IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

Civil Case No. 94 of 1994

IN THE MATTER OF:	An application of declaration of rights under the provisions of the Public Service Act and the Constitution.
BETWEEN:	JOHN KALSAKAU Applicant
AND:	PUBLIC SERVICE COMMISSION OF THE REPUBLIC OF VANUATU First Respondent
AND:	GOVERNMENT OF THE REPUBLIC OF VANUATU Second Respondent

CORAM: The Chief Justice

Mr Juris Ozols for the Applicant
The Honourable Patrick Ellum, Attorney General for the Respondents.

Judgment

The Applicant in this matter, Dr John Kalsakau, was employed as a medical officer in the Department of Health upon the terms and conditions set out in a letter from the Department of Public Services dated 2 January 1992. This letter stated inter alia that the Applicant would be required to serve on probation for a period of two years and went on to state "confirmation of your permanent appointment will be decided by the Public Service Commission only after the expiry of the probationary period and with the favourable recommendation of your Head of Department. The Commission may extend the probationary period or terminate your employment after giving one month's notice of your service, if your conduct or health are not satisfactory." By letter to the director of the Public Service Department dated 15 January 1992, Dr Kalsakau sought clarification of an apparent ambiguity between the expressions 'permanent appointment' and 'two year probationary period,' pointing out that the Employment Act Cap 160 stipulates that

'probationary period' should not exceed a maximum period of 6 months. There appears to have been no answer to his query and he commenced work on the terms of the letter of the 2 January 1992. At midnight on the 24 November 1993, the VPSA, a union to which the Applicant was affiliated decided to call a strike. On the 29 November the Applicant joined in the strike. On the 10 January 1994, he received a letter from the Director of the Public Service Department suspending him from his duties for absenting himself from his place of work without official leave and in disobedience to the order issued by the Minister responsible for the Public Service, Order No.39 of 1993. In the same letter he was told that he would remain on suspension until his case could be heard by the Public Service Commission. Subsequently, the VPSA applied to the Court for a declaration that the strike declared at midnight on the 24 November 1994 was valid. The case was decided by the Supreme Court on the 28 February 1994, and is referred to as case No 148 of 1993. The Court was not asked to declare that the strike was unlawful, but merely to declare that it was lawful. Therefore within the terms of reference before the Court, it refused to declare the same lawful. It is clear that if the Court had been asked to declare the strike unlawful, on the facts before the Court, it would have been bound to do so. The Applicant on the face of it had absented himself from duty without official leave or lawful grounds, therefore leaving himself open to disciplinary action. This therefore led to the letter of suspension dated 10 January 1994, which referred to two grounds for the suspension; i) under section 11(b) of the Public Service Act Cap 129, the other under section 11(h). Namely disobedience to lawful orders and absence from duty without lawful excuse. The only evidence that was called on behalf of the Applicant was the Applicant himself, whose evidence is set out in his affidavits of the 17 June 1994 and 26 August 1994 respectively. The Respondents called no evidence, but both parties made the following admissions:

i) That Mrs Crowby did hold the powers of the Commission as delegated to her under section 9(1) of the Public Service Act in order to issue the letter of suspension dated 10 January 1994, and that the letter was sent under the terms of the delegation under section 9(4);

ii) It is conceded that there was no sitting of the Disciplinary Tribunal in relation to the suspension;

iii) The letter dated 21 March was also sent under the delegated powers of the Public Service Commission; and

iv) It is admitted that the Disciplinary Board never sat to consider the Applicant's case.

The case revolved around legal arguments as to whether it was necessary for the Disciplinary Board to sit in order to determine the Applicant's fate.

The learned Attorney General submitted as follows:

of the Constitution

That under Articles 57(5) and 57(7), public servants are afforded security of tenure until such time as they reach retirement age or are dismissed from public service by the Public Service Commission. Article 60(2) states that it is the Commission which shall be responsible for the discipline of public servants. Article 60(4) states that the Public Service Commission shall not be subject to the direction or control of any other person or body in the exercise of its functions. The learned Attorney General therefore submits that since the Constitution makes it clear that it is the Commission that has the power under Article 57(7) to dismiss and since the Constitution is the supreme law, no other law can take away the powers given by the Constitution to the Commission who are not subject to the control of any person or body. He submits that the Public Service Act can only assist the Commission in the exercise of its powers and cannot in anyway constrain the Commission or reduce its powers. He further submits that all public servants are appointed by the Commission on terms set out in the Public Service Staff Manual, which forms the basis of the terms of their employment. Chapter 9.5 of the Manual provides that an officer absenting himself for one week or more from duty without valid reasons renders himself liable to dismissal. The learned Attorney General seeks to distinguish between the words "renders himself liable to dismissal" when referring to absence without leave and "renders himself liable to disciplinary action" for other breaches referred to in other parts of the Manual. He submits that it is the factual act of absenting himself that renders the officer liable to dismissal, and that the act of absence does not require any adjudication, since the Applicant admits it in his affidavit. The Applicant he says has not given any satisfactory explanation for his absence and the First Respondent is satisfied that no satisfactory explanation exists, since the declared reason for the Applicant's absence is the unlawful strike. Further the Applicant refused without valid reasons to obey the discontinuance order issued by the Minister responsible for Public Service. The learned Attorney General submits that striking cannot be a satisfactory explanation for absence, therefore the Applicant renders himself liable to dismissal and the First Respondent was satisfied that he should be dismissed. That in all the circumstances of this case, the sitting of the disciplinary Board would have been a fatuous exercise, since in any event it only has the power to make recommendations which can be overturned by the Commission under section 13(3) of the Act. Further, he submits that in the circumstances of this particular case, where there would have been 400 or more cases to consider, it would have been impractical to expect a Board to be set up to consider each of these cases individually.

The Applicant complains as follows:

i) That the First Respondent has failed to refer the matter to the Public Service Disciplinary Board, as it ought to have done under the Act; and

ii) That the First respondent has failed to exercised its powers according to the rules of Natural Justice and that he was not afforded a hearing at all, let alone a fair hearing.

Alternatively, it is submitted that the Applicant is entitled to security of tenure as a public servant under the Constitution and he seeks a declaration that his dismissal was ultra vires the Constitution and the law. It is further submitted that the First Respondent has failed to

provide reasons for his dismissal, has failed to comply with its own procedural rules, has failed to comply with its statutory obligations, and has failed to afford the Applicant a right to be heard.

The Applicant therefore claims the protection of the law to which he is entitled under the Constitution and to be treated with the equality of treatment that he is entitled to both under the law and administrative action. Through counsel he seeks inter alia, an order from this Court to be reinstated to his post in the Public Service.

The preamble to the Public Service Act reads as follows:

"To confer powers and functions on the Public Service Commission in addition to those conferred upon it by the Constitution and to provide for a Public Service Disciplinary Board, for appeals therefrom and for other matters relating to the public service."

The Act is no more and no less than the administrative arm of the Public Service Commission. None of the sections of the Act either fetter or limit the powers of the Commission. At the end of the day, it is the Commission and the Commission alone that decides. What the Act does is to allow the Commission to adopt a procedure whereby those Constitutional guarantees set out in the Constitution itself for the protection of individual liberties, are seen to be carried out by the Commission. Articles of the Constitution cannot be looked at in isolation. The Constitution and the spirit of the Constitution must be construed as a whole. The Fundamental Rights and Freedom of the Individual guaranteed under Article 5 reflects on the whole of the Constitution. It is in the light of those guarantees and with them in mind that the Constitution must be looked at and not as a dead letter. Those in whom are vested Constitutional responsibilities have a duty to exercise them in the spirit of the Constitution and with a mind for all the guarantees and obligations set out thereunder. In Bulekone v Timakata Civil Case No. 90 of 1986; which was a decision of the full Supreme Court sitting as the Court of Appeal, the Hon Mr Justice Williams who delivered the judgment of the Court said at page 2 of the judgment:

"Fundamental rights are set out in Article 5(1) which includes under paragraph (d) 'protection of the law'. Article 5(2) describes what is meant by 'protection of the law'. Without repeating it in detail one can say that it specifies the essential requirements of a fair hearing by anyone facing an allegation, that is to say, the principles of natural justice as known and understood in the free and democratic world will be applied by the tribunal considering the allegation. All tribunals in Vanuatu are accordingly bound by the rules of natural justice whether they be administrative in function or purely judicial."

