JOSEFA VUETAKI

v.

THE COMMISSIONER OF PRISONS &
THE ATTORNEY-GENERAL

[HIGH COURT, 1989 (Jesuratnam J) 8 June]

Civil Jurisdiction

Public Service- Prisons Service- whether termination of employment a discharge- whether termination lawful- Prisons Act (Cap 86) Sections 12 & 15.

The Plaintiff sought a declaration that the termination of his employment with the Prisons Service was a discharge within the meaning of Section 15 of the Act but that it was invalid for want of the required notice and because he was given no opportunity to make representations. Dismissing the Plaintiff's claim the High Court HELD: that the Plaintiff's term of engagement had merely expired through effluxion of time and that accordingly no question of discharge arose.

Case cited:

Nakkuda Ali v. M F de S Jayaratne [1951] A.C. 66

K. Vuetaki for the Plaintiff
Ratu J. Madraiwiwi for the Defendants

Jesuratnam J:

In this originating summons the plaintiff Josefa Vuetaki, a former Prisons Officer, is suing the defendants, the Commissioner of Prisons and the Attorney-General of Fiji, for a declaration that his "discharge" from the Prisons service was unlawful.

The plaintiff states in his affidavit that he joined the Prisons service as a Prisons officer class 'C' on 5th February 1968 and that he rose to the position of Prisons officer class 'B' and class 'A'. He was at one time Acting Principal Prisons Officer. He complains that in late January 1988 prior to his going away on vacation leave he was told that he would not be re-engaged as from the 6th February, 1988. He says that his "discharge" was made under section 15 of the Prisons Act (Cap. 86) and as such could have been made only on one of three grounds and should have been preceded by the requisite notice as required by that section. He states he was not informed of the reason why he was "discharged" and that he was not given an opportunity of being heard and that there has been a denial of natural justice.

The first defendant in his amended affidavit in reply states that he did not act under section 15, but under section 12 of the Prisons Act under which latter section the plaintiff was not re-engaged for a further period after the expiry of his

previous period. The first defendant states that the Prisons officers of the class to which the Plaintiff belonged are enlisted for particular periods. At the expiry of each period the officer concerned is re-enlisted or re-engaged for a further period in the absolute discretion of the first defendant. However the first defendant concedes in paragraph 7 of his amended affidavit that "the first defendant accepts that such discretion should be exercised according to law and the rules of natural justice which are tempered by the nature of the Prisons service as a disciplinary force as reflected in section 12 of the Prisons Act (Cap. 86) and the exercise of the discretion to re-engage thereunder."

When this matter came up for trial, counsel for both parties agreed on certain basic facts and stated there was no dispute on the relevant facts and invited the court to decide the case on the law based on such agreed facts. I now proceed to do so.

It is clear that if the non-re-engagement of the plaintiff is construed as a discharge under section 15 it is irregular and unlawful because it is not based on any of the 3 grounds set out there and even if it is he was not given one month's notice of the first defendant's intention to discharge him and was not afforded the opportunity to make representations to the Public Service Commission as required by the section.

Although the first defendant in his first affidavit appeared to agree that the plaintiff's "discharge" came under section 15 yet in his amended affidavit he took up the position that the non-re-engagement of the plaintiff came under section 12.

Both sections should therefore be set out. Section 15 reads as follows:

> "15 (1) Subject to subsection (3) any officer of the Prisons Service other than a senior officer may be discharged by the Controller at any time -
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> (a) if he is pronounced by a Government medical officer to be mentally or physically unfit for further service;
>
> (b) on reduction of establishment;
>
> (c) if the Controller considers that he is unlikely to become, or has ceased to be, an efficient officer.
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> (Amended by Ordinance 20 of 1968 s. 4, Order 10th July 1970 and Act 19 of 1974, s. 4).
>
> (2) Every officer of the Prisons Service discharged under the provisions of subsection (1) shall be given one month's notice of intention to discharge him from the Prisons Service or at the option of the Controller one month's pay in lieu of such

notice.

(3) Where it is considered that any such officer should be so discharged, he shall be so informed and told that - A

(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 B

(b) if he makes no representations within fourteen days, he shall be discharged in the manner prescribed by this section."

Now section 12 reads as follows:-

"Every subordinate officer, other than a person temporarily employed C in any prison pursuant to the provisions of subsection (4) or (5) of section 11, shall be enlisted to serve in the prisons service for such period of years as may be fixed by the Minister and this period of service shall in all cases, be reckoned from the day on which such officer was enrolled."

D

Section 11 too is relevant in this connection because it is 11(2) which confers the power of appointment to the Commissioner. Section 11(2) states "All officers of the Prisons Service, other than senior officers, may, subject to the provisions of any delegation made by the Public Service Commission, be appointed by the Controller".

E

I think it is clear from the terms of section 12 and the scheme of the Act as a whole that implicit in the power of the Commissioner to enlist an officer for a particular period of years is the power to desist from enlisting or re-engaging him for a further period at the conclusion of the current period. If however an officer is discharged during the pendency of a current period the provisions of section 15 will apply because such discharge arises during the current period and not at its conclusion. F

A discharge can thus arise if the services of an officer are dispensed with during the pendency or currency of his actual period of service. At the end of a stipulated period of service there cannot arise any question of discharge because in such a case his period of service expires by effluxion of time. That is why there is no specific provision to cover such a situation. No intervention or no extra act by anyone is necessary to bring about that result. G

I am fortified in my view by a comparison of section 12 of the Prisons Act with section 9 of the Police Act and section 8 of the Royal Fiji Military Forces Act.

The regulations too refer to "appointment" and "re-appointment". The scheme of

the Act and allied Acts make it quite clear that each period of appointment under section 12 is separate, distinct, exclusive, independent and self-contained.

A It may perhaps be hard on the plaintiff that after twenty years of service his services were not availed of for further periods although he is only 47 years of age.

But the first defendant, who has been entrusted with the task of recruitment, and termination of the services of Prisons officers of certain categories of officers in
B which the plaintiff is included states in his sworn affidavit that he "properly considered" the plaintiff for re-engagement but decided against it due to the "poor work performance" of the plaintiff. Such an averment puts the matter at an end particularly in view of the fact that the plaintiff has not made any allegation of victimisation or *mala fides* against the first defendant. Of course the plaintiff states that he was not informed of the ground for his non re-engagement. But it
C does not even appear to be necessary that the first defendant should give his reason. However the first defendant gives his reason presumably to show his *bona fides*. I do not know whether he means the same thing when he says in his affidavit that his discretion should also be exercised in accordance with "rules of natural justice".

D There is nothing to suggest that the first defendant has not acted honestly in entertaining his view of the non-suitability of the plaintiff for further re-engagement.

In my view therefore the non-re-engagement of the plaintiff by the first defendant was not unlawful.

E In Nakkuda Ali v. Jayaratne [1951] A.C. 66 Lord Radcliffe said at p. 78:

> "In truth, when he (Controller of Textiles) cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it. But, that apart, no
F procedure is laid down by the regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private, before the Controller acts."

Although that case has been dissented from in many aspects, I think the passage in question contains good law and is relevant to the instant case.
G

I therefore dismiss the plaintiff's summons with costs.

(Judgment for the Defendants.)