THE STATE

v

PERMANENT SECRETARY FOR JUSTICE & SECRETARY, PUBLIC SERVICE COMMISSION

ex parte
METUISELA WAQANISAU

[HIGH COURT, 1999 (Scott J) 30 June]

Revisional Jurisdiction

Public Service- disciplinary proceedings- bias- extent of delegation allowed to Public Service Commission- Constitution (1997) Sections 127 (3) & 157 (1)- Public Service Commission (Constitution) Regulations 1990, Part V.

The Applicant was dismissed from the Public Service. He sought judicial review of the decision to dismiss him. The High Court quashed the dismissal. It HELD: (i) that the applicant was given no opportunity to be heard on the question of penalty (ii) that the PSC failed to give reasons for its decision and (iii) that the proceedings were fatally flawed since the Permanent Secretary had acted both as prosecutor and as Judge in the same cause thereby breaching both the Rules of Natural Justice and the requirements of the Regulations.

Cases cited:

Akbar Buses v TCB - (C.A. 9/84-FCA Reps 84/40)
General Medical Council v Spackman [1943] AC 627
Pacific Transport v Khan (ABU 21/96 - FCA Reps 97/3)
Permanent Secretary for Public Service Commission v Epeli Lagiloa - (ABU 38/96 - FCA Reps 97/578)
R v Lancashire County Council ex parte Huddleston [1986] 2 All ER 941
State v TCB ex parte Peni Company Ltd HBJ 22/94S
The State v PSC ex parte Michael Raman – HBJ 13/1994S

Motion for judicial review inthe High Court.

I.V. Tuberi for the Applicant
E. Walker for the Respondents

Scott J:

The Applicant moves for judicial review of a decision taken by the First Respondent

on 16 October 1998 to dismiss him from the Public Service. No complaint is made directly against the Second Respondent who was technically the Applicant's employer but these proceedings raise the important question of how far the Second Respondent's delegation of its powers to the First Respondent was compatible with the due exercise of disciplinary proceedings and as such the Second Respondent is obviously at least an interested party.

The following affidavits were filed:

(i) Applicant's affidavit in support filed 14 December 1998;
(ii) 1st Respondent's 1st affidavit filed 27 January 1999;
(iii) 1st Respondent 2nd affidavit filed 10 March 1999; and
(iv) Applicant's affidavit in reply filed 6 April 1999.

By agreement with counsel written submissions were also to be filed. Mr. Tuberi with his usual diligence filed a most helpful written submission on 4 May. Mr. Walker failed to file anything and made no oral submissions: not, it must be said a very impressive performance.

On 30 August 1995 the Applicant was appointed on one year's probation as a clerical officer (Affidavit in support – Exhibit B). Confirmation of the 12 months appointment was to be subject to a pass in the H1 examination. So far as I can gather there has been no pass and no confirmation of the appointment but in the absence of any point being taken on this by either counsel I propose to treat the Applicant as being a *de facto* confirmed appointee and as such a person entitled to the protection conferred on him by Regulations.

Towards the end of September 1997 two complaints were received against the Applicant who was at that time working as a counter clerk in the Office of the Registrar of Companies. The first complaint was made by Mohammed Arsad Khan (First Respondent's second affidavit – Exhibit E) while the second was made by Mathew Hill (First Respondent's second affidavit – Exhibit A). The complaint in both cases was that the Applicant had solicited payment for himself for performing his duties. Both complaints were referred by the Administrator General (Mr. W. A. Archibald) to the 1st Respondent.

On 6 October 1997 the 1st Respondent charged the Applicant with four major disciplinary offences contrary to Regulations 36 (a), (q) and (t) of the Public Service (Constitution) Regulations 1990 (the Regulations) (FRG 18/12/1990) (supporting affidavit – Exhibit C). The Applicant was required to answer the charges within 14 days pursuant to the provisions of Regulation 41 (2).

The Applicant's first answer was sent to the 1st Respondent on 16 October

(supporting affidavit – Exhibit F) and following further correspondence a second and expanded answer was sent by the Applicant to the 1st Respondent on 14 April 1998 (supporting affidavit – Exhibit M).

On 22 September 1998 the Applicant was interviewed by the 1st Respondent in relation to the charges. Also present at the interview was Principal Assistant Secretary Mrs Viniana McGoon. On 14 October 1998 the Applicant was again interviewed by the 1st Respondent and Mrs. McGoon. The record of these interviews is Exhibit C to the 1st Respondent's second affidavit.

On 16 October the 1st Respondent advised the Applicant that his employment in the Public Service had been terminated (supporting affidavit - Exhibit M).

The Applicant impugns the 1st Respondent's decision to dismiss him on 4 grounds:

(i) bias;
(ii) failing to hear the Applicant;
(iii) failing to give reasons; and
(iv) unreasonableness.

It will be convenient to take these four grounds in the order (ii), (iii), (iv) and (i).

In view of the correspondence exhibited to the affidavits and the two interviews between the Applicant and the 1st Respondent and Mrs. McGoon it cannot in my view plausibly be argued that the Applicant was not given a fair opportunity to answer the charges brought against him. It is however apparent that no opportunity was given to the Applicant to address the question of penalty after the 1st Respondent reached the decision to find him guilty. While it might be argued that in view of the seriousness of the charges a hearing as to penalty "would have made no difference" such arguments are not viewed with favour in administrative law (see e.g. General Medical Council v Spackman [1943] AC 627, 644). Furthermore, the Fiji Court of Appeal has made it quite clear in Permanent Secretary for Public Service Commission v Epeli Lagiloa (ABU 21/96 - FCA Reps 97/578 at p. 16) that a public servant *must* be given an opportunity to be heard both as to guilt and as to penalty. This ground succeeds.

