

000321

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 513 OF 1979

Between:

JOSIA DAUGUNU of Suva, Fiji,
Civil servant.

PLAINTIFF

AND:

1. ATTORNEY GENERAL for and on behalf of the Government of Fiji
2. PUBLIC SERVICE COMMISSION a statutory body under the Laws of Fiji.

DEFENDANTS

Mr. K.C. Manrakha and Mr. K.K. Singh
for the Plaintiff.

Mr. G. Grimmett for the Defendants.

D E C I S I O N

The plaintiff has made application under Order 33 Rules 3 and 4 of the Rules of the Supreme Court for the trial of certain issues before the trial of the action and counsel for the defendants has agreed to this procedure.

Counsel have filed an agreed statement posing three preliminary questions for determination by the Court which I will refer to when I come to consider them later.

It was also agreed by counsel for the defendants that the plaintiff could in addition raise the issue whether the second defendant had in any event the right to punish the plaintiff without giving him a hearing.

Counsel for the plaintiff admits, that the facts stated in paragraphs 5 to 17, both paragraphs inclusive, of the Joint Defence by the Defendants are admitted and may be treated as agreed facts. The

paragraphs are as follows :

5. On 10th March 1976 written copies of three disciplinary charges were served on the plaintiff under Regulation 22(1)(b) of the Public Service Commission (Constitution) Regulations, 1974 for disciplinary offences against section 12 of the Public Service Act, 1974.
6. The plaintiff was interdicted from duty as an officer of the Public Service with effect from 12th March 1976 pursuant to the provisions of Regulation 22(1)(a) of the Public Service Commission (Constitution) Regulations, 1974.
7. Criminal proceedings against the plaintiff arising out of the allegations in respect of which the plaintiff had been interdicted were instituted for alleged offences contrary to section 306(b) of the Penal Code but the plaintiff was acquitted of all charges preferred against him by the Supreme Court.
8. On the plaintiff's acquittal of the criminal charges against him only one of the three disciplinary charges was pursued against the plaintiff, this being laid under section 12(b) of the Public Service Act, 1974.
9. An officer specially appointed by the second-named defendant under regulation 22(4) of the Public Service Commission (Constitution) Regulations, 1974 conducted an enquiry into the matter and duly reported his opinion thereon and forwarded a copy of all evidence received to the second-named defendant pursuant to Regulation 22(5) of the same Regulations.
10. The truth of the charge was not admitted by the plaintiff and, the second-named defendant, after consideration of the reports relating to the charge and the reply or explanation furnished by the plaintiff, and after the further investigations or enquiry referred to in paragraph 9 herein, the second-named defendant was satisfied as to the truth of the charge against the plaintiff and having taken into account the service record of the plaintiff dismissed the plaintiff from the Public Service pursuant to regulation 22(6)(e) of the Public Service Commission (Constitution) Regulations, 1974.

11. The second-named defendant, by notice in writing, duly informed the plaintiff of its decision and of the penalty imposed, namely dismissal.
12. The plaintiff appealed against the punishment imposed by the second-named defendant to the Public Service Appeal Board under section 14(1)(b) of the Public Service Act, 1974.
13. The Public Service Appeal Board disallowed the plaintiff's appeal under section 14(5) of the Public Service Act, 1974.
14. The plaintiff, in civil proceedings in this Honourable Court in Civil Action 393 of 1973 applied, inter alia, for an order of certiorari to remove into this Honourable Court, and quash, the decision of the Public Service Appeal Board dismissing the plaintiff's appeal.
15. The plaintiff was successful and this Honourable Court in those proceedings quashed the decision of the Public Service Appeal Board.
16. The Public Service Appeal Board, reconstituted, reheard the plaintiff's appeal and allowed the plaintiff's appeal.
17. On the 11th October 1979 the second-named defendant by letter addressed to the plaintiff, advised the plaintiff that the second-named defendant had decided that :
 - (a) his interdiction should be uplifted;
 - (b) he should forfeit salary during the period of his interdiction other than that salary already paid to him; and
 - (c) he should be and was thereby downgraded to the grade of Executive Officer on the minimum of the ADO6 salary scale. "

It will be noted from the foregoing statement of facts that the plaintiff was interdicted from duty with effect from the 12th March, 1976 and such interdiction was not lifted until the 11th October, 1979. This is a most unusual case in that it can rarely happen that a civil servant can be interdicted for such a long period of time before disciplinary action against him is completed.

