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

CIVIL APPEAL NO. ABU0031 OF 2004S
(High Court Civil Action No. HBJ of 2002S)

BETWEEN:

PUBLIC SERVICE COMMISSION

Appellant

AND:

SOLOMONE SILA KOTOBALAVU

Respondent

Coram: Penlington, JA
Scott, JA
Wood, JA

Hearing: Friday, 5th November 2004, Suva

Counsel: Mr. S. Sharma with Ms. A. Uluiviti for the Appellant
Mr. K. Muaror with Ms. L. Vaurasi for the Respondent

Date of Judgment: Thursday, 11th November 2004

JUDGMENT OF THE COURT

The Respondent was the Permanent Secretary in the Ministry of Finance from 1 December 2000 until the Appellant Commission terminated his service on 27 March 2002. He had previously been the Permanent Secretary for National Planning and had served in the civil service of the Fiji Government for almost 20 years.

Following the termination of his service, he applied for judicial review seeking:

(a) An Order of Certiorari that the decision of the Commission dated 27 March 2000 be quashed;

(b) A Declaration that the decision of the Commission dated 27th March 2002 was null and void;

(c) A Declaration that the Ruling of the Commission dated 19th September 2001 that he was guilty of breaches of the Public Service Code of Conduct was null and void.

After a hearing in the High Court, orders were made by Judge Jitoko in accordance with each of these prayers. An order was also made that each party should bear its own costs. It was additionally noted that the effect of these orders was that the Respondent's status remained the same, save that he was to be regarded as having left the Public Service through his letter of resignation of 15 March 2002. No order was made for damages.

FACTS

The termination by the Appellant of the Respondent's appointment arose by reason of its dissatisfaction, in relation to two separate series of actions that had been taken by him, contrary to instructions which had been given by the Secretary for the Appellant. They may be briefly summarised.

(a) Reluctance to Implement the Appellant's Decision to Promote Netani Vosa to the Post of Manager, Debt and Cash flow Management in the Ministry of Finance.

On 30 May 2001 the Secretary for the Appellant ("the Secretary") wrote to Netani Vosa informing him of his promotion to be Manager Debt and Cash Flow Management Unit, in the Ministry of Finance. The appointment was effective immediately.

The Secretary added, by way of a footnote:

> ***"Please note that the acting appointment of Mr Rohit V. Parmesh as Manager Debt and Cash Flow Management Unit is hereby revoked effective from 30/05/2001."***

The Respondent was most displeased when he received the advice concerning the appointment of Mr Vosa, and held back its implementation. He wrote to the Secretary on 5 June. After reviewing their previous discussions, in which he had indicated Mr Vosa's unsuitability for the post, he added:

> ***"the decision to promote Mr N. Vosa has placed me in an untenable position and put me at a serious disadvantage in meeting professional and statutory responsibilities. I therefore, cannot allow Mr Vosa to assume the duties and responsibilities of the post as it would only add to the list of senior officers in my Ministry who have been promoted but are unable to cope with their respective responsibilities. I cannot allow the situation to worsen any further by placing officers in jobs which they are not well-equipped to perform."***

The Secretary responded in a letter dated 14 June 2001, in which he reaffirmed the finality of the Appellant's decision and warned, "as an executive of the public service, you are therefore reminded that the Commission's decision on the above remains and you are to ensure that Mr Vosa is accorded what the Commission feels he rightly deserves."

In a memorandum of 27 June 2001 the Respondent reiterated his deep reservation as to the suitability of Mr Vosa, and expressed concern that his views appeared to have been ignored by the Appellant adding:

> ***"This in effect completely undermines my position as the Chief Executive of the Ministry of Finance who is in the best position to assess and give advice to the Commission on the staffing needs of the Ministry, particularly in the technical areas. Where this does not happen, as in this instance, the principle of consultation is compromised with counter-productive effect and far reaching consequences."***

He concluded:

> ***"Netani Vosa's promotion will not be effected until we can resolve this matter to our mutual satisfactions."***

His office wrote on 10 July 2001 to the Appellant requesting the extension of Rohit Parmesh's acting appointment. This was declined in a memorandum of 18 July, which reiterated that Mr Vosa had been promoted to the vacant post with effect from 30 May 2001.

On 19 July the Respondent replied saying that Netani Vosa's promotion had not been effected for the reasons explained in his 27 June 2001 memorandum, and again asking that Mr Parmesh's acting appointment be extended.

At this point, the Secretary convened an urgent meeting between himself, the Respondent and the Chairman of the Appellant, for 31 July 2001. The decisions taken at that meeting can be gleaned from the Secretary's letter, dated 3 August, which states:

> *"RE: MEETING – PROMOTION OF NETANI VOSA*
>
> *I write to express the gratitude of the Commission for your attendance at the meeting to discuss the above which was convened by the Chairman Public Service Commission on 31 July 2001.*
>
> *As agreed, the Commission's decision on the promotion by [sic: of] Netani Vosa remains as earlier conveyed and all are asked to honour the decision.*
>
> *The meeting I assume had also taken account of all other matters which had been subject of recent communications relating to the above.*
>
> *Hence, I am to confirm that the above case is now considered closed."*

The Respondent still did not move to implement Mr Vosa's promotion and as a result, the Secretary sent to him a memorandum, dated 10 August 2001, giving him the following ultimatum:

> *"You are now given until 4:30 p.m. Wednesday 15 August, 2001 to implement the Commission's decision failing which disciplinary action will be instituted against you without further notice."*

On 13 August, Netani Vosa was given his letter of promotion, although his effective promotion date was amended by the Respondent from 30 May 2001 to 14 August 2001. The Respondent's alleged disregard in complying with the Appellant's decision to effect Mr Vosa's promotion from 30 May 2001, led to the Appellant laying disciplinary charges against him.

(b) Attempts to Transfer and to secure disciplinary action against Suliasi Sorovakatini

Suliasi Sorovakatini was the Principal Accounts Officer in the Ministry of Agriculture, Fisheries and Forests (MAFF). In January 2001, the Respondent and the Ministry of Finance were informed of alleged abuses and/or mismanagement of public funds within MAFF, as part of an episode which came to be known as the "Agriculture Scam."

An internal audit team from the Ministry of Finance, which conducted investigations, found what were asserted to be discrepancies amounting to serious breaches of the Financial Regulations.

