

HIGH COURT OF SOLOMON ISLANDS

BROWNLESS ZAKU and Others -v- PUBLIC SERVICE COMMISSION

CC No. 095 of 2000

Date of Hearing: 23 October 2003

Date of Judgment: 5 November 2003

Mr. Titiulu for the applicant

Mr. Deve for Attorney General

Administrative Law - *declaration of right under Public Service Commission regulations 1979 – application to review notice of termination of employment given under General Orders made under the Regulations - nature of claim - advantage from the felony/tort rule*

Practice and Procedure - *declaratory relief – claim against the Public Service Commission – claim in the nature of an application for judicial review of the notice to terminate the employment of the applicants - appropriate process – proper respondent O 56, 58, 61 High Court Rules
Crown Proceedings Act (cap 8) ss. 11, 15, 18 (1), 21 (2).
Crown Proceedings Act 1947 (UK).*

The applicants were officers of the Public Service terminated by letter under hand of the Under Secretary for the Permanent Secretary, Office of the Prime Minister in February 1998, citing the Public Service Commission Regulations 1979 and Chapter B para 702 (1) of the General Orders. They came to court seeking declarations of unlawful termination and consequent orders for reinstatement or damages for breach.

The facts are stated in the judgment.

- Held: 1. Declaratory relief is available to employees of the Public Service in these circumstances, for the Crown Proceedings Act (cap 8) ss 3, 11, 15, 18 (1) and 21 (2) when read with the earlier UK Act affords a right of action against the Attorney General.
2. The appearance of the Attorney in his own right without taking the point about the proper defendant enabled the applicants to argue the merits of the claim.
3. The use of the felony/tort rule in this fashion is contrary to public policy, for it may be used as a shield but not as a sword to substantiate a claim where none existed before.

4. In the circumstances, the Commission may choose to terminate non-pensionable officers of the public service by giving 3 months notice and no just cause has been advanced to set aside the notice of termination.
5. The failure to allow 1 month in which to make representation is not such an error as to vitiate the effect of the notice, rather it affords the applicants a claim for salary for that period of employment denied by the notice and consequently an appropriate remedy is damages in the amount of the salary foregone.

Cases cited

1. *Ridge -v- Baldwin* (1964) AC 40; (1963) 2 ALL ER 66
2. *Smith -v- Selwyn* (1914) 3KB98; (1914-15) All E.R. Rep 229
3. *P.T. Garuda Indonesia* (1994) 48 FCR 252
4. *Reed -v- Howard* (1995) 184 CLR 1; 14
5. *Joes Wawari Sanga -v- Public Service* (unreported HC-CC18/1991 Kabui PJ)

Statutes

Crown Proceeding Act (cap 8) ss 11 (1), 15 (1)
 Crown Proceedings Act 1947 (U.K.)
 The Penal Code (cap 26) ss. 4, 91
 High Court Rule O 56, 61

Summons seeking declaratory orders and damages

The various plaintiffs were officers of the Public Service whose employment was terminated by letters given them in February 1998. The terminations followed a scandal (for want of a better word) in the management of large sums of public moneys meant for National or Provincial developments. These officers were in various government ministries implicated in the scandal which reached back to early 1996. The officers were suspended following preliminary investigations in the Department, the suspensions were initially on ½ pay, later they were reinstated to full pay. The investigations, both departmental and by the police, were clearly unsatisfactory and despite the loss of much money, it seems no one was charged, amongst these complainants with any criminal offences.

They consequently come to court seeking a declaration that the termination was unlawful in that the reasons for termination were directly linked to these persons alleged involvement in the scandal. As such allegations were unproven, the complainants pleaded the Commissions breach of Reg. 54 to 60 of the PSC Regulations 1979, specifically Reg. 55 (no action on "misconduct" pending report) and that they had been denied the right to be heard, before termination. They sought declarations confirming their positions as public officers and entitled to salary and allowances since 1998 or, in the alternative a declaration that they are entitled to damages for such unlawful termination. The notice of termination was:

Mr. B. Zaku
 Through: Permanent Secretary/MOF
 PO Box G26
 Honiara

Date: 24/02/98

Dear Mr. Zaku,

RE: TERMINATION OF APPOINTMENT

Under the terms and conditions of your appointment, you as well as the Government have the right to terminate your appointment by either of you giving three months notice or paying three months salary in lieu of such notice as required by Chapter B paragraph 702 (1) of the General Orders.

