STATE v PUBLIC SERVICE COMMISSION, Ex parte SOLOMONE SILA KOTOBALAVU

HIGH COURT — CIVIL JURISDICTION

PATHIK J

15 February 2002

[2002] FJHC 94

Administrative law — judicial review — application for judicial review — whether wrong Respondent in judicial review — whether no decision reached — Court of Appeal Act (Cap 12) s 12(2)(f) — High Court Rules 1988 O 53 r 9(4) — Public Service Act 1999 ss 1, 17, 20, 26(9) — Public Service Regulations 1999 (Legal Notice No 48 of 1999) reg 22.

Applicant as Permanent Secretary for Finance sought judicial review of the decision of Respondent conveying the Commission's findings of guilt against the Applicant on all six disciplinary charges against him. Respondent alleged that this was a premature application since the wrong person has been named as Respondent and no decision has been reached.

Held — (1) All the Commission did was to make a finding of guilt in the Applicant. Respondent Secretary does not make decisions. The Respondent as Secretary to the Commission is not a member of the Commission and therefore did not take part in the finding of guilt against the Applicant. There is no finding, action or decision of the named Respondent which can be the subject of an order for certiorari. Hence, the application for certiorari has been brought against the wrong person.

(2) There is no decision by any tribunal except that there is a finding of guilt in the Applicant on the disciplinary charges by the Public Service Commission which has not even been joined as a Respondent in this case. The Applicant failed to appear before the Commission. As a result, no finality was reached in the matter by the Commission. There was no decision of the Commission enabling the Applicant to apply for judicial review under Order 53 of the High Court Rules. No doubt there was a finding of an interlocutory nature, not by The Secretary of the Public Service Commission but by the Commission itself, namely, finding the Applicant guilty on all the disciplinary charges.

Application dismissed.

Cases referred to

Ayantuwo v IRC [1975] 1 RLR 253 CA; *Ashmore v Corp of Lloyds* [1992] 2 All ER 486; *Daemar v Gilliand* [1981] 1 NZLR 61; *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513; *State v Supervisor of Elections, Ex parte United National Labour Party* Juducial Review No HBJ 10/1999S; *Permanent Secretary for the PSC and Anor v Epeli Lagiloa* Civil Appeal No ABU38/1996, cited.

Council of Civil Service Unions and Ors v Minister for the Civil Service [1984] 3 All ER 935; *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155; *O'Reilly v Mackman* [1983] 2 AC 237; *In Re Amin* [1983] 2 AC 818; *Regina v Arts Council of England, Ex parte Women's Playhouse Trust* The Times 20 August 1997; *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* (1997) 1 NZLR 650; *State v Secretary, Public Service Commission and Ors, Ex parte Anare Vuniwai* Judicial Review No HBJ 29/98S, considered.

I. Tuberi for the Applicant

W. Calanchini and *S. Navoti* for the Respondent

Judgment

Pathik J. The Applicant Solomone Sila Kotobalavu (the Applicant) as Permanent Secretary for Finance has, pursuant to order for leave granted him on 27 September 2001 applied for judicial review of what he calls the decision of the Respondent, namely, The Secretary, Public Service Commission (hereafter referred to as The Secretary) made on 19 September 2001 conveying the Commission's findings of guilt against the Applicant on all the six disciplinary charges laid against him.

The decision

The so called decision impugned is contained in the Public Service Commission Memorandum dated 19 September 2001 signed by A Jale, Secretary of the Public Service Commission addressed to the Applicant and which reads as follows:

> *At its meeting held today, 19 September 2001, the Public Service Commission considered the six allegations of breaches of the Public Service Code of Conduct filed against you on 06 September 2001 by the Secretary for the Public Service, your various responses to the allegations, together with the submission from your solicitor.*
>
> *The Commission found you guilty on all six allegations.*
>
> *Before the Commission decides on the imposition of penalty in terms of Regulation 22(a)–(g) of the Public Service Regulations 1999, it has agreed that you be given the opportunity to mitigate before the Commission.*
>
> *The Commission has decided to meet with you at 10.00 am on Wednesday 26 September, 2001 at the Chairman's Board Room, PSC, Berkley Crescent, Suva and you are allowed the choice to appear in person or be represented by another person or the combination of both.*

Relief sought

The relief sought by the Applicant is as follows:

(a) **An order of certiorari** to remove the said decision/findings of the Respondent to this Honourable Court and the same to be quashed.