As regards paragraph 8 of the agreed facts I do not have a copy of the charge referred to therein laid under section 12(b) of the Public Service Act 1974. That section is as follows :

"12(b) In the course of his duties disobeys, disregards, or makes wilful default in carrying out any lawful order or instructions given by any person having authority to give the order or instructions given by any person having authority to give the order or instruction, or by word or conduct displays insubordination."

Before considering the preliminary question I would refer to the procedure to be followed when disciplinary action is taken against a civil servant. Part VI of the Public Service Commission (Constitution) Regulations, 1974 deals with discipline.

Where a Permanent Secretary has reason to believe that an officer in his department has committed an offence under section 12 of the act, which the Permanent Secretary considers a minor offence, he may charge that officer with having committed that offence and request the officer to furnish an explanation. If after considering the explanation and any evidence bearing on the offence the Permanent Secretary is satisfied that the offence has been proved, he may caution or reprimand the officer. He may also order that a sum not exceeding \$10 be deducted from the officer's salary.

There is provision for an appeal to the Commission which, under Regulation 21(4) is empowered to confirm, annul or vary, by reducing or increasing the penalty imposed by the Permanent Secretary provided that the fine for a minor offence shall not exceed \$10.

That is the procedure where an offence by an officer is considered a minor one.

Where, however, the permanent secretary considers the offence is not a minor one, or it is a minor one but the latest of a series of such offences, he may at his

discretion, and where he thinks the public service would best be served by his so doing, interdict the officer at once from the exercise of and function of his office. At the same time he must serve the officer with a written copy of the charge against him. (Regulation 22(1) (a) and (b).).

The Permanent Secretary, after the officer has been given an opportunity to admit or deny the truth of the charge and to give an explanation, reports to the Commission and forwards documents relating to the offence. The Commission is then required to proceed to consider and determine the matter.

Up to this stage the procedure for considering the 3 charges laid against the plaintiff in this action by the Permanent Secretary appears to have been followed. It is not clear from the agreed facts what the Commission did next but, if the agreed facts, which lack dates, have been set out in chronological order, and the Commission followed the procedure laid down, the Commission on receiving the Permanent Secretary's report placed the matter in the hands of the police pursuant to the provisions of Regulation 24(1).

Paragraph 7 of the agreed facts shows that the plaintiff was charged by the Police with alleged criminal offences arising out of the allegation in respect of which he was interdicted.

After the plaintiff was acquitted of the criminal charges against him, the Commission then proceeded against the plaintiff on one of the three original charges laid against him by the Permanent Secretary. The procedure laid down by Regulation 22 for investigating this charge appears to have been followed, and in due course the Commission, being satisfied of the truth of the charge, dismissed the plaintiff from the Public Service.

To briefly state what happened thereafter; as the facts disclose, the plaintiff appealed to the Public

Service Appeal Board against his punishment of dismissal and the Board dismissed his appeal. The plaintiff then sought and obtained an order of Certiorari from this court, which quashed the Board's dismissal of the plaintiff's appeal. A reconstituted Appeal Board then heard and allowed the plaintiff's appeal.

The facts before me do not disclose the precise nature of the plaintiff's appeal nor of the Board's actual decision on allowing the appeal. Section 14(5) of the Act makes it mandatory for the Commission to implement the decision of the Appeal Board.