By virtue of the powers conferred upon the Public Service Commission under section 116 and 135 of the Constitution of Solomon Islands and Public Service Commission Regulations 1979 and in pursuance of the said terms and conditions of your appointment, the Public Service Commission after consultation with the Secretary for the Public Service.

- (a) *has decided to terminate your appointment with effect from the date of this notice. Instead of giving three months notice you will be paid three months salary in lieu of notice.*

On behalf of the Government of Solomon Islands I wish to sincerely thank you for your service to the Government and the people of Solomon Islands and wish you well in your future endeavours.

Yours sincerely

A. M. Garo (Ms)
 Under Secretary
 Public Service Division
 For: Permanent Secretary/Public Service
OFFICE OF THE PRIME MINISTER

cc: Accountant General/MOF
 cc: Permanent Secretary/MOF

The availability or otherwise of declaratory relief

The Crown Proceedings Act, s 11 (1) provide for the applicability of rules of this High Court in "all civil proceedings by or against the Crown" and further by s. 15(1) any such civil proceedings shall be instituted "by or against the Attorney General".

The plaintiffs have couched their prayer for relief in terms of a declaratory order for s. 18 (1), the Crown Proceedings Act provides:

- (1) *In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make*

in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that –

- (a) *Where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and*
 - (b) *In any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.*
- (2) *The Court shall not in any civil proceedings grant any injunction or make any order against any officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.*

The High Court has over time, extended the nature and scope of its judicial review. In an order for certiorari, for instance, where a public tribunal has acted without jurisdiction, or exceeded its jurisdiction or failed to comply with the *audi alterim partum* rules where applicable or the decision is unreasonable in the Wednesbury sense. (The Rules. O 56 and O 61 deal with orders for mandamus, prohibition and certiorari).

The jurisdiction and procedure of this Court in judicial review proceedings involving as this case does, private rights, does not often come before the court for consideration. It has not been raised in this case, but this court has cannot assume jurisdiction unless it is satisfied, on the question of a substantive law right to sue the Crown, that such a right exists in these complainants.

The Crown Proceedings Act, Part II sets out the substantive law, giving an individual particular right to sue the Crown restricted to:

- a) a right enforceable through previous statutory provisions ceasing to have effect in Solomon Islands by virtue of this Act.
- b) tortious acts
- c) infringement of industrial property right
- d) application of law as to indemnity contribution etc (s.6)
- e) liability in respect to government vessels (s.7)
- f) postal packets (s.8)

g) postal packets (s.8)

The right to sue in this case, must arise from circumstances in a) above, which, before Independence were governed by the Crown Proceedings Act 1947 (U.K). In *de Smith's Judicial Review of Administrative Action* (1980) 511 the author illustrates the problem

Problems have arisen in connection with actions by subjects against the Crown and its servants. If a Crown servant personally commits, or orders or authorizes the commission of a tort, the plaintiff may sue him in his private capacity for damages and for a declaration that his act was invalid, notwithstanding that the act may have been done in the course of Crown duty. If, however, the wrongful act is not a tort, but is merely an unlawful act done or demand or order made by or on behalf of the Crown through the instrumentality of one of its servants, it may well be thought to be contrary to principle to award a declaration against the Crown servant in his capacity. Nonetheless, several cases in which actions for declarations were brought against Ministers in their private capacities in respect of non-tortious but allegedly unlawful acts have appeared in the law reports. In these cases the plaintiffs were seeking what were in substance declarations against the Crown. Before the Crown Proceedings Act 1947 an action for a declaration (except on a petition of right) could not have been brought against the Crown as such. An appropriate defendant would have been either the Attorney General or, in certain special cases, a government department or an officer of the Crown sued in his official capacity. The right of action for damages and a declaration against the individual tortfeasor was, in general, preserved by the Crown Proceedings Act. But under the Act it became possible to bring an action for a declaration against the Crown by instituting civil proceedings against the appropriate authorized government department."

It would be quite inappropriate to fix upon a U.K Department for instance, so that the Attorney-General U.K would be the appropriate officer to name as the nominal defendant, as it were (see Halsbury's Laws of England (4th edit) Vol II para 1420). We have then, the office of the Attorney-General in this country who would be the appropriate defendant in this case. While the Public Service Commission has been named, the Attorney General appeared in his own right and no point was taken by the Attorney over the joinder of the Commission (incorrectly in my view) as the respondent.

The right to a declaration, while envisaged under the Crown Proceedings Act 1947 (UK), must still be shown to be available in this jurisdiction prior to independence.

