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

CIVIL APPEAL NO. ABU0078 OF 2007S
(High Court Civil Action No. HBJ 35 of 2007S)

BETWEEN: **NAVITALAI MEYA DAKAI**

Appellant

AND: **CHAIRMAN – PUBLIC SERVICE**
APPEALS BOARD

Respondent

Coram: **Byrne, JA**
Hickie, JA
Lloyd, JA

Hearing: **Wednesday, 19th November 2008, Suva**

Counsel: **I.V. Tuberi for the Appellant**
K. Muaror for the Respondent

Date of Judgment: **Friday, 21st November 2008, Suva**

JUDGMENT OF THE COURT

[1] By way of application filed in the High Court on 22 October 2007 Navitalai Meya Dakai ('the appellant') applied to the High Court for leave to apply for judicial review of decisions of the Public Service Appeal Board ('the PSAB') and the Public Service Commission ('PSC') dismissing the appellant from the Public Service with effect from 10 February 2005. The relief sought by the appellant in his application to the High Court were orders quashing the decisions of both the PSAB and the PSC, damages by way of unpaid wages and an order for costs. The application came before a judge of the High Court on 25 October 2007 and on the same day the judge refused the appellant leave to apply for judicial review.

Factual Background

- [2] The appellant joined the public service on 21 February 1989 as a temporary teacher with the Ministry of Education ('the Ministry'). The appellant was promoted to different positions within the Ministry and by early 2003, the time of the events the subject of these proceedings, the appellant was employed as a Technical Officer at the Research and Development Section of the Ministry. From the material provided to us it appears that the appellant's responsibilities within the Ministry included involvement in the tendering process for contracts awarded for the erection of new school buildings. As we understand the process, the Ministry would provide funding for new works direct to school administrators, and then those administrators would call for tenders for the works, the tendering process being supervised by the Ministry.
- [3] One tender over which the appellant had some supervisory role was a tender for the upgrading of the Methodist owned Navuso Secondary School. The appellant submitted three tenders to the Methodist Church ('the Church') for consideration by the Church, those tenders being priced at \$175,000.00, \$184,000.00 and \$200,000.00 respectively. In a letter from the Ministry to the Church signed by the appellant and dated 15 February 2003 the Ministry recommended to the Church that it award the building contract to the lowest bidder, a construction company named Veitacini Building Construction ('VBC'). The Church accepted the Ministry's recommendation and duly awarded the tender to VBC. VBC maintained a bank account with the ANZ bank. At some stage after the tender was awarded to VBC a cash cheque in the sum of \$87,500.00 drawn by the Church was deposited into VBC's ANZ bank account. This cheque represented part payment by the Church to VBC for the upgrade of Navuso Secondary School.
- [4] The Ministry later discovered that the appellant was Chairman and a trustee of VBC and that VBC's registered address was the same as the appellant's residential address. The Ministry believed that the appellant was the silent controller of VBC and that the appellant had abused his position within the Ministry to ensure VBC was awarded the tender for the upgrade of Navuso

Secondary School. The Ministry also believed it was the appellant who collected and deposited the Church's cheque into VBC's ANZ bank account.

[5] By way of letter dated 10 April 2003 the Ministry notified the appellant that he was forthwith suspended from duty for breaching the provisions of sections 6(1), 6(7) and 6(10) of the Public Service Act ('the Act'), which provisions require public service employees to behave honestly and with integrity; require employees to disclose conflicts of interest (real or apparent); and prohibit employees from making improper use of their position to gain any benefit or advantage for themselves or anyone else. The Ministry alleged in the suspension letter that the appellant had abused his office by awarding contracts to his own company and collecting cheques or payments himself.

[6] By way of letter from the Ministry to the appellant dated 4 July 2003, pursuant to section 7 of the Public Service Act the appellant was formally charged by the Ministry with four disciplinary charges averring breaches of various sub sections of section 6 of the Act. The charges related to the appellant's connections with VBC and his involvement in the tender awarded by the Church to VBC for the upgrade of the Navuso Secondary School, including an allegation that he had collected the \$87,500.00 cheque paid to VBC. The charges were as follows:

"Charge 1

That you, Mr NAVITALAI MEYA DAKAI, whilst employed as Technical Officer at the Research & Development Section of the Ministry of Education, did fail to declare your business interest, being one of the trustees of Veitacini Building Construction ("the company"), whose account is kept at the ANZ Bank and that you collected a payment of \$87,500 on behalf of the said company, such conduct being an offence within the meaning of section 6(7) of the Act whereby: "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."

