

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0011 OF 1999S
(High Court Civil Action No. HJB0027 of 1998S)

BETWEEN:

THE COMPTROLLER OF CUSTOMS
AND EXCISE

Appellant

AND:

UTTAM LAL DULLABH
DURGA PRASAD
ROSHNI DEVI

Respondents

Coram:

The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Mr. Justice Savage, Justice of Appeal

Hearing:

Wednesday, 17 November 1999, Suva

Counsel:

Mr. D. Singh for the Appellant
Mr. V. Kapadia for the Respondents

Date of Judgment:

20 January 2000

JUDGMENT OF THE COURT.

This appeal is against a judgment of Fatiaki J given in Judicial Review in the High Court Suva on 25 February 1999 issuing certiorari to quash the decision of the Comptroller of Customs and Excise (the Comptroller) that the results of the Customs House Agents' Clerks examination held on 27 June 1998 be disregarded and that a fresh examination be held. He also directed the Comptroller to release the appropriate certificates of completion. There were four named applicants, but one (Sashi Kant) is no longer involved and he is dismissed from the proceedings. They alleged that along with candidates in Suva and Lautoka they duly sat the examination, but before the results were officially published they each

received a letter from the Comptroller dated 3 September 1998 advising that he had decided to disregard them, as he had reason to believe it was not properly conducted. He informed them that a fresh examination would be held on 3 October 1998 for which the candidates could apply to sit without fee, otherwise they could seek a refund of the \$22 paid. The applicants refused to accept this decision and did not sit the replacement examination.

The relief sought was certiorari to quash the Comptroller's decision; mandamus directing him to release the results of the examination and, if they had passed, to release the results and the certificates to that effect; a declaration that in any event the Comptroller had acted in breach of their legitimate expectations and/or abused his discretion and/or exceeded his jurisdiction, and further declaration or relief as to the Court might seem just, together with costs.

In his judgment Fatiaki J. recorded that the Court, with the concurrence of counsel, formulated four questions:

- (1) *Does the Comptroller of Customs have power to declare examination results invalid?*
- (2) *If he does, is the exercise of such power subject to judicial review?*
- (3) *If so, was the exercise of the power in the case of the applicants a breach of natural justice and/or unfair and/or unreasonable? and*
- (4) *What, in the event, ought the Court to order?*

The first question was seen as fundamental. After a review of various statutory provisions and regulations His Lordship concluded that the Comptroller had no power to invalidate the entire results of an examination, nor could he see such a power in the Examinations Act (Cap. 262A). Accordingly he answered the first question "No" and so found it unnecessary to deal with the others.

From this decision the Comptroller appealed on the sole ground that His Lordship erred in law in holding that no power exists in the Examinations Act, either expressly or by implication, that would permit or enable any of the named authorities (accepted as including the Comptroller of Customs) to annul or invalidate the entire results of any examination conducted, supervised, arranged or invigilated by such authority.

At the hearing of the appeal it became apparent that it was too narrowly based to achieve any worthwhile result. After discussion counsel agreed that the following questions be substituted for the ground of appeal and be dealt with by way of written submissions:-

- (1) *Does the Comptroller of Customs have the power under the Examinations Act Cap.262A to disregard the examination results?*
- (2) *If not, does he have any other power to disregard the examination results in the exercise of his duties as Comptroller of Customs?*
- (3) *If yes, was the exercise of the power in the case of the first three respondents a breach of natural justice and/or unfair and/or unreasonable and/or in breach of their legitimate expectations?*
- (4) *What, in the event, ought the Court to Order?*

There was a timetable for the delivery of written submissions on the basis of which, together with the oral submissions at the hearing on 17 November, judgment would be given on notice.