(b) **A declaration** that the Respondent has acted in bad faith after this matter was amicably resolved on 31 July 2001.

(c) Damages

(d) Costs.

Grounds of relief

The grounds upon which the Applicant relies are as hereunder:

(1) The Respondent was biased in that it became the prosecutor and the judge in its own cause:

  (A) The Respondent wrote the disciplinary charges.

  (B) The Respondent was the writer in the decisions/findings.

  (C) The Respondent participated in all aspects of the disciplinary proceedings.

(2) The Respondent was in breach of the rules of natural justice in:

  (A) failing to give an opportunity to the Applicant to be heard on the question of guilt.

  (B) failing to give an opportunity to the Applicant to cross-examine the materials or evidence before it.

(C) Failing to provide an independent tribunal to hear the allegations against the Applicant.

(3) The Respondent failed to give any reason or reasons for its findings of guilt.

Background facts

The facts surrounding the judicial review have been summarised by the Respondents counsel in his written submission which are as follows:

On 6 September 2001, six disciplinary charges were laid by the Respondent against the Applicant for:

(1) His continuous refusal to implement the Commission's decision to promote Mr Netani Vosa to the post of Manager, Debt and Cash Flow Unit of the Ministry of Finance with effect from 30 May 2001;

(2) His unilateral decision to effect the promotion of Mr Netani Vosa on 14 August 2001 instead of 30 May as originally directed by the Commission;

(3) His failure to hand over Mr Netani Vosa's letter of promotion.

(4) His unilateral action of allowing Mr Rohit Parmeshwar's acting appointment at the debt and Cash Flow Unit without the approval of the Commission.

(5) His unilateral action of allowing Mr. Rohit Parmeshwar's acting appointment at the Debt and Cash Flow Unit without the approval of the Commission.

(6) His failure to effect the Commission directive to promote Mr Netani Vosa after his undertaking that he would do so in a meeting held between the applicant, the respondent and the Chairperson of the Commission on 31 July 2001.

(7) His attempt to improperly influence the Commission by directing the Respondent to change the Commission's record on the promotion date of Mr Netani Vosa to 14 August 2001 instead of the earlier Commission approved date of 30 May 2001.

Applicant's submission

As ordered, Mr Tuberi filed written legal submissions in this matter. He dealt with the various grounds for judicial review.

On the ground of bias he said that the Respondent has become the prosecutor and judge in his own cause. He said that no man should be a judge in his own cause. Hence, he says, that the respondent laid the charges, it heard the evidence and it also made the finding of guilt. Mr Tuberi submits that looking at the procedure and the way the Respondent became the complainant, the prosecutor and the judge in reaching the guilty verdict, the decision or finding was therefore invalid.

The learned counsel referred the court to a number of authorities on the subject of bias and said that in the circumstances the finding of guilt against the Applicant on the disciplinary charges is null and void.

On the ground of breach of rules of natural justice Mr Tuberi submitted that the Respondent failed to give an opportunity to the Applicant to cross-examine any adverse evidence which may have been presented before the Respondent in the hearing to consider the question of guilt and in this regard referred to the observation of Fiji Court of Appeal in *Permanent Secretary for Public Service Commission and Another v Epeli Lagiloa* (Civil Appeal No ABU 38/1996 at 16) and to reg 22(a) of the Public Service Regulations 1999 (Legal Notice No 48

of 1999). He said that the right of the Applicant to be heard or to cross-examine evidence before the Respondent has been entrenched in the said Regulation which provides:

> (2) In deciding whether an employee has breached the Public Service Code of Conduct and if so what disciplinary action should be taken against the employee, the Commission must comply with the principles of natural justice.

Mr Tuberi submitted that although the Respondent was aware of the principles of natural justice, it refused to accord the said principles when dealing with the applicant.

Mr Tuberi says that the Applicant should have been heard on the disciplinary charges and to cross-examine the evidence laid before the Respondent and in this case he referred to the following passage from the judgment of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237:

> *But the requirement that a person who is charged with having done something which, if proved to the satisfaction of a statutory tribunal has consequences that will, or may, affect him adversely, should be given a fair opportunity of hearing what is alleged against him and of presenting his own case, is so fundamental to any civil legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement.*

Counsel argues that the Respondent failed to provide an independent tribunal to hear the disciplinary charges against the Applicant. Had that been done the question of bias would have been avoided.