From the wording of paragraph 17 of the agreed facts, the action taken by the Commission after the plaintiff's successful appeal would appear not to have been implementation of the Appeal Board's decision. It was the Commission's decision that the plaintiff be downgraded and he was advised that he forfeited all salary for the period he was interdicted, other than salary already received by him. No further charges were laid against the plaintiff and it would appear that the punishment meted out to the plaintiff was in respect of the charge the Commission proceeded with after the plaintiff's acquittal by the Supreme Court.

The foregoing are the relevant facts. I now come to consider the first of the three questions which is as follows :

"Does the right of appeal against "any punishment imposed" by the Public Service Commission given by section 14(1)(b) Public Service Act 1974 (No.4 of 1974) give the officer a right to appeal against the finding of guilt as well as the sentence imposed or does it merely give a right to appeal against the punishment imposed leaving the finding of guilt undisturbed? "

Section 14(1)(b) of the Act provides that an officer "shall have a right of appeal to the Appeal Board in accordance with this section against :-

"(b) any punishment imposed by the Commission on an officer by virtue of its powers under the Constitution for an offence set out in section 12 of this Act. "

Then follows a provision which has no relevance in this instance.

The Commission apparently holds the view that section 14(1)(b) only entitles an officer, who has been punished for an offence under section 12 of the Act, to appeal against the punishment imposed on him by the Commission. There is no appeal they say against the Commission's 'finding' that the officer committed the offence he was charged with. Mr. Grimmett referred to the New Zealand State Services Act 1962 on which he says our Public Service Act was modelled. Section 64(1)(c) of that Act gives an aggrieved officer a right of appeal in respect of -

"(c) Any penalty imposed by the Commission on the officer under section 55 or section 58 of this Act or any decision in respect of a charge made against an officer under section 58 of this Act. (the underlining is mine)

The New Zealand provision is much more explicit.

The Fiji draftsman of our Act made two major alterations when modelling section 14(1)(b) on the corresponding section in the New Zealand Act. He changed 'any penalty' to 'any punishment' and he omitted any reference to 'any decision in respect of a charge made against an officer under section 58 of this Act.'

The reason for such change and omission, in my view, is due to the fact that, whereas the New Zealand Commission was created by the New Zealand State Services Act 1962, the Fiji Commission was constituted by section 104 of the Constitution which also specifies, but only in general terms, the powers of such Commission. The Public Service Act 1974 makes no provision for disciplinary proceedings against an officer, and goes no further than spelling out certain disciplinary offences in section 12 of the Act and, under section 16, empowering the Commission in wide terms to make regulations. Nowhere in the Act are there any provisions specifying the powers of the Commission to punish or penalise an officer or directing procedure it must follow. Such omissions are

deliberate as the Commission is an independent body and derives its powers from the Constitution. It is not subject to the control of any authority except as provided by the Constitution.

The draftsman provided for a right of appeal against any punishment by the Commission for an offence set out in section 12 of the act. Section 105(10) of the Constitution provides:

"(10) Parliament may provide for appeals to be from such decisions of the Public Service Commission to such person or authority as Parliament may prescribe."

The punishment of an officer by the Commission is a decision by the Commission. It is the final decision after a process which can involve a series of decisions by the Commission. No draftsman could have been expected to anticipate what decisions the Commission would make in taking disciplinary action against an officer and determining what punishment to inflict on him in advance of any regulations made by the Commission. The New Zealand Act on the other hand sets out in some detail the disciplinary procedure to be followed and what decisions the Commission can and should make. There is no difficulty therefore in determining under the New Zealand Act what decision in respect of a charge made against an officer under section 58 of that Act is appealable.

There is little difference between a 'penalty' and a 'punishment' but, in my view 'punishment' is of wider scope. 'Penalty' is more often used where fines are involved and is a punishment imposed for the breach of law or rule. 'Punishment' is that which is inflicted as a penalty. The draftsman clearly sought to cover 'any punishment' and not have an appeal limited to a 'penalty'.