The English Rules of Court 1883 0.25 r 5

"no action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether or not a consequential relief is or could be claimed"

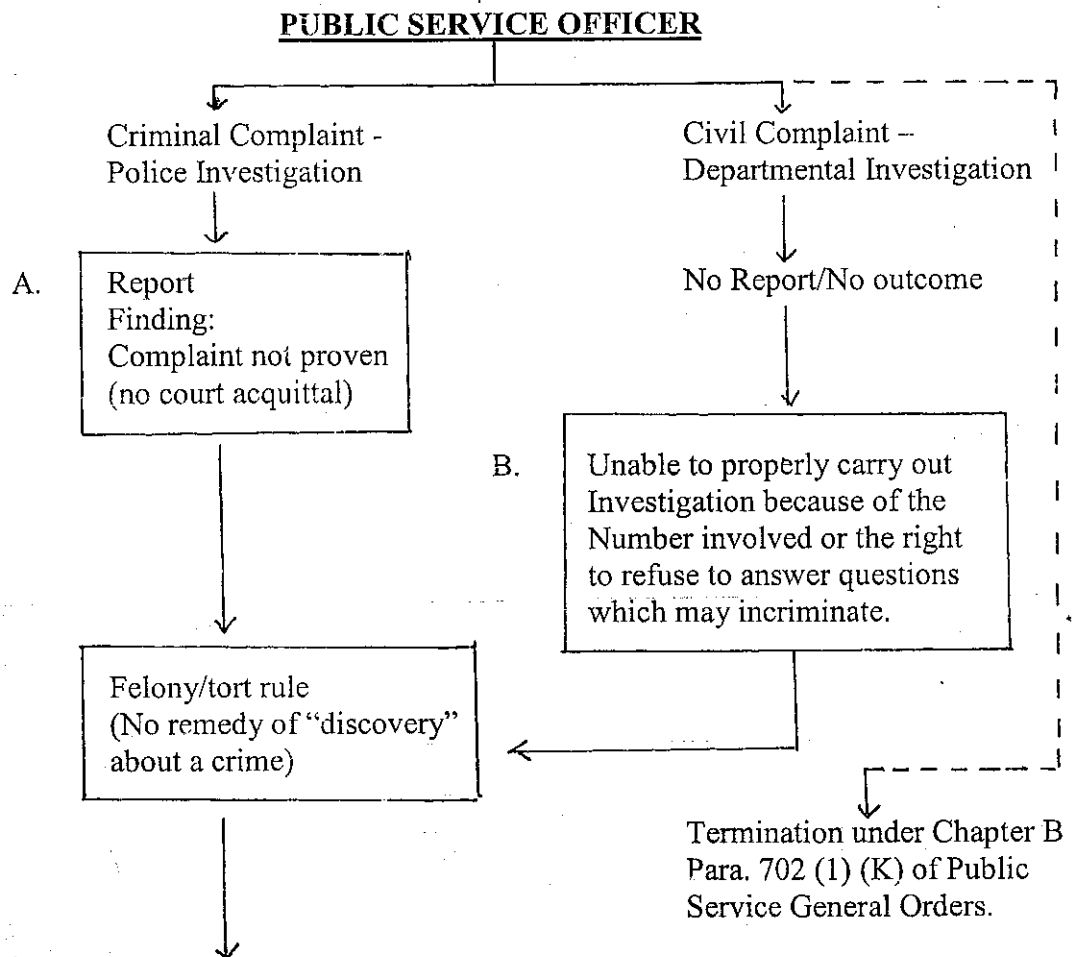
and by O 58 r (2) of the High Court (Civil Procedure) Rules 1964

Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of any provision of a written law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed.

Read together, leave me in no doubt that declaratory orders were available prior to Independence.

The complainants seek declarations in respect to the proper interpretation of the PS Regulations 1979 coupled with the General Orders so that for these reasons, I am satisfied that the substantive law affords these complainants the right to claim this courts assistance. The decision of the House of Lords in *Ridge -v- Baldwin* (1) has been adopted and applied in this Court.

Judicial review now lies against an inferior court or tribunal and any person or body which performs public duties or functions. In such cases, orders in the nature of the prerogative writs may be made, or as is sought in this case, by virtue of the private interest in these complainants (their employment) in the public law element, a declaration of right.



The Rule protects the innocent and the guilty. It may be used as a shield but not a sword in in civil proceedings.

Consequently the fact of A and B does not give rise to a right in these complainants to point to a supposed breach of the *audi alterem partem rule* which somehow vitiates the notice of termination relied upon by the Commission.