Mr Tuberi emphasised that there was the need to give reasons for the decision or findings. None was given in this case. Counsel referred the Court to a number of authorities in support of this argument. He also referred to The Fiji Public Service Act 1999 which in s 26(9) provides:

> 26(9) In the conduct of an appeal, the Appeal Board is not bound by the procedures, legal forms and rules of evidence of a court of law but should:
>
> (a) Accord natural justice to parties to the appeal;
>
> (b) Keep a written record of its proceedings;
>
> (c) Give reasons for its decisions on the appeal.

He said that since the Appeal Board is required by statute to give reasons for its decision the respondent would also be required to give reasons for its decisions. Failure to do so, he submits makes the said decision null and void.

For the reasons advanced by him, he says that the relief sought should be granted.

Respondent's submission

The learned counsel for the named Respondent, namely, The Secretary, Public Service Commission submits that the application has been brought against the wrong person. The said Respondent has no decision-making function.

Mr Calanchini submits that it was not the Respondent who acted in bad faith but the Applicant after 31 July 2001 in not implementing the Public Service Commission's decision and the agreement reached at a meeting. He submitted that section 20 of the Public Service Act 1999 required the Applicant to comply with written directions from the Commission conveyed by the Respondent concerning the appointment on promotion of Mr Netani Vosa to the position of Manager, Debt and Cashflow Unit with effect from 30 May 2001.

On the question of bias, counsel submitted that there has not been bias against the Applicant for the reasons given in the written submissions, stating, inter alia, that there is no material to suggest that the Respondent who is not a member of the Commission, participated in the decision-making process of the Commission.

In the matter of rules of natural justice counsel submitted, inter alia, that there was no need for an oral hearing and that the absence of oral hearing is not a breach of natural justice (*Ayantuwo v IRC* [1975] 1 RLR 253 CA). He said that since there were no factual disputes there was no need to allow the Applicant the opportunity to cross-examine the Respondent.

Proceedings in respect of a breach of the Code of Conduct are to be dealt with by the Commission (see s 7 of the Public Service Act 1999).

On the giving of reasons, counsel submitted that this was not a case which necessitated the setting out of the reasons for the decision.

He further said that this is a premature application as the Commission's disciplinary procedure has not been completed. The Applicant was required to appear for penalty either personally or through counsel before the Commission on the question of mitigation but instead makes the present application for judicial review.

Counsel further submits that the Applicant should have exhausted the alternative remedy by way of appeal before proceeding with the judicial review. He said that because this was not done the Court should refuse to grant judicial review.

As for claim for damages counsel submits that this is not a case in which the Applicant is entitled to damages.

Mr Calanchini says that the application for judicial review should be dismissed for the reasons he has given in his written submissions.

Consideration of the issues

A. Decision — Is there one?

Before an application for judicial review is made in a matter under Order 53, there has to be a *decision* in the matter. It is a decision which is impugned in the judicial review. In an application for judicial review the court is concerned with reviewing, not the merits of the decision, but the decision-making process itself. The text books on judicial review talk of the supervisory jurisdiction by way of judicial review, over the proceedings and decisions of inferior courts, tribunals and other bodies. As Lord Brightman said in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1174 at 155:

> *Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.*

His Lordship observed further at 1173:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

Further on the argument that there has to be a decision as distinct from a finding which is the case before me, Lord Fraser in *In Re Amin* [1983] 2 AC 818 at 829 observed that:

> *… Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and*

is to be contrasted with an appeal where an appellate tribunal substitutes its own decision on the merits for that of the administrative officer. [Emphasis mine.]

The judicial review application is a specialised procedure by which the courts may grant one of the prerogative remedies of certiorari (to quash a decision) … (Judicial Remedies in Public Law by Clive Lewis).

In the matter before me there is no decision by any tribunal except that there is a finding of guilt in the Applicant on the disciplinary charges by the Public Service Commission (the Commission) which has not even been joined as a Respondent in this case. The Applicant was required to appear before the Commission on 26 September 2001 but he failed to do so and instead decided to institute the present proceedings. As a result no finality was reached in the matter by the Commission. In other words there was no decision of the Commission enabling the Applicant to apply for judicial review under O53 of the High Court Rules. No doubt there was a finding of an interlocutory nature, not by The Secretary of the Public Service Commission but by the Commission itself, namely, finding the Applicant guilty on all the disciplinary charges.

