

discipline over staff in the Ministry was delegated to Mr Hatch by the Commission on 27 November 1996 (pp. 99-101). The powers delegated expressly included power to interdict an officer under regulation 42 of the regulations and to impose penalties under regulation 51.

Regulation 41 of the Regulations, as far as is relevant, provided:

"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.

.....

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

Section 10 of the Public Service Decree 1990 empowered the Commission to "make General Orders covering the work..... of employees for their guidance, assistance and conduct." The General Orders already in existence were deemed to have been made under section 10 until amended, superseded or revoked. Section 11 authorised the Commission to issue circulars or manuals containing instructions to be observed by employees.

The appellant applied to the High Court for judicial review of Mr Hatch's decision on the grounds that the respondents had breached the rules of natural justice, abused their discretions under the Regulations, exceeded their jurisdictions and acted contrary to the appellant's legitimate expectation of fair disciplinary proceedings.

In the High Court the learned judge dismissed the application, finding that none of the grounds on which judicial review had been sought had been established. As Mr Tuberi has made clear in his written submission to this Court all but two of the grounds of the present appeal directly concern the alleged failure of the respondents to accord the appellant natural justice. One of the other grounds does not really raise a different issue; it concerns the learned judge's alleged failure to follow judicial precedents in dealing with the questions of natural justice. The remaining ground is that the learned judge failed to apply regulation 52 of the Regulations properly.

Regulation 52 reads:

"52. (1) Where criminal proceedings have been instituted in any court against an officer, the Commission shall not take proceedings against

the officer upon any grounds arising out of the criminal charge until the court has determined the matter and the time allowed for an appeal from the decision of the court has expired; but where an officer on conviction has appealed, the Commission may commence proceedings after the withdrawal or determination of the appeal.

(2) Nothing in this regulation shall prevent the officer from being interdicted from duty pursuant to Regulation 42."

At the time of the proceedings before Pathik J, no criminal charge was pending. But we were informed by counsel for the appellant that on 5 April 2000 a charge had been laid. A copy of the charge was handed up to the Court. It was a charge laid pursuant to s.111 of the Penal Code (cap 17) for abuse of office. The appellant has pleaded not guilty to the charge. The hearing of it is pending.

In dealing with the submissions made to him on the appellant's behalf that the respondents had not accorded her natural justice, the learned judge referred to a number of decisions of the House of Lords, the New Zealand Court of Appeal, the High Court of Australia and the Full Court of the Supreme Court of Victoria. From those cases he derived the propositions that there are some circumstances in which natural justice, or procedural fairness, may not be required and that, where it is required, the requirement varies according to the character of the decision-making body and the nature of the decision which it has to make. He noted the observation of Lord Diplock in *O'Reilly v. Mackman* [1983] 2 AC 237 that, where a person is charged with having done something and, if the decision-maker is satisfied that he has done it, the consequences will, or may, affect him adversely, he must be given a fair opportunity of hearing what is alleged against him and of presenting his own case, and that, if he has not been given it, the decision reached is null and void.

His Lordship stated that he could not see that there were any special circumstances

which rendered a hearing desirable and that he did not think that it had been necessary for the respondent " to obtain a reply to the statements from the [appellant] before interdicting her and finally dismissing her". He found that the procedure followed met the requirements of regulation 41 and that it "did match what justice demanded". He appears to have addressed his mind principally to the question whether the appellant should have been accorded an oral hearing, and not to have given consideration to the fact that the respondents did not inform the appellant that they regarded her signatures endorsing the cheques as significant or tell her what were the contents of the statements made by the library assistants, which were stated as having been taken into account by Mr Hatch.

In his written submission to the High Court in reply to the respondents' written submissions Mr Tuberi had drawn to His Lordship's attention the judgment of the Fiji Court of Appeal in *The Permanent Secretary for the Public Service Commission and the Permanent Secretary for Education v. Epeli Lagiloa* Civil Appeal No. ABU0038 of 1996, delivered on 28 November 1997, and had provided him with a copy of it. The learned judge did not refer to it in his judgment.

In his submission to this Court Mr Tuberi points out that *Lagiloa* concerned the operation of regulation 41 of the Regulations and that in it the Court observed that, as the legislation did not exclude, limit or displace the rule implied by the common law, the person charged was entitled to a fair opportunity to be heard. Mr Tuberi submits that the learned judge erred in not following the judgment of the Fiji Court of Appeal in *Lagiloa*. On the other hand, Mr Kumar in his written submission argues that the learned judge was correct in stating that each case is to be decided on its own facts, was not, therefore, bound to apply *Lagiloa* and was entitled to find that the procedure followed in the appellant's case was fair to her.

In our view the learned judge was correct in stating that what amounts to procedural fairness in any particular instance depends on the circumstances of that case. However, we believe that he erred in failing to have regard to the reasoning of the Court in *Lagiloa* in relation to the requirements of natural justice in disciplinary proceedings under regulation 41. We are of opinion that Mr Hatch ought not to have had regard to the assistant librarians' statements without the appellant having first been informed of their contents and given an opportunity to respond to them. Although there is no express reference to Mr Hatch having had regard to the endorsement of the cheques by the appellant, the cheques were material obtained by the first respondent and presumably delivered to Mr Hatch when the other material was delivered to him. It is reasonable to assume that he took them into account. It was, in our view, a breach of natural justice for him to do so without first giving the appellant an opportunity to explain why she had endorsed them.

