

A THE STATE
v
PUBLIC SERVICE COMMISSION

ex parte

B MICHAEL RAMAN
[HIGH COURT, 1995 (Fatiaki J), 22 March]

Revisional Jurisdiction

C *Public Service-disciplinary proceedings-circumstances in which PSC must enquire into the truth of denied charges. - PSC (Constitution) Regulations 1990 Regn. 41 (6).*

D The applicant was charged with misbehaviour which he denied. The PSC pronounced itself satisfied of the truth of the charges without conducting a hearing. HELD: Where determination of the truth of a charge depends substantially on an assessment of credibility it is necessary for a full hearing to be held.

Cases cited:

D.P.P. v. Hester (1973) 57 Cr. App. R. 212
Fraser v. State Services Commission [1984] 1 NZLR 116
E *Furnell v. Whangarei High Schools* [1973] AC 660
Local Government Board v. Arlidge [1915] AC 120
Osgood v. Nelson (1872) L.R.5.H.L. 636
Ridge v. Baldwin [1964] AC 40

Mr. H.M. Patel for Applicant
F Mr. I. Wikramanayake for the Public Service Commission

Motion for Judicial Review

H.M. Patel for the Applicant
I. Wikramanayake for the Respondent

G **Fatiaki J:**

By letter dated the 1st June 1994 the employment of the applicant as a Hindu language teacher at Suva Grammar School was terminated by the Public Service Commission (PSC).

On the 20th of June 1994 the applicant sought and obtained leave to apply for

an order for judicial review of his dismissal on the ground that the PSC had failed to comply with the requirements of Regulation 41 of the PSC (Constitution)

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Regulations 1990 which sets out the procedure that "shall" be followed in the event that an officer is charged with committing a "major (disciplinary) offence".

In particular the regulation provides :

"(2) The officer shall by notice in writing be required to state in writing ... whether he admits or denies the charges and shall be allowed to give ... an explanation if he so wishes.

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(4) The Permanent Secretary or Head of Department shall require those persons who have direct knowledge of the allegation to make written statements concerning it.

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(5) The Permanent Secretary or Head of Department shall forthwith forward to the Public Service Commission the original statement and relevant documents, and a copy of the charge and of any reply thereto, together with his own report on the matter and the Public Service Commission shall thereupon proceed to consider and determine the matter.

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(6) If the truth of the charge is admitted by the officer concerned, or if the Public Service Commission, after consideration of the reports and documents submitted to it ... and after such further investigation or inquiry as it considers necessary, is satisfied as to the truth of the charge it may, after taking into account the service record of the officer impose any of the penalties specified in Regulation 51.

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In this latter regard Regulation 51 provides a list of six penalties in descending order of seriousness, ranging from "(a) dismissal ...", through "(c) reduction of remuneration", to "(f) reprimand". Quite clearly the applicant has had the maximum penalty imposed on him.

Finally Regulation 41(8) provides :

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"(8) Where the PSC is not satisfied as to the truth of the charge it shall appoint a disciplinary tribunal in accordance with Regulation 44."

A Before leaving the provisions of the regulation it may be noted that there is no specific procedure to be followed if an officer (as in this case) chooses to deny the charge or charges. If I may say so this is a glaring lacuna in a regulation that purports to set out comprehensively the procedure to be followed in dealing with "major (disciplinary) offences" where a denial is more likely to occur than if an officer was charged with a minor infraction.

B I am satisfied that this is a case which falls within the third class of cases of dismissal enumerated by Lord Reid in Ridge v. Baldwin [1964] A.C. 40 namely, "dismissal from an office where there must be something against a man to warrant his dismissal" or in the words of Lord Hatherley L.C. in Osgood v. Nelson (1872) L.R.5.H.L. 636 at 649 :

C "(where) it is open to the Court ... to correct any court, tribunal or body of men who may have power ... of removing from office, if it should be found that such persons, have disregarded any of the essentials of justice in the course of their inquiry, before making that removal, or if it should be found that in the place of reasonable cause those persons have acted obviously upon mere individual caprice."

D Be that as it may there can be no doubting that the applicant as the dismissed officer has a "sufficient interest in the matter" within the terms of Or. 53 r.3(5) of the High Court Rules to seek an order for judicial review. Furthermore there is little dispute as to the relevant chronology of events which may be summarised as follows:

E (1) By memo dated 10.11.93 from the Permanent Secretary ('PS') (Education, Science and Technology) the applicant was charged with two major offences contrary to Regulation 36(t) of the PSC (Constitution) Regulations 1990 which makes it a disciplinary offence where an officer :

F "(t) is guilty of any improper conduct in his official capacity, or of any other improper conduct which is likely to affect adversely the performance of his duties or is likely to bring the PSC into disrepute or be prejudicial to the conduct of the Public Service."