The Commission in making the Public Service Commission (Constitution) Regulations 1974 also modelled the Regulations on the provisions of the State Services Act 1962. Regulations 20 to 27 (both inclusive) deal with disciplinary proceedings.

The Commission itself dictated what procedure had to be followed in disciplinary proceedings and what part it would play in the proceedings. There is no trial of an accused officer or finding of guilt or conviction in the accepted sense when the Commission deals with the matter. The proceedings are in the nature of an investigation or inquiry into a charge laid against the officer. If the Commission 'is satisfied as to the truth of the charge', it may impose one or more of the penalties stated in Regulation 22(6). The punishment is a decision which merely reflects the opinion of the members, or majority of the members, of the Commission that the charge is true. It is not, I would repeat, a finding of guilt.

Since there is no finding of guilt or any conviction, but merely a decision reflecting the opinion of the Commission that the charge is true, there is nothing concrete against which an officer can appeal other than the outcome of the Commission's decisions, namely his punishment.

Section 14(1)(b) of the Act would not entitle the officer concerned to appeal against an expression of opinion that the Commission was satisfied as to the truth of the charge and must be limited by the express wording of the section to an appeal against any punishment imposed on him by the Commission. As I will indicate later, however, that right of appeal does enable an aggrieved officer to challenge the Commission's opinion that the charge is true. Question 1 cannot be answered either in the affirmative or the negative since in my view there is no 'finding of guilt' by the Commission acting under Regulation 22(b) which can specifically be the subject of an appeal.

The second question I have to decide is as follows :

"Can the Public Service Commission, under regulation 22(6) of the Public Service Commission (Constitution) Regulations 1974, impose any other punishment upon an officer whose appeal under section 14(1)(b) Public Service Act 1974 has been allowed by the Public Service Appeal Board?"

In answering this question what must be appreciated is that the Regulations are regulations made by the Commission under the provisions of section 135(1) of the Constitution.

While the Regulations are in force they have the force of law and the Commission must abide by its own regulations.

In the instant case the Commission, while the disciplinary offences were being investigated, were apparently of the view that offences against the law may have been committed and decided that action should be taken under Regulation 24 which, since it is relevant, is quoted in full.

"24. (1) When a disciplinary offence is being investigated under the provisions of the three last preceding regulations and it seems that an offence against any law might have been committed by an officer, the Permanent Secretary or the Commission, as the case may be, shall refer all relevant papers to the Commissioner of Police for investigation and for such actions as may be appropriate.

(2) Whilst the Commissioner of Police is investigating the matter, no disciplinary inquiry shall be held.

(3) If as a result of the investigation by the Commissioner of Police it is decided that no prosecution shall take place, the Commission shall decide whether or not a disciplinary inquiry should be held."

Subsection (2) provides that while the Commissioner of Police is investigating the matter no disciplinary enquiry shall be held.

Subsection (3) preserves the right to hold an enquiry where the Police decide not to prosecute the officer.

I interpret Regulation 24 as being in substitution for Regulation 22 paragraphs (4) to (6) and, if a prosecution takes place, whatever the outcome of that prosecution the Commission is not empowered to

take further disciplinary action under Regulation 22 in respect of any disciplinary offence arising out of the same facts giving rise to the original charges. If there is a conviction, the Commission can act under Regulation 25 which I will refer to later.

It would have been open to the Commission to have provided by regulation that, an acquittal by a Court, was no bar to disciplinary action being taken against that officer by the Commission in respect of any disciplinary offence under section 12 of the Act not being also an offence against any law. The Commission made no such regulation. It could well have considered that such a provision would be unjust and savouring of persecution of the officer concerned. In the Penal Code there are provisions where a person charged with a serious offence may be convicted of a lesser offence but, where no such provisions exist, a person acquitted of an offence cannot at that trial be convicted of some other offence disclosed by the evidence.

