

**NEMANI BAUTANI NAISOLE &
FIJI PUBLIC SERVANTS ASSOCIATION**

v.

THE ATTORNEY-GENERAL

[HIGH COURT, 1990 (Palmer J) 5 September]

Civil Jurisdiction

Public Service- appeals to Public Service Appeals Board- whether preserved or abolished- whether alternative remedies available- Fiji Service Commissions and Public Service Decree 5/1987 Section 9; Fiji Service Commissions (Amendment) Decree 10/1987 Section 2 (e), Public Service Order 1987.

The Plaintiff was dismissed from the Public Service. He began proceedings in the High Court seeking, inter alia, a declaration that his dismissal was unlawful and reinstatement. Dismissing the action the High Court HELD: (i) that the Plaintiff had a statutory right of appeal to the Public Service Appeals Board and (ii) that, the Plaintiff not having availed himself of that right the Court had no jurisdiction to entertain his action, whether or not the point was taken by the Defendants.

Cases cited:

Cooper v. Wilson [1937] 2 KB 309

Pasmore v Oswaldtwistle Urban Council [1898] AC 394

*Rothmans of Pall Mall (Overseas) Ltd & Ors v. Saudi Arabian
Airlines Corp* [1980], 3 All ER 359

Wilkinson v. Barking Corp., [1948] 1 All ER 564

H. Nagin for the Plaintiffs

Ratu Joni Madraiwiwi for the Defendant

Palmer J:

The First Plaintiff was an officer in the Public Service and a member of the Second Plaintiff. In 1988 he was charged with Disciplinary Offences against the Public Service Commission Regulations 1987 and by letter dated the 28th November 1988 the Public Service Commission dismissed him from the Service with effect from 18th August 1988.

By Originating Summons filed the 15th June 1989 the Plaintiff is seeking: a) a declaration that his dismissal was unlawful arbitrary and unreasonable, b) an order that he be forthwith reinstated in his employment with the Government of Fiji and c) an Order that the Government of Fiji pay him all his unpaid salary from the 18th August 1988. The Summons is supported by an Affidavit sworn by the First Plaintiff and the Defendant filed an Affidavit in reply sworn by the Director of Personnel in the Public Service Commission. Because questions of

A time may hereafter become relevant I set out further items in the chronology of this action. The matter came before me on the 20th November 1989. On that occasion Counsel for both parties informed me that they would rely on the Affidavits and would call no further evidence. They both wanted to file written submissions. I accordingly ordered written Submissions to be filed within 14 days. The Plaintiff filed his Submissions on the 27th March 1990. No Submissions were filed by the Defendant. The file was brought to my attention on the 28th June 1990.

B The basis upon which the Plaintiff is seeking the declaration and consequential orders is twofold: firstly he claims - and there is some evidence to support it - that the Public Service Commission had already decided to dismiss him before the appropriate procedure was put in motion which provides, inter alia, that the Commission should make its determination after giving the officer an opportunity to state his case and receiving such statement.

C Secondly he complains - and there is evidence to support also - that the Public Service Regulations provide that an officer should be charged by the Permanent Secretary or Head of his Department and thereupon the Public Service Commission should determine the matter. He says that in this case he was charged by the Commission itself and that therefore the Commission, in breach of the law, acted as both D Prosecutor and Judge instead of confining itself to its role of an adjudicator upon the Charge laid by someone else. For reasons which will become apparent I need go no further into the details of that matter.

E In the course of the brief hearing before me I raised the question of whether there was not some internal appeal within the Public Service designed to deal with this kind of problem rather than requiring recourse to the Court. I was told that there had been such an appeal procedure previously but that after the Coup it had been abolished. I find on considering the legislation that that is not so. What was abolished in fact was the right of appeal against promotions and transfers and the like. The present Public Service Commission was created by Interim Military Government of Fiji Decree No.5 dated the 3rd October 1987, Section 9 of which F preserved the appeal procedures existing prior to the 25th September 1987; this was the Fiji Service Commissions and Public Service Decree 1987. By the Fiji Service Commissions and Public Service (Amendment) Decree 1987 (No.10 of that year and dated the 4th October 1987) section 9 of the previous Decree was amended by abolishing all appeals from decisions of the Public Service Commission and terminating all appeals then pending. However it goes on to G provide:

“Appeals to lie from decisions of the Public Service Commission are restricted to Disciplinary Appeals only, no appeal is to be allowed with respect to matters concerning appointments, promotions, transfers, and gradings.”

