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

CIVIL APPEAL NO. ABU 0024 OF 2001S
(High Court Civil Action No. 0300 of 1997S)

BETWEEN:

PUBLIC SERVICE COMMISSION

First Appellant

THE ATTORNEY-GENERAL OF FIJI

Second Appellant

AND:

RUSIATE TAGICAKIBAU

Respondent

Coram: Eichelbaum JA, Presiding Judge
Sheppard JA
Tompkins JA

Hearing : Tuesday, 13 November 2001, Suva

Counsel : Mr S N Sharma for the Appellants
Mr R P Singh for the Respondent

Date of Judgment : Thursday, 22 November 2001

JUDGMENT OF THE COURT

From 1980 the respondent had been a subordinate officer in the Prison Service. His appointment had been renewed for successive 5 year terms. On 6 January 1997 the Commissioner of Prisons (the Commissioner) wrote to him stating he had received several reports on the respondent's poor work performance. After giving details the letter continued:

> *"It is obvious that you have ceased to be an efficient officer. Under the provisions of Section 15(3) of the Prisons Act, Cap 86, I wish to inform you that I intend to discharge you under Section 15(1)(c) of the Prisons Act and hereby serve you one (1) month notice as required under sub-section 2.*

However, I invite you to submit in writing within fourteen (14) days as to why you should not be so discharged. An early written explanation will be forwarded to the Secretary for Public Service Commission. If no representation is received from you within fourteen (14) days, I will assume that you have waived this privilege extended to you."

The respondent sent a full reply dated 14 January. He pointed out that since his contract was last renewed, in November 1995, only two disciplinary actions had been taken against him, one of which was still under investigation.

The next communication to the respondent was from the Public Service Commission (PSC). Dated 5 February 1997, it read:

"The Public Service Commission at its meeting held today has considered your appeal and decided that you be discharged from the Prison Service in accordance with Section 15(1)(c) of the Prisons Act, Cap 86."

The respondent replied with a lengthy letter dated 12 February. He disputed the procedures that had been adopted, maintaining he should have been given the opportunity of a disciplinary hearing, under Part VI of the Prisons Act Cap 86 (the Act). He also disputed the merits of the decision to discharge him, saying that his good service over the years had not been taken into account. On 9 July 1997 the PSC replied as follows:

"Appeal Against Discharge From The Service

The Public Service Commission, at its meeting held today, disallowed your appeal against its decision whereby you were

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discharged from the Prisons Service in accordance with Section 15(1)(c) of the Prisons Act Cap 86."

Although the letter spoke of the appeal as being disallowed, in evidence at the trial an officer of the PSC deposed that as there was no statutory provision for such a procedure, the respondent's "appeal" was not considered.

The respondent issued proceedings against the appellants in the High Court, alleging that the decision of the PSC to discharge him was ultra vires, void and of no effect, and claiming loss of salary, general damages and incidental relief. At the trial before Fatiaki J the respondent gave formal evidence recounting the history of the matter. For the appellants, the Commissioner provided a lengthy affidavit. After dealing with the history of the disciplinary matters concerning the respondent during his service the affidavit turned to the events leading to his dismissal. The Commissioner stated:

> *"33. On 5 December 1996, a report was filed by the Officer in charge of the medium security prison that the Plaintiff was seen driving a taxi when in fact he had reported sick and was on sick leave. The Plaintiff was severely warned about the seriousness of his poor attitude towards work by the officer in charge, and this matter was reported to the headquarters.....*
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> *34. A tribunal was elected to make findings in relation to the alleged disciplinary offence committed by the Plaintiff. Although the Plaintiff pleaded not guilty at first, he admitted during the course of investigation that he was driving a taxi while on sick leave to secure financial assistance. In mitigation, he sought leniency from the Tribunal and promised to reform himself*
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> *35. As the facts had been established that the Plaintiff had in fact committed a disciplinary offence, I found him guilty. While I did not punish him for this offence with one of the penalties under section 30,*

it was clear to me that the Plaintiff had ceased to be an efficient officer. As such, I considered that the procedure under section 15(1)(c) was more appropriate to the Plaintiff's case. The following factors were relevant in my decision:

a) The Plaintiff had committed numerous disciplinary offences and on each occasion, he had been punished in the hope that the punishments would deter him from committing further offence and that he would improve his performance. Despite this, he had failed to improve himself and had failed to change his attitude towards work. He continuously committed disciplinary offences.

b) The Plaintiff had also, on numerous occasions, been warned severely and counselled to uplift his performance at work. Despite these warnings (including final warnings) and counselling, he had continued to commit disciplinary offences and his attitude towards work was very poor.

c) On a total of four occasions, he had been given notices of intention to discharge him from the service. As indicated in this statement, when these notices were given, only then would the Plaintiff attempt to improve his performance. As soon as these notices were withdrawn, his performance would gradually deteriorate.

d) In my view, it was quite clear that the Plaintiff was abusing the leniency and goodwill that were extended to him.