On 19 March 2001, following the report of the audit team, the Respondent wrote to the Secretary recommending that Mr Sorovakatini be transferred away from MAFF, in order to allow the auditors to proceed with their investigations "without hindrance and also [to] allow us to restructure the work within the accounting section." This was opposed by the Secretary who advised the respondent, on 27 April 2001, that his recommendation was not accepted.

The Appellant in its response of 2 May confirmed that it would take up the matter with the Permanent Secretary of Ministry of Agriculture, Fisheries and Forests. This it did by a memorandum of 3 May, which forwarded the allegations and findings of the special audit team, so as to allow consideration to be given to charging Mr Sorovakatini with a breach of the Public Service Code of conduct.

On 15 May 2001, the respondent wrote to the Secretary outlining six serious allegations of breach of Regulations and Code of Conduct linked to Mr Sorovakatini, and again suggested that he be suspended in accordance with the provisions of Regulation 23 of the Public Service Regulations 1999.

On 13 June 2001, the Respondent wrote directly to the Permanent Secretary MAFF threatening to suspend any further warrant to MAFF unless he gave an undertaking to ensure that his duties as the Chief Accounting Officer of MAFF, were strictly complied with. The Respondent referred to Mr Sorovakatini's case noting that "Despite the seriousness of the allegations and offences committed, no appropriate action has been taken against the officer."

The Secretary wrote, on 3 July, to the Respondent, agreeing with his concerns in relation to the indiscipline and misconduct which had been identified. However he expressed his disagreement with the proposed way of dealing with the problem, and advised that the matter was best left to the Permanent Secretary of MAFF who was responsible under the law, to discipline that Ministry's officials.

On 25 July 2001 the Permanent Secretary of MAFF brought four charges against Mr Sorovakatini, relating to improper payments of overtime, unauthorised payments of advances, irregular purchases of computers and printers, and failure to properly supervise FNPF payments resulting in misappropriation of funds.

On 6 August 2001, the Respondent wrote to the Permanent Secretary MAFF informing him that his authority as Chief Accounting Officer, and his ability to incur expenditures, was being withdrawn until further notice, pursuant to the powers vested in the Ministry under section 5 of the Finance Act. The Respondent of his own motion also froze Mr Sorovakatini's salary.

A memorandum was then sent from the Secretary, on 13 August 2001, advising the Respondent that the suspension of Mr Sorovakatini's salary was vested solely in the

Appellant, and that the Respondent had no authority to do so himself. He was directed to restore the officer's salary with immediate effect and to pay any arrears.

On 16 August the Secretary, by letter, gave the Respondent an ultimatum that unless Mr Sorovakatini's salary was reinstated by 4:00 PM on the next day, and payment was made of his salary for the fortnight ending 9 August 2001, the Appellant would have no alternative other than to initiate disciplinary action against him. By a reply of the same date the Respondent outlined his reasons for acting in the way that he had, and indicated that he would act upon receipt of a response to this memorandum.

The Respondent next wrote to the Secretary on 22 August 2001 and indicated that unless he received a satisfactory answer by 31 August 2001 as to why no "appropriate actions" had been taken to ensure that MAFF accounts officials undertake their tasks in accordance with the requirements of the Finance Act, he would stop allocation of funds to the Appellant (under ss. 5&9 of the Finance Act).

On 23 August, the Secretary replied reiterating that under the law the Appellant alone was responsible in matters of disciplinary actions for alleged breaches of the Public Service Code of Conduct. The Secretary also warned the Respondent to seek legal advice first if he intended to go ahead with stopping the further release and allocation of funds to the Appellant. Finally he advised him that:

> ***"You have continued to defy the Commission's advise to reinstate Mr Sorovakatini's salary and you should now take note that proposed charges against you will be considered and decided by the Commission at its next meeting."***

(c) Disciplinary Proceedings Against the Appellant Arising out of these Events

Five disciplinary charges relating to breaches of the Public Service Code of Conduct concerning the MAFF matter were laid against the Respondent on 6 September 2001, as follows:

"Allegation 1

That you, Solomone Sila Kotobalavu, Permanent Secretary for Finance with the Ministry of Finance, by your wilful act, did usurp the powers of the Public Service Commission by initiating disciplinary action through withholding the fortnightly salary for pay-day 09.08.2001 in respect of one Mr Suliasi Sorovakatini, Principal Accounts Officer of the Ministry of Agriculture, Fisheries and Forests, contrary to Section 6 (2) (3) (4) (5) (14) of the Public Service Act 1999.

Allegation 2

That you, Solomone Sila Kotobalavu, Permanent Secretary for Finance with the Ministry of Finance, by your wilful act, did usurp the powers of the Public Service Commission by withholding the fortnightly salary for pay-day 09.08.2001 in respect of one Suliasi Sorovakatini, Principal Accounts Officer with the Ministry of Agriculture, Fisheries and Forests, contrary to Section 6 (2) (3) (4) (5) (14) of the Public Service Act 1999.

Allegation 3

That you Solomone Sila Kotobalavu, Permanent Secretary for Finance with the Ministry of Finance, by your wilful act, failed to comply with the lawful instructions issued to you vide the first memorandum dated 13th August 2001, by the Secretary for the Public Service, to reinstate the fortnightly salary for pay-day 09.08.2001 in respect of one Suliasi Sorovakatini, Principal Accounts Officer with the Ministry of Agriculture, Fisheries and Forests, contrary to Section 6 (4) (5) (14) and Section 20 (4) of the Public Service Act 1999.

Allegation 4

That you, Solomone Sila Kotobalavu Permanent Secretary for Finance with the Ministry of Finance, by your wilful act failed to comply with lawful instructions issued to you vide the second memorandum dated 16th August 2001, by the Secretary for the Public Service to reinstate the fortnightly salary for pay-day 09.08.2001 in respect of one Suliasi Sorovakatini, Principal Accounts Officer with the Ministry of Agriculture, Fisheries and Forests contrary to Section 6(2) (3) (4) (5) (14) and Section 20 (4) of the Public Service Act 1999.