There is little doubt therefore that the rules of natural justice have always applied equally to all tribunals in Vanuatu whether administrative or purely judicial. There is equally little doubt that the rules of natural justice are enshrined in the Constitution of Vanuatu. By the use of the words "protection of the law" in Article 5(d), the Constitution could not have meant otherwise than the protection of the whole of the law including the protection

afforded by the rules of natural justice "as known and understood in the free and democratic world" which is very much part of the laws of Vanuatu. Indeed in Bill Willie v The Public Commission, Civil Case No. 145 of 1992, at first instance at page 13, in the second paragraph, the Supreme Court stated:

" So there is little doubt that the common law applies to Vanuatu as do the rules of natural justice ..... indeed the Constitution of Vanuatu itself says as much in article 5(1) (k) 'equal treatment under the law and administrative action' which is one of the fundamental rights which is guaranteed under the Constitution itself."

Again at page 14 in the last paragraph it is stated:

"Likewise, in Vanuatu, what the Constitution does not permit Parliament to do by article 57(5) and 57(8) is to remove from the individual the protection of the rules of natural justice, as guaranteed under the Constitution."

Therefore, far from seeking to diminish the powers of the Public Service Commission or of fettering it in anyway, or dictating to the Commission, the Public Service Act in fact enhances its powers. It merely provides for the implementation of fair procedural standards and to facilitate the operation of the rules of natural justice, which are guaranteed under the Constitution of Vanuatu and by which the Commission is bound. I accept entirely the learned Attorney General's submission that the Public Service Manual forms part of the terms of employment of every public servant, but I cannot accept that a distinction can be drawn between the expression "renders himself liable to dismissal" and "renders himself liable to disciplinary action" in the manual, in such a way as to entitle the Commission to curtail a person's right to a fair procedural hearing as guaranteed by the Constitution or the rules of natural justice. Nor do I agree with his submission that the act of absence does not require any adjudication. He goes on to submit that the Applicant has not given any satisfactory explanation for his absence. May it be that the reason why he did not was that he was not afforded an opportunity to provide those reasons. What is more the Applicant was denied all opportunity of explaining himself as he is entitled to do under the rules, and at the very least he was deprived of the right to be heard in mitigation of his behaviour by the Board. After hearing him, they might have decided to discipline him in some other way rather than dismiss him. The fact that section 13 of the Act gives wide powers to the Commission is not in itself a reason for ignoring the rules of natural justice to a fair hearing under the procedural rules laid down under the Public Service Act. Nor does inconvenience or impracticability, in that there were numerous people in the same position, entitle the Commission to curtail a person's Constitutional right to the protection of the law. As Lord Atkin said in G.M.C. v Spackman [1943] A.C. 627 at 638 *"Convenience and justice are often not on speaking terms."* However many cases had to be heard, and however long and tedious the process, that in itself did not entitle the Commission to act in breach of the rules of natural justice by denying the Applicant a fair and proper hearing. In the words of Lord Hewart, a Chief Justice of England in Rex v Sussex Justices, Ex parte McCarthy (1924) 1 K.B. p 256:-

"It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"

I can but echo the words of the learned Chief Justice. In this case not only was justice not seen to be done but it was totally denied to the Applicant.

Section 11 of the Act sets out the disciplinary offences:

under 11(b) it is an offence if an officer *"in the course of his duties disobeys, disregards or makes wilful default in carrying out any lawful order given by any person having authority ..... "* and

under section 11(h) it is an offence if an officer "*absents himself from his office or from his official duties ..... without leave."*

Section 13(1) states that *"All disciplinary offences shall be heard by the Board in accordance with rules that shall be prescribed."*

Those rules are set out in the schedule to the Act as a subsidiary legislation under Order 59 of 1982. All the procedural requirements of a fair hearing as would be required by the rules of natural justice and more, are set out under those rules; the provision for a fair hearing, an opportunity to know in advance the charges laid against one, a right to answer those charges etc ... are set out therein.

Although absence from duty may render an officer liable to dismissal, it is not mandatory, as section 15 of the rules to the Act states: *"In any proceedings the Board may impose any 1 or more of the following punishments."* This is followed by seven types of punishments, the last of which is dismissal from service. It is true that under section 13 of the Act, the Commission may confirm decisions of the Board, vary such decisions or quash them. That in itself does not entitle the Commission to deny the Applicant a fair hearing as set out under the rules. This Act and the rules made thereunder in no way diminish or curtail the powers of the Commission, indeed as I stated previously they add to them and complement them. They create the executive arm of the Commission.