G The memo also sought within fourteen days the applicant's written explanation to the charges in compliance with Regulation 41(2) (above).

(2) By letter dated 23.11.93 the applicant denied the charges and provided a detailed explanation in respect of both incidents the subject matter of the charges ; Also submitted with the applicants letter were two (2) additional exculpatory letters from colleagues of the applicant who

were allegedly present and witnessed what transpired in respect of the alleged incidents.

- (3) By letter dated 1.6.94 the applicant was dismissed from the Public Service with effect from 3 July 1994.

It is common ground that the applicant was charged upon allegations of improper conduct in that he had made statements and suggestions with sexual undertones to two female students in circumstances that State Counsel describes as : "Importuning a young female student". It is also common ground that the PS (Education, Science and Technology) complied with the requirements of Regulations 41(4) and (5). Certainly no complaint has been seriously made in that regard although learned counsel for the applicant appeared to suggest that the permanent secretary's report to the PSC under Regulation 41(4) ought in fairness to have been made available to the respondent. I cannot agree.

In the scheme of Regulation 41 the permanent secretary might be considered the investigating or referring officer charged with the responsibility of making initial enquiries into the complaint and reporting thereon to the PSC which is the decision-making body. It is no part of his function to make adverse findings against the officer concerned or any final determination on the complaint. In the circumstances I cannot accept that the permanent secretary's confidential report to the PSC ought to be disclosed to the officer concerned as a matter of fairness.

As was said by Lord Morris of Borth-y-Gest in delivering the judgment of the majority of the Privy Council in Furnell v. Whangarei High Schools (1973) A.C. 660 :

"... there is a contrast between investigating a complaint ... and a 'determination of the matter' ... One of the principles of natural justice is that a man should not be condemned unheard. But the Sub-committee do not condemn. Nor do they criticise."

Further in Local Government Board v. Arlidge (1915) A.C. 120 Lord Shaw of Dunfermline in rejecting the respondent's demand to see the inspector's report said:

"I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure. And I feel certain that if it were laid down in Courts of law that such disclosure would be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file."

I turn then to consider the particular instances of non-compliance alleged against the PSC as enumerated in para. 11 of the applicant's affidavit. They are :

- A “(a) Failed to satisfy if the PS had sent written statements from all those persons who had direct knowledge of the allegation made against me herein;
- (b) Failed to give weight to the written statements of Mr. Gyanendra Lal Sahay and Miss S. Prasad both teachers at Suva Grammar School and present during the time of the alleged misconduct as mentioned in the charge brought against me ;
- B (c) Failed to act judiciously or otherwise in carrying out further investigation or inquiry in the whole matter;
- (d) Failed to give any opportunity to me or my witnesses to appear before the Commission to give evidence or explain or otherwise before my dismissal;
- C (e) Failed to give weight to my 28 years of experience as a school teacher before the Respondent ordered dismissal by letter dated the 1st of June 1994 ; and
- D (f) Purported to have failed to do justice to me in not complying with the proper procedure for a disciplinary proceeding as provided in Regulation 41(6), 42(1)(a), 44 and 45 of the PSC (Constitution) Regulations 1990.”
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In summary learned counsel for the applicant submitted that fairness demands that the PSC conduct an oral inquiry where the complainants could be cross-examined and the applicant could be heard and also call witnesses on his behalf. On principle I cannot agree.

- F At the outset I would observe that there is no such requirement to be found in Regulation 41 for an oral hearing before the PSC. Indeed Regulation 41(6) contemplates two distinct situations or limbs ; firstly, the situation where the charge is admitted by the officer concerned which is not the case here, and secondly, where although the charge is not admitted by the officer, nevertheless, the PSC is satisfied as to the truth of the charge which is the relevant limb
- G relied upon by State Counsel.

In this latter regard State Counsel stressed that the PSC had before it the PS's confidential report; the applicant's written explanation, the two (2) statements of the applicant's colleagues; and presumably the complainant's statements, and, although the PSC did not consider it necessary to conduct any further

investigation or inquiry into the matter, it was perfectly entitled to form an opinion based solely on the documentary evidence available. (See : paras. 11(d) & (f) and 12 of the affidavit of Shiu Prasad filed on behalf of the P.S.C.)

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It is clear from the affidavit of Shiu Prasad and the submissions of State Counsel that the PSC's view is that notwithstanding a categorical denial of the charges there is no right conferred by the regulations for an officer to have the matters investigated by PSC where he can face his accusers, and, either himself, or through his counsel, subject their testimony to cross-examination.

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According to PSC, the officer's rights are confined to a written reply to the charges whether he admits or denies their truth and, to giving such explanation as the officer wishes to have considered. The clear implication is that no particular importance or status attaches to the plea itself as far as dictating a future procedure. Admissions and denials rank equally, and it follows that an admission does not necessarily mean there will not be an investigation, or a denial that there will be one.