Allegation 5

That you, Solomone Sila Kotobalavu Permanent Secretary for Finance with the Ministry of Finance, by your wilful act, had acted illegally by withholding, except for SEG 1 and SEG 2 (personal emoluments and wages), the September 2001 expenditure warranted for the Public Service Commission, with the intent to pressure and improperly influence the Secretary for the Public Service with regards to the Commission decision on the allegations against one Suliasi Sorovakatini, Principal Accounts Officer with the Ministry of Agriculture Fisheries and Forests, contrary to Section 6 (2) (3) (4) (12) and (14) of the Public Service Act 1999."

Six charges were laid against the Respondent in relation to the Netani Vosa matter, on 6 September 2001, as follows:

"Allegation One

That you, Solomone Sila Kotobalavu, whilst employed as Permanent Secretary for Finance with the Ministry of Finance by your wilful act failed to hand over Mr Netani Vosa his notices of promotion to the position of Manager Debt & Cashflow Management Unit conveyed by letter from the Public Service Commission dated 30th May 2001 contrary to Section 6 (1) (2) (3) (4) and (5) of the Public Service Commission Act 1999.

Allegation Two

That you, Solomone Sila Kotobalavu, whilst employed as Permanent Secretary for Finance with the Ministry of Finance by your wilful act failed to implement Mr Netani Vosa's promotion to the position of Manager Debt, Cashflow Management Unit from 30th May, 2001 when directed to do so by the Public Service Commission at a meeting held with the Chairperson of the Public Service Commission on 31 July, 2001 and confirmed by memorandum dated 03 August, 2001 contrary to Section 6 (1) (2) (3) (4) and (5) and Section 20 (4) of the Public Service Commission Act 1999.

Allegation 3

That you, Solomone Sila Kotobalavu, whilst employed as Permanent Secretary for Finance with the Ministry of Finance by

your wilful act failed to implement Mr Netani Vosa's promotion to the position of Manager Debt, Cashflow Management Unit from 30th May, 2001 when directed to do so by the Public Service Commission at a meeting held with the Chairperson of the Public Service Commission on 31 July, 2001 and confirmed by memorandum dated 10 August, 2001 contrary to Section 6 (1) (2) (3) (4) (5) and Section 20 (4) of the Public Service Act 1999.

Allegation 4

That you, Solomone Sila Kotobalavu, whilst employed as Permanent Secretary for Finance with the Ministry of Finance by your wilful act ignored and disregarded the Public Service Commission powers under Section 147 of the Constitution of the Democratic Republic of the Fiji Islands, and Section 20 of the Public Service Act 1999, when you chose to usurp the powers of the Public Service Commission by appointing Netani Laveti Vosa to the position of Manager Debt & Cashflow Management Unit with effect from 14 August, 2001 instead of 30th May, 2001 contrary to Section 6 (1) (2) (3) (4) and (5) and Section 20 (4) of the Public Service Act 1999, and clause 3 of the Legal Notice 102 of 30.07.99.

Allegation 5

That you, Solomone Sila Kotobalavu, whilst employed as Permanent Secretary for Finance with the Ministry of Finance by your wilful act approved Mr Rohit Parmesh to act as Manager Debt & Cashflow Management Unit from 30th May to 13 August without the approval of the Public Service Commission contrary to Section 6 (1) (2) (3) (4) (5) and Section 20 (4) of the Public Service Act 1999, and clause 3 of the Legal Notice 102 of 30.07.99.

Allegation 6

That you, Solomone Sila Kotobalavu, whilst employed as Permanent Secretary for Finance with the Ministry of Finance by your wilful act sent a memo dated 13 August, 2001 to the Secretary for the Public Service meant to improperly influence the Secretary for the Public Service Commission to amend the record of the promotion to Mr Netani Vosa to be effective from 14 August, 2001 instead of 30th May, 2001 contrary to Section 6 (1) (2) (3) (4) (12) (14) of the Public Service Act 1999."

In the letters advising of these charges, the Respondent was informed that if he wished to provide "any written information or explanation in relation to the allegations," then he was requested to do so within ten days. He was also informed that the allegations together with any reply, would be sent to the Public Service Commission, and cautioned that disciplinary action contained in Regulation 22(a) to (g) of the Public Service Regulations might be taken against him, should the Commission be satisfied that he had breached the Public Service Code of conduct.

On 11th and 12th September 2001, the Respondent provided written submissions in response to these charges, and indicated that he wished to elaborate on these submissions by "making oral statements to a tribunal and eventually to the Public Service Commission." Further submissions were supplied by the Respondent's Solicitors on 14 September 2001 in relation to both sets of charges. This was followed by a letter from the Secretary drawing attention to an advice from the Solicitor General concerning the Respondent's asserted right to have withheld the expenditure warrant for the Appellant, and by a letter from the Respondent on 18 September re-asserting his right to make an oral submission to the Appellant.

At its meeting on 19th September, for which the Respondent was not given a right of audience, the Appellant Commission determined that he was guilty of all of the charges preferred. Letters advising of these decisions were sent to the Respondent, in which he was advised that he could appear before the Commission, either in person or by representative on 26 September 2001, to mitigate any penalty which might be imposed under Regulations 22(a) to (g) of the Public Service Regulations 1999. No reasons were given for the decisions.

The Respondent then commenced Proceedings in the High Court (31 and 32 of 2001) for Judicial Review of these decisions, but they were dismissed on 15 and 22 February respectively, as premature, since final decisions had not been delivered. Notice had been given of the Respondent's intention to seek review by letters sent from his Solicitors, on 20 September 2001, to the Secretary.

Pending the hearing of these proceedings for Judicial review, the date for the supply of submissions to the Appellant, and for its meeting to determine a penalty, was extended. By its letter dated 4 March 2002, the Respondent was advised that he could address the Appellant on 13 March 2002.

In anticipation of the hearing, the Respondent prepared some written submissions which were forwarded to the Appellant on 12 March 2002.

He attended the meeting on 13 March, at which were present the Chairman and two Members, as well as the new Secretary for the Commission, and was heard on penalty. He was advised by a letter of 26 March, and by a further letter of 27 March that his employment as Permanent Secretary of Finance was terminated. That termination was said to take effect from 27 March 2002, and it is evident that it was the result of the decision made at the meeting of the Commission which had been adjourned to 18 March. No reasons were given for this determination.

Pending notification of the Commission's decision, the Respondent submitted a letter of resignation on 15 March 2002, to take effect from 19 April 2002. This resignation was not expressly accepted, being replaced by the letter of termination. In the letter of resignation, the Respondent indicated that he was taking up the position of Chief Executive Officer, Fiji Islands Revenue and Customs Authority, from 1 May 2002. His contract for appointment to that office was dated 12 March 2002.

