



**SUPREME COURT OF NAURU
YAREN**

Appeal No 1 of 2016

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

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| BETWEEN: | TRISHA ROLAND | APPELLANT |
| AND: | CHIEF SECRETARY | RESPONDENT |

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| Before: | Madraiwiwi CJ (Chair) and Ms I Garabwan |
| For the Appellant: | Vinci Clodumar |
| For the Respondent: | Jai Udit |
| Date of Hearing: | 12 April, 7 June 2016 |

CATCHWORDS:

Appeal against disciplinary action - Public Service Act 1998 - Disciplinary offences - Section 58(a), (c) & (d) - Lack of specificity - Non disclosure of evidence - Mere presence equated with commission of offences - Defective proceedings - Appeal allowed.

DECISION

1. Trisha Roland (the "Appellant") was contracted by the Government of Nauru as a Community Consultative Committee Member for a three year term with effect from 8 April 2014 with an annual basic salary of \$15,000.00 paid at the rate of \$577.00 per fortnight.
2. The role of the Appellant in the Community Consultative Committee was "to represent the Republic of Nauru in the LLC and thereby contribute to the making of decisions (in consultation with other stakeholders) related to the activities of protected persons and refugees outside of a Refugee Processing Centre."
3. On 18 June 2015, the Appellant was suspended from her employment by the Secretary for Justice and Border Control (the "Secretary") pursuant to section 67 (1) (c) of the Public Service Act 1998 (the "Act") for allegedly breaching sections 58 (a), (c) and (d) of the Act on 16 June 2016 and given 7 days to respond to the charges. The Secretary merely cited the provisions mentioned and did not particularize them as in applying them to the facts so the Appellant was fully apprised of the nature of the case against her.
4. In her explanation dated 23 June 2015 to the Secretary, the Appellant sought to justify herself and cited *inter alia* her curiosity. She also apparently had a personal concern as appears in the passage below:

"When the protesters arrived I quickly noticed my 2 daughters standing behind the main group of protesters and I became concerned for their safety. I left my observer's position and approached my daughters and pulled them away forcefully telling them to move away from there.

After doing that ... I also noticed 2 of my close relatives amongst the protesters ..."

The Appellant concluded as follows:

*"My participation was not to get involved as being a party to the protest but I get involved to help avert a major calamity from spiraling out of control. At the time, I thought that my previous experience as a settlement officer being involved on the **FRONTLINE** (bold and caps in the original text) *at recent refugee protests, I had something to offer ...*" (emphasis added)*

5. On 31 July 2015 the Chief Secretary advised the Appellant of her dismissal by letter. As with the Secretary, he reiterated the provisions relied on i.e. "behaviour considered improper conduct in your official capacity or otherwise", "behaviour considered disorderly and unbecoming an officer and" behaviour considered prejudicial to the good order and discipline of the public service".
6. The Chief Secretary's reasons are excerpted in full below because they are relevant to the view the Public Service Appeal Board (the "Board") took for reasons which will become apparent:

"I have taken into consideration the reply and explanations adduced by you. You denied being guilty of the three charges:

In summary you did not reject the three charges but contended that you were at the scene as you were "... curious..." That while there, you became involved in removing some relatives who were participating in the public demonstration. That you got involved to "... to help avert a major calamity from spirally (sic) out of control.

Having deliberated upon the charges as well as fully taking into account the explanations and defences made by you I am satisfied that the charges against you are proven and have been substantiated.

Having reviewed the evidence before me, I find it proven and not in dispute that you were in and amongst the protesters on 16 June 2015 within the precincts of Parliament. You contended that you were extricating participating relatives but omitted to name them. The fact that you did not name them does not assist your defence as it is a serious offence to be in and amongst the group of people protesting on the day of the incident. Your conduct would set a bad precedent across the public service. Your action could be seen as bringing the public service into disrepute.

In the circumstances, I find you guilty of the disciplinary offences as charged, pursuant to section 88 of the Public Service Act 1998 and record such a finding." (emphasis added)

7. The Appellant appealed against her dismissal and the charges *vide* a letter dated 20 November 2015 and the matter was heard on 12 April and 7 June 2016. At the initial hearing, upon application by counsel for the Appellant, and given the Board was not bound by the strict rules of evidence, it allowed the former to file further documentary evidence in support of her case.
8. This comprised affidavits from two senior police officers attesting to the Appellant's contention she was not a part of the protest. In addition there was a letter from the Hon David Adeang, Minister for Justice and Border Control, stating that on the day in question he had authorized the Appellant to go to the precincts of Parliament to help de-escalate the situation that was developing. The contents of the affidavits and the Hon Minister's authorization were not disclosed to the Chief Secretary when he took the decision to dismiss the Appellant.
9. The additional evidence the Appellant tendered was definitely exculpatory of any misconduct on her part. The Board accepts however, that it could necessarily have no bearing on the Chief Secretary's decision, because it was unreasonable to expect him to take into account what he did not know. Moreover, the Appellant, for whatever reason, did not acquaint the Chief Secretary with the facts which were either within her knowledge or which she was in a position to access.
10. However, that does not resolve the issue. There are serious shortcomings in the Respondent's case that have a significant bearing on the outcome. First, the charges themselves lack specificity. They cite the applicable provisions without more, so the Appellant or any person in her position had no reasonable means of ascertaining what the exact nature of the offences were because they were not contextualized. The bald case against the Appellant is that her presence in the precincts of Parliament on 18 June 2016, as captured on video, was sufficient

for the Chief Secretary to conclude it was “disgraceful or improper conduct”, “unbecoming of an officer ..” and “prejudicial to the good order and discipline of the public service ...”.

