

IN THE FIJI COURT OF APPEAL

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 47 OF 1990
(Civil Action No. 205 of 1989)

BETWEEN:

NEMANI BAUTANI NAISOLE
FIJI PUBLIC SERVICE ASSOCIATION

APPELLANTS

-and-

THE ATTORNEY GENERAL OF FIJI

RESPONDENT

Mr. V. Kapadia for the Appellants
Mr. E. G. Leung for the Respondent

Date of Hearing : 5th June, 1992
Date of Delivery of Judgment : 26th August, 1992.

J U D G M E N T

This matter was heard at first instance on affidavit evidence by consent. It was open, therefore, for the learned Judge hearing the summons to make the findings of fact set out herein. There are two plaintiffs (appellants) but this Court struck out the name of the second one because it had no right to be a party to the proceedings.

The plaintiff was at all material times employed by the Department of Education as a Senior Clerical Officer, Grade V,

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in what is called the Western Division. On 15th April 1988 he moved into a house provided by the Department for occupation of its officers of a higher grade than he was. He had no right to do so and no authority to continue in occupation as hereafter appears. By memorandum dated 18th April 1988 the Senior Education Officer at Lautoka was advised of this occupation, and permission to occupy sought. It appears that the Public Service Commission through its Commissioner, Western Division was also advised of this, but it matters not whether this is correct or otherwise. On 22nd April the plaintiff was told to get out by a representative of the Housing Committee (probably a committee of the Department). He did not. On 11th July 1988 the plaintiff was told again to get out and agreed to do so. He did not.

Following a request by the plaintiff it was agreed by the Housing Committee that he be permitted to remain in occupation until 31st August, by which date he agreed to move. He did not. When asked why on 2nd September, he made a further request and it was agreed by Chairman of the Housing Committee that he be allowed until 10th September to vacate.

On 2nd September 1988 a memorandum setting out a summary of the above history was sent to the plaintiff. It appears to have been sent to him by the Public Service Commission (i.e. Commissioner, Western Division). At any rate the secretary of

that Commission was sent a copy. It is relevant to note that the memorandum included this passage:

".....should you fail to vacate by the due date, recommendation will be made to:-

- (a).....*
- (b).....*
- (c) take appropriate disciplinary actions."*

(record pp 13, 27). The plaintiff did not go. About 27th September he was apparently told that he had until 2nd October. This was disclosed in a memorandum from the Secretary, Public Service Commission to the Commissioner, Western Division dated 29th September 1988. The memorandum contained this passage:

"(The plaintiff's) failure to vacate the quarters within 48 hours will lead to his interdiction and dismissal from the Service" (record p 28)

The plaintiff did not vacate. By memorandum dated 5th October the Commissioner, Western Division informed the Secretary, Public Service Commission, that the plaintiff was still in occupation; the memorandum stated that the writer had spoken to an official of the Fiji Public Service Association and informed him *".... that the decision to vacate had been made by the Public Service Commission...."* (record p 29).

On 17th October 1988 the plaintiff was served with a notice of two charges of disciplinary offences committed contrary to the Fiji Public Service Commission Regulations 1987. One was a

charge under s.35(a) of those regulations, and then under s.35(m); it is unnecessary to detail the charges. The notice went on to state that *"(in) terms of Regulation 40(2) of the ... Regulations 1987, you are required to state in writing within seven days of the date of this memorandum, whether you admit or deny the truth of the charges laid against you"* (record p 15). It set out the consequences of adopting either course. The notice was signed by Poseci W. Bune, Secretary, Public Service Commission. The plaintiff furnished a statement in writing dated 19th October 1988.

The Public Service Commission held a meeting to consider the charges on 24th November 1988. By notice to the plaintiff dated 28th November, he was advised that the charges had been considered, and the decision made *"that you should be and you are hereby dismissed from the Service with effect from 18th August, 1988 in accordance with Regulation 50(1)(a)"* of the regulations (record p 22); it was signed for the Secretary, Public Service Commission.

It can be noted that a separate notice dated 17th October was served on the plaintiff at the same time as the notice of disciplinary charges, which stated that in view of the laying of those charges, the Commission *"has, in accordance with the provisions of Regulation 41(1)(a) of the Regulations, 1987, decided that you be and are hereby interdicted from performing the functions of your office with effect from 18th August 1988 until further notice. You will not be paid*

salary during the period of your interdiction" (record p 16). This notice was also signed Poseci W. Bune as Secretary of the Commission.

By originating summons filed on 15th June 1989 the plaintiff sought a declaration that his dismissal was, inter alia unlawful, an order that he be re-instated in his employment and an order that the Government pay all his unpaid salary from 18th August 1988.

