



Republic of Nauru

Appeal No 68 of 2014

IN THE MATTER of the Public Service Act 1998

AND IN THE MATTER of an Appeal to the Public Service Appeals Board pursuant to section 70 of the Public Service Act

BETWEEN ABIGAIL LIMEN APPELLANT

And CHIEF SECRETARY RESPONDENT

Before: Madraiwiwi CJ (Chair), Ms I Garabwan, Ms C Garabwan

For the Applicant: In Person
For the Respondent: GE Leung

Date of Hearing: 20 January 2015

Date of Ruling: 23 January 2015

CATCHWORDS:

Appeal against disciplinary action – Constitution Article 12 Freedom of Expression – Article 13 – Freedom of Association – Public Service Act – Disciplinary Offices – Public Service Roles and Conventions – Rights of Public Servants – Appeal dismissed

DECISION

1. This is a rehearing de novo of Ms Abigail Limen's (the "Appellant") initial appeal following reconsideration by the Chief Secretary (the "Respondent") of her case pursuant to the Public Service Appeals Board's (the "Board") decision dated 3 November 2014.

2. On that occasion the Board annulled the proceedings on a technicality, the basis being that no finding of guilt had been made against the Appellant.
3. The Respondent was directed by the Board to reinstate her “immediately to the Ministry of Finance as an interim measure pending reconsideration of her case by the Respondent and Secretary for Finance, and paid all salary and benefits due to her from the date she was granted leave without pay.”
4. That has now been effected and a finding of guilt made adverse to the Appellant on 26 November 2014 against which the present appeal was lodged on 3 December 2014.
5. Before considering the merits of the appeal, the Board must deal with the issue of possible double jeopardy raised by the Appellant. There is none simply because the Board did not consider the substantive issues involved.
6. On the previous occasion, the matter was dismissed at the threshold with specific directions to the Respondent. He proceeded to reconsider the matter in accordance with the Board’s findings and found accordingly.
7. The Appellant was found guilty of breaching section 58 (a), (b), (c) and (d) of the Public Service Act (the “Act”) in relation to her participation in a public demonstration on 14 May 2014 against the Government and in her use of a government mobile phone on the night of 13 May 2014 to encourage both public servants and others to join the demonstration.
8. It is not necessary to repeat the detail of the charges against the Appellant because the facts are not in dispute.
9. What is in contention is that the Appellant asserts she is innocent of the charges because she was exercising her constitutional and democratic rights to freedom of conscience as well as expression and association.
10. Alternatively, that the punishment to demote and transfer her to another department was too severe.
11. The issue before the Board is whether, as the Appellant so vehemently asserts, she has an unfettered right to exercise her freedom to express her opinions and to associate with other likeminded persons as she did on 14 May 2014.
12. The Appellant is a public servant bound by the Act and Regulations made thereunder as well as the well-established conventions of the Public Service.
13. Articles 12 and 13 of the Constitution of Nauru provide respectively for freedom of expression and freedom of assembly and association. Clause (3.) (a) of Article 12 in turn states-

“12. (3.) (a) Nothing contained in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, the provisions of this Article to the extent that law makes provision-

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; ...”

Clause (3.) (a) of Article 13 is in like terms. Simply put, both sets of rights and freedoms are subject to reasonable limitations.

14. The relevant provisions of section 58 of the Act define disciplinary offences respectively in terms of disgraceful or improper conduct, being negligent or careless in the discharge of his/her duties, acting in a disorderly manner or in a manner unbecoming an officer and acting in a manner prejudicial to the good order and discipline of the Public Service.
15. Participation in a public demonstration against the Government and encouraging others to do so, both within the Public Service and beyond, is a clear breach of subsections (a), (b), (c) and (d) of section 58 because it compromised the professionalism, neutrality and impartiality of the Public Service.
16. The tenor of the Australian and American authorities cited by counsel for the Respondent merely reinforce the proposition that the character and function of the Public Service impose certain restrictions on the rights officers would otherwise enjoy as members of the public.
17. That implication, almost trite in its profundity, also arises from the Westminster tradition inherited by the Republic of Nauru from the Commonwealth of Australia in which the Public Service as part of the Executive, subject to political control in the Legislature, is apolitical and responsible for providing government administrative services to the people of Nauru.
18. The letter and spirit of sections 58, 59, 60, 61 and 62 of the Act as well as the Schedules thereto presuppose a Public Service that is bound by rules and protocols in which the conduct of its members are carefully circumscribed.
19. They are reasonable limitations as being essential for public order because without them confidence in the Public Service would not only be undermined, but it would become dysfunctional, partisan and subject to gridlock; unable to properly serve the people of Nauru and hostage to whim, caprice and the agendas of various interests rather than the public good.
20. The conduct of the Appellant detracted from her position in the Public Service in two respects: it conveyed in a very public way her political sympathies so as to raise considerable doubt about her neutrality; further it undermined the confidence of her superiors in the Appellant generally.
21. As a public servant, the Appellant’s rights are necessarily curtailed. Neither she nor any public servant has an absolute freedom to protest or express their opinions for the reasons stated earlier.

22. The Appellant may have justifiably felt very strongly about the suspension of the three Members of Parliament whether on principle or from some personal association with them. That is her prerogative and not an issue.
23. What is, however, is the manner in which the Appellant chose to express it.
24. In openly displaying that conviction, the Appellant called into question her status as a public servant and more directly, her ability in that capacity to distance herself from the controversies of the day and make decisions regardless. It was that consideration which weighed heavily upon the Appellant's superiors.
25. By descending into the arena and entering the fray, the Appellant eroded the loyalty, trust and belief her superiors hitherto had in her as reflected in the affidavit evidence of Mr Martin Hunt, the Secretary for Finance.
26. Notwithstanding the Appellant's impressive professional credentials, particularly as one of a handful of qualified Nauruan accountants, it counted for little once she publically displayed her political inclinations.
27. How could the Department of Finance, routinely the repository of sensitive and confidential matters of policy and administration, be assured subsequently of her loyalty and commitment in the light of the Department's pivotal role in the Government of Nauru?
28. That the Appellant appears either unwilling or unable to appreciate the consequences of her actions or connect one to the other is the most disturbing aspect of this case and reflects adversely on her.
29. It matters not that the Appellant was acting in her own time i.e. on maternity leave. She remained an employee of the Public Service at all times. In any case, the content of subsections (a), (b) and (d) of section 58 of the Act may be construed to apply when a public servant is not on official duties.
30. In the circumstances, the Board is of opinion that the Appellant is fortunate to have retained employment in the Public Service given the gravity of her conduct.
31. The appeal is therefore dismissed and the decision of the Respondent to both demote and transfer the Appellant to the Department of Health affirmed.

DATED this 23rd day of January 2015.

Joni Madraiwiwi
CHAIR
PUBLIC SERVICE APPEALS BOARD