

STATE

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v

PUBLIC SERVICE COMMISSION

ex parte

OVETI LALADIDI

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[HIGH COURT, 1995 (Byrne J), 19 July]

Revisional Jurisdiction

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Public Service-disciplinary proceedings-whether immoral conduct not adversely affecting the performance of duties amounts to improper conduct-Public Service Commission (Constitution) Regulations 1990 Regn 36(t).

The Applicant who was a public servant was disciplined after being found guilty of adultery. On a motion judicially to review the proceedings against him HELD: purely private immoral conduct could seldom if ever amount to a disciplinary offence.

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Cases cited:

Council of Civil Service Unions and others v. Minister for the Civil Service [1984] 3 All ER 935

R. v. Barnsley Metropolitan Borough Council, ex parte Hook [1976] 3 All ER 452

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Motion for Judicial Review.

S.P. Sharma for the Applicant

D. Balram for the Respondent

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Byrne J:

The Applicant who is a Civil Servant seeks judicial review of the decision dated 2nd November 1992 by which the Commission directed that:

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- (i) the Applicant be downgraded forthwith from Assistant Commissioner of Prisons to Assistant Superintendent of Prisons.
- (ii) the Applicant do receive downgraded salary of \$16,784.00 p.a.
- (iii) the Applicant be transferred to another District to be arranged by the Commissioner of Prisons.

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- (iv) the Applicant be issued with a final warning.

The Applicant applies for an order of Mandamus directing the Respondent to re-instate the Applicant to his substantive former position of Assistant Commissioner of Prisons and for a declaration that the Applicant's downgrading, transfer and loss of salary is unlawful and null and void.

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On the 15th of December 1992 by consent I granted the Applicant leave to apply for judicial review and directed that the Respondent file an Affidavit in Reply to that of the Applicant dated 4th December 1992 and that the Applicant have leave to swear and file any affidavit in response to that of the Respondent. He swore and filed this affidavit on the 16th of March 1993.

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On the 24th January 1994 Apolosi Vosanibola the Commissioner of Prisons was cross-examined before me on parts of his affidavit on 19th February 1993 in accordance with my direction of 29th September 1993 but counsel for the Respondent chose not to cross-examine the Applicant. I directed written submissions be filed. The Applicant filed his submission on the 28th of March 1994 but to-date despite frequent telephone calls from the Court Registry to counsel representing the Respondent, the Respondent has not filed any submission.

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This fact was not brought to my attention until the 10th of July 1995 and the Applicant is naturally concerned at the delay which has ensued without any judgment being given. This delay must be placed squarely at the door of the Respondent's solicitor but it would be unconscionable that there should be any further delay in the delivery of my judgment which now follows.

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The facts are not in dispute and I shall briefly record them before going to the evidence given on his cross-examination by Apolosi Vosanibola.

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The Applicant joined the Public Service of the Government of Fiji in the Prisons Department in 1970 as Prison Officer Class C. Over the 22 years he was promoted a number of times, the last such promotion being with effect from 2nd January 1991 to the position of Assistant Commissioner of Prisons.

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Over those 22 years the Applicant received excellent reports on his work performance from the Prisons Department as well as the Public Service Commission which were the reasons for his promotions.

Allegations that the Applicant was conducting an extra-marital affair with a female Prison Officer, Leata Saua appear to have been made first in November 1986 and these were repeated in April and June 1987 when the former Commissioner of Prisons received correspondence from a person claiming to be the Applicant's wife and from the husband of Leata Saua. The Commissioner took no action on these allegations apart from transferring Leata Saua to the Female Prison but expressly stated in a letter to Leata Saua's husband that this

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was not in any way to be taken as reflecting any belief by the Commissioner that the allegations were true.

- A Nothing more was done by the Commissioner until the 29th of December 1989 when he wrote to the Applicant on the subject of "public morality". The letter which is self-explanatory and also very paternalistic is worth quoting in full. It reads:

B	"The Commissioner of Prisons	314599
	Superintendent Opeti LALADIDI	P-C
	<u>PUBLIC MORALITY</u>	29/12/89

(As spoken to you DCP/ACP/yourself)

- C We saw you sometimes in November and again spoke to you on 29/12/89 relating to the above subject.