Charge 2

That you, Mr NAVITALAI MEYA DAKAI, whilst employed as Technical Officer at the Research & Development Section of the Ministry of Education, did on or about February this year, behaved dishonestly when you obtained and provided 3 quotations one being from the Company which provided the lowest bid amount thus securing the tender for the construction of Navuso Methodist High School from the Methodist

Church in Fiji, such conduct being an offence within the meaning of section 6(1) of the Act whereby "an employee must behave honestly and with integrity in the course of employment in the public service."

Charge 3

That you Mr NAVITALAI MEYA DAKAI, whilst employed as Technical Officer at the Research & Development Section of the Ministry of Education, did on or about the 10th of February 2003 abuse your office by making improper use of your official duties, when you used the Ministry's letter head to inform the Methodist Church in Fiji that the tender had been awarded to the Company to carry out the development project at the Navuso Methodist High School, such conduct being an offence within the meaning of section 6(10) of the Act whereby: "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 of the employee or for anyone else."

Charge 4

That you Mr NAVITALAI MEYA DAKAI, whilst employed as Technical Officer at the Research & Development Section of the Ministry of Education, brought disrepute to the Public Service and that you failed to uphold the integrity of the Public Service when you made improper use of your authority to gain an advantage for yourself, such conduct being an offence within the meaning of section 6(12) of the Act whereby: "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."

- [7] In its letter of 4 July 2003 the Ministry also requested the appellant to state in writing within 14 days whether he admitted or denied the four charges and invited him to provide any explanation in relation to his alleged behaviour the subject of the charges.
- [8] In a letter dated 30 July 2003 the appellant wrote to the Ministry responding to the allegations the subject of the four charges laid against him. In short, in his response the appellant denied collecting the cheque; stated he was merely a trustee of VBC; stated he had no personal interest in VBC and received no benefits whatsoever from it; stated he did act as technical advisor to the company and stated he had in no way caused or influenced the award of the tender to VBC.

- [9] On 2 September 2004 the PSC conducted a disciplinary hearing into the four charges laid against the appellant. In the letter notifying the appellant of the hearing he was advised to appear and present any evidence that could help his case. He was advised that any person of his choosing could represent him. The appellant appeared at the hearing on 2 September 2004 together with his solicitor. By way of letter dated 8 November the appellant was notified by the PSC that at a meeting held on 2 September 2004 it had found him guilty of *'two of the charges laid against you...based on the submissions and evidence adduced at the hearing on 2 September 2004'*. The matter was adjourned to a later date for the hearing of mitigation.
- [10] On 9 December 2004 the Ministry wrote to the appellant advising him that the Ministry had been advised by the PSC that another hearing into the four charges the subject of the disciplinary hearing conducted by the PSC on 2 September 2004 was to be held on 16 December 2004. In this letter the Ministry requested the appellant *'to defend your case'*. It is not clear from the papers made available to us why a second hearing on the merits of the charges was being convened by the PSC. Certainly, the appellant was not asked if he consented to a second hearing. In any event, the second hearing took place on 16 December 2004 and by way of letter dated 17 December 2004 the appellant was notified by the PSC that at its meeting the previous day it had found the appellant *'guilty on the first part of charge 1, and on charges 2, 3, and 4'*.
- [11] At the request of the appellant the matter was then adjourned on several occasions. But finally, on 10 February 2005 a mitigation hearing took place before the PSC and by way of letter dated 11 February 2005 the PSC notified the appellant that the PSC had decided on 10 February 2005 that he *'be dismissed him from the Service with effect from 10 February 2005'*.
- [12] By way of letter dated 10 March 2005 the appellant appealed to the PSAB against the PSC's decision dismissing him from the public service. In his letter the appellant stated his grounds of appeal. Many grounds of appeal were stated in the letter but the major grounds were the insufficiency of evidence to support

the charges and that *'the PSC had breached the rule of double jeopardy'* in subjecting him to two hearings concerning the same four charges.