In the circumstances of this case, since there was an interlocutory finding (by the Commission) the Practice Note No 1 of 1993 issued by the Honourable the Chief Justice of 30 September 1993 is pertinent and ought to be noted and for ease of reference I set it out in full as hereunder:

JUDICIAL REVIEW OF INTERLOCUTORY ORDERS

There has been a recent increase in the number of applications for leave to seek Judicial Review of interlocutory orders.

It has long been settled law and practice that interlocutory orders will seldom be amenable to appeal. It is for this reason that leave to appeal against such orders is usually required (See Court of Appeal Act — Cap 12, Section 12(2)(f)). Even where leave is not required the policy of the Court of Appeal is to uphold interlocutory decisions and orders of the trial Judge unless they are plainly wrong (see *eg Ashmore v Corp of Lloyds* [1992] 2 All ER 486 HL).

Although, for obvious reasons, Order 53 does not contain a leave provision similar to that found in the Court of Appeal Rules the principles governing interference with interlocutory decisions (which are based on the need to ensure the efficient and just disposal of the work of the Courts) are the same in both jurisdictions.

The legal profession is therefore requested to note that only in the most exceptional cases will the High Court grant leave judicially to review interlocutory decisions.

A helpful guide to the distinction between final and interlocutory orders is to be found at O 59 r 1A in the 1991 White Book.

In the *State v Secretary of Public Service Commission and Ors, Ex parte Anare Vuniwai* (Judicial Review No HBJ 29/98S) Scott J made certain observations on the availability of judicial review of decisions which are not final and on the procedures which Disciplinary Tribunals should follow. For the sake of giving a clear picture of the situation and for completeness of the subject-matter I am dealing with, I set out herein the following extract from His Lordship's judgment in *Ex parte Vuniwai* (above) which is as follows:

As has been explained elsewhere the High Court of Fiji derives its powers judicially to review from the High Court Act 1981 of England and Wales via Section 18 of the High Court Act (Cap 13). These powers have now become part of the Supreme Law of Fiji by virtue of Section 119 of the Constitution. They are similar to but also different from the powers of the High Court of New Zealand conferred by the Judicature Act 1908 as amended by the Acts of 1972 and 1977. They are also different from the powers conferred on the Federal Court by the Australian Administrative Decisions (Judicial Review) Act 1977.

In New Zealand sections 3 & 4 of the Judicature Act 1908 as amended gave a statutory power to the High Court which it did not previously possess namely a power to review decisions which do not finally determine the rights and obligations of the parties (see Daemar v Gilliand [1981] 1 NZLR 61 *and Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513).

In Fiji there is no equivalent to the New Zealand Judicatrue Act and therefore the position here is that only those decisions which fall within the purview of the English 1981 Act are reviewable. As recently pointed out by Fatiaki J in the State v the Supervisor of Elections Ex parte United National Labour Party (Judicial Review No HBJ 10/1999S) such decisions, in order to qualify as a subject for judicial review must, in the words of Lord Diplock in Council of Civil Service Unions and Ors v Minister of the Civil Service [1984] 3 All ER 935:

> *Have consequences which affect some person (or body of persons) other than the decision maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (1) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do so until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (2) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.*

For these reasons, since there is no final decision the Applicant's application is premature and he ought to await finality in the matter of his disciplinary charges. Therefore I do not think that judicial review need be considered any further on the matters raised in the application. The application is dismissed. However, in case I am held wrong in the decision that I have come to, I should deal with other aspects of the application and the issues raised therein.

B. Is the proper Respondent before the court?

The question was raised by Mr Calanchini whether the proper Respondent is before the Court.

It is clear from the affidavit evidence that all that the Commission did was to make a finding of guilt in the Applicant. He was to appear before the Commission on 26 September 2001 for penalty but the Commissions' work was thwarted by the Applicant when he made the present application.

The Respondent named herein is: The Secretary, Public Service Commission. There is no doubt as to what the powers of Secretary to the Commission are. In short he does not make decisions. As counsel submits he is appointed under s 17 of the Public Service Act 1999 which provides:

> (1) There is to be a Secretary for public service who is also The Secretary to the Public Service Commission.

The Respondent as Secretary to the Commission is not a member of the Commission and therefore did not take part in the finding of guilt (the so-called decision) against the Applicant. I agree with Mr Calanchini that there is no finding, action or decision of the named Respondent which can be the subject of an order for certiorari.

Hence, I agree that the application for certiorari has been brought against the wrong person. Therefore, on this ground also the application fails. I need not proceed any further with the consideration of the application unless proper parties (Respondent or Respondents) are before the court.

