

SELESITINO LUBA

v.

FIJIAN AFFAIRS BOARD

[HIGH COURT, 1996 (Fatiaki J), 25 January]

Civil Jurisdiction

Administrative law- Fijian Affairs- dismissal of Roko- whether judicial review exclusively available- whether procedurally flawed- whether plaintiff entitled to relief. Fijian Affairs Act (Cap. 120)- Fijian Affairs Board Standing Orders 24, 25 & 26.

The Plaintiff sought a declaration that his removal as assistant Roko Tui Ra had breached the procedural requirements of the relevant standing orders. The High Court rejected a preliminary submission that the Plaintiff's complaint was exclusively open to judicial review. Having examined the standing orders the Court found that despite procedural breaches the Plaintiff had not been unfairly treated. Accordingly relief was refused.

Cases cited:

- Davy v. Spelthorne Borough Council* [1984] 2 A.C. 262
Lindsay Petroleum Co. v. Hurd (1874) L.R.5 P.C. 221
O'Reilly v. Mackman [1982] 3 All E.R. 689
Pyx Granite Co. Ltd. v. Minister of Housing and Local Government [1960] A.C. 200
Rama Gopal v. Attorney-General (1992) 38 FLR 211
Ratu Epenisa Seru Cakobau v. Fijian Affairs Board
 Suva C.A.295/88 (unreported)
Ridge v. Baldwin [1963] 2 W.L.R. 935
Russell v. Duke of Norfolk [1949] 1 All E.R. 109
Selvarajan v. Race Relations Board [1976] 1 All E.R. 12

Action for declaratory judgment in the High Court.

T. Fa for Plaintiff

J. Mataitoga for Defendant

Fatiaki J:

On the 2nd of February 1981 the plaintiff was appointed by the Fijian Affairs Board (the Board) to the position of Assistant Roko Tui, Ra. On 17th April 1990 after acting in the position for several months the plaintiff was confirmed as Roko Tui, Ra. During the course of his duties as Roko Tui, Ra the defendant was charged with responsibility for organising the Adi Ra Festival sometime in October 1991.

A The Festival it appears ultimately returned a loss of approximately \$7,000 as disclosed in an Audit Report prepared by an officer of the Board and dated 5th February 1992. In it the auditor has highlighted various items of expenditure which "required further explanations from the Roko Tui Ra".

B On the 24th February 1992 under cover of a confidential memorandum from the Permanent Secretary for Fijian Affairs and Rural Development (the Secretary) a copy of the Audit Report was sent to the plaintiff with a request that he : "... reply to all the points raised in the audit report and submit (his) replies within 7 working days ..."

A fortnight later on 13th March 1992 the plaintiff submitted his written reply in which he sought to explain and/or justify the items of expenditure highlighted in the Audit Report.

C Meanwhile on 5th March 1992 in the absence of the plaintiff's written explanation his superior suggested that disciplinary charges be laid against the plaintiff for "insubordination in not replying (within the time given him)" and "for being incompetent in the discharge of his duties".

D Even after receiving the plaintiff's reply, his superiors remained unimpressed and proposed that he be disciplined and that he be suspended from office in the interim. (see : Internal minute dated 1.4.92 from the plaintiff's immediate superior to the Secretary)

E Under cover of a confidential memorandum dated 16th April 1992 the Minister of Fijians Affairs & Rural Development (the Minister) in purported exercise of his powers under Section 14 of the Fijian Affairs Act (Cap.120) (the Act) suspended the plaintiff from duties on half salary with effect from 27th April 1992.

F I say 'purported' advisedly because although the section does empower the Minister to suspend any roko, such suspension must be based upon an enumerated statutory grounds, namely illness, delinquency, or neglect, and be of such a nature and gravity as to impact upon the officer's ability or willingness to discharge the duties of his office.

G The order suspending the plaintiff is not challenged however and nothing further need be said about it albeit that it did affect the plaintiff's remuneration for at least 6 months.

To continue with the chronology of events, on 20th August 1992 a disciplinary case was prepared by the plaintiff's superiors and submitted to the Board for its consideration along with a recommendation : that the Board act in accordance with Standing Order 25 of the Fijian Affairs Board Standing Orders 1977

(Standing Orders), to demote and transfer the plaintiff to Headquarters.

Why it was thought possible or appropriate for the Board to invoke the provisions of its Standing Orders in the face of the procedure laid down in Section 14(2) of the Act and in the face of the clear wording of Standing Order 25, is not entirely clear.