THE APPLICATION FOR REVIEW

The Respondent then brought the proceedings in the High Court, challenging the decisions of 19 September 2001 and of 27 March 2002, which give rise to this appeal

The High Court dismissed an argument that the application was premature, for the reason advanced namely that the Respondent had not exhausted all other avenues for appeal or redress; and secondly, that the proceedings were academic, or moot, for the reason also advanced that the Respondent was no longer a civil servant, either by

reason of the termination of his employment, or by reason of his voluntary retirement on 19 April 2002.

The disciplinary action was brought principally under Section 6 of the Public Service Act 1999, which is in the following terms:

> *"6. – (1) An employee must behave honestly and with integrity in the course of employment in the public service.*
>
> *(2) An employee, when acting in the course of employment in the public service, must treat everyone with respect and courtesy, and without coercion or harassment of any kind.*
>
> *(3) An employee, when acting in the course of employment in the public service, must treat everyone with respect and courtesy, and without coercion or harassment of any kind.*
>
> *(4) An employee, when acting in the course of employment in the public service, must comply with all applicable Acts and subordinate legislation.*
>
> *(5) An employee must comply with all lawful and reasonable directions given by persons in authority in the employee's Ministry, department or parliamentary body.*
>
> *(6) An employee must maintain appropriate confidentiality about dealings that the employee has with any Ministry or any member of the staff of a Minister.*
>
> *(7) An employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with employment in the public service.*
>
> *(8) An employee must use Government resources and assets in a proper way.*

(9) A person must not, in the course of or in connection with employment in the public service, provide misleading information in response to a request for information that is made for official purposes.

(10) An employee must not make improper use of official information or of the employee's duties, status, power or authority in order to gain, or seek to gain, a benefit or advantage for the employee or for anyone else.

(11) An employee must not, except in the course of his or her duties as an employee, or with the express authority of the chief executive of his or her Ministry, department or parliamentary body, give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.

(12) An employee must at all times behave in a way that upholds the Public Service Values and the integrity and good reputation of the public service.

(13) An employee on duty overseas must at all times behave in a way that upholds the good reputation of the State.

(14) An employee must comply with any other conduct requirement prescribed by regulations, specified in directions or required of the employee by his or her chief executive.

(15) In this section "employee" includes wage earner."

In relation to some charges reliance was also placed on s.20(2) of the Public Service Act which provides:

> *"(4) Chief Executives and other employees must comply with any directions of a Service Commission that are expressed to be binding on them."*

The Court found that the Respondent's decision to unilaterally suspend the salary of Mr Sorovakatini, and to withdraw the money warrants to the MAFF and to the Appellant, were done without regard to the legal and constitutional requirements that existed, and may have gone beyond the powers bestowed upon him if they had been done without the authority of the Appellant, or of the Minister and Parliament, respectively.

Similarly, it was held that the Respondent had acted wrongly in not implementing straight away the Appellant's decision to appoint Mr Vosa, and then later in only partially implementing it.

However, there was held to be a denial of natural justice, and of procedural fairness, in so far as the Respondent had not been given the opportunity of orally making representations to the Appellant, at its 19 September meeting, in accordance with the essential principles of natural justice relating to the right to be heard, which were noted by Lord Denning MR in ***Kanda v Government of Malaysia*** [1962] AC 322 at 337.

Additionally, reference was made to the fact that while the Secretary to the Appellant was not a member of the Commission, he was present during its deliberations on 19 September 2001, giving rise to the kind of concern which was noted by Lord Denning MR in ***Kanda*** in the following passage (also at 337):

> ***"...It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations for one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough." (Emphasis added).***

Next, the Court observed that, in so far as the charges were based on breaches of s 6(2) of the Code of Conduct, that provision was cast in very general terms, such that the Respondent should have been given more precise particulars, and should also have been permitted to address the Appellant, in relation to them.

The failure to afford the Respondent natural justice, at the meeting of 19 September 2001, was held to result in the decision of 27 March being irregular. In relation to this ground of challenge, consideration was also given to the requirements of s 28 of the Constitution (concerning the right of charged persons to be given an adequate time and facility to prepare a defence) and s 22(2) of the Public Service (General) Regulations 1999 (application of the principles of natural justice in disciplinary actions), and to the observations of Lord Hailsham LC in ***Chief Constable of North Wales Police v. Evans*** [1982] 1 WLR 155 at 1160 that it is:

> ***"... important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by the law to decide the matters in question. The function of the Court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to the authority by the law."***

In relation to the Appellant's submission that the Respondent had not exhausted all available remedies before approaching the Court, since he could have appealed to the Public Service Appeals Board, it was held that this avenue for appeal had been closed to him, once his employment had been terminated by the Appellant.

The Court also dealt with the submission that the relief sought was academic, and for that reason should not be the occasion for an application to the Court (***Williams v Home Office No 2*** [1981] 1 All ER 1211 and ***Naidu v Attorney General*** FCA 39/1998); and with the further submission that the proceedings did not raise any point of public importance, or one of general public interest, that required the Court's guidance.

Each contention was rejected, the first upon the basis that the adverse consequences of the Respondent's dismissal from the Fiji public service for his reputation, would be ameliorated by the Court determining the matter: ***Peters v Davidson*** [1999] 3 NZLR 744; and the second upon the basis that the use of, and reference to, the Public Service Code of Conduct as the source of disciplinary

proceedings against Government employees, was of considerable public interest and importance.

In this latter regard it was noted that the Code was not of itself comprehensive, and that issues such as neglect of duty, failure to obey instructions, and other forms of misconduct were left to other agencies or Commissions for definition and action under the regulations of the relevant Commission (s.7 Public Service Act). In relation to the Public Service (General) Regulations 1999 there was seen to be an absence of any provision which, in defining the standards of conduct required of civil servants, would give weight to or reflect upon the principles and rules enunciated by the Code of Conduct.

In the absence of any clear framework for disciplinary arrangements of the kind that existed, for example, under s 12 of the 1974 Public Service Act, it was considered that charges based on s 6 of the 1999 Act were inappropriate, or if pursued, required the presence of the individual charged, at any disciplinary proceedings held.

By implication the determination by the Court of these questions was considered to be of sufficient public interest and importance for it to hear the matter.