The Applicant claims inter alia that he is entitled to the security of tenure afforded to all public servants under the Constitution. In support of his submission he relies on the Employment Act Cap 160 which stipulates that the probationary period should not exceed a maximum period of 6 months. This proposition is not a new one and was considered by the Court in the case of Taurakoto Civil case 107 of 1992. That case involved the dismissal of a very senior public servant who had not completed the probationary period stipulated in his letter of employment by the Commission, and he was seeking a declaration of the Court that he was protected by the security of tenure afforded by the Constitution to every public servant by reason of the operation of section 14 of the Employment Act. The very same submission made on behalf of the Applicant in the case

was heard and considered in full in the Taurakoto case, and is set out at pages 11 and 12 of the judgment as follows:

"... there is a conflict between the instructions (paragraph 3.6 [a] of the Public Service Manual) and the Employment Act Section 14, there is also clearly a conflict between that Act (i.e. the Employment Act) and Article 60 of the Constitution which entitles only the Public Service Commission to appoint public servants without limitations as to its powers (save under the rights as guaranteed by the Constitution itself). So unlike employment under the Employment Act CAP 160 (which is an Act to govern the employment of staff outside the Public Service) where after the probationary period there is no need for the employer to do anything in order to establish the employee on his staff as he becomes so automatically; under the powers conferred by the Constitution on the Public Service Commission, it is only the Commission which can appoint, without fetter as to its discretion to appoint, a permanent member of the Public Service. The instructions, therefore, contained in the staff manual are not only the terms of engagement which forms part of the contract of employment between the Petitioner and the Commission, but are also an expression of the terms under which the Commission chose to engage the Petitioner, and in that discretion which they hold from the Constitution they cannot be limited by any Act of Parliament. It would require an amendment to the Constitution itself. So, subject to the Constitution itself, it would mean that the Commission are at liberty to impose such terms of probationary period as they see fit to someone aspiring to become a permanent public servant. Once the person is admitted to the establishment of the Public Service he then, of course, is afforded all the protection which the Constitution and the law affords a permanent public servant. Until such time, he is employed under the terms and conditions of his letter of engagement. To state otherwise would mean that a power granted by the Constitution to the Public Service Commission could be limited by an Act of Parliament. The Public Service Commission is not simply a Statutory Body subject to the Public Service Act, but a Constitutional Body deriving its powers first and foremost from the Constitution itself. The result is that the Employment Act CAP 160 governs the employment of the ordinary man in the street, whereas the Constitution and the Public Service Act govern the employment of public servants. ..... A contract entered into by the Public Service Commission is not subject to and limited by any other Act of Parliament where that Act seeks to remove a right conferred upon the Commission by the Constitution. In practice they can make whatever contract they choose and subject to the length of probation they choose with 3rd parties and those 3rd parties would not move onto the "establishment" and become permanent civil servants until the Commission decide to place them there."

For the same reasons I rule that the Applicant in this case is not afforded the protection that extends to a permanent public servant. Until his term of employment is confirmed by the Public Service Commission, he remains liable to termination after one month's notice as specified in his letter of appointment. It does not follow at all from this, that if he is being disciplined for a disciplinary offence, that he is not to be afforded the procedures laid down under the Public Service Act. The Act in section 11 stipulates that "every officer commits a disciplinary offence for the purposes of disciplinary proceedings who ..." and

then goes on to specify the various heads of offences. In section 1 of the Act "Officer" is defined as any person holding or acting in any office in the Public Service. It is not limited in any way to permanent public servants. If any doubt remains then section 14 makes it clear beyond doubt that officers on probation are included in the ambit of the Act, for section 14(1) states: "..... *every officer other than an officer on probation appointed by the Commission shall have a right of appeal* ....." Therefore it is plain that the Act contemplates that the procedures laid down for the disciplining of all "officers" as defined by section 1, applies also to officers appointed on probation. Therefore unless a probationary officer is being terminated under the terms of his letter of appointment by the giving of one month's notice, if he is being disciplined under section 11 of the Act, the disciplinary procedures must be followed.