Customs Agents are licensed by the Comptroller for transacting business relating to the entry or clearance of any aircraft or ship goods or baggage (s.144)(1) of the Customs Act 1986 (Cap.196)). Customs Agents' Clerks play an important role in this business. Under s.149(1) of the Act a person licensed to act as a customs agent or any importer or merchant may, with the approval of the Comptroller, appoint a clerk to assist him in transacting his business, and subsection (2) prohibits a clerk so appointed assisting any person other than the

one appointing him. The importance of their role arises from s.150 which enables any person firm or company doing business in Fiji to grant authority to an employed clerk to sign binding customs declarations, bonds, or other documents required by the Act. The effect in practice, so we were informed by counsel, is that only the authorised clerks can sign such documents. Regulation 129A of the Customs Act Regulations 1996 states that the Comptroller may, upon written application and payment of a fee of \$22, grant an approval to any person to appear for the Customs Agents [and] Clerks Examination (clearly the word "and" has been inserted in error).

The respondents applied for and duly obtained approval and sat the examination on 27 June 1998. It consisted two papers of 2 hours and 1 hour respectively, the total marks on each being 100 with the pass mark 60. Copies were exhibited and they were clearly designed as a searching inquiry into wide areas of customs requirements and practice. As noted above, before the results were released, the Comptroller wrote the letter of 3 September 1998 advising that he had decided to disregard them. The three respondents and only one other candidate had obtained the necessary pass marks. We turn now to the agreed questions.

1 Does the Comptroller of Customs have the power under the Examinations Act Cap.262A to disregard the examination results?

The long title to the Examinations Act is "An Act to provide for the protection of the integrity of Examinations held in Fiji", and "examination" means "any examination conducted, supervised, arranged or invigilated by any of the authorities listed in the Schedule."(s.2). The Schedule includes the Public Service Commission, from which it is accepted the Comptroller has delegated powers. The Commission is empowered by Reg.26 of the Public Service Constitution Regulations 1990 to arrange for the taking of tests or examinations by applicants for appointments to the Public Service or by officers who wish to become eligible for promotion or transfer. Accordingly this appears to be the only delegated examination power

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the Comptroller could be given by the Commission, and since those seeking to sit the Customs Agents' Clerks examination were neither applicants for Public Service appointments nor officers of that service, the Comptroller did not come into the Commission's ambit of delegation so as to share its status as a scheduled person in respect of this examination, with the result that the Act would not appear to apply to it.

In any event the Act confers no power of the kind exercised by the Comptroller here. It creates a series of offences relating to irregularities in the examinations conducted etc. by the persons named in the Schedule, with a general penalty of a fine of \$2,000 or imprisonment for two years or both. It says nothing about what is to happen about an examination in respect of which any such offence has been committed, or if its integrity is compromised.

Fatiaki J. held that the power of annulling or invalidating the entire results of such an examination could not be derived by mere implication from the long title to the Act. He was clearly right. There is no ambiguity in the language used, and therefore no call for any explanation or assistance from the title, which reflects the obvious purpose to be gathered from the Act's provisions. In this Court Mr Singh for the appellant endeavoured to take the matter further by submitting that the purpose spelt out in the long title of protecting the integrity of examinations enables the Court to read into the Act a power to annul or invalidate a compromised examination in order to achieve that purpose.

Mr Singh relied on comments by the President of the New Zealand Court of Appeal in *Northland Milk Vendors Association Inc v. Northern Milk Ltd.* [1988] NZLR 530 at 537 where he said there were cases where, in the preparation of new legislation making sweeping changes in a particular field, a very real problem has certainly not been expressly provided for and possibly not even foreseen. As a result, he said the Court had a responsibility to work out a practical interpretation appearing to accord best with the general intention of Parliament as embodied in the Act. For this purpose it could be helpful, even crucial to have statements of

general principle or purpose in the Act itself. He went on to say

Whether or not the legislature has provided those aids, the Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended. The present case is in our opinion another illustration of a hiatus which the Court can legitimately and should bridge.