We are concerned with the way you have conducted yourself lately. Information reaching us indicated that you have been associated with a female subordinate officer to the extent that it has become a talking point to the subordinate officers.

- D Your action has greatly undermined the credibility of your Office and one which will not be condoned under any pretext. You should remember that this tantamount to a scandalous act of the highest order and could adversely affect your future prospect in the Service. It has now reached a point where we could see that you are not being impartial in carrying out your duties. This particular subordinate female officer has been allowed to do whatever she likes - given off indiscriminately and being irregular with her attendance - all under the guise of your office's privilege.

You are a senior officer representing the Commissioner of Prisons and as such junior officer will look up to you for guidance and advice. The way things are going, instructions coming from us have become a laughing stock simply because you have not lived up to the expectations demanded of your post.

- F Your action has also brought disrepute and shame on this Office but we stressed to you that you should now refrain from indulging in stealing someone else's property - knowing very well that the officer whom you are going around with is married and has children.

- G Our advice to you is that you now start afresh and make up for the losses which you have made.

I must warn you that should this crops again, we will take a very serious view of yourself.

(Sgd.)(L.V. Tiko)
for Commissioner of Prisons"

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The Commissioner shortly afterwards wrote another letter to the Applicant on the 3rd of January 1990 this being headed "Conduct" and it too must be quoted in full as another example of the view held then and even up to the present time by the Commissioner that he had a right to meddle in the private life of the Applicant. The professed disclaimer of such right contained in the 4th paragraph of the Commissioner's letter was not borne out by subsequent events.

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"The Commissioner of Prisons

314599

Supt Oveti Laladidi P/C

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CONDUCT 03/01/90

I refer to discussions I had with you in November and December 1989.

I have been following these very closely. However, I am indeed very disappointed that you have opted to take matters casually. For instance I spoke to you at length last Friday regarding your conduct which has brought discredit to this office. Yet on the following day Saturday 30 December, 1989, you entertained a female prison officer in the Senior and Junior Officers Mess and was reported to have indulged yourself heavily with drinks thereby you slept in the Mess. Your condition was such that subordinate officers on duty at headquarters were disgusted with such pathetic conduct.

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You are also well-known for frequenting public places which are normally accessible by subordinate officers and on many occasions you heavily drank with these officers.

Although we are not generally concerned with your private activities, they must not be such as to bring discredit on the Service.

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I was confident after speaking to you that you would have respected this office and showed improvement. I would have expected you as a senior prison officer to be exemplary in behaviour and conduct to subordinates. I regret to say that your conduct is such that it has brought discredit to this office.

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I must warn you now that any further misconduct on your part will be reported to the Public Service Commission with a view to terminating your Service.

I should remind you that your conduct now tantamount to an improper conduct likely to bring disrepute to the Service, using intoxicating liquor to excess and also you are behaving in a manner calculated to affect adversely the performance of your duties.

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As a senior officer you should act responsibly in the eyes of your subordinates, superiors and members of the public.

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It has now reached a stage whereby drastic actions will have to be taken to curb such misconduct on your part even if it means terminating your Service.

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(Sgd.)

(A. Vosanibola)

for Commissioner of Prisons"

- B In his evidence before me Mr. Vosanibola said that the two letters or Memoranda just referred to showed his and the department's concern about the Applicant's conduct - specifically his excessive drinking and having extra marital affairs. When he was asked why neither memorandum mentioned extra marital affairs he said first that it was "a confirmation of the discussion I had with him" which I take to mean that Mr. Vosanibola had formed the impression the Applicant was then having an extra marital affair or affairs. The other reason
- C he gave for not mentioning extra marital affairs was because they occurred outside working hours and because neither he nor the department was concerned with the Applicant's private activities. The department only became concerned with the alleged extra marital activities of the Applicant after an alleged incident at the Pender Court Apartments in Suva on the night of Saturday 16th May 1992 to which I shall come in a moment. After the two memos I have just
- D mentioned the Applicant was promoted to the position of Assistant Commissioner of Prisons with effect from 2nd January, 1991 on a salary scale of \$21,634.00 to \$24,435.00. He received a letter advising him of this promotion from the then Secretary to Government and the Public Service.