As will be seen from the letter of dismissal the 1st Respondent neither advised the Applicant in respect of which charge he had been found guilty nor provided reasons either for reaching findings of guilt nor for imposing the penalty of dismissal.

The matter of giving reasons has frequently been considered by the Courts and it is surprising and disappointing that once again the guidance given by the Courts has been ignored. In Akbar Buses v TCB (C.A. 9/84 - FCA Reps 84/40) the Fiji Court of Appeal recommended that brief reasons for administrative decisions

should always be given. In State v TCB ex parte Peni Company Ltd (HBJ 22/94S) having cited Rv Lancashire County Council ex parte Huddleston [1986] 2 All ER 941, I advised that where a decision making body had failed to give reasons by the time proceedings for Judicial Review were commenced it should always give its reasons in its affidavit in answer filed in the proceedings. In Pacific Transport v Khan (FCA Reps 97/3) the Fiji Court of Appeal again *strongly recommended* that in all cases of this kind brief reasons for the decision should be given. As pointed out in Khan where the circumstances are not such that the reasons for the decision can otherwise satisfactorily be ascertained the failure to provide reasons will amount to a fatal procedural defect.

In the present case the four charges arose from two entirely unconnected incidents, the evidence relating to which was quite distinct and required separate evaluation. There is nothing in the papers to show the process by which the 1st Respondent arrived at the conclusion either that the Applicant was guilty as charged or that he should be dismissed. Ground (iii) also succeeds.

As to unreasonableness it is my opinion that on the materials presented it was open to the 1st Respondent to reach the conclusions at which he arrived. This is not an appeal against the merits of the 1st Respondent's decision but is a judicial review of the procedure employed to reach those conclusions. Ground (iv) fails.

The final ground, bias, gives me the most concern. At the relevant time the Public Service Commission's powers to discipline public servants were contained in the Regulations which were made pursuant to Section 157(1) of the Constitution. While these Regulations have been repealed (see Constitution 1997, Public Service Act 8/1999, Public Service Regulations 1999 (LN 48/99) and Public Service (Appeal) Regulations 1999 (LN 49/99)) I am of the view that the question of bias raised by the Applicant is likely to be of continuing relevance.

In addition to the Regulations it is also important to refer to a delegation of powers which was made on 27 November 1997 by the Public Service Commission under the provisions of Section 127 (3) of the 1990 Constitution and Section 6 of the Public Service Decree 1990 (see LN 138/1997). Section 127 (3) was repealed by Section 195 (1) of the 1997 Constitution while Section 6 was repealed by Section 33 (1) (c) of the Public Service Act 8/1999. It appears therefore to me that the delegation itself has been repealed although it is not necessary finally to determine that matter for the purposes of these proceedings.

As is well known the disciplinary provisions of the Regulations are contained in Part V. Regulations 41 (1), 41 (5), 41 (6), 41 (8), 44 (1), 44 (4), 45 (1), 46, 48, 49, 50 (1), and 50 (2) are all particularly relevant.

Without going into detailed examination of these Regulations it is clear that Part V envisages that where it is suspected that a public servant has committed a disciplinary offence the public servant is to be charged either by his Permanent Secretary or Head of Department. Where the charge is disputed the Commission is then to proceed to consider and determine the matter. Where substantial issues of fact are raised, a disciplinary tribunal should be appointed to hear the evidence and find the facts (see The State v PSC ex parte Michael Raman – HBJ 13/ 1994S.) Regulations 45 and 46 set out the way in which the tribunal should proceed and when the tribunal has reached its findings it is to report to the Commission (Regulation 47). After considering the tribunal's report the Commission then advises the public servant of its findings and, as already seen should then provide the reasons for its conclusions.

In the present case the 1st Respondent apparently thought that he could exercise all the powers conferred on the Commission by Part V of the Regulations by virtue of the delegation to him of powers in Legal Notice 138/1997. In my opinion, although the delegation is somewhat ambiguous, he was mistaken. I reach this conclusion for two reasons.

First, the Commission's powers which are delegated to Permanent Secretaries are specified by and limited to those powers which are set out in paragraph 2 (i) - (xv) of the delegation. Although the powers to appoint a disciplinary tribunal (Regulation 44), to impose penalties (Regulation 51) and to determine appointment, retirement and resignation (Part III) were delegated the general powers of the Commission under Part V were not.

Secondly, the general scheme of Part V, as has already been seen, involves the prosecution or presentation of charges by a Departmental Head, usually a Permanent Secretary, to the Commission which then considers the charges laid. Mr. Tuberi's case was that the procedure adopted by the 1st Respondent amounted to the 1st Respondent acting both as prosecutor and judge in the same cause and as such fundamentally breached one of the major rules of natural justice: *nemo iudex in causa sua*. I agree. In my opinion it was quite wrong for the same person, the 1st Respondent, to charge the Applicant, to investigate his own complaint, to determine its truth and then impose sentence. The procedure adopted by the 1st Respondent was, in my opinion, inconsistent and incompatible with the requirements of Part V of the Regulations and was therefore incorrigibly flawed. Ground (i) succeeds.

The disciplinary charges brought by the 1st Respondent against the Applicant were serious. Although I am satisfied that certiorari should issue to quash the 1st Respondent's finding of guilt and the Applicant's dismissal from the Public Service

I do not think that the matter should be allowed to rest there. The charges should now be referred to the Commission as required by Regulation 41 and the disciplinary proceedings against the Applicant should then continue according to law.

(Motion granted; dismissal quashed.)