In the course of its reasons there were two findings made that were strictly unnecessary for the decision of the High Court.

First, it was held that disciplinary proceedings based on section 6 of the Act, namely breach of the Code of Conduct for Civil Servants, is "inappropriate without reference to instructions that further define the circumstances to which initiation of disciplinary proceedings may be appropriate."

Secondly, it was held that even if the Commission had acted properly, the sanction imposed would appear extremely harsh and excessive, and that there were other sanctions available, short of outright termination of service , which would have seemed mere appropriate.

THIS APPEAL

The Public Service Commission now brings an appeal against this decision based upon the following grounds:

> *"1. THAT the Learned Judge erred in law and in fact in ruling that the Public Service Code of Conduct in section 6 of the Public Service Act 1999 is inappropriate authority and source of charges in disciplinary proceedings without reference to instructions that further define the circumstances to which initiation of disciplinary proceedings may be appropriate.*
>
> *2. THAT the Learned Judge erred in law and in fact in deciding that the Respondent had exhausted all available alternative remedies and that consequently his resort to the court was not premature.*
>
> *3. THAT the Learned Judge erred in law and in fact in giving a restrictive interpretation of sections 25 and 26 of the Public Service Act 1999 and thereby ruling for the Respondent that the appeal procedures to the Public Service Appeal Board can only apply if he remained an employee of the government.*
>
> *4. THAT the Learned Judge erred in law and in fact in ruling for the Respondent on the mootness point since the employee had effectively resigned from the public service."*

It is not asserted by the Appellant that the High Court erred in finding that there had been a denial of natural justice and of procedural fairness.

Ground One – Formulation of the Charges

The observations of the trial judge were strictly unnecessary for the decision as to the denial of natural justice, which was based upon the failure to allow the Respondent to present oral submissions to the Public Service Commission at its meeting of 19 September 2001, and the presence of the Secretary at that meeting. However, they did have some indirect relevance, in so far as they related to the Respondent's ability to know what charges he faced, so as to be in a position to respond to them.

Moreover, the observations which were made give rise to potentially significant questions for the Public Service, in relation to the proper approach to disciplinary proceedings, such that we consider it necessary to clarify any residual uncertainty that may arise.

Read in their full context, we do not understand his Lordship to have suggested that charges should not, or could not, have been laid under ss.6&7 of the Public Service Act. Rather the concerns, which were expressed, appear to have related to the vagueness of the present charges, and for the need for them to be properly formulated in accordance with the Act and the Regulations. With those concerns we express our entire agreement.

There can be no doubt that a breach of any of the duties specified in s.6 of the Public Service Act provides a ground for disciplinary action under the regulations of the relevant Commission (s.7 of the Public Service Act). The regulations which were applicable in this instance, and which were made under s.173(1) of the Constitution and s.15 of the Public Service Act, were those contained in the Public Service (General) Regulations 1999.

They did not create any further duty or obligation, the breach of which would give rise to disciplinary action. Their only relevance was to create a framework for disciplinary action, in so far as Reg. 22(1) specified the range of penalties which the Commission could impose, and in so far as Regs. 22(2) and (3) guaranteed to the employee the principles of natural justice.

The source of disciplinary action therefore arose under ss.6&7 of the Public Service Act, and there could be no problem in formulating a charge which is based upon a breach of one or others of the duties specified in s.6, so long as that was formulated with sufficient precision, and supported by particulars of what was alleged to constitute the breach.

It may well be, as his Lordship noted, that the current s.6 is not as tightly worded as the former s.12 of the Public Service Act of 1974, and in some respects expresses a duty in very wide terms for example sub-paragraphs (1), (2), (4) (12) and (14). However, this does not mean that, subject to the provision of sufficient particulars, a charge brought for a breach of such a subparagraph would be bad.

It is the case that s.6 largely mirrors the code of conduct which is embodied in the Public Service Act 1999 (Cth) which applies to Public Servants employed by the Australian Federal Government, and it is also the case that the validity of that legislation, as a basis for disciplinary action is accepted.

In relation to each charge or allegation that was brought in this case, reliance was placed upon an asserted breach of more than one provision of the Code of Conduct contained in s.6 of the Public Service Act. In some instances, reliance was also placed upon a breach of another provision (s.20)(4) of the Act. It follows that while there were, in all, eleven distinct acts of misconduct alleged, each act was said to have involved the breach of several provisions.

A criminal count that was charged in this way would clearly have been bad for duplicity, and would present an accused person with great difficulty because, in relation to each count, there would be uncertainty as to the precise charge that had to be answered. Equally, in the event of a conviction, it would be unclear, and unascertainable, particularly in the absence of reasons, as to the actual breach that had been established.

The strength of this difficulty can be seen by reference to the various provisions of s.6, which were said to be breached, each of which involves a different duty. In common for most of the eleven counts, were breaches alleged under subsections (2),(3),(4),(5); for six counts a breach was also alleged of subsection (14). In five instances reliance was also placed on subsection (1).

As a result for six counts, there were six distinct breaches of s.6 allege to have been committed as giving rise to that count; for five counts, four separate breaches of s.6 were relied upon on giving rise to that count; and in one case, four separate breaches of s.6 were relied upon for that count.

The difficulty for the Respondent was only compounded by the fact that, added to the s.6 breaches for the individual counts, on six occasions, reliance was also upon a breach of s.20(4) of the Act; and by the further compelling circumstance that no reasons were given to show which of these many alleged breaches, which we calculate as amounting in total to 60 breaches, was made good.

The fact that the allegations were "very serious in nature" was flagged by the Appellant in its correspondence with the Respondent, on more than one occasion; and the fact that the penalty imposed was one of termination of employment, only supports the fact that this is how the case was seen by the Appellant from the outset.

It is also not to be overlooked that, in so far as allegation 5 in relation to the Sorovakatini matter involved an allegation of acting illegally "with the intent to pressure and improperly influence the Secretary", and in so far as a similar allegation was made in count 6 of the Vosa matter, these breaches, it made good, would have amounted to criminal offences under s.22 of the Public Service Act.

It may also be observed that, in the case of allegations 1 and 2, in the Vosa matter, the breaches were said to have been breaches of the Public Service Commission Act, whereas there was no such Act.