- E When he was asked about this in evidence Mr. Vosanibola said that between 1987 and 1992 the Applicant had received two promotions those of Superintendent of Prisons and Assistant Commissioner of Prisons. He said that he had prepared annual confidential reports on the Applicant and that because of those reports he was promoted although during the time when the Applicant was having an affair with Leata Saua. He said that the Applicant's extra marital affairs were common knowledge in 1986 and 1987 but for five
- F years the Commissioner did nothing about them. He said the Applicant was a person of integrity, honesty, neatness, courtesy and was considerate to other people. He had high motivation and was generally moderate in his use of alcohol. He also said that both the Applicant and the Commissioner had medals for efficient service in the Prisons Department.

- G The Commissioner's decision to interfere in the Applicant's private affairs came after an alleged incident at the Pender Court Apartments which I have just mentioned. The Commissioner received three statements purporting to come from persons named Serupepeli Kubanara, Tiko Varasiko and Vivili Talili. These statements claimed that some time after 7.20 p.m. on the 16th of May 1992 they accompanied Leata Saua's husband Vibose to the Apartments on information received that the Applicant and Leata Saua had taken a room

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in the Apartments.

When they arrived there they allegedly requested the Manager to call the Police and shortly afterwards two Policemen arrived and allegedly saw the Applicant and Leata Saua lying naked on a bed in Room No. 5.

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Kubanara stated that when after some time the Applicant and Leata Saua came outside he saw love bites on Leata Saua's neck. They were then taken shortly afterwards to the Central Police Station.

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Tiko Varasiko and Vivili Talili had made similar although shorter statements to the like effect.

It is crucial to the Applicant's case and Mr. Vosanibola admitted it when he was cross-examined that he did not give the Applicant a copy of the statements because he thought it was unnecessary.

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On or about 26th May 1992 the Commissioner received a letter from Mr. Vibose complaining that over the past five years his wife had been having an affair with the Applicant about which the department had done nothing and then referring to the alleged incident at the Pender Court Apartments which Mr. Bose said he had witnessed with the three other persons named.

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The Applicant complains, and it is not denied by the Respondent, that he did not receive a copy of Bose's letter until after the decision to demote of the Public Service Commission on 2nd November 1992.

It is to be made clear here that at all times the Applicant has denied having any extra marital affairs with Leata Saua but says that even it were true any such alleged affair occurred after official hours and cannot constitute improper conduct.

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Here I return to the cross-examination of Mr. Vosanibola who said that it was only after he received the highly charged letter from Mr. Bose and the three other statements that he decided to lay a charge against the Applicant. He said that these statements provided the department with "independent witnesses".

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He agreed that the Applicant had been disciplined for a moral reason and Mr. Vosanibola did not subscribe to adultery which he said was immoral according to his standards. He also agreed that two previous Commissioners had lived with de facto wives while the Applicant was employed in the department but they had not been disciplined although Mr. Vosanibola said he probably would have depending on the circumstances if he had been the Commissioner.

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He admitted that there was no statutory disciplinary offence relating to immoral conduct but said that in his opinion the Applicant's conduct was likely to bring the Prison Service into disrepute. The Applicant was a senior officer and an

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A Assistant Commissioner and as such the Prison Officers as well as prisoners and the members of the public would look up to him and expect him to conduct himself properly.

He said that it was important in his view that all Prison Officers should be exemplary in their conduct at all times.

B Although he said it was common knowledge that the Applicant had been having an affair with Miss Saua nothing had been done over the previous five years because of lack of evidence. In his view the Applicant's conduct was particularly opprobrious because Leata Saua was the mother of six young children and was much younger than the Applicant.

C Mr. Vosanibola then said that he knew extra marital affairs occurred in very high places in Fijian society and knew for a fact that these occurred even among people who held ministerial office and some very high Chiefs. It was obvious to me that Mr. Vosanibola was in great difficulty trying to justify the laying of the disciplinary charge against the Applicant. The charge against the Applicant reads thus:

“CHARGE

D That you, Oveti Laladidi, Assistant Commissioner of Prisons have engaged in immoral conduct by having an extra - marital affair with a female prison officer Leata Saua since late November 1986 and thus committed a disciplinary offence under Regulation 36(t) of the Public Service Commission (Constitution) Regulations 1990.