The plaintiff on 26th March 1990, pursuant to an order made on 20th November 1989, filed written submissions. It is only necessary to refer to two aspects of them. One is that the plaintiff claimed that the disciplinary charges against him had not been properly brought and were invalid. The other is that the matter of the interdiction was not mentioned.

The matter came on for hearing before a Judge of the High Court on 20th November 1989. Counsel for all parties (there were then two plaintiffs for some unknown or invalid reason) wished the matter to be decided solely on the affidavits that had been filed. He ordered written submissions within 14 days, an order which both sides ignored. Eventually the plaintiff filed the submissions mentioned earlier herein.

Unfortunately the learned trial Judge ignored the written submissions and the orders sought in the summons. He proceeded to consider whether there was at the relevant time a procedure in force which provided for appeals from decisions of the Public Service Commission in disciplinary cases. He decided that the regulations "establishes an Appeal Board for the purpose of hearing Disciplinary Appeals" from the Public Service Commission in disciplinary matters (record p 41). For reasons that he proceeded to explain, he decided that the High Court had no jurisdiction to review such a decision. He therefore dismissed the summons. We think it regrettable that he did not seek further guidance from counsel before pursuing this path.

While there may have been an appeal procedure as discussed by the Judge, it would only apply to decisions of the Public Service Commission. Unfortunately in the present instance there was no such decision, and the Appeal Board could not possibly have had jurisdiction to deal with this matter.

Part V of the Public Service Commission Regulations 1987, which came into force on 4th October 1987, is headed DISCIPLINE. Section 35 sets out a number of disciplinary offences, the two relevant ones have been earlier referred to. Section 40, so far as relevant, provides:

40-(1) *If a Permanent Secretary or Head of Department, or any officer acting properly with the authority of the Permanent Secretary or Head of Department has reason to believe that an officer of his Portfolio or department has committed a disciplinary offence which the Permanent Secretary or Head of Department regards as a major offence (or one of a series of minor offences which should be treated as a major offence) he shall forthwith serve the officer with a written copy of the charge against him and the particulars of the alleged offence, in which event the following provisions of this regulation will apply.*

(2) The officer charged shall by notice in writing be required to state in writing within a reasonable time to be specified in such notice whether he admits or denies the charge and shall be allowed to give the Permanent Secretary or Head of Department any explanation he may wish.

(3) Where an officer fails to state in writing under the subregulation (2) whether he admits or denies the charge, he shall be deemed to have admitted the charge.

(4) The Permanent Secretary or Head of Department shall require those persons who have direct knowledge of the allegation to make written statements concerning it.

(5) The Permanent Secretary or Head of Department shall forthwith forward to the Commission the original statements and relevant documents and a copy of the charge and of any reply thereto, together with his own report on the matter and the Commission shall thereupon proceed to consider and determine the matter."

It is unnecessary to go further. It can be seen at once that the provisions of sub-sections (1), (4) and (5) were simply not followed. There is no power given to the Public Service Commission that enabled it to prefer disciplinary charges laid under s.35 against the plaintiff in the present case. The charges purported to be laid were simply a nullity. The

Commission had no power to consider and detrimine the matter. There was simply no decision, notwithstanding what purported to be done.

It may be that under Schedule 4 of the Disciplinary Appeal Board Rules, 1987, a schedule to the Fiji Service Commissions and Public Service (Amendment) Decree 1987, No. 10 (operative from 4th October 1987), there was an Appeal Board to which decisions of the Commission in disciplinary matters "shall lie" (s.10). In the present case there was no decision. It therefore matters not whether any such Board had been constituted or otherwise. We, however, note that the counsel appearing for the Attorney General conceded that in fact no Appeal Board had been constituted and there was no Secretary on whom the Appellant could have served his notice of appeal.

So the plaintiff was entitled to bring the proceedings, and have a declaration to the effect of the one sought in the summons. It is unnecessary to decide whether he might have also have been entitled to such a declaration based on either of the other two grounds proffered in his submissions.

We think it proper that the parties be given these reasons for allowing the appeal so that they can be considered, after which the matter can be re-listed for consideration of the making of such further orders, if any, as may be appropriate.

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The appeal will be stood over with liberty to either party to restore on 7 days notice to the other party.

Michael M. Helsham

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Mr Justice Michael M Helsham
President, Fiji Court of Appeal

Moti Tikaram

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Sir Moti Tikaram
Resident Judge of Appeal

Arnold Amet

.....
Mr Justice Arnold Amet
Judge of Appeal