Cockburn C.J. in R. v. Irington (1851) 1 B & S 688 at p.696 said :

"We must bear in mind the well established principle of our criminal law that a series of charges shall not be prepared and whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

If, in criminal law, it is considered unjust to charge a man with a more serious offence on the same facts where he has previously been charged with a minor offence and is acquitted, how would the law consider the converse position? Having been acquitted of a number of serious charges he is then punished for a minor offence arising out of the same facts.

The Commission did, however, specifically cover the position of an officer who is charged with having committed an offence punishable by imprisonment for a term of 1 year or more. If he is convicted by a court Regulation 25 provides that he may be dismissed or he may be deemed to have committed an offence against

000332

section 12 of the Act and be required to suffer such penalty less than dismissal as the Commission may impose. If he is convicted of any offence to which paragraph 1 of Regulation 25 does not apply i.e. offences other than those punishable by imprisonment for 1 year and upwards he may be deemed by the Commission to have committed an offence under section 12 of the Act and required to suffer such penalty less than dismissal as the Commission may impose.

Specifically under Regulation 25 it is provided that nothing in Regulation 22 shall apply to any action taken under Regulation 25.

Regulations 24 and 25 satisfies me that the Commission in making the regulations never intended that a person acquitted by a court of competent jurisdiction should be proceeded against again on a charge arising out of the same facts and on further inquiry punished if the Commission considered the charge was true.

In voicing this opinion I am not overlooking the fact that the Commission when acting under Part VI of the Regulation is acting as a domestic tribunal investigating an offence against discipline and not as a Court of competent jurisdiction. In R. v. Hogan & Thompkins (1966) 44 Cr. App. p. 255, Elrington's case, which I have referred to above, was distinguished. In Hogan's case the appellants were prisoners who had escaped from prison. They were dealt with by Visiting Justices under the Prison Rules 1949 and punished by them. They were subsequently charged and convicted of Prison Breach.

It was held the prior punishment by the Justices was no bar to a subsequent prosecution because the Justices dealt with the matter as an offence against discipline under the Prison Rules and did not deal with the common law offence of simple escape. The Court in that case stated that the visiting justices could have dealt with the breach against discipline if it had come before them even after the appellants had been convicted at assizes.

The Court did not state what the position would have been had the appellants been acquitted at assizes but

did at p. 260 state :

"The truth of the matter is that the visiting justices are dealing with matters of internal discipline with which this Court is in no way concerned."

That remark while appearing to support the defendants' contention must be related to the appeal the court was hearing. The Court was a criminal appeal court and would not be concerned with appeals from the actions of visiting justices in any event.

However, if I am wrong in my view that the plaintiff's acquittal by the Court should have been the end of the matter there is still his success on his appeal to the Public Service Appeals Board to be considered which is the subject of the second question.

By section 14 of the Act an aggrieved officer has a right of appeal to the Board against any punishment imposed on him by the Commission for an offence committed against section 12 of the Act. He can by section 14 complain in his appeal that punishment was excessive or that there should be no punishment at all. If the Appeal Board is of the view that the officer should not have been punished at all that is tantamount to the Board disagreeing with the views of the Commission that the charge is true. I would go further and say the Board could express its own opinion as to whether the charge is true.

Mr. Brimmett has referred to section 14(5) of the Act which is as follows :

"(5) The Appeal Board may allow or disallow any appeal and the Commission shall implement the decision of the Appeal Board."

The Appeal Board it will be noted is not expressly given any power to vary the punishment inflicted on an officer. That in my view is immaterial, since the Commission is legally bound to implement the decision of the Board. If the Board's decision is that the officer should suffer no punishment, because the Board believes the officer is

innocent, the Commission must reinstate the officer if he has been dismissed. Or, if his salary or grading has been reduced, and the Board's decision is that it should not have been, the Commission must take the necessary steps and give the necessary orders to reinstate the officer.

The Appeal Board is not bound by the opinion of the Commission regarding its opinion that the charges are true. Section 13(9) and (10) of the act make it clear that the functions of the Board are not merely to accept what the Commission may consider a 'finding of guilt'. The appeal is clearly by way of rehearing. Section 14(4) empowers the Board to summon witnesses and admit and receive evidence.

