DAVID DHIRAJ

v

THE ATTORNEY-GENERAL OF FIJI

[HIGH COURT, 1993 (Byrne J), 5 April]

Civil Jurisdiction

Public Service- judicial review- disciplinary proceedings- failure to reply to charges within time- failure to hear plaintiff- whether breach of natural justice- Public Service Regulations 1987 (Public Service Decree 10/87 Schedule 2).

After he was charged with 3 disciplinary offences the Plaintiff replied after the reply period had expired. The High Court HELD: the PSC should have considered the explanations offered and should have treated them as a denial of the charges. The failure to grant a proper hearing was a denial of natural justice.

Cases cited:

Lever Finance Limited v. Westminister (City) London Borough Council [1971] 1 Q.B. 222
Minister of Housing v. Sharp [1970] 2 Q.B. 233
Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1960] A.C. 260
Robertson v. Minister of Penisons [1949] 1 K.B. 227
Sefanaia Masi Kaumaitotoya v. The Controller of Prisons (Civ. Action 282 of 1982)

Action for declaratory judgment in the High Court.

T. Fa for the Plaintiff
G.E. Leung for the Defendant

Byrne J:

In this case the Plaintiff seeks three declarations in an Originating Summons following his purported dismissal as a Senior Clerical Officer in the Office of the Commissioner of Police on 21st December 1989.

FACTS

I take the following summary of the facts of the case from the affidavits which have been sworn and filed by the parties.

The Plaintiff was a civil servant for some twenty years; his first appointment was that of a Laboratory Technician from 1st September 1969 and then by various promotions he attained the position of Senior Clerical Officer. On 5th

December 1989 he was given a letter of the same date in which he was charged with three disciplinary offences under the Public Service Regulations, 1987 under the signature of the then Commissioner of Police Mr. Josefa Lewaicei. The letter gave the Plaintiff five days from the day of receipt of the letter to state in writing whether he admitted or denied the truth of the charges together with any explanations he might wish to offer in respect of the charges.

The letter continued that if he did not deny the truth of the charges within the five days he would be deemed to have admitted the truth of the allegations and become liable to any one or more of the penalties specified in regulation 50(1) of the Regulations.

The three charges were:

> (i) "That you David Lal Parshotam s/o Dullabh Bhai ... was (sic) found to be negligent, careless and incompetent in the discharge of your duties on 1.8.89 when you did not produce Wages Reconciliation and Special Constabulary Pay Reconciliation for the period 1/12/88 to 31/7/89 this being an offence within the meaning of Regulation 35(d) of the Fiji Public Service Commission and Public Service (Amendment) Decree 1987.
>
> (ii) That you David Lal Parshotam ... did absent yourself from your office and from official duties without valid excuse on the following dates:
>
> 6.9.89, 11.9.89, 15.11.89 and 22.11.89.
>
> (iii) That you ... used very vulgar and insulting words and remarks towards other accounts staff on 3.11.89 which was calculated to cause unreasonable distress to those officers."

The Plaintiff enquired from the Personnel Officer at the Office of the Commissioner of Police, one Peni Cavuilagi what "the five days in the letter meant". He was told that they meant five working days which at the time meant that the Plaintiff had at least until 12th December and probably, I consider, until the beginning of work on 13th December 1989 to answer the three charges.

On 12 December 1989 the Plaintiff delivered a reply to the Commissioner of Police which in my view at least amounted to an explanation of his conduct or, if I accept the submission of his counsel, a plea of not guilty to the first two charges and an explanation on the third.

The Public Service Commission held a meeting on 20th December 1989 at which it considered the charges against the Plaintiff and decided to dismiss him in accordance with Regulation 50(1)(a) of the Public Service Commission

Regulations, 1987. The Plaintiff was informed of the decision in a letter dated 21st December 1989 which referred to the Plaintiff's alleged negligence, carelessness and incompetence in the discharge of his duties and noted that "you failed to reply to the charges within the stipulated time". A

Upon receiving his dismissal letter the Plaintiff on 17th January 1990 appealed the decision and in the process enlarged on and purported to explain his earlier answer to the charges of 13th December 1989.

On 5th February 1990 the Plaintiff wrote to the Disciplinary Appeals Board of the Public Service Commission virtually reiterating what he had said in his previous correspondence but submitting also that he had never previously received a disciplinary letter and that consequently his dismissal was too severe or "drastic" as he put it. He submitted that other more compassionate penalties could have been imposed on him because the effect of his dismissal was not only that he had lost his employment but also all his pension benefits. B C

On 9th March 1990 the Public Service Commission declined to review its earlier decision after which the Plaintiff consulted his union, the Public Service Association which then wrote to the Public Service Commission on 20th June 1990 seeking to intervene on behalf of the Plaintiff and requesting that the Plaintiff be re-instated. D

The Commission replied to this letter in a brief two-paragraph letter of 6th July 1990 stating simply that the Commission had closed its file on the Plaintiff who had been dismissed some six months previously.

The Plaintiff apparently did nothing more until early in 1991 he sought legal advice as a result of which the present proceedings were commenced. E

Had the Plaintiff consulted his solicitors much earlier I have no doubt that he would have requested a Judicial Review of the decision to dismiss him by way of Certiorari but for this he was out of time; he therefore proceeded by Originating Summons.

