IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW ACTION NO.: HBJ 23 OF 2007

BETWEEN:

THE STATE v. COMMISSIONER OF PRISONS
DISCIPLINE SERVICE COMMISSION
ATTORNEY GENERAL OF FIJI

Respondents

EX-PARTE: **RAJNI KANT** f/n RAM CHANDRA

Applicant

Mr. A. Naco for Applicant
Mr. L. Daunivalu with
Ms G. Hughes for Respondents

Date of Hearing: 5th June 2008
Date of Judgment: 18th June 2008

JUDGMENT

BACKGROUND:

[1] The applicant was a prison officer at Korovou Prison at Suva. In 2006, he was investigated for passing alcohol namely gin in a small Fiji water bottle to a prisoner named Timothy O'Keefe. After a series of investigations he was dismissed from the prison service. It is this dismissal from the prison

service he is trying to judicially review after obtaining leave on 8th August 2007.

GROUNDS OF REVIEW:

[2] He has advanced eight grounds for review. These are :

> ***"(a) The Commissioner of Prisons erred in law in accepting the evidence of the Analysts Certificate dated 18th October 2006 without allowing the Applicant to challenge its evidence or the tribunal itself determining that the alcohol analysed is indeed the same as the one allegedly seized by CPO Qoli and that the sample was not contaminated or interfered with in the period between the seizure and the analysis.***
>
> ***(b) The Commissioner erred in law in not allowing the Applicant to address him completely, neither did he consider the submission, that the charging officer, PPO Tupeni Tila, was biased against the Applicant as he had refused to repay money he borrowed from the Applicant and had boasted to other officers that he would sack me.***
>
> ***(c) The Commissioner erred in law in not allowing the applicant to call any witnesses in defense.***
>
> ***(d) The Commissioner erred in law in not allowing the Applicant to make any submissions in his defense.***
>
> ***(e) The Commissioner erred in law, in not allowing the Applicant to be assisted by a friend, that is a senior officer, nor did the commissioner, in his discretion***

consider whether the Applicant needed to be assisted by a friend during the proceedings.

(f) The Commissioner erred in law in failing to ensure that the first witness statement by prisoner timothy O'Keefe, where he first said that the alcohol was given to him by his girlfriend, be given to the Applicant before the hearing of the proceedings in order to allow the Applicant to properly prepare his defense.

(g) The Commissioner erred in law in failing to ensure that the Applicant read over the witness statement records and ensure that the records are correct indicating such by marking the records as R.O.F.C. (Read Over and Found Correct).

(h) The Public Service Commission erred in law in failing to allow the Applicant to be heard on Appeal before making its findings on 27th April 2007.

(i) The Discipline Service Commission erred in law in failing to give any reasons for its decision on 27th April 2007."

I shall deal with the grounds under the headings breach of natural justice, right to representation, the analysis report and bias.

BREACH OF NATURAL JUSTICE:

[3] The applicant alleges that he was not allowed to address the Commissioner completely, that he was not allowed to call any witnesses or make submissions in his defence. He also suggests that the Commissioner failed to analyse the evidence properly.

[4] Natural justice ensures certain legal standards of basic fairness. One of those standards is that ***"before someone is condemned he is to have an opportunity of defending himself, and in order that he may do that he is to be made aware of the charges or allegations or suggestions which he is to meet"***: Ridge v. Baldwin – 1960 A.C. 40 at 113. Section 30(2) of the Prison Act reinforces the above common law rule. It provides:

> ***"No officer of the Prisons Service shall be convicted of an offence against discipline unless the charge has been read and investigated in his presence and he has been given sufficient opportunity to make his defence thereto."***

[5] Procedural fairness requires that certain principles be followed or be borne in mind. These are :

> ***"(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.***
>
> ***(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.***
>
> ***(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.***
>
> ***(4) An essential feature of the contest is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.***

(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

The above six principles were set out in Dody v. Secretary of State for the Home Department – (1995) 3 ALL ER 92 at 106; and approved in Kaiseppo v. Minister for Immigration – ABU 54 of 1996.

[6] The applicant is a subordinate officer. He was charged under Section 18(29) of the Prison Service Regulation for having business dealings with a prisoner and secondly assisting a prisoner in obtaining a prohibited article namely water bottle containing gin.

[7] Regulation 19 sets out the procedure to be followed in all proceedings heard by a tribunal under Section 30 of the Act which is for trial of offences against discipline. So far as relevant Regulation 19 provides that the following steps should be followed :

"(i) the officer charged with an offence against discipline (hereinafter referred to as "the accused") shall be supplied with a copy of the charge prior to the hearing;

(ii) no documentary evidence shall be used in any such proceedings unless the accused has been given access thereto prior to the hearing;

(iii) the evidence of any witness taken during the course of the proceedings shall be recorded in the presence of the accused;

(iv) the evidence given at the proceedings need not be taken down in full, but the substance and material points thereof must be recorded in writing and read over to the accused;

(v) the accused shall have the right to cross-examine each witness giving evidence against him, and after each such witness has given evidence he shall be asked if he desires to cross-examine such witness;

(vi) the accused shall be asked if he desires to given evidence in his own defence and to call witnesses and, if he does so desire, shall be given a reasonable opportunity to do so;

(vii) the tribunal may, in its discretion, allow the accused to be assisted by a friend, being a senior officer, and, when such permission is given, his defence may be conducted by such friend."