In my view section 14(5) empowers the Board to allow an appeal against any punishment imposed by the Commission for an offence under section 12 of the act. It can decide that no punishment should be inflicted at all. It can decide the punishment is too harsh or excessive and decide what is the proper punishment. The Commission must implement the Board's decision. The Board may disallow the appeal but it cannot dismiss the appeal and decide that the punishment is too lenient and decide that a harsher punishment should be imposed since its powers are limited to allowing or disallowing an appeal.

Where an appeal is allowed by the Appeal Board it is mandatory for the Commission to implement the Board's decision. In my view it cannot impose any other punishment on the officer unless such punishment is implementation of the Board's decision. Otherwise such imposition of other punishment would be in defiance of the Board's decision and in breach of its mandatory duty imposed on it under section 14(5) of the act to implement such decisions. The Commission may well feel disgruntled by the fact that their decisions as regards punishment of an officer can be set aside or varied by a decision that a lesser punishment be imposed by a Board consisting of officers who are subject to the Commission's disciplinary jurisdiction. Section 105 (13) of the Constitution permits Parliament to legislate

for appeals to be from such decisions of the Commission to such person or authority as Parliament may prescribe. In New Zealand there is provision for a stipendiary magistrate or retired officer to be Chairman of the appeals Board.

I do not know precisely what punishment the Commission imposed when it first proceeded against the plaintiff after he was acquitted by the Court and whether it then dealt with the question of the plaintiff's salary when it purported to dismiss him. Nor have I before me the actual decision of the reconstituted Board which allowed the appeal. The answer to the second question is - No.

The third question is as follows :

"Has an officer, whose appeal to the Public Service Appeal Board has been allowed, been "acquitted of the charge" within the meaning of regulation 26(3) Public Service Commission (Constitution) Regulations 1974?"

Regulation 26(3) is as follows :

" An officer shall not be paid salary or any amount in compensation for loss of earnings in respect of a period of interdiction unless the Commission otherwise directs or he is acquitted of the charge."

Paragraph 3 of this Regulation covers two situations in my view so far as payment of salary or compensation of an officer under interdiction is concerned.

1. Where an officer who has been interdicted is either convicted by a Court of a criminal offence or the Commission is satisfied as to the truth of the charge properly brought against him for an offence covered by section 12 of the Act, no salary or compensation is payable unless the Commission otherwise directs. The Regulation permits the Commission

000336

to direct that the officer be paid salary or compensation notwithstanding that the criminal or disciplinary offence has been established.

2. The officer under interdiction is acquitted of the charge. Here two situations can arise.

(a) If the officer is acquitted after a trial in a Court of law of an offence against the law where the officer has been interdicted as a result of alleged offences against section 12 of the Act and the Commission has acted under Regulation 24 and placed the matter in the hands of the Police who have prosecuted the officer;

(b) Where the result of an investigation and or enquiry into the alleged offence has failed to satisfy the Commission of the truth of the charge or where so satisfied the Public Service Appeal Board allows an appeal and directs that the officer shall receive no punishment.

'Acquitted' in the regulation has two meanings dependent on whether the charge is being investigated by a Court or the Commission.

In the former situation 'acquit' means 'to set free by verdict sentence or other legal process'.

In the latter situation it means 'to clear from a charge'.

If the appeal board decision is that the officer should suffer no punishment that in my view is tantamount to an acquittal in the second sense.

However, I have pointed out that in allowing an appeal the board may decide the punishment is excessive

and direct the imposition of a lesser punishment in which case there has been no acquittal in the second sense.

If by the question it is meant that the Appeal Board has allowed an appeal and directed that no punishment be imposed on the officer the answer is in the affirmative.

I am unable at this stage to consider whether there has been any breach of natural justice by the Commission as I have insufficient information before me.

(R.G. KERMODE)

JUDGE

SUVA,

July, 1980.