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To put it another way, there was no need for an oral hearing because the PSC had not arrived at an opinion of being not satisfied as to the truth of the charge which would have entailed it proceeding under Regulation 41(8) and appointing a disciplinary tribunal which in turn would have necessitated a full oral hearing. (See : Regulations 44, 45 and 46).

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However even if I accept those propositions in their entirety, the natural question that must be asked is - under what circumstances would the PSC consider it necessary to conduct further investigation or inquiry in terms of Regulation 41(6) ? or in the context of the present case, - how can the PSC be satisfied as to the truth of the charge without further investigation, where the issue is one of credibility between the complainants and the officer concerned?

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In the absence of a right of appeal against what is akin to a summary determination of a complaint by the PSC under Regulation 41(6) which may (and did in this case) result in the dismissal of an officer, I have no hesitation in holding that the *audi alteram partem* rule applies to the decision of the PSC under Regulation 41(6), where the truth of the charge depends substantially upon an assessment of credibility.

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In my view in the particular circumstances of this case, the decision of the PSC under Regulation 41(6) that no further investigation or inquiry into the matter was necessary, can only be classed as capricious and unreasonable in the sense that no reasonable tribunal could consider it justifiable to determine an issue of credibility on paper alone.

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Richardson J. in Fraser v. State Services Commission [1984] 1 NZLR 116 in

dealing with a disciplinary procedure enacted in substantially similar terms to Regulation 41 said at p.125 :

- A “It is obvious that the manner in which the Commission is expected under the statutory scheme to proceed to its determination ... must depend on the nature of the charges and the sufficiency of the material furnished to it at that point. If the material is inadequate or incomplete some further investigation will be necessary to furnish a factual foundation
- B for a decision on the truth of the charges and on the appropriate penalty if they are found to be established. If on the papers there is a conflict between the evidence furnished by the permanent head in support of the charges and the replies made by the officer which is sufficiently material to have a hearing on the findings of the Commission in relation to the charges
- C (or to the penalty, ... the Commission may be expected to make further inquiry before reaching a decision.”

and later in dealing more specifically with the power of the Commission to make “such further investigation or inquiry (if any) as it considers necessary” (cf : an almost identical power given the PSC in Regulation 41(6)) the learned

- D judge said at p.125/126 :
- E “In some cases it will be able to proceed to a decision on its consideration of the papers filed : in others further investigation will be necessary ... In those cases where further investigation is necessary the nature of that investigation will depend on all the circumstances of the particular case. Where it is a matter of giving the officer concerned a fair opportunity of correcting or contradicting any relevant statement prejudicial to his or her position an inquiry of the officer giving particulars of that statement may suffice. At the other extreme where there are conflicting versions of events natural justice may require a full scale hearing
- F with the opportunity of presenting oral evidence and of cross-examination ... The requirements of natural justice have to be tailored in a realistic way to meet the needs of a particular case. In providing those express powers which will enable the Commission to achieve justice to the individual officer and at the same time to facilitate a fair decision on the charges, I do not think
- G it can be said that the legislature intended to leave such an important question of natural justice to the unfettered discretion of the Commission. On the contrary I consider it is implicit in the subsection that the powers of investigation will be exercised so as to accord with the principles of natural justice and I would so hold accordingly.”

In similar vein Cooke J. in delivering the leading judgment in the case said at p.122 (ibid) :

“The provision in S.58(6) for ‘such further investigation or inquiry (if any) as it considers necessary’ gives a power whose use was here demanded by natural justice. If material and damaging allegations of fact, not previously disclosed to the officer, are contained in what is placed before the Commission by the permanent head, I think that natural justice requires the Commission to give the officer at least an opportunity of answering them in writing. And there may be cases, for instance cases turning on acute issues of relative credibility, where it is so obvious that only a full hearing will be adequate that it becomes obligatory to use subs (4) (which is in similar terms to Regulation 41(8)).”

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A fortiori where the complaint is unsworn and concerns misconduct of a sexual nature and where the complainants are children.

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In this latter regard Lord Diplock observed in D.P.P. v. Hester (1973) 57 Cr. App. R. 212 at p.242 :

“... common sense ... suggests that there are certain categories of witnesses whose testimony as to particular matters may well be unreliable either because they may have some interest of their own to serve by telling a false story, or through defect of intellect or understanding, or as in the case of sexual acts committed on them by others, because experience shows the danger that fantasy may supplant or supplement genuine recollection.”

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That is not to say that the PSC is required to conduct any sort of trial but it cannot be ignored that to accept the truth of the complaints in the face of the applicant’s corroborated denials necessarily entails an adverse finding on the creditworthiness of the applicant (and his colleagues) who have all been disbelieved.

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In the light of the above I have no hesitation in quashing the determination of the PSC and in directing that this matter be referred back to the PSC to be dealt with in accordance with this judgment.

(Motion allowed.)

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