A

RE INIASI VODO TUBERI

[SUPREME COURT—Sheehan, J.—24 July 1986]

Civil Jurisdiction

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Judicial Review—discretionary remedy—decision of Public Service Commission—Disciplinary Committee may have found facts but did not make alternate method of appeal a fact or relevant to discretion).

K. Bulewa for the Applicant.

C

Application for leave to apply for Judicial Review of a decision by Warren David Sisarich who was the Disciplinary Committee of Inquiry of the Public Service Commission (Disciplinary Committee) whereby Iniasi Vodo Tuberi was dismissed from the Public Service for alleged improper conduct as provided by s.12(1) of the Public Service Act. The application sought relief by an Order of Certiorari.

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The actual "decision" of which applicant complained was not specified; whatever the Committee of Enquiry decided, the decision to dismiss was by the Public Service Commission for which the Disciplinary Committee would find facts. The application apparently assumed that the Disciplinary Committee found him guilty of the offence alleged; yet the decision of Public Service Commission is what the applicant sought to challenge. The Court stated that accordingly the Committee itself cannot in this case be made a respondent.

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Held: The application would be dismissed on the basis that as worded it did not show sufficient case to warrant leave being granted.

If leave were to be granted substantial amendment would be necessary to put the application on proper form so that a respondent could be "adequately informed of

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what it had to oppose".

Further the application for leave requires the exercise of a discretion, for which purpose the court would have to consider whether there was an alternative method of challenge viz a "statutory right of appeal (i.e. to the Public Service Appeals Board) against dismissal. Such an appeal had already been set down. A court "would not readily allow such a procedure to be short circuited" (See e.g. *R. v. Epping & Harlow General Commissioners ex parte*

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Goldstraw (1983) 3 All E.R. 257 per *Donaldson M.R.: R. v. Huntingdon D. C.*, ex parte Cowan 1984 1 All E.R. 58.

Application for leave dismissed.

Cases Referred to:

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Furnell v. Whangarei High School Board (1973) A.C. 660.
R. v. Epping & Harlow General Commissioners ex parte Goldstraw (1983) 3 All E.R. 257.
R. V. Huntingdon D. C. ex parte Cowan (1984) 1 All E.R. 58.

SHEEHAN, J

B

Ruling

On the 12th of December 1985 the applicant was formally advised of his dismissal from the Public Service for improper conduct as provided under Section 12(1) of the Public Service Act.

C

This is an application for leave to apply for Judicial Review of the decisions leading to by dismissal. It seeks to have the decision of the Public Service Commission and the decision of a Committee of Enquiry set up by that Commission under Regulation 22(4) of the Public Service (Constitution) Regulation brought into this Court and quashed.

The application filed also seeks an interim order that the Public Service Appeal Board hearing of the applicant's appeal against dismissal, stayed. Counsel for the applicant in fact advised the Court that notice from the Appeals Board had only just been received setting the hearing of the appeal for the end of this month. However that application for stay was not proceeded with and only the question of leave to apply for Judicial Review calls for decision.

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The relief sought is set out in the applicant's statement—

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"(1) Application for judicial review in the form of an Order of certiorari to remove into this Honourable Court and quash a decision of Mr Warren David Sisarich Esq. The Disciplinary Committee of Inquiry of the Public Service Commission dated 12th December 1985 and

(ii) The decision of the Public Service Commission dated 12th December 1985 which both decided that the Applicant be dismissed from his employment as an Acting Principal in the grade FTE02 with the Ministry of Education, Government of Fiji on the grounds known only to the Respondents and not to the Respondents and not disclosed to the Applicant."

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As I read the Regulation 22(4) the Committee of Enquiry is a fact finding body created by the Public Service Commission to enable a decision to be made on complaints of serious offences by public servants. The Committee investigates and reports its findings to the Commission. In the present case the applicant has not stated what "decision" of the Committee of Enquiry he has complaint of. He asumes because of his dismissal that the Committee of Enquiry found him guilty of the disciplinary offences alleged.

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Counsel for the respondents cited the Privy Council case of

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Furnell v. Whangarei High School Board 1973 AC 660

as being on all fours with this matter. While it certainly similar it was concerned with a suspension from duty rather than a dismissal. Nonetheless the rationale of the decision is relevant here. In that case though a Committee of Enquiry investigated and reported on charges without informing the appellant or affording him an opportunity to be heard the majority opinion was that there could be no complaint against the Committee as it neither condemned or criticised. Here though the applicant was afforded a hearing he still takes issue with the conduct of that hearing.

But whether or not the Committee of Enquiry reported the applicant "guilty" of the offences complained of it made no decision on his future. The decision to dismiss was the decision of the Public Service Commission and that is the only decision the applicant in fact wishes to challenge. In so doing it is possible that the mode of conduct of the enquiry or the information supplied to the Commission may be challenged but the Committee itself cannot in this case be made a respondent.