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It might be that the penalties provided in Section 14(2) of the Act were not considered appropriate in the plaintiff's case, or it might be that the officer who prepared the disciplinary case considered that once a matter was referred to the Board by the Minister for enquiry, then the Board became seised of the matter and could deal with it as it saw fit including imposing a penalty upon the officer concerned.

B

In both instances however the recommendation to the Board was clearly misconceived and wrong. As to the first hypothesis, if the statutory penalties were considered inappropriate then a condition precedent to the exercise of the Minister's powers under Section 14(2) of the Act was unfulfilled and no referral could be made to the Board.

C

In the second situation, assuming that the plaintiff's matter could be properly referred to the Board under Section 14(2) of the Act, then the Board's role in such a Ministerial referral is to conduct an inquiry at which the officer concerned: "... shall be entitled to be heard ..." and thereafter, the Minister (not the Board as appears to be wrongly assumed) may impose a penalty on the officer concerned.

D

Indeed in my reading of the relevant legislation and Standing Orders there appears to be a fundamental misconception as to the function and role of the Board as it relates to disciplinary proceedings taken against employees of the Board including rokos.

E

In this regard Section 14 of the Fijian Affairs Act (Cap.120) empowers the Minister (not the Board) in appropriate circumstances to suspend and remove a roko from office after inquiry by the Board. The Standing Orders on the other hand, are wider in their scope as they apply: "to all officers in the employ of the Board", which expression is apt to include rokos.

F

However under the Standing Orders the person charged with the primary responsibility for discipline is the Secretary not the Board which merely has an appellate function (see : Standing Order 26).

G

In other words the Board's role in any disciplinary proceeding taken against an employee is dependent upon whether such proceeding is taken, under Section 14(2) of the Act, in which case its role is limited to conducting an inquiry and making a recommendation or, under its Standing Orders, in which latter case its

role is a purely appellate one.

A Plainly under neither procedure does the Board have an original jurisdiction to hear or to impose any disciplinary penalty upon its employees. Furthermore in the case of disciplinary proceedings taken under Standing Orders, I confess to having grave doubts about the propriety of the Secretary consulting the Board prior to a decision being taken by the Secretary as appears to have occurred in the plaintiff's case.

B In such circumstances one is bound to ask how can the Board be seen to be independent and impartial in discharging its appellate function if it had been consulted and was a party to the decision being appealed against - *Nemo iudex in causa sua*!

C Be that as it may and mindful of the possible inconsistency between the Minister's exercise of his statutory powers to suspend the plaintiff and the recommendation that the plaintiff be dealt with by the Board in accordance with its own Standing Orders, legal advice was sought.

D The 3 paragraph advice tendered to the Board was to the effect that: "... the matter (had) been properly handled (thus far) and should be left to take its course ..." It was also suggested that: "... a letter be sent to (the plaintiff) asking him to show cause within seven days as to why he should not be demoted and transferred" and ended with the pious observation that: "it is important that the rules of natural justice are observed even at this stage as it is a further penalty imposed on an employee of the Board."

E Needless to say having regard to the foregoing discussion of the relevant regulatory framework dealing with the discipline of employees of the Board I cannot agree with the legal advice tendered.

F I am willing however to assume in favour of the Board, that the plaintiff's case was being dealt with from the outset, in accordance with the Board's Standing Orders and that resort to Section 14 of the Act is confined solely to the plaintiff's temporary suspension from duties.

G Nevertheless, on the 13th October 1992 acting on the legal advice tendered the Secretary wrote to the plaintiff advising him that his written response to the Audit Report queries "(had) been given full consideration" and further requesting him "... to show cause within seven days ... as to why (he) should not be demoted in accordance with the provision of Regulation 25 of the Fijian Affairs Board Standing Order 1977 and to be transferred out of the Province of Ra'.

The plaintiff replied to the Secretary's memorandum of 13th October 1992 in a memorandum of his own dated 3.11.92 and entitled: "suspension from official

duties". In it he drew attention to the length of the suspension he had already suffered and referred to a 5 year plan he had instigated for the development of Ra Province and the chiefly support he had received both during his tenure as Roko Tui, Ra and after his suspension. A

By a hand-delivered confidential memorandum dated 24.11.92, the plaintiff was advised by the Secretary that his : "... submission (of 3.11.92) had been given the fullest consideration however it had been decided that :

- (a) You will be demoted ... ; and
- (b) You are to be transferred to Headquarters, Suva, where you are to commence duties on 1.12.92."

