

IN THE FIJI COURT OF APPEAL

Civil Appeal No. 19 of 1986

Between:

THE ATTORNEY-GENERAL OF FIJI

Appellant

and

MOHAMMED IMAM SHAH
s/o Munaf

Respondent

Miss P.I. Jalal & Ratu Jone Madraiwiwi for the Appellant

Mr. S.M. Koya for the Respondent

Date of Hearing: 21st July, 1986

Delivery of Judgment: 23. 7. 86

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal by the Attorney-General against a decision of Rooney J. granting the respondent declarations that he was entitled to confirmation of his appointment to the Public Service and that the purported annulment of his appointment by the Public Service Commission was null and void.

The following is a summary of facts as the learned Judge found them and its correctness is conceded by the appellant :-

" On the 27th August, 1979 the plaintiff was appointed a Senior Fisheries Assistant in the then Ministry of Agriculture and Fisheries. The letter of appointment states that it would be probationary for a period of one year. The letter further advised the plaintiff that, while he was on probation, his appointment could be terminated by one month's notice on either side or by payment of one month's salary in lieu of notice. The plaintiff was notified that he was subject to the provisions of the Public Service Act, 1974, and the regulations made under it and to General Orders etc.

On the 2nd September, 1980, the Permanent Secretary advised the plaintiff in writing that "due to unsatisfactory work performance, your probationary appointment has been extended until 27.8.81".

On the 26th August, 1981 the plaintiff received a further letter from the Permanent Secretary indicating that the Chief Fisheries Officer had reported that the plaintiff's work "is still of poor quality and that you do not take instructions". The letter went on to say "moreover you have yet to appear for Examination Z which is requirement for confirmation".

The plaintiff was informed that his probationary appointment was extended "for the last time to the 1st August, 1982". He was advised that by that date he should make a marked improvement in his work performance and "secure the required pass in Examination Z". He was warned that if he did not satisfy these requirements "consideration will be given to annul your probationary appointment".

On the 9th September, 1982, by which time the plaintiff had served on probation for more than three years, his probation was again extended by the Permanent Secretary until the 31st December, 1983 "in order for you to sit the Z Examination, which is a prerequisite for confirmation". Although advised that his "probationary appointment is extended for the last time" no mention was made of any dissatisfaction with the manner in which the plaintiff was performing his duties.

On the 9th November, 1982 the plaintiff received a memorandum from his Ministry reading:

"I refer to my letters dated 26/8/81 and 9/9/82 in which you were advised that you need to pass Examination Z before confirmation of your appointment.

I must apologise for not specifying that you are required to sit Examination Z1.

A 50% pass in Examination Z1 is necessary for confirmation of appointment.

If you obtain a 60% pass in Z1 this will qualify you for consideration to proceed beyond the bar point of your salary scale."

On 21st January, 1983 the plaintiff informed the Permanent Secretary that he had passed the Z1 examination and he enquired about the current status of his confirmation.

On the 22nd June, 1983 the plaintiff received the following :

"ANNULMENT OF PROBATIONARY APPOINTMENT

At its meeting held on 8.6.83, the Commission considered a report on your poor work performance by the Permanent Secretary for Agriculture and Fisheries.

It noted that despite written warnings and instructions to improve, and the fact that your probationary period was twice extended, you still did not improve your work performance.

In view of the foregoing, the Commission has decided that your probationary appointment be annulled forthwith in accordance with Regulation 10(3) of the Public Service Commission (Constitution) Regulations, 1974. "

The main issue before this Court concerns the construction of regulation 10 of the Public Service (Constitution) Regulations which reads :-

" 10.(1) Except as otherwise determined by the Commission, every person who is first appointed to the permanent staff of the Public Service, and every person who, having ceased to be so employed in the Public Service, is again appointed thereto, shall be on probation for one year (except as provided in paragraph(2)),

or as the Commission specifies either generally or in any particular case or class of cases.

(2) With the approval of the Commission a Permanent Secretary may from time to time extend the period of probation of any probationer (except as provided in paragraph (3)) for a specified period not exceeding one year in order to afford the officer -

- (a) further opportunity to pass any examination the passing of which is condition of the confirmation; or
- (b) the opportunity of improvement in any respect in which his work or conduct has been adversely reported upon.

(3) The Commission may at any time in writing, confirm or annul the appointment to the Public Service of any probationer.

(4) Notwithstanding that the period of probation (including any extension thereof) of any probationer may have expired, and whether or not he is appointed to any other post in the Public Service, he shall while he remains in the Public Service, be deemed to be employed on probation until his appointment to the Public Service is confirmed or annulled, by notice in writing, as provided under this regulation:

Provided that if, at the end of six months after the expiration of his period of probation (including any extension thereof), he is still deemed under the foregoing provisions of this paragraph to be employed on probation his appointment to the Public Service shall thereupon be deemed to be confirmed under this regulation."