If the appeal succeeds on the natural justice grounds, it will not be necessary to consider the final ground of the appeal, which relates to regulation 52 of the Regulations. There is evidence that, when the second respondent dismissed the appellant, the police were investigating whether she had committed any criminal offence but had not decided whether to charge her with any such offence. The position has now been clarified. A charge has been laid.

The critical facts of this matter are the failure by Mr Hatch or anyone else in the Public Service Commission or the Ministry to disclose to the appellant the statements which were obtained from the library assistants. These were taken into account by Mr Hatch in reaching his conclusion. The letter of 25 June 1997 expressly states that that is the case. The appellant has never seen the statements. Yet they were relied on by Mr Hatch in reaching his conclusion that the charges had been established and that the appellant's employment should be

terminated. Similar considerations apply in relation to the cheques. Mr Hatch does not mention them. It seems clear that he had them and they too should have been given to the appellant.

The appellant has at all times denied the charges but apart from the initial invitation to her to say whether she admitted or denied her guilt and to give any explanation which she might wish to give, she has never been heard on the matter. Mr Hatch conducted no hearing nor did he invite the appellant to make any further submission. The appellant was not given the statements or the cheques. Furthermore, the appellant has never been heard on the question of penalty. It may be that the facts point strongly to the appellant being guilty of breaches of Orders 306 (a) and 312 (b) of the Public Service Orders. But depending on the circumstances dismissal may have been far too harsh a penalty. Mr Hatch deprived himself of the opportunity of making a proper judgment about the matter by not hearing the appellant.

On the basis of these facts, it is enough for us to state that this is a clear case of a serious breach of the obligation to proceed regularly. The matter may be put in a number of ways. Plainly the appellant has been denied natural justice and procedural fairness. There is no basis for any other view.

It is important that those responsible for administering disciplinary provisions in the Public Service read and understand the import of this decision and recent decisions of this Court and the Supreme Court which have preceded it. We have mentioned *Lagiloa.* The later decision of this Court in *The Permanent Secretary for Public Service Commission and The Permanent Secretary for Education, Women and Culture v Lepani Matea* Civil Appeal No.ABU0016of 1998, delivered on 29 May 1998 is to the same effect. *Matea* was upheld on appeal by the Supreme Court of Fiji in *The Permanent Secretary for Public Service Commission*

and The Permanent Secretary for Education, Women and Culture v Lepani Matea, Civil Appeal No. CBV 0009 of 1998S delivered on 10 March 1999. There the Court said:

> *"The Permanent Secretaries appeal to this Court from the decision of the Court of Appeal on the first ground. But the law on such a question is so clear that the appeal is virtually hopeless. There are numerous authorities establishing, at common law, that where someone's livelihood is at stake that person is entitled to a fair opportunity of a hearing unless the relevant legislation has clearly excluded it. There is a presumption that natural justice applies or, as Lord Reid put it in Wiseman v Borneman [1971] A.C. 298, the courts supplement procedure laid down in legislation if the statutory procedure is insufficient to achieve justice and the additional steps would not frustrate the apparent purpose of the legislation. We repeat that we are not now called upon to consider whether the constitution requires some qualification of the last part of Lord Reid's proposition. The general presumption of a common law right to a hearing is, however, so well established that we need not labour it. As already indicated an opportunity for some form of fair hearing by the commission is perfectly consistent with the scheme of the regulations. It is only the elaborate disciplinary code procedure that is excluded in a case such as this."*

Finally there is the judgment of this court delivered today in *Sherina Begum Khan v The Permanent Secretary for Public Service Commission, Director of Immigration and the Attorney-General of Fiji,* Civil Appeal No.ABU 0003 of 1998S delivered on 12 May 2000.

These cases provide a weighty body of authority providing guidance to the Fijian administration concerning the procedures which ought be followed in disciplinary proceedings against members of the Public Service. If these authorities are not applied by the administration, there will be repeated applications for judicial review, perhaps some appeals to this Court, frustrations for both the parties to the proceedings and the waste of a great deal of public time and money. None of this is necessary if people concerned with the administrative legislation of this kind read and understand the law. There is nothing to be gained by raking through countless

authorities dealing with various aspects of the rules and principles relating to natural justice when the provisions in question have been the subject of repeated decision by this Court. We add that we are not concerned with the guilt or innocence of any particular applicant for relief. The guilt or innocence of a particular employee of a charge is irrelevant. What we are concerned to ensure is that those charged with the task of determining questions of misconduct or imposing penalties proceed according to law. All that is required is the application of ordinary standards of fairness. In this case fairness was not accorded because documents taken into account by the decision-maker were never shown to the employee. The decision cannot be allowed to stand.

Accordingly the appeal is allowed and the order made by Pathik J is set aside. In the circumstances it is unnecessary to deal with the submissions relating to regulation 52. The formal orders of the court are:

1. The appeal be allowed and the orders made in the High Court be set aside.

2. The application for judicial review be granted and the finding that the appellant is guilty of charges 1, 2 and 3 set out in the letter from the Permanent Secretary for Education and Technology dated 25 June 1997 be quashed.

3. The second respondent is directed to determine the truth of the charges in accordance with regulation 41 (6) of the Public Service (Constitution) Regulations 1990 and with this Judgment.

4. The respondents are to pay the appellant's costs and disbursements of the proceedings in this Court and the High Court. Such costs are assessed at $1,500.00

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Mr Justice Jai Ram Reddy
President

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Mr Justice Ian Thompson
Justice of Appeal

.....
Mr Justice Ian Sheppard
Justice of Appeal

FIJI COURT OF APPEAL

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