The application for judicial review is therefore again dismissed on this ground as well.

Other issues

Although I am dismissing the application as stated hereabove, nevertheless because other issues have been raised, I ought to, in deference to the very interesting submissions made by both counsel, very briefly deal with them.

Bias

On the question of bias, it is clear that since the Respondent named is not a member of the Public Service Commission no question of bias arises. It is the Commission which has the Constitutional function of taking disciplinary, action, against the holders of public offices. The question is, could bias be imputed in the Commission in those circumstances?

Under the powers vested in it by the Public Service Act 1999 and the Public Service Regulations 1999, The Commission took disciplinary action against the Applicant. The functions of the Commission are set out in s 147 of the Constitution and s (1) of the Public Service Act 1999.

The Applicant was required to comply with the directions from the Commission conveyed by The Secretary to the Commission concerning the appointment on promotion of Mr Netani Vosa with effect from 30 May, 2001. This direction the Applicant defied culminating in disciplinary charges against him.

In these circumstances no question of bias arises either on the part of the Commission or The Secretary for as I said before The Secretary's function is to record the finding of the Commission and to convey the finding to the Applicant. This is what the Secretary did in this case.

Natural justice and right to cross-examine

In this case the PSC stated as to how it came to the finding of guilt on the disciplinary charges as conveyed to the Applicant by The Secretary to the PSC.

The Commission acted under the Public Service Regulations 1999. The PSC stated that the Applicant was given the opportunity of being heard himself and through his counsel on the disciplinary charges. The PSC stated that it has powers to hear and determine disciplinary charges.

The Applicant alleges that he was denied natural justice and that he should have been allowed to cross-examine during the hearing.

In view of the orders which I propose to make herein, it is not intended to deal at any length with the subject of natural justice on the facts of this case. A few observations will be sufficient.

As Mr Calanchini submitted reg 22 of the Public Service Regulations 1999 does deal with the requirement of the Commission to comply with the principles of natural justice. However the Regulation does not expressly require that there be an oral hearing, and whether one is required in any particular case will depend upon the subject-matter and the circumstances of the particular case.

It appears that the Applicant was given an opportunity to present his response in writing to the allegations that he had breached the Public Service Code of Conduct. This response was considered by the Commission.

In the light of the above there does not appear to be any breach of natural justice. Because there was no oral hearing, as the PSC says, does not mean that there was breach of natural justice [*Ayantuwo v IRC* (above)].

The Applicant says that he was not allowed to cross-examine. On this aspect it was held as follows by Court of Appeal, Wellington in *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* (1997) 1 NZLR at 650):

> *It was well settled as a desirable practice that cross-examination was not permitted as of right in judicial review proceedings except where the interests of justice required.*

It is further stated in that case that:

> *Rarely his cross-examination of deponents on their affidavit evidence been ordered. Cross-examination may be appropriate where there is a conflict of evidence or where the applicant alleges that a precedent fact to the making of a decision did not exist. But cross-examination in only exercised when justice so demands.* (de Smith, Woolf and Jowell, Judicial Review of Administrative Action (5th ed 1995, p 672, para 15-034)

The following statement, in the context of this case is also worth noting:

> In a judicial review hearing where a jurisdictional fact was not in dispute, a court would not order cross-examination of witnesses on their affidavits unless it considered their evidence might be misleading or in material respect incomplete. (*Regina v Arts Council of England, Ex parte Women's Playhouse Trust*, The Times 20 August 1997 at 19).

Conclusion

To sum up because the wrong person has been named as the Respondent and also because the finding is only interlocutory and no decision has been reached in this case it is a premature application for judicial review and for these two reasons particularly, the application cannot be considered as it stands.

Although some observations have been made by me on the various aspects like bias, natural justice, cross-examination, it does not mean that I have made a finding on these matters on the facts of this case. However, if the application comes before this court free from the shortcomings referred to hereabove by me, these aspects will definitely have to be considered on the whole of the facts once a decision is made.

In this case in the interests of justice, under O 53 r 9(4) I will remit the matter of the disciplinary proceedings to the Public Service Commission which heard the charges to reach a decision herein possibly by calling the Applicant before it as it did by its letter on the question of penalty. Once a decision is reached, the Applicant will be at liberty to consider what course of action to take.

For these reasons the application is dismissed with each party to bear his own costs.

Application dismissed.