36. As the person directly in charge of all prison officers, it was clear to me that the Plaintiff had ceased to be an efficient officer. Section 15(1)(c) provides me with the discretion to discharge an officer of the Prisons Service who has ceased to be an efficient officer.

37. I considered that section 15(1)(c) was the most appropriate course of action in the Plaintiff's case, instead of imposing a penalty upon the Plaintiff for malingering and for driving a taxi while on sick leave. As such, I did not impose a penalty under section 30. Such a penalty would have been futile as I intended to exercise my powers under section 15 to discharge the Plaintiff.

38. THEREFORE, on January 1997, in compliance with the procedure outlined under section 15(2) and 15(3), I gave the Plaintiff one month's notice of my intention to discharge him."

The Tribunal hearing was before a prison Supervisor. The charge was described as Malingering. The respondent cross examined witnesses, and gave evidence himself. With regard to para. 34 we were unable to find any clear reference in the record of the Tribunal proceeding to the respondent admitting the charge. At the conclusion of proceedings the Tribunal stated:

Without making any finding I state the proceedings to the Commissioner of Prisons for his decision and award.

However, under a heading "Summary of Proceedings" the Tribunal went on to record that although the respondent had continued to deny the charge, "the fact remains" that the respondent had breached an order of a superior by leaving his quarters when he was supposed to be confined. Further, the Tribunal remarked unfavourably on the respondent's credibility. He commented on the number of breaches committed by the respondent, and the final warning he had received, and said his record dramatically showed an unresponsive attitude towards management.

Fatiaki J found that in the respondent's trial on the charge of Malingering, there was substantial compliance with the provisions of section 30(2) of the Act, and the relevant regulation of the Prison Services Regulations. He pointed out that the Tribunal did not determine the charge, or invoke section 32 as he could have done. Instead, he elected to refer

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the proceedings to the Commissioner, a course authorised by section 35. In the circumstances the Tribunal should not have made findings of fact, nor commented on the respondent's credibility. The procedure the Commissioner ought then to have followed, his Lordship said, was that set out in Section 35:

> **The Controller may hear and determine the case himself or direct that it be dealt with by the Supervisor or senior officer who transmitted it, or by any other Supervisor or Senior Officer.**

Fatiaki J continued:

> ***"For his part the Commissioner of Prisons no-where deposed that upon receipt of the proceedings he had exercised his power to 'hear and determine the case himself' as he was obliged to do in the event that he did not direct it to be dealt with by the referral officer or by another officer. Indeed, it is sufficiently clear from paragraphs 34 and 35 of his affidavit ... and his answers in cross-examination, that the Commissioner of Prisons determined the case against the plaintiff merely by considering the written transcript of the proceedings heard by the Supervisor of Naboro Prison which had been transmitted to him with the tribunal's inadmissible findings and remarks. That was a course which the Commissioner was not entitled to follow."***

Supporting his conclusion with citations from the judgment of Kermode J in *Kaumaitotoya v Controller of Prisons* (1982) 28 FLR 54 his Lordship held that the Commissioner did not "hear" the respondent's case, and that the Commissioner's finding of guilt (see para 35 of the Commissioner's evidence, quoted above) could not stand.

In the Judge's view there were further errors in the handling of the case. Having formed the view that rather than impose a penalty on the respondent for the offence, it would be appropriate to invoke section 15, the Commissioner ought to have had regard to the provisions of section 32 of the Act:

> *"Where it is considered that a junior or subordinate officer should be removed from office ...; he shall be so informed at the conclusion of the hearing by the Tribunal and told that –*
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> *(a) any representations made in writing by him within fourteen days, will be forwarded to the Secretary of the Public Service Commission, accompanied by all relevant papers and records for a decision to be made by the Commission; and that*
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> *(b) If he makes no representations within 14 days, he shall be removed from office ... accordingly"*

