

IN THE KIRIBATI COURT OF APPEAL]
CIVIL JURISDICTION]
HELD AT BETIO]
REPUBLIC OF KIRIBATI]

Civil Appeal No. 2 of 2014

BETWEEN

KARIANAKO KAMAUA

APPELLANT

AND

ATTORNEY-GENERAL IRO PUBLIC
SERVICE COMMISSION

RESPONDENT

Before:

Paterson JA
Blanchard JA
Handley JA

Counsel:

Banuera Berina for appellant
Taira Timeon for respondent

Date of Hearing: 13 August 2014

Date of Judgment: 15 August 2014

JUDGMENT OF THE COURT

1. The appellant has sued her former employer, the Public Service Commission, for damages for wrongful dismissal.

2. She was employed as an accounts clerk in the Office of Te Beretitenti at Bairiki. There was discovered to be a loss of funds from the office which came to the attention of the internal auditor from the Ministry of Finance who, on 22 October 2009, reported the matter to the police for investigation. That investigation took well over a year. In the meantime disciplinary action was taken against the appellant by the Public Service Commission. The appellant was initially suspended from work on half pay. There was then a hearing of the disciplinary case, after which the Commission advised that the appellant should be dismissed. Acting on that advice, Te Beretitenti dismissed the appellant from the public service on 13 September 2010 with effect from 29 July 2010.
3. The criminal investigation by the police was not completed until March 2011 and on 30 August 2011 the appellant was charged with one count of embezzlement. However, she was acquitted at her trial on 6 March 2012.
4. In her damages claim against the Commission the appellant asserted that her dismissal was unlawful because the Commission had acted in breach of Clauses D.29 and D.30 of the *National Conditions of Service* which, it was admitted by the Commission, applied to her employment.
5. We set out those clauses along with Clause D.31. As Mr Berina submitted, these three clauses need to be read together:

“Procedure with Criminal Offence

- D.29(a)** *When on preliminary inquiry into the misconduct of an employee, a Senior Responsible Officer is of the view that an offence has been committed; he shall immediately inform the police.*
- (b)** *When the offence believed to have been committed involves the misappropriation of funds the Senior Responsible Officer will also immediately inform the Director of Audit.*
- (c)** *If the police are unable to take action the Senior Responsible Officer will decide whether or not disciplinary action should be taken.*

Criminal Proceeding

- D.30** *If criminal proceedings are instituted against an employee, no disciplinary action shall be taken against the employee on any grounds connected with the criminal charge until the conclusion of the criminal proceedings and judgment on any appeal has been given. But the employee may be suspended in accordance with National Conditions D.32 and D.33.*

Acquittal on Criminal Charge

- D.31** *An employee acquitted of a criminal charge shall not be punished on any charge on which he has been acquitted”.*
6. The claim in the High Court focused particularly on Clause D.30. The argument for the appellant was that Clause D.30 applied as soon as there was a complaint to the police.
7. In his decision the Chief Justice held, however, that Clause D.30 applies only when “criminal proceedings” have been instituted

against the employee, which had not happened before the appellant was dismissed. The dismissal was therefore lawful.

8. The High Court also held that the appellant had no right to be reinstated after her acquittal on the criminal charge. That determination was not challenged on this appeal and we need say no more about it. The appellant renews in this Court only her claim that she was unlawfully dismissed.
9. The focus of that claim before us has shifted somewhat to Clause D.29 which seems to have featured very little in argument below. It was submitted for the appellant that the meaning of “criminal proceedings” in Clause D.30 has to be understood in light of Clause D.29 and also Clause D.31. It was said that the intent of the three clauses is that an employee should not be exposed concurrently to punishment both by way of a criminal proceeding and by a disciplinary process. Therefore, it was argued, once there is a police investigation there may not be disciplinary action until the determination of any criminal charge or a decision by the police not to bring any charge. Only then, it was submitted, can the Commission take steps to dismiss the employee, if that is justified, and subject to the constraint in Clause D.31. In order to achieve this end, “criminal proceedings” in Clause D.30 must, it was submitted, be read as including a police investigation following a complaint to the police by the Government employer.

10. Mr Berina submitted that unless “criminal proceedings” is given this extended meaning Clause 29(c) will have no meaning. He said it was implicit in that subclause that the Senior Responsible Officer may not take disciplinary action until the police are “unable to take action”.
11. Although this argument was presented by Mr Berina with his usual skill, we do not accept it. In our view “criminal proceedings” has its normal meaning and does not apply to anything done by the police prior to the charging of the employee with a criminal offence.
12. The purpose of Clause D.30, in our view, is to protect the employee’s right not to be exposed to the risk of incriminating himself or herself, while facing a charge laid in a criminal court, because the employee is at the same time also having to defend his or her conduct in a disciplinary process. The clause recognises that such jeopardy for the employee could arise where the employer is alleging misconduct which in itself does not involve criminality but has some overlap with the subject matter of the criminal charge. Hence Clause D.30 prohibits disciplinary action “on any grounds connected with the criminal charge” until the criminal proceedings are finalised.
13. In contrast, if there is an acquittal the restriction on the employer is limited to a duplication of the charge – there must be no punishment on any charge on which there has been an acquittal.

That does not prevent punishment of misconduct which is not of essentially the same nature as the subject of the charge. For example. If the charge was of theft of Government property, it would seem that an acquittal would not prevent the disciplining of the employee for neglect of duty in failing to take steps to prevent the loss of the stolen property.

14. As for Clause 29, we see its purpose as merely to ensure that the Senior Responsible Officer immediately informs the police if an offence appears to have been committed and, where misappropriation is suspected, informs the Director of Audit. But where the police consider that a prosecution is not warranted, there may nevertheless be a proper basis for disciplinary action against the employee. Thus, guarding against the possibility that such action may otherwise be neglected or delayed, Clause D.29(c) requires the Senior Responsible Officer to put his or her mind to that question and make a decision on whether there is to be such action. There is nothing in Clause 29, however, to prevent disciplinary action being pursued right through to dismissal while the police are still deciding whether to bring a charge. As we have seen in this case, that decision could be long delayed and it would be unfair if the employer were to be precluded from taking such action in the meantime when any criminal proceedings may be no more than a possibility.
15. The appellant was dismissed before the laying of the charge against her. The dismissal was not in contravention of

Clauses 29-31 or otherwise unlawful. The appeal is accordingly dismissed with costs of \$500 to the respondent.



Paterson JA



Blanchard JA



Handley JA