Two years later on 15th December 1994 the plaintiff issued an Originating Summons against his employer seeking : C

"A declaration that the purported disciplinary action taken against the plaintiff including his purported demotion from the position of Roko Tui were done contrary to law in particular contrary to Regulations 23, 24 & 25 of the Fijian Affairs Board Standing Orders and therefore null, void and of no effect." D

Before dealing however with the merits of the plaintiff's substantive motion it is necessary to dispose of a preliminary objection taken by the learned Solicitor-General to the form or mode of proceedings adopted by the plaintiff in challenging the Board's decision viz by way of Originating Summons as opposed to an application for Judicial Review under Order 53. E

In this regard the Solicitor-General's submission reads:

"... the matters raised by the Plaintiff are properly the province of Judicial Review and not Originating Summons because the relief sought is against a public body ..."

Stress was laid upon the lateness of the plaintiff's application ; his circumvention of the safeguard of seeking the Court's leave on an application for judicial review ; the substantial hardship likely to be caused to an innocent third party who had been appointed to replace the plaintiff and the consequential detriment to the efficiency and effective administration of the Board's affairs if complaints such as the plaintiff's could be brought many years later. The submission concluded that the plaintiff's action "... is an abuse of the court process and should be struck out". References were also made to the judgment of Denning M.R. in the leading case of *O'Reilly v. Mackman* [1982] 3 All E.R. 689 at 692, 695. G

Learned counsel for the plaintiff in answer to the preliminary objection pointed

A to the absence of any formal application by the Board to strike out the plaintiff's action as an abuse of process and referred to the well-known dictum of Lord Goddard in Pyx Granite Co. Ltd. v. Minister of Housing and Local Government [1960] A.C. 200 at 290.

B In Rama Gopal v. Attorney-General (1992) 38 FLR 211 this Court had occasion to consider a similar application to strike out an Originating Summons seeking a declaration against an Immigration Officer who had seized the plaintiff's passport, and which action was instituted 9 months after the event.

In rejecting the application in that case this Court said at p.5 :

C "... the existence of a more appropriate procedure per se does not ipso facto preclude or exclude the availability of other albeit less appropriate forms of action."

Reference was also made to the dictum of Lord Wilberforce in Davy v. Spelthorne Borough Council [1984] 2 A.C. 262 where his lordship said at p.271 :

D "We have not reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary Courts : to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remove."

E The preliminary objection is accordingly dismissed.

I turn then to consider the plaintiff's complaint which has been conveniently reduced in the written submissions to the single question :

F "Whether Regulation 24 (of the) Fijian Affairs Board Standing Orders were in fact violated by the defendant (Board), thus voiding its act in demoting the plaintiff from Roko Tui, Ra to Assistant Roko."

G It is clearly necessary to consider the various Standing Orders that deal with the disciplining of officers and employees of the Board. In Ratu Epenisa Seru Cakobau v. Fijian Affairs Board Suva Civil Action No. 295 of 1988 (unreported) this Court had occasion to consider the relevant Standing Order Nos. 22, 23, 24, 25 and 26.

In its judgment the Court said at pp.4 & 5 :

"It is clear that the disciplinary procedure laid down in the

defendant Board's Standing Orders envisages 4 stages :

- | | | |
|-----|---|---|
| (1) | That a report be written by a controlling officer to the Secretary who is, by definition the Permanent Secretary for Fijian Affairs and Rural Development ; (Standing Order 23) | A |
| (2) | That the Secretary on receiving the report must inform the employee of the disciplinary offence he is alleged to have committed and call upon him to tender a written explanation to the offence within 21 days ; (Standing Order 24) | B |
| (3) | That after receiving the employees' written explanation, the Secretary may conduct such enquiries as he sees fit, and decide on what penalty, if any, should be imposed ; (Standing Order 25) | C |
| (4) | That the officer has a right of appeal to the defendant Board from any disciplinary decision imposed by the Secretary." | D |

Learned counsel for the plaintiff's submission is that the Board "... failed to comply with Standing Order 24 when dealing with the plaintiff". More particularly, in its failure to inform the plaintiff of the particular disciplinary offence(s) that was being alleged against him. Not surprisingly counsel asks : "what has been established that the plaintiff had done wrong for which he was being punished?"

The Solicitor-General for his part submits that :

"Regulation 24 does not require the defendant Board to actually give the plaintiff a charge as in a criminal prosecution, rather sufficient notice or advice in writing that the plaintiff has been complained against and that a written explanation be obtained within 21 days from the time the plaintiff is made aware of the particulars of the complaint."