Initially the defendant argued that the Plaintiff was estopped from proceeding by Originating Summons but finally on 11th November 1992 its counsel properly conceded that this course was open to the Plaintiff. F

There can be no doubt about this. In Civil Action No. 282 of 1982 Sefanaia Masi Kaumaitotoya v. The Controller of Prisons and the Attorney-General of Fiji, in a judgment delivered on 17th August 1982 Kermode J. Held on almost similar facts that the Plaintiff was not precluded from seeking a Declaratory Judgment where the facts or circumstances required it. Kermode J. Quoted with approval the statement of Lord Goddard in Pyx Granite Co. Ltd v. Ministry of Housing and Local Government (1960) A.C. 260. Lord Goddard at p. 290 said: G

> "I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is certiorari."

THE SUBMISSIONS OF THE PARTIES

The first defence of the Defendant is that the Plaintiff was out of time in delivering his first answer or explanation to the charges. Regulation 40 (2) of the Public Service Commission Regulations states that when a public servant is charged with either any major offence or one of a series of minor offences which should be treated as a major offence, he must state in writing within a reasonable time specified in the notice of the charge or charges whether he admits or denies the charges. The Defendant claims that in this case five consecutive days were reasonable for the Plaintiff.

The Defendant also relies on Section 51 (d) of the Interpretation Act, Cap. 7 which states that where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluding days meaning Saturdays, Sundays or public holidays are not to be taken into account in computing the time.

Accordingly, it is said, the Plaintiff should have delivered his reply on 10th December 1989 or at the latest the morning of 11th December 1989. In fact the Plaintiff's letter was not received by the central Registry of Police Headquarters until 12th December 1989. Therefore the Defendant says the Commission was entitled to disregard the Plaintiff's explanation.

As to this the Plaintiff submits that the Defendant is estopped in law from pleading this defence. He says, and it is not denied by the Defendant, that the Defendant through one of its Senior Officers informed the Plaintiff that he had five working days in which to reply and that the Plaintiff relied on this statement. The Plaintiff further submits that because one of the functions of the Personnel Officer was to advise employees on Public Service Commission policy, he was in a position of authority and knew or must have known that the Plaintiff would rely on what he told him. Therefore it is alleged the Personnel Officer owed the Plaintiff a duty of care to ensure that the advice he gave the Plaintiff was correct.

The Plaintiff then refers to a number of authorities to support this claim. The first is Robertson v. Minister of Pensions [1949] 1 K.B. 227, a decision of Denning J., as he then was, who held that a letter written by the War Office to Mr. Robertson stating that a physical disability from which he was suffering had been accepted as attributable "to military service" bound the Minister of Pensions later and precluded him from denying that Mr. Robertson's injury

was related to military service.

Denning J: held that the assurance from the War Office was enforceable because it was intended to be binding, intended to be acted upon and was in fact acted upon. He also held that the Appellant had become entitled to assume that the War Office had consulted any other departments concerned before it gave the assurance.

In Lever Finance Limited v. Westminster (City) London Borough Council [1971] 1 Q.B. 222 Lord Denning, by now the Master of the Rolls, said on page 230:

> "There are many matters which public authorities can now delegate to their officers. If an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be."

It appears that Megaw L.J. agreed with everything Lord Denning said in his judgment whilst the other member of the Court, Sach L.J. appears to have agreed generally with Lord Denning's remarks.

In another case decided the previous year, Minister of Housing v. Sharp [1970] 2 Q.B. 233 Lord Denning stated at p. 266 that when an official duty is laid on a public officer, by statute or by common law, he is personally responsible for seeing that the duty is carried out.

It is therefore submitted that in the instant case the Personnel Officer owed a duty of care to the Plaintiff and might be expected to assume that the Plaintiff relied on the advice he gave him.

The Defendant denies that the Personnel Officer was acting as an agent for the Commission and submits that there is no evidence of this either in the Plaintiff's affidavits or elsewhere in the material.

Also the Defendant submits that as the Plaintiff had been long in the Civil service he must have known the urgency and consequences to him if he failed to give an explanation in the time stated on the charges. His failure to do so was negligent and must be held against him. It is further submitted that Regulation 40(2) is not confusing at all, as was submitted by the plaintiff. Sub-rule 2 of the Regulation 40 states so far as relevant "The office 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 ....."

It is submitted that the regulation must be construed to mean five consecutive days so that the Plaintiff's explanation should have been received by 10th December 1989 or at the latest on the morning of Monday, 11th December 1989. As we know now it was received at Police Headquarters on 12th

December 1989, a day later in the view of the Defendant.
Reliance was also placed on Section 51(d) of the Interpretation Act, Cap. 7 which reads:

A

> "Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

B For these reasons the Defendant says that the Commission had every right not to take the Plaintiff's explanation into consideration.