For this reason Judicial Review is not available to question the findings of the Committee of Enquiry.

As to the application regarding the Public Service Commission decision to dismiss, the only two grounds actually cited, to my mind afford little chance of success.

They were as follows:

(1) That the Public Service Commission exercised its discretion wrongfully to appoint a Committee of Enquiry to hear charges against the Appellant.

(2) That the punishment imposed by the Commission was harsh and excessive having regard to the circumstances of the case.

The first ground must surely fail.

By Regulation 22(4) the Public Service Commission is specifically empowered to set up a Committee of Enquiry. The decision to do so or not is a matter of discretion entirely that of the Public Service Commission when faced with any complaint.

If any reasons were wanted the applicant has filed the correspondence which show iminently suitable reasons. By its letter of 25/8/85 the Public Service Commission advised the applicant that a Committee of Enquiry had been appointed to investigate the two charges against the applicant—a complaint of sexual relations with a student and sexual harassment of a fellow exployee. Considering a possible challenge of undue delay I find that under Regulation 2 the Public Service Commission is prohibited from conducting disciplinary proceedings while police investigations are in progress. Apparently these had been completed but the position concerning prosecution of the applicant was not clear and enquiry was made of Director of Public Prosecutions. The fact that no criminal prosecutiion was to follow certainly did not preclude a decision by the Public Service Commission to hold an enquiry.

The only other ground of complaint cited against the Public Service Commission is that the punishment i.e. dismissal of the applicant was harsh and excessive. There is no ground cited to base a claim that the Public Service Commission to dismiss was wrong, only that dismissal was an excessive penalty. If in fact the Public Service Commission found that there was substance to the charges laid dismissal was a course open to it and it can hardly be said that a decision to dismiss under such circumstances would be harsh or excessive.

Paragraph (4) of the applicant's statement does state that the Public Service Commission (and the Committee of Enquiry) were wrong in law in convicting the applicant and he is entitled to an acquittal.

This phraseology is of course inappropriate. However taking the statement overall I accept that the applicant's real complaint may be summarised as being that because the Committee failed to accord him a proper hearing the report it made to the Public Service Commission was invalid. The Public Service Commission acting on that report without itself giving the applicant an opportunity to be heard made an invalid decision affecting his future. It also dismissed him without giving its reasons. The application could be dismissed on the basis that the application as worded does not show sufficient cause to warrant leave being granted but to do so at such a preliminary stage on this ground alone might be somewhat severe.

But certainly if leave were to be granted then substantial amendment would be necessary to put the application in proper form so that a respondent could be adequately informed of what it had to oppose.

In exercising its discretion as to whether to grant leave to apply for Judicial Review the Court has also to consider whether there is an alternative method of challenge of the decision complained of. Here there is a statutory right of appeal laid down in the code that Parliament has provided for dealing with disciplinary matters concerning public servants. It seems reasonable therefore that the Court should not readily allow that procedure to be short circuited. I note that under the old Order 53 (see RSC 1967 53/2/1) that when an appeal had been lodged against the decision complained of, that as a rule certiorari would not issue and that an application for leave would be adjourned till the appeal was determined. Of course there has been a marked change of pace in Judicial Review since 1967. While it is open to the Court to entertain Judicial Review before other provided remedies are exhausted as Donaldson M.R. said in

R. v. Epping & Harlow General Commissioners ex parte Goldstraw (1983) 3 All E.R. 257

"It is a cardinal principle that save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used".

In *Aldous & Alders*
"Application for Judicial Review" it is stated at page 118:

"The governing principle is that the Court will as a matter of discretion refuse to grant a Judicial Review remedy where another remedy is available which is equally speedy effective and convenient."

R. v. Huntingdon D. C. ex parte Cowan (1984) 1 All E.R. 58

is also cited in that work. There Glidewell J held that where there is an application for Judicial Review and the applicant has an alternative remedy by way of appeal the Court should always ask itself when deciding whether to grant the relief sought which of the alternative remedies is the more convenient in the circumstances not only for the applicant but in the public interest, and should exercise its discretion accordingly.

The Court is notified that the hearing of the applicant's appeal by the Public Service Appeal Board is set for next week.

A The applicant in fact has come to this Court having lodged that appeal to the Public Service Appeal Board himself. It was apparently lodged out of time as was this application for review. Counsel for the appellant adverted to the delay in obtaining that leave to appeal as a reason for applying to this Court. But such criticism is not open to an applicant who has himself failed to treat the statutory time limits as being of essence in his own interests.

B With this statutory remedy immediately available, the applicant can obtain a speedy decision and it cannot be said that Judicial Review would provide a more convenient or effective remedy. Again for an application to be granted leave, it would require to be substantially amended, which would occasion further delay.

Accordingly leave for Judicial Review is dismissed.

Application dismissed.

(*Note:* See also 33 FLR 30)