Standing Order 24 reads :

"24. On receipt of such report the Secretary will inform the officer in writing of the alleged offence and require a written explanation from the officer concerned within 21 days."

For convenience of analysis Standing Order 24 may be broken down into its component parts of which there are three :

A

(a) There must be a written report submitted to the Secretary recommending disciplinary action against an employee :

(b) The Secretary if satisfied that disciplinary action is warranted must inform the employee concerned in writing of the disciplinary offence(s) he is alleged to have committed (see : Standing Order 22); and

B

(c) The Secretary must call upon the employee to submit a written explanation to the disciplinary charge within 21 days.

C

As to (a) it is common enough ground in this case that a controlling officer of the plaintiff wrote to the Secretary by way of an internal minute dated 1.4.92 and entitled "S. Luba, Roko Tui Ra - proposed disciplinary action" proposing that the plaintiff be disciplined because (the writer claims) :

D

"... it has been proved beyond any shadow of reasonable doubt that S. Luba has been negligent in the performance of his duties. Indeed the officer has by his own actions and admission proved that he is incapable of discharging the duties of the high office of Roko Tui."

E

In my considered opinion and in agreement with the submission of the learned Solicitor-General, the above-mentioned minute is a sufficient compliance with the requirements of the first limb of Standing Order 24.

Any suggestion however that the Secretary's earlier 5-line confidential memorandum of 24.2.92 could, whether considered alone or in conjunction with the Audit Report, be taken as being in compliance with Standing Order 24 can be summarily dismissed as fanciful.

F

Several features of the memorandum and the Audit Report lead me to that inevitable conclusion. These are :

G

(1) The memorandum merely seeks the plaintiff's written response to various points raised in the Audit Report;

(2) Assuming that the Audit Report was written by a 'controlling officer', nowhere is it suggested that the plaintiff had been guilty of any wrong-doing or had committed any disciplinary offence(s) in organising the Adi Ra Festival, nor is it suggested that such a course of action should be considered or was appropriate notwithstanding any explanation which

the plaintiff might care to provide :

- (3) The memorandum pre-dates the above-mentioned minute calling for disciplinary action to be taken against the plaintiff and the minute was specifically relied upon as being in compliance with Standing Order 23 ; A
- (4) The memorandum completely fails to warn the plaintiff that disciplinary proceedings were being contemplated or instituted against him, nor does it inform him of the nature of any 'disciplinary offence(s)' alleged to have been committed by him ; and B
- (5) The memorandum demands a reply within 7 working days whereas Standing Order 24 refers to 21 days. C

It is a matter of some concern as learned counsel for the plaintiff observed : "... that despite the availability of (the) decision in the case of Ratu Epenisa Seru Cakobau ... the senior officers concerned did not read the judgment when dealing with (the plaintiff's) situation ..." In this regard there can be little doubt that had the various disciplinary stages set out in the judgment been followed in the plaintiff's case there would have been no ground for complaint. D

Be that as it may the question I must decide in this case is whether or not the Board complied with the disciplinary procedure laid down in its own Standing Orders and more particularly the requirements of Standing Order 24 and if not, what relief ought the Court to grant the plaintiff. E

In this regard I am satisfied that the office held by the plaintiff was of the 'third class' enumerated by Lord Reid in the leading case of Ridge v. Baldwin [1963] 2 W.L.R. 935 where he said at p.941 :

"(there is) an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation." F

I am also conscious of the oft-cited words of Tucker L.J. in Russell v. Duke of Norfolk [1949] 1 All E.R. 109 when he said at p.118 :

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth." G

A Furthermore it is my considered opinion that a mere departure from the requirements of a procedural rule such as Standing Order 24, would not entitle the plaintiff to claim any relief unless he was in fact in some way prejudiced by such departure. The learned Solicitor-General's contention is that the plaintiff had reasonable notice and several opportunities to state his case and nothing more was required by the rules of natural justice.

B Lord Morris of Borth-y-Gest in Ridge v. Baldwin (*op.cit*) in recognising that subsequent events may validate an invalid decision and in accepting that different considerations might apply to a minor procedural failure said at p.982:

C "It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself and in order that he may do so that he is to be made aware of the charge or allegation or suggestions which he has to meet."

D What is indisputable in this case is that the plaintiff was demoted and transferred without being formally charged or informed in writing of the disciplinary offence he was alleged to have committed as required by Standing Order 24. Was that a minor procedural failure and has it been cured by subsequent events ?