The first question raised by the appeal is :-

Does the regulation limit periodic extensions to an aggregate of one year or does it permit extensions, each not exceeding one year, until the Public Service Commission can take a final decision whether to confirm or to annul?

The respondent, at the hearing before the Judge contended for the former construction, the appellant for the latter. The learned Judge found the wording of the regulation ambiguous and construed it against the Commission which is empowered to make regulations under the Public Service Act and which, also, is the employer. He said :-

"There is an ambiguity in the regulation for which the Public Service Commission is itself responsible. It follows that a construction adverse to the grantor ought to be applied. I hold that an officer on probation who has completed one year's service may not have his probation extended beyond another year."

The appellant submits that the meaning of the section, considered in its entirety, is clear and the learned Judge erred in holding otherwise. The period of probation prescribed by the regulation is one year which applies to all entrants.

The phrase that calls for interpretation is "The Permanent Secretary may from time to time extend the period of probation for a specified period not exceeding one year". The regulation itself does not specify any period of a possible extension. That function is left to the Permanent Secretary who must specify, in the letter extending the probation, a period not exceeding one year and this he may do from time to time to afford the officer further opportunity to better himself. The regulation, as we read it, does not place any limit either to the number of extensions or prescribe any over-all period which the various extensions in their totality may not exceed. It is the Permanent Secretary who, presumably by letter, extends the period for a specified period. As it is a specification which may be made on a number of occasions the one year limit applies each time a period is specified.

The only limitation appears in the proviso to sub-section (4) which states that if the original period of probation or any extension thereof has expired, and no communication is addressed to the officer for six months, his appointment is deemed to be confirmed. The door is then shut and no further extension or annulment is thereafter possible.

A Permanent Secretary is in our view empowered to extend the period of probation as many times as he considers necessary as long as no single extension exceeds the period of one year. The power, however, must be exercised for one or both of the two stated purposes viz. to afford the officer further opportunity to pass an examination if it is a condition of confirmation, or to allow him time to improve some aspect of his work in which he has been found deficient. The language being clear it is not for the courts to go into possible consequences of a lengthy period of probation. The learned Judge, therefore, erred in holding that an officer on probation may not have his probationary period of one year extended beyond one year and, to that extent, the appeal is allowed.

There is, however, a second aspect of this appeal which raises the issue not of the existence of power but of the validity of its exercise in this particular instance. The respondent had been on probation for three years when his probationary period was extended for the third time by the following letter :-

"Your Probationary Appointment has been extended until 31.12.82 in order for you to sit the 'Z' Examination which is prerequisite for confirmation.

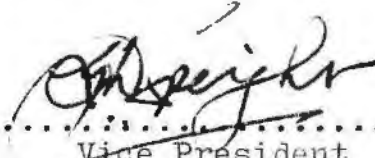
You are hereby informed that your Probationary Appointment is extended for the last time to 31.12.82. You are advised that if you do not satisfy the requirement mentioned above then consideration will be given to terminate your Probationary Appointment."

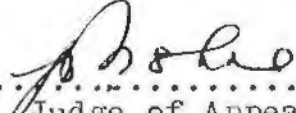
The appellant concedes that the respondent had entered the service not at the point of Fisheries Assistant but at the higher level of Senior Fisheries Assistant and passing 'Z' Examination, therefore, was not a prescribed prerequisite for confirmation in his case but the probationary period was extended specifically for no other reason than to afford him an opportunity to pass this examination. There was no complaint, this time, as to the quality of his work. If, because of the unusual nature of his entry into the service, passing of 'Z' Examination was considered desirable or necessary, it could have been made a condition of confirmation by his letter of appointment, but that had not been done. There was, therefore, no power under regulation 4 to extend the period for the purpose specified in the letter and its purported exercise, was invalid.

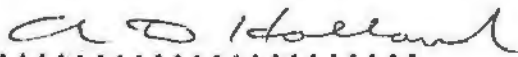
We agree with the conclusion reached by the learned Judge that this invalidity would bring into operation the proviso to regulation 10(4) and the respondent's appointment to the office of Senior Fisheries Assistant would be deemed to have been confirmed on 31st January, 1983 after which date no annulment would be within the power of the Commission.

The letter of annulment dated 22nd June, 1983 was, therefore, void having no legal effect.

The appeal is dismissed with costs which will be taxed in default of agreement.


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Vice President


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Judge of Appeal


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Judge of Appeal