The hiatus in that case was that Parliament, in making fundamental changes to the control of the milk industry, had not dealt with what was to happen about home deliveries of milk in the interval before the new administrative control system came into effect. The Court effectively determined that they should be continue at the levels prevailing when the Act came into force. It can be seen that it was doing no more than amplifying or adding to the existing provisions to achieve the Act's purpose of rationalising milk delivery.

What we are being asked to do goes well beyond filling a gap in the Examinations Act. Its aim of protecting the integrity of examinations is to be achieved only by penal sanctions, and Parliament did not see fit to go further and give a power to nullify one in which offending had occurred or was suspected. For the Court to read into the Act the ability to disregard the examination results of all the candidates would constitute the introduction of an entirely different remedy, which could not be regarded as merely completing or filling in an unforeseen gap in the existing provisions. For these reasons the answer to the first question must be "No". However, as we make clear in the next question, we are satisfied that in the absence of special provisions governing the matter, any examining authority has implicit power to disqualify an offending candidate, or to disregard the results of a compromised examination.

2 *If not, does he have any other power to disregard the examination results in the exercise of his duties as Comptroller of Customs?*

There is no statutory or similar authority given to the Comptroller to conduct the Customs Agents' Clerks examination and his ability to do so must arise by necessary

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implication from his duty to promote the efficient operation of the Act under his control by ensuring that those concerned with its administration are properly qualified. This ability is recognised in Reg 129A of the Customs Regulations referred to above, authorising him to approve persons to appear for the examination upon written application and payment of the fee. In the absence of any prescribed rules or procedure, the conduct of the examination must be a matter for his judgment.

Those responsible for conducting examinations which are not governed by any relevant rules, whether statutory or otherwise, have the ability to prescribe their content and requirements for passing, and by necessary implication they must also have the power to take whatever action may be required to foster and preserve their integrity, which is something fundamental to public examinations of the type involved in these proceedings. To this end, an examining authority should be able to disqualify any candidate for cheating or other improper practice, for example; or to nullify or disregard the result of an examination the integrity of which has been compromised. Any other view flies in the face of logic and common-sense.

Accordingly the answer to the second question is "Yes".

3 *If yes, was the exercise of the power in the case of the [first three] respondents a breach of natural justice and/or unfair and/or unreasonable and/or in breach of their legitimate expectations?*

As with any public authority making decisions affecting public rights and liabilities, the judgments or decisions of the Comptroller in administering the examination must be arrived at in accordance with applicable rules of natural justice, and his decisions are subject to review by the Court: see Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd [1994] 2 NZLR 385 (PC). As Tucker LJ said in Russell v Duke of Norfolk [1949] 1 AllER 109 at 118, the question of whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and

circumstances. There were no procedures or guidelines specified for the Comptroller to follow, so that his decision about whether to disregard the examination results could only be the result of the exercise of his own judgment. In these circumstances he must act fairly and in good faith, and his decision must not be "unreasonable" or "irrational" in the public law understanding of those terms, as described by Lord Diplock in the following passage from Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 938 at 951:

By irrationality I mean what can now be referred to as "Wednesbury unreasonableness".....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.

From this extract it is clear that the circumstances in which a decision will be quashed for unreasonableness are very limited, and this is entirely consistent with the Court's function on review, which is not an appeal against the decision itself. Its concern is whether the decision was properly arrived at in accordance with recognised principles. There was no challenge to the Comptroller's good faith, and if there was material on which he could have reached his decision, the Court will not interfere unless that decision was irrational in the sense described by Lord Diplock.