Additionally in so far as charges were formulated in terms of the Respondent having "usurped the powers of the Public Service Commission" (counts 1 and 2 of the Sorovakatini matter, and count 4 of the Vosa matter) there is no provision in s.6, formulated in those terms. It is at least arguable whether allegations so formulated, or whether allegations formulated as breaches of s.20(4) of the Act, were good at law.

Had the charges been brought alleging in each case, a breach of a distinct paragraph of s.6, with information of the kind being provided as a particular of the breach, then, no doubt, they would have been good at law. It is that practice which should have been followed, and which should be followed for the future.

Absent a clear specification of the duty breached and the provision of suitable particulars, charges of the kind used here risk being struck down. The scatter gun approach should also be avoided since it offends against the rule of duplicity.

These considerations alone point to the fatally flawed nature of the charges that were brought.

In accordance with the principles of natural justice, and as identified by his Lordship, the Respondent was entitled to have sufficient particulars of each charge so as to know what he had to meet. The principles are well establisher, they were properly addressed by his Lordship, and they do not require any great analysis for the purposes of this appeal.

It is sufficient to note, as did Lord Denning in ***Kanda v. Government*** of Malaya (1962) AC 322 at 337 that:

> ***"if a right to be heard is to be a real right which is worth anything, it must carry with it a right to know the case that has to be met."***

In ***Carbines v. Pittock*** (1908) VLR 292 Hood J. said (at 296/7) that, when a charge is so worded that it leaves the accusation almost at large,

> ***"I think that (it) is radically wrong and is not in conformity with the true spirit of the rule."***

Those principles were clearly applicable to this case.

Grounds 2 & 3 Alternative Avenue of Appeal

It is convenient to deal with grounds of appeal 2 and 3 together, since they are related grounds. In that regard, it is obvious that ground 2 fails if it is the case that appeal to the Public Service Appeal Board was not available to the Appellant, once he ceased, either by termination or by resignation of his office, to be an employee within the Public Service.

It first needs to be observed that he was an employee at the time of the decision on 19 September, and also at the time of the making of the decision to terminate his service that was communicated to him on 26 and 27 March 2002.

At the heart of this ground of appeal is the question whether the Respondent could have brought an appeal to the Public Service Appeal Board from the decision terminating his appointment.

The power to enact laws providing for appeals from decisions of the Public Service Commission is contained in s.151 of the Constitution (Amendment) Act. The Public Service Appeal Board, which was established by the Public Service (Amendment) Act 1998 is continued by virtue of s.24 of the Public Service Act.

Section 25 of the Public Service Act provides:

"(1) Subject to this section, every employee, other than an employee on probation, may appeal to the Appeal Board under this part against –

(a) the promotion of any employee, or the appointment of any person who is not an employee, to a position in the Public Service for which the Appellant, had applied by promotion;

(b) the taking of disciplinary action against the Appellant; or

(c) ... ..."

(2) An appeal under paragraph (1)(a) lapses if, before the appeal is determined -

(a) the appellant resigns or retires or his or her employment in the Public Service is lawfully terminated....."

There is no provision comparable to sub section (2) in relation to a paragraph (1)(b) disciplinary appeal, indicating a clear legislative intention that no such restriction should apply to exclude an appeal in such a case where the employee has resigned, or had his or her employment lawfully terminated. The expressio unius rule of statutory interpretation applies.

Section 7 of the Public Service Act expressly provides that a breach, by an employee, of the Code of Conduct "is a ground for disciplinary action", under the Regulations of the relevant Commission. Regulation 22 of the Public Service (General) Regulations provides, relevantly,

"22(1). If the Commission is satisfied that the employee has breached the Public Service Code of Conduct, the Commission may –

(a) terminate the employee's employment
...."

It is clear, as a result, that a decision to terminate an employee's employment is a "disciplinary action" available to the Respondent, upon breach of the Code of Conduct. Absent some provision such as that contained in s.25(2), referable to an appeal against the taking of disciplinary action, there is no apparent reason why s.25(1)(a) should be read down, so as to confine appeals under that paragraph to those forms of disciplinary action that fall short of termination or dismissal from office.

The proposition advanced by the Respondent, and the finding of the High Court on this issue would have far reaching consequences. If correct, they would deny an employee who was terminated, but who could not advance administrative law grounds for review, any opportunity for an appeal, and redetermination of the decision on its merits. That the provision should not be interpreted in such a narrow way to exclude a right of appeal of an employee, who still held employment at the time of the decision to terminate his employment, has support in the decision in ***Wilkinson v. Barking***

Corporation (1948) 1 All ER 564 per Asquith LJ (with whom Bucknill LJ concurred) at 568)

The fact that the Respondent sent a letter of resignation on 15 March 2002, after the Commission met on 13 March, but before coming to a decision at its meeting on 18 March, does not effect the situation. He was required to give 30 days notice, and his resignation which was not accepted, was expressed not to take effect until 19 April 2002. He was therefore still an employee at the time of the decision to terminate his employment on and from 27 March 2002.

It follows that error has been demonstrated in so far as it was held that there was no avenue of appeal available to the appellant under s.25 (1)(b) of the Act to the Public Service Appeal Board.

The next question which arises is whether the existence of this avenue of appeal should have denied to the Respondent the opportunity of judicial review.

It is cardinal principle of administrative law that, save in exceptional circumstances, judicial review is not available where an applicant has failed to exhaust a suitable alternative remedy that is available.

This principle sees expression in the judgment of Sir John Donaldson MR in ***Regina v. Secretary of State for the Home Department, ex-parte Swati*** (1986) 1 W.L.R. 477 where his Lordship said (at 485):

> ***"However, the matter does not stop there, because it is well established that in giving or refusing leave to apply for judicial review, account must be taken of alternative remedies available to the applicant. This aspect was considered by this court very recently in Reg. v. Chief Constable of the Merseyside Police, Ex parte Calveley [1986] 2 W.L.R. 144 and it was held that the jurisdiction would not be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances. By definition, exceptional circumstances defy definition, but where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided."***

Similarly in ***Reg v. Panel on take-overs and Mergers ex parte Guinnes PLC*** (1990) 1 Q.B. 146 Lord Donaldson M.R. said (at p.177):

> ***"It is not the practice of the court to entertain an application for judicial review unless and until all avenues of appeal have been exhausted, at least in so far as the alleged cause for complaint could thereby be remedied. The rationale for this self-imposed fetter upon the exercise of the court's jurisdiction is twofold. First, the point usually arises in the context of statutory schemes and if Parliament directly or indirectly has provided for an appeals procedure, it is not for the court to usurp the functions of the appellate body. Second, the public interest normally dictates that if the judicial review jurisdiction is to be exercised, it should be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave to apply should be given."***

In ***Reg v. Birmingham City Council, Ex Parte Ferrero Ltd.*** (1993) 1 All ER 530 Taylor J pointed out that, in a case where there is a statutory appeal procedure, and the exception is invoked, it is necessary "to look carefully at the suitability of the statutory appeal in the context of the particular case." (See also ***Wislang v. Medical Practitioners Disciplinary Committee*** (1973) 1 NZLR 29 at 44).