This last named Decree was amended by Decree of No.24 of 1987 but not in any way affecting the present matter. The only subsequent amendments, namely by

Decrees No.7 of 1988 and No.8 of 1988 do not affect the provisions of the Decree No.10 here in question. Indeed the actions of the Public Service Commission in the present matter are based upon the provisions of that Decree. Decree No.10 enacts in schedule 1 the "Public Service Order 1987." Part III thereof is concerned with "Appeals from decisions of Commission in respect of Disciplinary cases." That part establishes an Appeal Board for the purpose of hearing Disciplinary Appeals. It provides for the appointment of an independent Chairman, who must not be a public servant, and of two officers nominated by the Commission and two officers nominated by the Trade Union. There are detailed provisions 'as to appointment and procedure and inter alia investing the Board with certain of the powers of a Commission of Inquiry under the of Commission of Inquiry Act. Section 10 (1) is as follows:

"1. An appeal shall lie to the Appeal Board from any decision of the Commission as a result of Disciplinary Proceedings brought against an officer."

It goes on to provide inter alia that both the appellant and the Commission are entitled to be present and to be heard and to be represented by a Barrister and Solicitor or an officer or in the case of the appellant by a representative of the Association or by himself. The Commission may also be represented by its Secretary. In the light of this legislation I consider first whether the Court has jurisdiction.

In Pasmore v. Oswaldtwistle Urban Council [1898] AC 394 the House of Lords, per the Earl of Halsbury, said:

"The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law."

In Wilkinson v. Barking Corp, [1948] 1 All ER 564; at 567; [1948], 1 KB 721 at 724 Asquith, L.J. said:

"It is undoubtedly good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal and not to others."

It may be objected that the Defendant has not taken the point. However the Court is aware of the legislation just referred to. And in Wilkinson the Court also said:

"A party cannot submit to, so as to make effective, a jurisdiction which does not exist."

In Rothmans of Pall Mall (Overseas) Ltd and others v. Saudi Arabian Airlines Corp. [1980], 3 All ER 359, at 364 Mustill J. (who was upheld on appeal) after citing the first quotation above from Wilkinson went on to say:

A “Where the statute is of this kind, it is immaterial whether the parties wish the Court to try the action. It must disclaim jurisdiction, since to continue with the action would be contrary to law.”

In the present case nothing has been put forward as to why the procedure provided for such matters by the legislature should be ignored and the matter determined by the Court instead. An Appeal Board has been expressly created for just such a case as this with a quasi-judicial structure and procedure.

B Counsel for the plaintiff has however referred to one case and that is Cooper v. Wilson [1937] 2 KB 309. That was a case where a Police officer was dismissed by his Chief Constable. He appealed against that dismissal to the Watch Committee which was the appropriate appeal body. The Chief Constable, who in reality was the Respondent to the appeal, or on another view the Prosecutor, was present with the Watch Committee when they heard and determined the appeal adversely to the officer. The officer took the matter to the High Court which granted a declaration that the presence of the Chief Constable whose mind was made up in advance was fatal to the validity of the Watch Committee’s decision. The Plaintiff seeks to draw a parallel to one of the factors alleged in the present case, namely that the Public Service Commission which was the adjudicating body here had made up its mind in advance. I have carefully considered the Judgments in that case to see whether from them can be gathered any inconsistency with the cases I have earlier referred to and whether the Court should deal with this present matter itself. However, I have come to the view that there is no such inconsistency in that Cooper v. Wilson can be distinguished because in that case what the Court was reviewing was the hearing of an appeal by an at least quasi-judicial Tribunal and not the action of an administrative authority which had made the primary decision, such as the Public Service Commission in the present case. I note in this context that Part III, section 12 (6) of the Schedule to Decree No. 10 provides that

“No appeal shall lie from any decision of the Board”

F It is of interest to note that the similar provision in the previous Public Service Act (Cap. 74) (Section 14 (11) contained the additional words:-

“and, except on the ground of lack of jurisdiction other than for want of form, no proceedings or decision of the Appeal Board shall be liable to be challenged, reviewed, quashed, or called in question in any Court.”

G For the foregoing reasons I am of the view that at least in the first instance the appeal procedure laid down in the Decree must be resorted to and that the Court has no jurisdiction to review the Commission’s primary decision. That being so the action must fail and accordingly is dismissed. In the circumstances there will be no Order as to costs.

(Action dismissed.)