

A

RE HUSSAIN GAFOOR SAMUT

[COURT OF APPEAL, Speight, V.P. Roper, J.A. Holland, J.A.]

Civil Jurisdiction

B Date of Hearing: 17 July, 1986
Delivery of Judgment: 23 July, 1986

(Public Service—Promotion appeals to Civil Aviation Authority Appeals Tribunal—personal files with adverse comments—taken into account—party unaware thereof—entitlement to know and opportunity to explain—natural justice).

C S. R. Shankar for the Appellant.
M. S. Sahu Khan for the Respondent.

Appeal by Hussain Gafoor Samut (Appellant) against a judgment of the Supreme Court (Dyke, J.) who had made a declaration that the decision of the Civil Aviation Authority Appeals Tribunal (Tribunal) given on 9 April, 1984 was unreasonable in all the circumstances and null and void.

D The parties were employees of the Civil Aviation Authority (C.A.A.) of Fiji and applicants for the post of Senior Communication Officer. Mohammed Farook Akbar (Respondent) (Akbar) was provisionally appointed. Samut appealed to the Tribunal which allowed his appeal. Thereupon Akbar sought leave to apply for Judicial Review and an order quashing the Tribunal's decision and confirming Akbar's appointment. Leave was granted, the matter heard with the result referred to above. The only appearance before Dyke, J. was on behalf of Akbar and on behalf of the C.A.A. a situation which the Court regretted. Samut took no part in the proceedings. The tribunal had never been served.

E The judgment of Dyke, J. nullified the decision of the Tribunal on the ground that it took into account matters adverse to Akbar in his personal file and of which he was unaware.

F Akbar's entitlement to have been informed of matters adverse to him to which might be taken into account was not disputed before the Court of Appeal. Authority referred to supported Akbar's entitlement. But it was submitted on behalf of Samut that Dyke, J. erred in finding that the Tribunal did take into account matters of which Akbar was unaware; and further and in the alternative that any such matters materially affected the decision of the Tribunal.

G The Court referred to the provisions of a collective agreement made between the C.A.A. and the Fiji Public Service (registered under the Trade Disputes Act (Cap. 97). These provisions were concerned, inter alia, with promotion and criteria therefor, endorsements in personal files (no adverse comments unless the employee is

H

given a copy thereof) and appeals, the right to which is confirmed by s.14 of the Public Service Act Cap. 74 subsection (1). The Court deduced from this legislation that the right to appeal was limited, the appellant may present submissions and evidence but not offer criticism of other appointees or any other applicant. A

The decision of the Tribunal included inter alia references to the personal reports of both Samut and Akbar: each apparently adverse to them, though the only reference to a report adverse to Akbar, relating to one example of arrogance and rudeness and that following the appointment. In their reasons the court referred the much greater criticism of Akbar relating to incidents in his file; in most cases the incidents must have been known to him. There was no evidence that in any of these cases Akbar had been given a copy of the adverse comments, or was aware these comments were in his personal file before the Tribunal. B

Held: It was not sufficient to establish that Akbar knew of these incidents to comply with principles of natural justice. Akbar should have known the adverse comments were before, and likely to be held against him by, the Tribunal when he sought of uphold his appointment. Adbar's denial of such knowledge was accepted by the trial judge. C

The declaration by Dyke, J., was correct, whereby Samut's appeal will go back to the Tribunal to be heard. D

Appeal dismissed with costs.

Comments made by Dyke, J. including that the usual rules of natural justice did not apply, disapproved. Dyke, J. had misapplied what was said in Fiji Public Service Appeal Board Mahendra (Civil Appeal 53/81). The Court indicated that it would have been in order for the Tribunal to consider the parties' personal files, but before doing so it should ensure the party was aware of the adverse matter and given an opportunity to answer it. E

The court indicated that if the Tribunal finds that paragraph 1.1.8 of the collective agreement (serving notice of adverse comments on a party before placing it in his file) had not been the subject of notice the Tribunal should decide whether the matter not so notified should be taken into account after giving the person concerned an opportunity to explain or ignore it on appeal. F

Cases referred to:

Durrayappah v. Fernando (1967) 2 A.C. 337.

Wiseman v. Borneman (1971) A.C. 297.

Fraser v. State Service Commission (1984) 1 N.Z.L.R. 116.

Fiji Public Service Appeal Board v. Mahendra Singh (Civil Appeal 53 of 1981) G

HOLLAND, J. A.:

Judgment of the Court

The appellant Hussain Gafoor Samut (Samut) and the respondent Mohammed Farook Akbar (Akbar) are both employees of the Civil Aviation Authority of Fiji. In March, 1982 they each applied for the post of Senior Communications Officer. Akbar was provisionally appointed to the position. Samut thereupon appealed to H

A the Civil Aviation Authority Appeals Tribunal which on 9th April, 1984 allowed his appeal substituting the appointment of Samut to the post in place of Akbar.