The maxim *ignorantia juris neminem excusat* has never been applied in a draconian fashion. It has always been taken to refer to ignorance of well-known rules of law. I doubt very much whether the Plaintiff would have been C familiar with the Interpretation Act. If he were, he would hardly have consulted Mr. Cavuilagi on the meaning of the five days in the charge. The question then is whether in all the circumstances it was reasonable to give the Plaintiff five days the last of which expired on a Sunday to submit an explanation. If, as I take it, the defendant concedes that delivering his explanation on 11th December would be reasonable, I cannot see how it was unreasonable for the Plaintiff to D hand in his explanation one day late on Tuesday, 12th December 1989.

The Plaintiff had been charged with what at least the Commission regarded as major offences. That being so, in my view it would not have been unreasonable for the Commission to have given the Plaintiff as much as seven consecutive days in which to reply to the charges.

E I think there is much to be said for the Plaintiff's argument that Mr. Cavuilagi was an ostensible agent of the Commission and had implied authority to speak for the Commission and advise the Plaintiff when he sought that advice.

This leads me to consider the Plaintiff's replies to the charges and the submissions by Mr. Fa that the Commission should have regarded his F explanations on the first two charges contained in his reply of 12th December as pleas of not guilty to them and at least providing an explanation in mitigation of the third charge.

The allegation in Charge one is that the Plaintiff has been negligent, careless and incompetent. It is said that he did not produce the Wages Reconciliation G and Special Constabulary Pay Reconciliation within the required time period. The Plaintiff accepts that he did not comply by the specified date but strongly denies that this was due to fault on his part. He pleaded four defences:

> (i) He was given no proper training or guidance to perform the work he had to learn on the job. This took time which was not considered by the Commission when it fixed the completion deadline.

(ii) When the Plaintiff took his leave for one month no one was appointed to take his place. When he returned to work he had a backlog of work to catch up on. He says the Commission should have foreseen his likely difficulties and either appointed a temporary replacement or re-set the completion date.

(iii) The Plaintiff recognised that he might have problems completing the tasks within the specified time so he saw his superior, the Force Accountant, a George Fonmoa. He was told to concentrate on the Wages Reconciliation and to do the Special Constabulary Pay Reconciliation if time allowed. The Plaintiff followed these instructions and says that when he was charged he had completed seventy percent of the Wages Reconciliation work and part of the other task.

(iv) In a memorandum addressed to the Force Accountant the Plaintiff requested unpaid overtime so as to finish his incompleted work before the deadline. This request was rejected.

CHARGE TWO

Here the Plaintiff is accused of being absent from work without leave or valid excuse on five specified days, three in September 1989 and two in November 1989. The Plaintiff says the charge is unfounded because he did have a valid excuse, he was on sick leave and had medical certificates to prove it. In this regard he relies on General Order 1004(a) of the General Orders 1981 which reads:

> "Where an officer falls sick and is absent from duty for any period exceeding twenty-four hours, the Medical Officer or private Medical practitioner is to complete the Medical Certificate on the prescribed form as soon as the patient is initially examined."

It follows therefore, according to the Plaintiff, that he was not required under the Public Service Commission regulations to supply a medical certificate and that he had a valid excuse for his absence.

This at least in my judgment should be taken as a plea of not guilty.

On the third charge the Plaintiff is accused of using vulgar and insulting words to a fellow employee. The Plaintiff admits this charge but says there were extenuating circumstances namely that he was under pressure at work and used only words in retaliation to comments made by others. He claimed to have been humiliated and ridiculed and never encouraged in his work.

In my judgment the Commission should have accepted the Plaintiff's reply to the first two charges as being a plea of not guilty to them and should not have been satisfied under Regulation 43(1) as to the immediate truth of those charges and therefore requiring more evidence.

Accordingly in my judgment the Commission should then have appointed a Disciplinary Tribunal under Regulation 45 of the Public Service Commission Regulations and given the Plaintiff and those accusing him an opportunity to give evidence on oath or affirmation. In the case of the Plaintiff, he would also have been entitled to assistance by a representative in cross-examining the witnesses called in support of the case against him.

This was not done because under the Regulation, and because his reply was received a day late, the Commission deemed him to have admitted the charges.

In failing to appoint a Tribunal in my judgment the Defendant through the Public Service Commission wrongly denied the Plaintiff a proper hearing of the charges against him. In doing so I consider that the Plaintiff was also denied natural justice and I therefore find that the decision to dismiss him from the Public Service Commission on 21st December 1989 was void and of no effect.

I therefore declare in accordance with Paragraph (a) of the Originating Summons of 18th April 1991 that the failure of the Public Service Commission at its meeting on 20th December 1989 either to hear the Plaintiff or listen to his explanation with regard to the three disciplinary charges against him amounted to a breach of the principles of natural justice and rendered the decision of the Public Service Commission to dismiss the Plaintiff from the Public Service in its letter of 21st December 1989 null and void and of no effect. I also declare in Paragraph (e) of the Originating Summons that the explanation given by the Plaintiff in relation to charges one and two amounted to a denial of these charges and that accordingly the Public Service Commission was obliged under the regulations to appoint a Disciplinary Tribunal to hear the charges which it failed to do.

The result is that the Plaintiff succeeds. I order the Defendant to pay his costs to be taxed if not agreed.

(Declarations granted)