In his Lordship's opinion, where during the course of a disciplinary hearing, a decision was made to discharge an officer, section 32 was "the more appropriate" procedure to invoke, rather than section 15. In relation to the section 15 process the Judge pointed to section 29 of the Act which provides that where punishment for a disciplinary offence has occurred, no officer shall be punished twice for the same offence. His Lordship said:

> *"This latter prohibition would be rendered meaningless if the officer's conviction could subsequently be resurrected for the purpose of undermining his 'efficiency' as occurred in the plaintiff's case. The same cannot be said however, of warning letters and counselling sessions or other non-disciplinary measures but that was not all that the Commissioner considered as his memorandum clearly disclosed."*

Finally, referring to the PSC's letter of 5 February 1997 (quoted above) the Judge said the reference to "appeal" was unfortunate in indicating a misunderstanding of the Commission's functions.

His Lordship concluded that in light of the numerous irregularities occurring in the case, the respondent had been improperly discharged from the Prison Service. He made a formal declaration to that effect, and for the assessment of damages.

On appeal from that judgment the appellants filed submissions arguing that the judgment was wrong in the following respects:

1. ***In holding that the provisions of section 15 had not been complied with. The appellants contended that both the Commissioner and the PSC properly followed the required procedures.***

2. ***In holding that in determining whether the respondent had ceased to be an efficient officer, the Commissioner was not entitled to consider the respondent's full employment history.***

3. ***In holding that section 32 was the more appropriate procedure to be applied. The appellants submitted that section 15 can be invoked at any time, even when disciplinary procedures are in progress. This submission was not pursued, and we do not express any opinion on it.***

The respondent on the other hand argued that the judgment should be upheld, for the reasons given by his Lordship.

Having considered the arguments, we can state our opinion quite briefly. The "Summary of Proceedings" appended to the Tribunal's record amounted to a series of findings about the merits of the charge and the respondent's suitability as a prison officer. Undoubtedly the Tribunal was in error in transmitting the proceedings to the Commisioner in this form. It was in direct breach of s 35, which provides that if the Tribunal decides to transmit the proceedings to the Commissioner, it shall do so "without recording any finding."

That was the first error. A second was that when the proceedings reached the Commissioner, he ought not, without more, to have made a finding of guilt. He should have heard the respondent before making any decision.

Understandably Mr Sharma felt unable to offer any argument against the above conclusions. He submitted however that there was insufficient evidence to conclude that either aspect had influenced the Commissioner's decision to discharge the respondent.

Given the respondent's history, we can understand the Tribunal's view that the situation called for a firmer response than yet another disciplinary penalty, and equally, the Commissioner's decision that the respondent had to be discharged. However, the inference that the errors must have played at least some part in the Commissioner's decision is irresistible. Clearly the receipt of the proceedings from the Tribunal was the catalyst for the Commissioner's subsequent actions. He received a report indicating that yet again the

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respondent had committed a significant disciplinary offence. While ostensibly on sick leave he had driven a taxi to supplement his income. The report, and in particular the Tribunal's comments which were wrongly included, would have left the Commissioner in no doubt of the respondent's guilt; and without conducting the further inquiry which should have taken place, he recorded a finding of guilty and decided to discharge the respondent. The sequence of events is such as to leave us in no doubt that the two errors were inextricably bound up with the ultimate decision to invoke section 15.

This is sufficient to dispose of the case but it will be helpful to refer to the Judge's finding that in determining whether the respondent had ceased to be an efficient officer, the Commissioner was not entitled to consider the respondent's employment history. We do not consider that this conclusion follows from the provision of section 29 of the Act, that no officer is to be punished twice for the same disciplinary offence. In deciding whether an officer had ceased to be efficient, his whole employment history may be taken into account. Discharge of an inefficient officer is a different issue from imposing a penalty. We add the caveat that if an officer is re-engaged, normally it must be assumed that he was then efficient. Something of significance would have to occur after reappointment to justify a finding of inefficiency. But he may have been a borderline case for re-engagement, as was likely the position with the respondent, and a further relevant offence could tip the scales to the point where a finding of inefficiency was justifiable, when past history was taken into account.

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Result

1. Appeal dismissed.

2. Appellants to pay costs to the respondent of $1,000.

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Eichelbaum JA, Presiding Judge

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Sheppard JA

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Tompkins JA

Solicitors:

Office of the Attorney General's Chambers, Suva for the Appellants
Messrs. Kohli and Singh, Suva for the Respondent

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