E In accordance with Regulation 41(2) of the Public Service Commission (Constitution) Regulations 1990 you are required to state in writing within fourteen (14) days from the receipt of this memorandum whether you admit or deny the above charge. You are also allowed, if you so wish, to give me such explanation which will enable a proper consideration to be given to the charge against you.

F If you fail to state in writing whether you admit or deny the charge, then pursuant to Regulation 41(3) you shall be deemed to have admitted the above charge against you, and one or more of the penalties specified in Regulation 51(1) of the above Regulations may be imposed by the Public Service Commission.”

G When questioned about the charge Mr. Vosanibola said that it was not what he intended because he wanted the charge to refer to immoral conduct constituted by adultery.

It is a guiding principle of our law that alleged offences should be made specific and that it is only when the evidence available shows that a person fits fairly

and squarely within a specific offence that they should even be charged, let alone convicted.

The Applicant complains that the decision to discipline and demote him is null and void as it is based upon a charge which fails to identify with precision the provisions of Regulation 36 which the Applicant is alleged to have breached and that it also fails to state without ambiguity the precise nature of the charge and the facts which constitute it.

With these complaints I agree and for that reason alone I hold that the decision to discipline the Applicant based on the charge which lacks the vital matters I have just mentioned must be regarded as a nullity and therefore quashed. There is also another reason why I grant the Applicant the relief he seeks. This is because the decision must be regarded as tainted by the three factors or grounds on which administrative action is subject to control by judicial review. These were set out concisely and clearly by Lord Diplock in Council of Civil Service Unions and others v. Minister for the Civil Service [1984] 3 All ER 935 at pp 950 - 951. They are:

- (i) illegality;
- (ii) irrationality;
- (iii) procedural impropriety.

In my judgment the conduct of the Respondent falls within all three of Lord Diplock's categories. In my view it would be rarely if ever that immoral conduct such as that alleged against the Applicant could ever constitute improper conduct within the meaning of Regulation 36(t).

There was no evidence given before this Court that even if the Applicant had an extra marital affair as alleged this had adversely affected the performance of his duties or was likely to bring the Public Service into disrepute or be prejudicial to the conduct of the Public Service. In my view it would be a bad day for the law and our society if any employer, be it private or public were allowed to be the judge or arbiter of the morals of its employees. If that occurred then truly we could say that Big Brother in the sense used by George Orwell had arrived. So far, mercifully he has not as far as I can gather but if allowed to go unchecked, actions similar to those taken by the Respondent against the Applicant could be the first step in that course. I am also satisfied on the evidence that the Respondent's action in charging the Applicant and in later convicting and demoting him was so unreasonable that no reasonable authority in the person of the Respondent would have made the decision.

I also hold that the Respondent was guilty of procedural impropriety by failing to give the Applicant copies of the three statements I have mentioned and the letter of Senitieli Bose. I should mention here that copies of that letter which was most derogatory of the Applicant went to the President, the Secretary of

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A the Public Service Commission, the Ombudsman, the Methodist Church of Fiji, the Director of Social Welfare and the Secretary of the Prisons Service. Despite this the Respondent gave the Applicant a copy of the letter only after he had been found guilty. There is a fourth ground on which I would also allow the Applicant the relief he seeks namely that even if the Applicant had been guilty of any charge under Regulation 36 the penalty imposed on him was excessive in the sense described by Lord Denning M.R. and Sir John B Pennycuik in R. v. Barnsley Metropolitan Borough Council, ex parte Hook [1976] 3 All ER 452 at p.457 and p.461.

For these reasons I make an order in terms of the Applicant's Summons of the 8th December 1992 and order:

- C (1) That Mandamus is to go directing the Respondent to re-instate the Applicant to his substantive former position of the Assistant Commissioner of Prisons.
- D (2) I declare that the Applicant's down-grading, transfer and loss of salary directed by the Respondent is unlawful and null and void.
- (3) I also order that the Respondent must pay the Applicant his costs to be taxed if not agreed.

E (*Motion allowed.*)

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