B On 6th July, 1984 Akbar applied for leave to apply for Judicial Review for orders quashing the decision of the Appeals Tribunal and confirming the appointment of Akbar and for consequential or alternative declarations. Leave was granted on 21st September, 1984. After a number of preliminary hearings the matter was heard before Dyke, J. on 18th July, 1985. Although Samut was served with these proceedings brought by Akbar and appeared by Counsel at one preliminary hearing he took no steps in the proceedings and did not appear at the substantive hearing.

C It would seem that the Appeals Tribunal was never served. This was unfortunate. The Appeals Tribunal was the author of the decision subject to attack. He should have been served to have enabled him to have instructed Counsel to appear and assist the Supreme Court in the event of there being any dispute as to what had occurred before him or what procedures had been adopted. In the event nothing has turned on the failure to serve him and the subsequent lack of any representation on his behalf. Only two parties appeared before Dyke, J.—Akbar who had made two affidavits and was represented by Counsel and the Civil Aviation Authority which was represented by Counsel who specifically disavowed any instructions from or representation of the Appeals Tribunal or Samut. This had the unfortunate result that the Judge had before him only two parties one of whom sought to set aside the decision of the Appeals Tribunal which had cancelled his appointment in favour of another and the Authority which had made the appointment cancelled by the Appeals Tribunal.

E Although Samut took no part in the substantive hearing in the Supreme Court he now appeals against the decision of Dyke, J. Prior to the commencement of the hearing in the Supreme Court, Akbar with the consent of the Civil Aviation Authority, the only other party present, abandoned the claims for certiorari and mandamus and sought merely a declaration that the decision of the Appeals Tribunal given on 9th April, 1984 was unreasonable in all the circumstances and null and void. A declaration to this effect with an order for costs to Akbar was made by Dyke, J. in a reserved judgment delivered on 23rd August, 1985.

F In short the judgment nullified the appeal decision on the ground that the Appeals Tribunal took into account matters in Akbar's personal file adverse to him and of which he was unaware. In his submissions on appeal Counsel for Samut did not dispute that Akbar was entitled to be informed of allegations adverse to him to be taken into account against him. A submission to the contrary could not have been supported in the light of the well known decisions such as *Durayappah v. Fernando* (1967) 2 A.C. 337, *Wiseman v. Borneman* (1971) A.C. 297 and *Fraser v. State Services Commission* (1984) 1 N.Z.L.R. 116. Counsel for the appellant submitted that the learned trial Judge erred in fact in his finding that the Appeals Tribunal took into account matters of which the appellant was unaware and further that the learned trial Judge erred in concluding that any such factor materially affected the decision of the Appeals Tribunal.

H The terms of employment of employees of the Civil Aviation Authority are governed by a collective agreement made between it and the Fiji Public Service Association and registered under the provisions of the Trade Disputes Act (Cap. 97). Clauses 1.15 to 1.18 of that agreement are relevant to the matters before us and are as follows:—

“1.15 *PROMOTION*

Promotion from one grade to another will be at the discretion of the Authority but an employee shall have the right to appeal against such decisions of the Authority in accordance with the appeals provisions of this Agreement. A

1.16 *CRITERIA FOR PROMOTION*

Promotions shall be based on merit and shall include the following factors: B

Personal qualities, characteristics, and attributes relevant to the post to be filled; and

work, experience and competence shown in performance of duties previously carried out by him where these can be related to the post to be filled; and

relevant educational or other qualifications; C

Provided that, where two or more employees who are applicants for a vacancy are adjudged to be equal in merit for promotion having regard to the matters specified above, regard shall be given to the length of continuous permanent service of each employee.

1.17 *ANNUAL INTERVIEWS*

The Authority shall make all efforts to ensure that each employee is interviewed annually to discuss his work performance, progress, prospects and any possible training opportunities. A record of any such discussion shall be kept in the employee's personal file. D

1.18 *ENDORSEMENTS IN PERSONAL FILES*

No adverse comments shall be placed in an employee's personal file unless he has been given a copy of the same.” E

The Collective Agreement makes provision for appeals in Chapter IX, the relevant paragraphs of which are as follows:—

“9.8 At the hearing of an appeal the appellant shall be entitled to be present and heard and he may be represented by a barrister and solicitor or an union official. F

9.11 The appeals tribunal shall regulate its own procedure and in doing so, shall be guided, as far as practicable, by the Public Service Act and the Public Service Commission Regulations pertaining to appeals to the Public Service Appeals Board.”

The right to appeal in the agreement is confirmed by Section 14 of the Public Service Act (Cap. 74) Subsection (1) of which provides as follows:— G

“14.—(1) Subject to the provisions of subsection (2), every officer, other than an officer on probation, appointed by the Commission shall have a right of appeal to the Appeal Board in accordance with this section against—

(a) the promotion of any officer, or the appointment of any person who is not an officer, to any position in the Public Service for which the appellant H

A had applied, if (in either case) the appointment of the appellant to that position would have involved his own promotion:

Provided that—

- (i) an appeal under this section must be confined to the merits of the appellant for promotion to the position, and must not extend to those of any other person for promotion or appointment to the position;

B Subsections (6) and (8) are also relevant and are as follows:

“(6) In any appeal the onus of proof shall rest with the appellant.