I have adopted this diagrammatic representation because it clearly explains the applicant's basis for their claim that they have been unfairly treated (*audi alterem partem* – "hear the other side") in that both the criminal and civil investigations blighted their prospects, although no findings of misfeasance were ever made against them. So far as the police complaints are concerned, tendered as an exhibit were two letters by Christian Mamu (D/Inspector) Supervising Deputy Director CID relating to Walter Veke and Michael Katea. The body of the letters were similar. In Michael Katea's case, the body is reproduced

In reference to the above subject, I wish to confirm that Mr. Michael Katea was a former Government employee and was the former Accountant General in the Ministry of Finance. He was among other Public Servant suspended being implicated in the alleged Government financial Scandal investigated by this office.

Prior to his implication, we were unable to substantiate the allegation that Mr. Michael Katea was actually involved in the Scandal. It might be in some sense, however, due to lack of sufficient evidence to prove his involvement, the case has already been put to rest "CLOSED NOT ESTABLISHED".

I hope the information provided will substantiate avenues where doubts would arise, especially when legal obligations related to the matter are sought by him.

Thank you

Yours faithfully

Both the fact of the Criminal and Civil complaint, (see box above) has been made the subject of argument by counsel, for the applicants say, that underlying the letter of termination given them, was the public perception of the misfeasance supposedly rife in the Department, misfeasance leading to their termination. But, they say, no findings giving rise to censure of these individual applicants were ever made. Consequently, they say, they have been unfairly dismissed, in effect, for they have not have had the chance to answer these innuendos.

The felony/tort rule was expressed in *Smith -v- Selwyn* (2) where Phillimore LJ said:

"It is well established rule of law that a plaintiff against whom a felony has been alleged by the defendant cannot make that felony the basis of an action unless the defendant has been prosecuted or some good reason has been given why a prosecution has not taken place".

Of course, the failure to prosecute does not give the alleged miscreant a cause of action for that would be contrary to public policy.

Again, the failure to investigate the corruption in the Department to a reasoned finding, one way or the other, cannot, for that reason alone, afford these complainants the right to complain, either that they have been part of the investigation or that they have not had an opportunity to be heard.

Our *Penal Code*, Part II, Interpretation S.4 “felony”, recognized the distinction between felonies and misdemeanors, Section 91 provides for the offence of official corruption, a felony with a penalty exceeding 3 years, and there are other offences dealing with abuse of office. It would be appropriate to follow the reasoning of Lockhart J in *P.T Garuda Indonesia Pty Ltd -v- Grellman* (3) at 265 where there is no distinction between felonies and misdemeanors in the application of the rule.

In the civil field, “discovery” will not be allowed, where to do so may produce evidence of a criminal act. In other words, a person’s right to remain silent, recognized in criminal proceedings cannot be breached in civil proceedings, (analogous to this Departmental investigation) where answers would produce evidence of a criminal act.

I adopt the reasoning of the majority of the High Court (Aust) in *Reed -v- Howard* (4)

“There is simply no scope for an exception to privilege, (to decline to answer) other than by statute. At common law, it is necessarily of general application – a universal right which, as Murphy J pointed out in Pyneboard Pty Ltd -v- Trade Practices Commission, (1983) 152 CLR 328 at 346 protects the innocent and the guilty. There is no basis for excepting any class or category or person whether by reference to legal status, legal relationship, or even, the offence in which he or she might be incriminated because, as already indicated, its purpose is the completely general purpose of protecting against ‘the peril and possibility of being convicted as a criminal’ (Lamb -v- Munster (1882) 10 QBD 110 at 111). For the same reason, there can be no exception in civil proceedings, whether generally or of one kind or another. Moreover, it would be anomalous to allow that a person could refuse to answer questions in criminal proceedings or before investigative bodies where the privilege has not been abrogated, if that person could be compelled to answer interrogatories or otherwise make disclosure with respect to the same matter in civil proceedings.”

The absence of findings of misfeasance by the police and the Department officers cannot now be held up, as it were, as illustrating the Commissions reliance on assertions of misfeasance, (assertions which were never formally proven) for, as I say, the Rule may be used as a shield (by exercising the privilege of refusing to answer questions) but cannot, after the event, be used in this fashion, in support of a claim of breach of Regs. 54/60 of the Public Service Regulations, more particularly Reg 55. There is no attempt by the Commission to justify dismissal under the “misconduct” provision.

The Commissions’ letter of termination does not speak of “misconduct”. It relies entirely on para 702(1) (k) of the General Orders.