The Applicant invites the Court to declare that the termination by the Commission of the Applicant's appointment was unlawful and therefore seeks an order reinstating him to the Public Service and he seeks an injunction restraining the Respondents from acting upon the contents of the termination letter dated the 21 March 1994 thus restraining them from interfering with the full rights and privileges of the Applicant to remain employed by the Government of Vanuatu. The effect of the submission that is advanced on his behalf is that the letter of termination dated 21 March 1994 was invalid only to the extent that it purported to dismiss him, but since it also revoked the suspension letter dated 10 January, that part of it had the effect of reinstating him to his employment. I do not agree with that submission. If the termination letter of the 21 March was invalid because the Applicant was denied the procedural fairness that he ought to have been afforded under the Constitution and the law, that is, the Public Service Act, then the quashing of the suspension merely puts the Applicant back to the position that he was in prior to the unlawful act which dismissed him. As the Court has already stated in the case of Bill Willie at first instance reported as Civil Case 145 of 1992, at page 22:

"the purpose of judicial review, even under the Constitution, is not to examine the reasoning of the subordinate authority .... with the view to substituting its own opinion. Judicial review is not concerned with the decision but with the decision making process."

For this Court now to reinstate the Applicant would be to substitute its views for those of the Commission in its delegated capacity to Mrs Maria Crowby, as represented in her letter of 10 January 1994. Furthermore, it would be breaching the terms of Article 60(1) of the Constitution. In the exercise of its powers of review, whether it be of the actions of a Constitutional Body or of any Statutory Body, the Court cannot and must not substitute its own decision for those of the Constitutional or Statutory Body, however tempted it may feel to do so. If it did so it would be exceeding its powers and would be setting itself up as an appellate court. It would no longer be a reviewing court and would itself be acting ultra vires. It can quash an order that was made ultra vires the enabling Act, but no more. It must not and cannot judge the issue and substitute its own decision for theirs.

It is plain that in this case the Commission acted ultra vires its powers when it failed to afford to this Applicant the procedural fairness to which he was entitled not only under the

Public Service Act, but also under the Constitution. By failing to act according to the rules of natural justice, the Commission has clearly acted ultra vires its powers and therefore unlawfully. To that extent I declare the termination of the employment of Dr Kalsakau null and void. He therefore remains suspended under the same terms and conditions as before, until the Commission has set up a Board to investigate whatever disciplinary charges are levelled against him. He must be afforded the same procedural fairness under the Act as he would be entitled to under the Constitution. Nevertheless, it is to be noted that the Applicant remains a contractual employee of the Government, as opposed to being a permanent public servant protected by the security of tenure afforded to such officers by the Constitution. As such the terms set out in the Public Service Manual applies to him as would any contractual terms entered into between two responsible parties. His letter of appointment dated 2 January 1992 makes it clear at paragraph 3 that he is appointed subject to the terms and conditions set out in the Public Service Staff Manual. Clause 3.6 [a] of the Staff Manual states *"Each candidate for permanent appointment shall be appointed on probation for 2 years and confirmation of his permanent appointment shall be decided by the Public Service Commission only after the expiry of the probationary period and with the favourable recommendation of the officer's Head of Department."*

3.6 [b] states that *"The Commission may decide to extend the probationary period, or to terminate the officer's employment after giving him one month's notice."*

Therefore if the Commission decides to discipline the Applicant, they must afford him the procedural fairness that he is entitled to under the law, as this implies the bringing of charges against him. If on the other hand they wish simply to terminate his employment under the terms of his contract of employment under the Public Service Staff Manual, all that is required is one month's notice. The difference may not be immediately obvious. If disciplinary charges are brought against him, they may affect his good name and reputation, whereas the contractual determination of his contract of employment does not imply any impropriety on his part, at the same time he is entitled to his term of notice and the salary that goes with it. That gives him the time to adjust to his new situation and to find himself another job.

Therefore, to the extent that this Applicant was not afforded the procedural fairness to which he was entitled under the Constitution and the law, his purported dismissal as set out in the letter of the 21 March is hereby declared null and void. The Applicant is therefore restored to the same position he was in prior to his purported dismissal, namely, he remains suspended from his functions and must await the decision of the Commission.

Costs of this action to be met by the first respondents, to be taxed or agreed

Delivered at Port Vila this 25 day of October 1994

CHARLES VAUDIN d'IMECOURT
Chief justice