In his affidavit the Comptroller (now described as the Director-General of the Fiji Islands Customs Service) deposed that on being informed of certain irregularities involving the examination conducted on 27 June 1998, he had no option but to declare it invalid and to arrange for a replacement examination on 3 October 1998. Three matters of concern to him emerged from the affidavit evidence. The first was the pattern of marks in this and earlier examinations sat by the respondents. He produced a summary of results for 1993-1997 and for the 1998 examinations. Uttam Lal Dullabh obtained 37 marks in 1993. He did not sit in 1994; in 1995 he obtained 47.5 and in 1996 23.5. He did not sit in 1997, and his mark in

1998 was 65. Durga Prasad obtained 22 marks in 1993, 19 in 1994, and 24.5 in 1995. He did not sit in 1996 and 1997, and in 1998 he obtained 67. Roshni Devi's mark in 1993 was 41, in 1994 39, in 1995 35.5, in 1996 32.5. She did not sit in 1997 and in 1998 she obtained 72. These three topped the examination, with the next successful candidate scoring 60, and nobody else passed. The fail marks ranged from 8 to 55, with the great majority scoring between 20 and 40. The Comptroller found the respondents' marks surprising in the light of their consistent failure in the earlier examinations.

The next matter of concern was an allegation by Selwa Nandan, the Senior Officer for Training in charge of the examinations, that he was offered \$1000 by the respondent Durga Prasad for a pass. The police investigated and reported there was insufficient evidence to take the matter further. Included in the record was a copy of the record of the police interview with Durga Prasad who denied the allegation, and it is clear that the issue was one of credibility. We would not have been surprised if the matter had been left to the Court to determine who was telling the truth on a prosecution. The Comptroller was entitled to believe his Senior Officer, who has since been promoted, according to one of the respondent's affidavits.

The Comptroller also had suspicions about the conduct of Anare Dobui, the training officer at the time, whom the respondents said had telephoned them before the results were issued and advised they had passed, and that he wanted to check their names for completion of the certificates. He faxed an unsigned copy of a certificate to Uttam Lal Dullabh at his request. The Comptroller said Anare Dobui went overseas on leave over a week before the police interview with Durga Prasad and did not return to work, and was deemed to have resigned.

This is obviously a difficult examination to pass, and in two of the previous years recorded nobody secured the pass mark of 60 or over, while in the other years the numbers

doing so ranged from one to three. There have also been problems with their integrity. Durga Prasad deposing that the Comptroller had nullified examinations on about five occasions over the last ten years, and he exhibited a press cutting in respect of the 1993 examination stating this was done because the papers had been leaked. A successful candidate has entry to a group of workers who play an important role in the industry, and they doubtless command a good income. Judging by the number sitting the examinations it seems to be a keenly sought qualification, with a correspondingly strong temptation to corruption in order to secure a pass, especially among those aspirants in the industry who have failed in earlier years.

Against this background and in the light of the earlier problems, it was only to be expected that the Comptroller should be vigilant to ensure that the examinations remain above suspicion, even to the extent of nullifying them should the circumstances appear to warrant such a drastic course. We are satisfied that the accumulation of the matters enumerated above provided grounds entitling him to make a judgment on whether to disregard the results, and applying Lord Diplock's test above, his decision to do so cannot be regarded as so outrageous in its defiance of logic that no sensible person could have arrived at it. We add that the element of fairness was satisfied in this case by the opportunity to sit the replacement examination in the following October without payment of fee. The complaint that the respondents' legitimate expectations have been ignored cannot be sustained. There can be no such expectation of a pass in an examination which the Comptroller responsibly concluded had been compromised. For these reasons the answer to question 3 is "No".

4 *What, in the event, ought the Court to decide?*

In view of the foregoing answers the appeal succeeds. The orders made by the High Court must be quashed, and the motion for judicial review dismissed.

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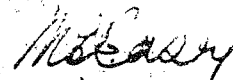
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Result

- 1 The appeal is allowed and the orders made by the High Court are quashed and the motion for judicial review is dismissed.
- 2 The parties are to bear their own costs in the High Court.
- 3 The appellant to have \$1500 costs against the respondents to cover his costs and disbursements in this Court



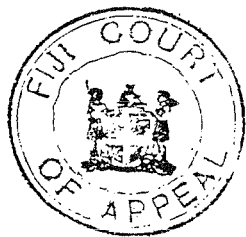
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Mr. Justice Savage
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Messrs. Sherani and Company, Suva for the Respondents