[8] The record of proceedings before the tribunal are annexed to the affidavit of Filipe Nagera, principal administrative officer at the Public Service Commission. The applicant was subject to two enquiries both oral. The first enquiry had Assistant Superintendent of Prisons Mr. Katonibau presiding as the Tribunal. The records of the proceedings show that the

charges were read and the applicant pleaded not guilty. The records also show that the evidence of the witnesses was taken orally and the applicant given an opportunity to cross examine these witnesses. The applicant also testified. The Tribunal without making any finding, stayed the proceedings and submitted the records to the Commissioner of Prisons for his decision.

[9] The Commissioner conducted his inquiry about five weeks later. The matter was heard on 8th November 2006 by the Tribunal. The Commissioner did not rely on the evidence presented before Katonibau. He called for oral evidence. The applicant was given an opportunity to cross examine. The applicant also gave evidence. He was asked if he wished to call any evidence. The applicant indicated that he did not intend to.

[10] The Commissioner found him guilty and recommended that dismissal from service was warranted. He asked the applicant to make written representations in fourteen (14) days under Section 32 of the Prisons Act. This was done. The entire file was then sent to the Discipline Services Commission.

[11] The Discipline Services Commission agreed with the Commissioner's recommendation and the applicant was dismissed.

[12] The result was that the applicant received two sets of oral hearings. There was no need for a third oral hearing before the Discipline Services Commission. An adequate opportunity had been provided to the applicant to provide his defence. The respondent had complied with the statutory provisions of the Prisons Act.

[13] There was no breach of rules of natural justice.

RIGHT TO REPRESENTATION:

[14] Regulation 19(vi) gives the tribunal a discretion to allow the accused to be assisted by a senior officer who can then conduct the defence. The applicant naturally would first have to ask for such assistance. Here the applicant had 25 years of experience in the Prison Service so he himself would be a fairly senior officer in terms of years of experience. So he may well have felt capable of running his own defence.

THE ALCOHOL ANALYSIS REPORT:

[15] This report was shown to the applicant. It was an important piece of evidence. Whether to accept it or not, what weight to attach to the report were matters entirely for the Tribunal to decide. This court does not sit as an appellate court or as a fact finding court whereby it can substitute its views for that of the Tribunal. I do not look at the merits of the claim.

BIAS:

[16] The applicant did not address the court on the issue of bias either in written or oral submissions even though there is reference to bias in the ground. An allegation of bias should not be lightly made: Arab Monetary Fund v. Hasham & Others (No. 8) The Times 4th May 1993. The leading Fiji case on bias is Amina Koya v. The State - CAV 2 of 1997 where the Supreme Court considered the slightly different approaches which have been taken in Australia, England and New Zealand. In Australia the test is whether a fair-minded but informed observer might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case. In England the test in all cases of apparent bias is whether in all the circumstances of the case there is a real danger or real likelihood, in the sense of possibility of bias. The Supreme Court agreed with the New Zealand Court of Appeal in Auckland Casino Ltd. v. Casino Control Authority – (1995) 1 NZLR 142 that there was little if any practical difference between the two tests at least in their application to vast majority of cases. The House of Lords in Porter v. Margill - (2002) 1 ALL ER 465 held that in determining whether there had been apparent bias on

the part of a tribunal, the court should no longer simply ask whether there was a real danger of bias, but whether circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal had been biased. In Taylor v. Lawrence – (2002) 2 ALL ER 353 a five member Court of Appeal including the Lord Chief Justice and the Master of Rolls stressed the importance of assessing bias not only from the point of view of a fair minded person but also from the point of an informed observer.

[17] All the tests stated above look at bias from the point of view of an observer and not from the point of view of a litigant himself. A litigant who has lost his cause is hardly likely to be an independent observer and totally impartial. In the present case the allegations are made by the applicant. He was given two bites at the cherry. He had a preliminary hearing before Katonibau Tribunal followed by the Taoka Tribunal. The way the proceedings were conducted was akin to a criminal proceeding in a court of law. It was a fair hearing with no trappings of bias.

CONCLUSION:

[18] I see no reason to exercise my discretion to grant any of the reliefs sought. The application for judicial review fails. It is dismissed with costs summarily fixed in the sum of $500.00 to be paid in twenty-eight (28) days.

[Jiten Singh]
JUDGE

At Suva
18th June 2008