11. How so? All the Board can apprehend from what counsel for the Respondent relied on, both in evidence and submissions, discloses little beyond the Appellant’s being in the midst of a crowd outside Parliament on the day in question. It cannot establish definitively whether the crowd were all protesters, curious bystanders, concerned relatives, Government supporters or an amalgam of all four groups. Conversely, it is reasonable to assume that the gathering comprised all those categories on the basis of reasonable probability. The Chief Secretary adopted the former approach (i.e. assumed the crowd were all protesters) and thereby fell into error.
12. Second, the video evidence of the Appellant being present among the crowd at the precincts of Parliament was not shown to her. Natural justice obligated the Chief Secretary to have the video shown to the Appellant for an explanation. That it was not disclosed to the Appellant is a serious miscarriage of justice. The Appellant was entitled to view the footage and put forward an explanation particularly as the Chief Secretary chose to draw on adverse inference upon doing so himself. The Board has been shown the video footage. All it reveals is the Appellant’s presence in the precincts of Parliament and nothing more.
13. Third, there is no basis for concluding the Appellant contravened the provisions of the Act cited because the Chief Secretary appears to have treated her mere presence as suggestive of misconduct. It was, with respect, an assumption on his part, just as the initial charge by the Secretary conflated the Appellant’s presence at the demonstration with an assertion of wrongdoing on her part.
14. The Chief Secretary in his letter of dismissal asserted that the Appellant “did not reject the three charges but contended that you were at the scene as you were ... “curious...”. With respect, that is not quite accurate. Inasmuch as the Appellant was offering an alternative rationale that sought to explain her actions on the day in question, it was a direct response to the allegations levelled against her and should have been treated as a denial. It was instead perceived as a tacit acceptance and enabled the Chief Secretary to come to an adverse (and erroneous) conclusion.
15. The facts are not in dispute, the nature of the Appellant’s involvement is. She was at Parliament and can be clearly seen in the melee around the entrance to the parliamentary precincts in the video. But there is little that can be characterized as incriminating, and even were the Appellant perceived to be behaving in an inappropriate or untoward manner, fairness required that she offer some explanation in that regard.
16. A reflection of the Chief Secretary’s approach appears in this passage of the letter of dismissal: ***“Having reviewed the evidence before me, I find it proven and not in dispute that you were in and amongst the protesters on 16 June 2015 within the precincts of Parliament. You contended that you were extricating participating relatives but omitted to name them. The fact that you did not name them does not assist your defence as it is a serious offence to be in and amongst the group of people protesting on the day of the incident. Your conduct would set a bad precedent across the public service. Your action could be seen to bringing the public service into disrepute...”*** (emphasis added)

17. It appears from the paragraph quoted, taken with the video footage the Chief Secretary had reviewed, that he considered the Appellant's mere presence at the precincts of Parliament as sufficient of itself to find her at fault. True it is that she was present as alleged, but to then equate mere presence with the commission of the offences is a long bow to draw. In the Board's respectful opinion, the Chief Secretary made unsubstantiated assumptions and compounded the error by treating the Appellant's response as a tacit admission of the charges when it was otherwise.
18. As for not naming "extricating participating relatives", the Appellant had already made reference to her concern for her daughters. In any case, while the fact that "you did not name them..." was not germane to her defence, "extricating participating relatives" was because it indicated she was "amongst the group of people protesting on the day of the incident" for reasons other than breaching the provisions of the Act. This appears to have been given no proper consideration.
19. *Abigail Limen v Chief Secretary* Appeal No. 68 of 2014 was relied upon by counsel for the Respondent for the proposition that the Appellant by her actions had contravened the provisions of the Act by engaging in conduct that related to a public demonstration against the Government. The facts are clearly distinguishable: in the *Limen* case, the Appellant asserted her right to protest was absolute and the Board held it was circumscribed under the Constitution of Nauru and related legislation.
20. In the instant case, the Appellant's mere presence in the precincts of Parliament on 16 June 2015 resulted in her being dismissed for what seems to be akin to "guilt by association."
21. Accordingly the Board determines that the Appellant is innocent of the charges which were defective for lack of specificity, merely asserting her presence on the day and venue in question and failing to provide details thereof. Further that the evidence of the video footage was not put to the Appellant for a rebuttal as was her right and that her explanation of 28 June 2016 was taken as a tacit admission of misconduct when it was in substance a reasonable explanation, that should have been given greater weight. Considered on their individual merits, these omissions compromised the case against the Appellant, taken together they impugned the proceedings.
22. Counsel for the Respondent submitted that, in any case, the Chief Secretary was now *functus officio* and that there was a new legislative scheme in place, the Public Service (Disciplinary Procedures) Regulations 2016, that precluded the former from dealing further with this case. That argument is easily disposed of: because this matter arose during the pendency of the pre-existing statute, and the new structures are not retrospective, this matter falls to be determined under the *status quo ante*.

23. The Board therefore allows the appeal: the Appellant was unfairly dismissed for the reasons stated. There will be no order for reinstatement in accordance with the Appellant's wishes and she will be deemed to have voluntarily resigned from the date of this ruling and is to be paid all her emoluments due from the date of the Appellant's suspension plus six months' salary as compensation.

24 Pursuant to section 87 (1) of the Public Service Act 1998, the Board recommends the Respondent pay the Appellant's costs which are summarily assessed at \$400.00.

DATED this 13th day of June 2016.

A handwritten signature in blue ink that reads "Joni Madraiwiwi". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Joni Madraiwiwi
CHAIR
PUBLIC SERVICE APPEALS BOARD