This principle has been applied strictly in other jurisdictions: ***Reg v. Inland Revenue Commissioners, ex Parte Preston*** (1985) AC 835, and by the Courts in Fiji: See for example ***The State v. The Ministry of Labour & Industrial Relations and Attorney General of Fiji, ex parte Fiji Mineworkers Union*** (Suva High Court Judicial Review No. 1 of 1998) where his Lordship, Pathik J, also noted that the doctrine operates as a discretionary bar to the grant of a remedy, but not as an absolute bar to jurisdiction. For other instances of its application, see ***Makarava v. Director of Public Prosecutions and Attorney General*** (Suva High Court Judicial Review No. 8 of 1998); ***Re Tony Udesh Bidesi*** (Suva High Court Judicial Review No. 20 of 1997) and ***Re Geoffrey Miles Johnson*** (Suva High Court Judicial Review No. 11 of 1995).

The Respondent did contend in the High Court that the case was one involving exceptional circumstances, but that submission was not dealt with, as His Lordship

found that there was no alternative statutory avenue for appeal. As the point was taken below, it is open for us to determine whether the case fall within the exception, such that a proper exercise of discretion would have permitted the proceedings to be entertained.

In this regard, the Respondent has identified, as exceptional circumstances the existence of an abuse of power by the Appellant in the denial of natural justice arising from its failure to grant him an audience on 19 September, notwithstanding the several requests made for an opportunity to address the Commission; the imprecise and uncertain way in which the charges were formulated, and their duplicity; the fact that the Respondent had no confidence in the way that the Commission had dealt with the charges in circumstance where it was, in substance a judge in its own cause, and the severity of the penalty imposed.

There are some dicta in support of the first of these matters, in so far as in ***Harley Development Inc. v. Commissioner of Inland Revenue*** (1966) 1 WLR 727 Lord Jauncey, when delivering the judgment of the Privy Council, cited with approval (at 736) the statement of the general principle by Fox LJ in ***Inland Revenue Commissioners v. Aken*** (1990) 1 WLR 1374, in the course of which statement Fox LJ had referred to the presence of "an abuse of process or unfairness" as examples of cases where the Court might intervene.

There is a further consideration which is relevant to the exercise of discretion, which concerns the question whether review by the Public Service Appeal Board could have provided a suitable remedy, or "cure" of any denial of natural justice in the proceeding before the Public Service Commission.

While the approach that was once taken, to the effect that a decision, which was made contrary to the principles of natural justice was a nullity, and that the problem could not be cured by way of an appeal to a domestic tribunal, which did provide natural justice, (see for example ***Leary v. National Union of Vehicle Builders*** (1971) Ch

34 and ***Denton v. Auckland City Council*** (1969) NZLR 265), that approach has not withstood subsequent challenge in appellate courts.

The Privy Council in ***Calvin v. Carr*** (1979) 2 WLR 755 put this view to rest, holding that such a decision could not be considered as "totally void in the sense of being legally non-existent" (at 763); and that it remained susceptible of appeal to a domestic appeal tribunal (at 764 -765). What is of absence to the present case is their Lordships' conclusion, following a review of the several decisions which have addressed the question (including ***Annanumthodo v. Oilfields Workers Trade Union*** (1961) AC 945 ***Pillai v. Singapore City Council*** (1968) 1 WLR 1278 and ***Australian Workers' Union v. Bowen*** (No.2) (1948) 77 CLR 601) that

> ***"no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be "cured' through appeal proceedings."***

Their Lordships noted that there were a range of cases, observing at one extreme were cases where "the rules provide for a rehearing by the original body, or some fuller or enlarged form of it," where" it is not difficult..... to reach the conclusion that the first hearing is superseded by the second..... " (at 765).

At the other extreme, it was noted are cases where "after examination of the whole hearing structure... the conclusion is reached that a complainant has the right to nothing less than a fair hearing both at the original and at the appeal stage" (at 765).

In between there are other case, where there Lordships said:

> ***"In them it is for the Court .... to decide whether, at the end of the day, there has been a fair result, reached by fair methods,..... Naturally there may be instances when the defect is so flagrant, the consequence so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result." (at 766).***

This decision was applied in ***Slipper Island Resort v. Number One Town and Country Planning Appeal Board*** (1981) 1 NZLR 143 and in ***Love v. Porirua City Council*** (1984) 2 NZLR 309, and it is one which we consider should be applied in this case. As indicated, it requires consideration of the extent to which the appeal to the Public Service Appeal Board could provide a suitable avenue for redress, thereby producing a just result.

Of considerable importance in this respect is the nature of the appeal which lies to the Public Service Appeal Board.

As has been observed earlier, the charges which were brought by the Appellant, and determined by it, and which arose out of disputes between its Secretary and the Respondent, were seriously flawed. In those circumstances, significant questions arise as to whether the Public Service Appeal Board could have adequately dealt with an appeal.

By reason of s.26(4) of the Public Service Act the onus of proof in such an appeal, to establish error, lies with the party bringing the appeal and while evidence may be received, including additional documentary evidence in accordance with Regulations 7 & 8 of the Public Service (Appeal) Regulations 1999, the Appeal mechanism would not have been well suited to a case that was fundamentally flawed both in relation to the charges and in relation to the denial of natural justice that had occurred, in this case.

It was accepted by the Appellant that the way in which the charges were formulated and decided, left it quite unclear, and indeed unascertainable which breaches of the Code of Conduct had been established. It was however submitted that the Appeal Board could either reformulate the charges and hear the matter de novo, or remit the proceeding to the Public Service Commission. The difficulty with this submission is that there is no clear source of power in the Appeal Board to do either of these things. Moreover any remitter would have run into the same problem in hearing the matter upon the basis of fundamentally flawed charges.