The applicants have pursued their argument over the “misconduct” aspect but as the diagrammatic representation illustrates, there is an effective bar to the complainant’s assertion that a breach of the *andi allerem partem* rule, in misconduct proceedings under Part VII of the PSC Regulations gives them the right to impugn the Commissions grounds for termination under Part IX.

Mal’a fide on the part of the Commission has not been pleaded nor is there evidence to consider.

Chapter B, paragraph 702 (1) of General Orders under the Public Service Regulations 1979

At the time of their termination the officers were under suspension but the termination was not based on any allegation of misconduct. The notice of termination in these applicant's cases all relied on para 702 (1) (K) of the General Orders.

Cause of Termination	Notice to be given by Government	Notice to be given by Government
(a) dismissal for misconduct	Nil	-
(b) retirement on the due date (S7 (1) (a) (i), Cap. 110)	-	3 months (1)
(e) compulsory retirement:		
(i) on reaching retiring age (S.9 Cap. 110)	6 months	-
(ii) on abolition of office	2 months	-
(iii) to facilitate improvement	2 months	
(iv) to effect economy	2 months	
(v) in public interest	2 months	
(f) voluntary resignation of a pensionable officer	-	3 months
(g) retirement on medical grounds at least (but - subject to Consultant's advice)	2 months	
(h) termination of agreement before contracted period completed	3 months	3 months
(i) termination (temporary terms)	1 month (2)	1 month (2)
(j) termination of fixed term appointment before expiry of specified period.	3 months	3 months
(k) termination of permanent non-pensionable appointment	3 months	3 months

So it is clear alternatives were available, grounds for termination which included "misconduct in office" but they were not the grounds chosen and recited in the notice.

There is no right to be heard on the question of termination of a permanent non-pensionable appointment except the right allowed by Regulations to make "representations". Sub para (k) presumes an exclusive right in the Commission to terminate; in some instances terminating employees under (k) or under (e) (iii) to facilitate improvement. The procedure by which this is carried out must clearly specify what "cause" is relied on, and give the appropriate notice. In this case, the procedure is not in issue, in so far as notices of termination of appointment are concerned, so there can

be no complaint, as it were, over the notice. On its face the letters effectively tell the employees under what provision they have been terminated, and by virtue of para 704, the 3 months salary in lieu of notice given. The fact that "notice" of termination must be given does not, in my view give rise to a right in the employee to argue the termination, rather it fixes the appropriate time frame for the employee to leave or under para 704, the appropriate payment in lieu of working the period out.

My view about the "exclusive right" is supported by the approach adopted by my brother Judge Kabui PJ in *Joses Wawari Sanga's case* (5) at 13, for although permanent officers were entitled to "reasons", in accordance with R.73 (4), and the "reasons" were *ejusdem generis* with the tenor of the Regulation, the employee cannot go behind the termination by arguing no right in the employer to decide to terminate, without the employees involvement in the decision making process. He has a right to representations but is not a party to the decision making, or proper management of the Public Service, when termination under Reg 73 and s.116 (1) of the Constitution is involved

The process was recited in the letter of termination by Ms. A. M. Garo, Under Secretary, Public Service Division for the Permanent Secretary. She recited the fact that the Public Service Commission (the appropriate authority under S.116 (1) of the Constitution) after consultation with the Secretary, Public Service, has decided to terminate the various officers with effect from the date of the notice but had not, under R. 76, allowed the period of 30 days for the officer concerned to make representations.

Failure to strictly follow the terms of Reg. 76 does not vitiate the notice for these reasons. Firstly, the right to terminate remains with the Commission (S.116 (1) Constitution) Secondly, the history of the proceedings involving these officers left no doubt that they would be terminated notwithstanding any representations. Thirdly, the right to make representations, in itself, is not so fundamental that it should take precedence over the Constitutional right in the Commission to terminate. Its breach, however, must be a matter for "damages" in a financial sense, for the notice provisions, para 702 of the General Orders clearly relate to financial considerations. It is appropriate, then to award damages in the amount of the salary foregone (not allowances, for the notice, is efficacious) during that 30 day period for representations.

I accordingly find that the applicants are not entitled to the declarations sought and they are refused. There shall be judgment for the respondent on that part of the summons.

There has been a breach of Reg. 76 in that the 30 day period for "representations" was not given in the notice of termination. The applicants shall have judgment in the amount of that salary by way of damages for that breach. Each party shall pay their own costs.

BROWN PJ