[13] On 10 March 2005, the same day the PSAB received the appellant's letter appealing his dismissal, the PSAB wrote to the PSC requesting it to forward to the PSAB within two weeks the PSC's submission in support of its dismissal decision and its response to the grounds of appeal submitted by the appellant. Despite numerous reminders by the PSAB to the PSC, it was not until 4 April 2007 that the PSC provided the PSAB with the requested material. The PSC's response is dated 29 March 2007. The PSC's response to the appellant's ground of appeal alleging breach of the rule of double jeopardy was to say that *'deciding to re-hear the case was in the best interest (sic) of both the parties'*. The PSC submission did not go on to explain just how a second hearing was in the best interests of the appellant.

[14] The PSAB heard the appellant's appeal on 24 July 2007. By way of letter dated 13 August 2007 the PSAB notified the appellant that it had dismissed his appeal. The reason given by the PSAB for dismissing the appeal was that *'the Board regards your actions as very serious in view of the large sums involved [\$175,000.00], that you abused your position and that you behaved dishonestly by not declaring your interest'*. The PSAB concurred with the PSC that the appellant was guilty of charges 2, 3 and 4.

The application for leave to apply for judicial review

[15] The appellant filed his application seeking leave to judicially review the decisions of the PSC and the PSAB in the High Court registry on or about 20 October 2007. The main reasons given by the appellant for reviewing the decisions of the PSAB and the PSC in his application were that the PSAB did not consider PSC's breach of the double jeopardy rule, the undue delay in the finalisation of the disciplinary proceedings (caused by the two year delay in the PSC responding to the PSAB's request for the PSC's response to the appellants grounds of appeal), and that in all the circumstance of the case the punishment of dismissal was too severe.

[16] In a brief written judgment dated 25 October 2007 refusing leave to the appellant to apply to judicially review the decisions of the PSC and the PSAB, the High Court judge hearing the matter stated amongst his reasons for refusing leave *'the [PSC] proceedings had not finished and the defendant was not subjected to a double penalty [jeopardy]. Any second hearing traversed the same ground as the first and came to the same conclusion'*. Elsewhere in his judgement the judge clearly commented on the merits of the dismissal and that the penalty was within the range of appropriate penalties. We pause here to make one obvious comment. If the PSC's original decision that the appellant was acquitted on two charges had stood, the penalty it ultimately imposed may well have been less severe.

The appeal to this Court

[17] By way of Notice and Grounds of Appeal dated 5 December 2007, the appellant appeals to this Court against the discretionary decision of the High Court judge refusing him leave to apply for judicial review. In his Grounds of Appeal the appellant raises many grounds, including the same grounds that were raised before the judge in the High Court.

[18] In order to properly determine this appeal we need only consider two major grounds of appeal raised by the appellant. The first ground is an assertion by the appellant that the judge, in commenting on the merits of the appellant's dismissal, failed to address the important issue of whether the appellant had an arguable case of demonstrable error on the part of the PSC and PSAB. Secondly, that the judge clearly erred in finding the appellant was not subjected to double jeopardy. It is convenient for us to deal with these two grounds together.

[19] The nature of an application for leave to apply for judicial review was considered by Lord Diplock in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd** [1982] AC 617 at 643:

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in

favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

- [20] Apart from the issue of whether an applicant has a sufficient interest in the decision sought to be reviewed, the major issue for a judge to consider when determining whether or not to grant leave to an applicant to apply for judicial review is whether the applicant has an arguable case for the grant of the relief sought. The judge need only be satisfied on the material available that the applicant has established an arguable case that the decision maker erred in some respect such that the relief sought should be granted. It is not for the judge considering leave, or indeed for this Court to determine the merits of the matter (*Naidu v The Attorney-General* ABU39/1998S; *Nivis Motor & Machinery Co Ltd v Minister for Lands and Mineral Resources* ABU17/1998S). Unfortunately, the judge's reasons for refusing the appellant leave to apply for judicial review reflect that his overall approach to the matter was infused with his views on the merits. His exercise of discretion miscarried.
- [21] Any person who believes he/she has been denied procedural fairness by a person or body exercising statutory power may apply to the High Court for leave to apply for judicial review of the decision maker's exercise of that power. If the claim of procedural unfairness is made out then the Court has power to declare the decision invalid. A statutory body which makes a decision adversely, directly and personally affecting a person's rights, interests or legitimate expectations must ensure that the procedures utilised in making the decision are fair. The critical question is: what does the duty to act fairly require in the circumstances of the particular case (*Kioa v West* (1985) 159 CLR 550 at page 585)?
- [22] In our opinion, and as submitted by the appellant, the duty on the PSC (and the PSAB) to act fairly was arguably breached by the holding of two hearings into the same four charges, the first hearing resulting in acquittals on two of the four charges, the second hearing convicting, in effect, on all four charges the subject of the first hearing. This to us seems grossly unfair and smells of allowing the

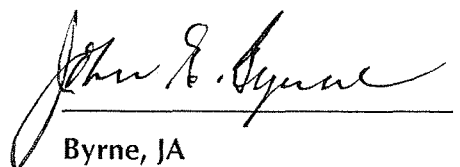
prosecutor two bites at the same cherry. Strictly speaking, the principles of double jeopardy may not be directly applicable, but they certainly highlight the obvious unfairness of what took place in this case. We simply do not understand how the PSC could suggest that the holding of two hearings was in the interests of the appellant. We simply cannot agree with the finding (by implication) of the judge in the High Court who heard the leave application that there was nothing unfair in what took place. In our opinion no reasonable judge could have made such a finding.

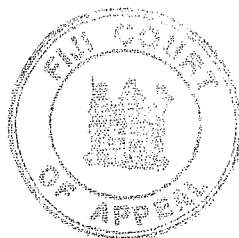
- [23] The seriousness of the consequences of the decision made is a relevant matter in determining what is required by way of procedural fairness (*Minister for Local Government v South Sydney Council* (2002) 55 NSWLR 381). Here the decision made was to dismiss the appellant from secure and well paid employment within the public service. The consequences of the dismissal on the appellant and his family were obviously serious. The content of the obligation for procedural fairness depends on the circumstances of the case, the nature of the inquiry and the subject matter dealt with. In this case the PSC laid formal charges and found the appellant 'guilty'. Its duty to act fairly was paramount. Arguably, the PSC breached its duty to act fairly in the manner in which it conducted the disciplinary hearings in this matter. In our opinion the High Court judge should have so found.

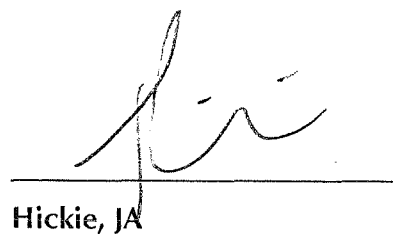
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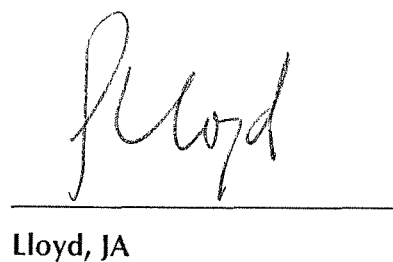
- [24] For all the above reasons this Court orders that:
- (1) The order of Coventry J made on 25 October 2007 refusing the appellant leave to apply for judicial review be set aside;
 - (2) The appellant be granted leave to apply for judicial review of the decision made by the Public Service Commission on 10 February 2005 to dismiss him from the public service and of the decision made by the Public Service Appeal Board notified to the appellant on 13 August 2007 dismissing the appellant's appeal from the decision of the Public Service Commission:

- (3) The appellant's application for judicial review to proceed in accordance with the requirements of Order 53 of the High Court Rules.
- (4) The respondent to pay the appellants costs of this appeal as agreed or taxed.


Byrne, JA




Hickie, JA


Lloyd, JA

Solicitors:

Tuberi Chambers, Suva for the Appellant

Office of the Public Service Appeals Board, Suva for the Respondent