On both counts I am satisfied that the answer is 'yes'! As to the requirement for notice I adopt as correct the statement of law to be found in para. 75 of Halsbury's Laws of England (4th edn.) Vol. 1 which reads (in part) :

E "The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held to be immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice."

F

(see also : per Denning M.R. in Selvarajan v. Race Relations Board [1976] 1 All E.R. 12 at 19)

G In this case the plaintiff was furnished with a copy of the internal Audit Report which highlighted instances of unsupported and unauthorised expenditure ; missing souvenir stock items ; absence of control records ; a dishonoured cheque and the nett loss position of the Adi Ra Festival Fund. Furthermore he was given an opportunity to reply to all the points raised in the audit report and his detailed memorandum of 13.3.92 attests to his having availed himself of the opportunity

albeit that it was submitted out of time.

Then after receiving the plaintiff's written explanation he was suspended from duties ostensibly because it was considered he was incapable of performing his duties satisfactorily. In my view even the most naïve person in the plaintiff's position would have been aware of at least two things, firstly that the matters raised in the Audit Report were being treated seriously by his superiors ; and secondly, he would have realised that his written explanations given earlier were considered unsatisfactory.

A

B

It is in that context that I turn to consider the Secretary's memorandum of 13.10.92. In it the Secretary refers to his earlier memorandum dated 16.4.92 and the plaintiff's written reply dated 13.3.92 and the subject matter under consideration namely, "the queries raised by the internal auditors in respect of the Adi Ra Festival Fund 1991". Then the plaintiff is requested to show cause as to why he should not be punished.

C

In my view if the plaintiff was still not convinced of the seriousness of the situation even after his suspension from duties then the above memorandum would have left him in no doubt at all. It not only drew his attention to relevant earlier correspondence and the subject matter of that correspondence but also indirectly to the inadequate and unsatisfactory nature of his earlier explanation and finally, to the disciplinary action that was being considered by the Secretary.

D

It is also interesting to note that the nature of the plaintiff's complaint as deposed in his affidavit in support is to the effect that : (para.13) "... the Permanent secretary acted prematurely" and not that he (the plaintiff) was unaware of "... the charge or allegation or suggestions which he had to meet".

E

Certainly the plaintiff's written response dated the 3.11.92 makes no such claim as might be expected if he truly didn't know. Instead, the plaintiff recognises "... that allegations had been put forward regarding the over-expenditure" ; accepts that a final decision had not by then been taken by the Secretary and refers to a meeting that occurred between him and the Secretary on the 29.10.92 after he had received the Secretary's memorandum to show cause and before submitting his own memorandum of 3.11.92.

F

In this latter regard, it is not disclosed in any of the affidavits or annexures what was discussed at that meeting but in any event the Secretary deposed in his answering affidavit (without contradiction) :

G

"... that the plaintiff was informed by the Permanent Secretary for Fijian Affairs of the alleged offences ..."
(para.8)

A I am satisfied from the foregoing that the plaintiff well understood the nature of the case he had to meet ; the seriousness with which it was being viewed by his superiors; and further, that any failure on the part of the Secretary to comply with the procedural requirements of Standing Order 24 were of a minor technical nature and did not in any way prejudice the defendant in presenting his case.

B That is not to say that this Court necessarily approves of the particular course adopted by the Secretary in this case for use in future disciplinary proceedings. Rather it is the Courts firmly held view that the principle: "*audi alteram partem*" may extend beyond mere procedural failures where the circumstances are such as to excuse and justify such departures.

C If I should be wrong however in my consideration of the Standing Order 24 issue, I would nevertheless exercise my discretion in refusing the plaintiff the declarations that he seeks upon the well-known equitable ground of laches and the obvious hardship likely to be caused to the innocent third party who was appointed to replace the plaintiff.

D In the leading case of Lindsay Petroleum Co. v. Hurd (1874) L.R.5 P.C. 221 Lord Selbourne explained the doctrine of laches in the following passage at p.239:

E "The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as an equivalent to waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

F I am of course mindful that the plaintiff since his demotion in November 1992 has always had a right of appeal to the Board against the disciplinary decision of the Secretary (Standing Order 26), but for reasons that remain undisclosed, he has not sought to exercise that right - *vigilantibus et non dormientibus lex succurrit!*

G The plaintiff's Originating Summons is accordingly dismissed with costs to be taxed if not agreed.

(Judgment for the Defendant.)