(8) (a) At the hearing of any appeal the appellant shall be entitled to be present and may be represented or assisted by a barrister and solicitor or any officer.

C (b) At the hearing of the appeal, the officer against whose promotion or appointment the appeal has been lodged shall be entitled to be heard by the Board in such a manner as the Board thinks fit as if he were a respondent in the appeal and such officer may also be represented or assisted by a barrister and solicitor or by another officer.”

D It follows that the right of appeal is a limited one in respect of which an appellant has a right to present submissions and call evidence in favour of his claims to promotion but not in criticism of the person appointed or any other appellant for the position.

The Appeals Tribunal conducted a hearing at which both Samut and Akbar and their Counsel were present. It is common ground:—

- E
1. That the Tribunal had before him the personal files of both Samut and Akbar but these were not available to either party or their Counsel.
 2. That neither Samut nor Akbar nor their Counsel questioned the character of the other.
 3. That there were no adverse confidential reports before the Appeal Tribunal against either Samut or Akbar other than what may have been contained in their personal files.
- F

G In a carefully considered 8 page decision the Appeals Tribunal concluded that Samut was the person who should have been promoted to the post awarded to Akbar. He first compared the record of service of each noting that Akbar commenced employment with the Authority in 1962 some two years ahead of Samut. He further observed that when the appointment of Akbar was made in March, 1982 Samut had caught up on Akbar and had held senior rank for 2 years longer than Akbar as well as having acted as Senior Communications Supervisor for 11 months as against Akbar's 4½ months. He also recorded that in confidential reports before him both were fitted for promotion but Samut was shown a grade higher than was Akbar.

H However a substantial part of the decision of the Appeals Tribunal comprises references to the personal reports of both Samut and Akbar each apparently adverse to them. There is only one reference to a report adverse to Samut and that relates to

conduct of Samut following the provisional appointment of Akbar. The Appeals Tribunal found Samut's behaviour on this one occasion to be "arrogant rudeness" but he excluded this incident because as he said: A

"There is only one recorded such incident and it occurred after the post was filled."

There follows three pages relating at least 7 incidents recorded in Akbar's personal file critical of his behaviour. In most cases the incidents must have been known to Akbar as they involve correspondence to which he was a party. There is no evidence that in any of those cases a copy of the adverse comment was given to Akbar as required by paragraph 1.18 of the collective agreement. More importantly there is no evidence that Akbar, at the time of the hearing before the Appeals Tribunal was aware what, if any, of these "adverse comments" were in his personal file which was before the Appeals Tribunal. B

We do not think it sufficient to establish that Akbar must have known of these incidents. In order to comply with the basic principles of natural justice it was necessary to establish that Akbar knew that such "adverse comments" were before the Appeals Tribunal and were likely to be held against him in considering his claim to uphold his appointment to the position. Akbar has sworn on affidavit: C

"9. THAT I had at the hearing of the appeal by the Appeals Tribunal no knowledge of any document that had any adverse comments about me nor did I have a copy of any such document and upto today I do not have any knowledge of the contents of any such document except what appears in the judgment of the Appeals Tribunal. D

11. THAT at the hearing of the Appeal by the Appeals Tribunal I was not asked nor was I asked to explain and/or comment on any matter or document in my personal file or otherwise that had any adverse comments about me." E

Those sworn statements have not been denied and were accepted by the trial Judge. It follows that we consider that Dyke, J. was correct in making the declaration which he did.

This means that Samut's appeal will go back to the Appeals Tribunal to be heard. We do not wish to be thought as giving any indication as to whom is to be preferred between Samut and Akbar. We cannot, however, agree with Dyke, J. when he said: F

"As was stated in *Mahendra Singh's* case the usual rules of natural justice do not apply because the applicant would have no more right to be heard at the appeal, or before the selection board than is given under the collective agreement or by statute. Neither the selection board nor the appeals tribunal would be obliged to tell the applicant what matters it was considering adverse to him, and to give him an opportunity to be heard on those matters. Neither would be obliged to explain the reasons for its decision." G

In this respect we consider that Dyke, J. has misapplied what was said by this Court in *Fiji Public Service Appeal Board v. Mahendra Singh* (Civil Appeal 53 of 1981). All that case is authority for is that at the hearing of an appeal the person whose appointment has been appealed against has no absolute right to cross-examine witnesses called as to the character of the appellant. That is in accord with the principles of the Statute. H

In this case it is in order for the Appeals Tribunal to consider the personal files of both Samut and Akbar but before the Tribunal considers any matter contained in such file adverse to the person whose file it is, he must ensure that that person is aware of the nature of such adverse matter, and is given an opportunity before the Appeals Tribunal to explain it. If it be established before the Appeals Tribunal that paragraph 1.18 of the Collective Agreement has not been observed it will be for the Appeals Tribunal to decide whether justice requires him to take the matter into account after giving the person concerned an opportunity to explain or whether he should ignore the matter on the appeal.

The appeal against the decision of the Supreme Court is dismissed. The respondent is entitled to costs to be fixed by the Registrar.

Appeal dismissed.