In proceedings before the Appeal Board the Respondent would have had the onus of establishing that the decision of the Public Service Commission as to his guilt, and as to penalty, were wrong. As such, while that appeal would have had some of the features of a rehearing, it did not have all of those features, because of the onus which was placed on the Respondent, by reason of s.26(4) of the Act. Moreover there is no right of appeal from the Board's decision, and the consequences of the original decision were of considerable seriousness to the Respondent.

The decisions of the Commission as to guilt and penalty were intrinsically linked, since the severity of the penalty would depend on the nature and extent of the breaches established. Yet, for the reasons earlier identified that was unascertainable both by reason of the scatter gun charges, and the lack of any reasons for the first decision.

In all of those circumstance this was a case which, in our view, attracted an exercise of the discretion to allow the proceedings to be brought by way of judicial review. It was a case falling within the category where the alternative avenue for appeal was not one that could have produced a just result. It also fell within the category of case where exceptional circumstances have been shown.

Quite apart from the fundamental flaw in the charges, and the uncertainty that persists as to the precise nature and extent of the breaches which had been made good, is the circumstance that there was a flagrant abuse of power in not extending to the Respondent a right of audience at the 19 September 2001 hearing, and in the presence of the Secretary at that hearing.

While the Secretary had duties in relation to assisting the Commission with the performance of its duties, and while in most instances his presence would not have been of concern for the reasons given in ***Wislang v. Medical Practitioners Disciplinary Committee*** (1973) 1 NZLR 28 at 33, the present case stood in an altogether different position since it was the Secretary whose conflict with the Respondent had given rise to the charges. The situation in this case was more akin to that in ***Leary v. National Union of Vehicle Builders*** (1971) Ch 34 and ***Stollery v. The GreyHound Racing Control Board***

(1972) 128 CLR 509 where the presence of the accuser at the tribunal's meeting was held to have involved a denial of natural justice even through he had not participated in the deliberations.

This ground is, accordingly, not made good.

Ground 4 – Proceedings Moot

It was the Appellant's submission that, as the Respondent had elected to resign his position, and take up alternative employment, the relief sought was of no practical value, and, on that account, the proceedings should have been dismissed.

The principle upon which the Appellant relied was that stated by Viscount Simon L.C. in ***Sun Life Assurance Company of Canada v. Jervis*** (1944) A.C. 111 at 113-114 where His Lordship said:

> ***"I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties... . I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."***

The dicta of Viscount Simon was applied by the House of Lords in ***Ainsbury v. Millington*** (1987) 1 WLR 379, where Lord Bridge, who delivered the leading judgment, said, at p.351:

> ***"It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law where there is no dispute to be resolved."***

Each of these decisions concerned disputes as to private rights – in the ***Sun Life*** case as to the terms of an insurance policy, and in ***Ainsbury v. Millington*** as to the parties' rights to occupation of a property. In ***Reg v. Board of Visitors of Dartmoor Prison*** (1987) QB 106, and ***Reg v. Secretary of State for the Home Department*** (1966) 1 WLR 298, however, the Court of Appeal, and the House of Lords, respectively, held it appropriate to hear the proceedings, by reason of the questions of general public interest, or of fundamental importance, that were involved in those cases.

Each of these decisions was cited, without questioning their correctness, by Lord Slynn in ***Reg v. Secretary of State for the Home Department, ex parte Salem*** (1999) 1 A.C. 450 where his Lordship (with whom the remainder of their Lordships agreed) said, at 456 to 457:

> ***"My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the Sun Life case and Ainsbury v. Millington (and the reference to the latter in rule 42 of the Practice Directions applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.***
>
> ***The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."***

To similar effect have been the decisions in ***Williams v. Home Office*** (1981)1 All ER 1211; ***Gardner v. Dairy Industry Authority of New South Wales*** (1977) 52 ALJR 180; ***Madever v. Umawara School Board Trustees*** (1993) 2 NZLR 478; ***Richard Krishnan Naidu v. Attorney General of Fiji*** CA 39 of 1998 and ***Rev. Akuila Yabaki v. Attorney General of Fiji*** CA 61 of 2001.

While it is the fact that, by the time that 19 April 2002 arrived, the Respondent had moved on, this case could not have been dismissed on so narrow a proposition.

There are two ways in which the issue was neither moot, nor one the determination of which lacked a practical utility. First, and foremost, while the termination decision stood, the Respondent was a person who went forward with an entry on his record of having been dismissed from the Public Service of Fiji, as the result of findings of multiple breaches of the Code of Service, some of which, having regard to the multiplicity of breaches alleged under each count, could only have been regarded as seriously reflecting on his honesty and integrity. This was not aided by the continuing uncertainty as to which of the very many allegations that were encompassed within each count, had in fact been made good. There was a practical utility for him in having his name cleared, since the presence of such an entry on his record may well have affected him in public life, and in seeking future employment, whether in the civil service, or in the private sector.

It was this kind of consideration that was regarded as important in ***Peters v. Davidson*** (1993) 3 NZLR 744 where it was held that judicial review was justified to correct an error of law which materially affected a matter of substance relating to a finding, particularly where the error damaged the reputation of the person directly concerned in the inquiry (See also ***Institute of Chartered Accountants of New Zealand v. Bevan*** (2003) 1 NZLR 154 at 170).

Of less importance and probably insufficient of itself, is the fact that if the termination decision was quashed, then the Respondent was entitled, should he seek it, to payment of his salary between 27 March and 19 April, a period of 3 weeks or so.

In any event the issues which arose concerning the decision of the Appellant, and the procedure which were followed were of general public interest, and of importance to the Public Service generally, in relation to the correct way in which disciplinary proceedings brought under the Public Service Act should be conducted.

In these circumstances, we are not persuaded that the proceedings were moot, or that relief should have been refused by reference to the principles earlier noted. Put another way, we are not persuaded that the discretion which existed was exercised other than in accordance with proper principles.

This ground is not made good.

It follows that the appeal should be dismissed. We order the Appellant to pay the Respondent's costs fixed in the sum of $2,000.00.

Penlington, JA

FIJI COURT OF APPEAL

Scott, JA

Wood, JA

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