

IN THE SUPREME COURT OF NAURU

CIVIL ACTION NO. 4/2003

In the matter of a Special Case under
Order 63 of the Civil Procedure Rules
1972.

BARON WAQA

APPELLANT

AND

CHIEF SECRETARY

RESPONDENT

Special Case heard on *31st MARCH* 2003.

Secretary for Justice for Respondent

P. Aingimea for Appellant

DECISION

Preliminary to a hearing in the Public Service Appeals Board ('the Board') on 10 December 2002 certain matters were raised on questions of jurisdiction by the Respondent Chief Secretary. It was by the consent of both parties to the Appeal that a case be stated to the Supreme Court under Order 63 of the Civil Procedure Rules 1972. The Board adjourned the hearing of the appeal until the Court delivered its decision on the special case.

The questions asked of the Supreme Court by the parties to the appeal before the Board were the following:-

1. In view of Article 70(6) of the Constitution and the provisions of the Public Service Act 1998 ('the Act') can a First Division Officer in the Public Service appeal to the Public Service Appeals Board against a disciplinary action?
2. If the answer to question one is 'Yes', are there any procedural provisions in the Act to take such disciplinary action?
3. If the answer to question two is 'Yes', are there any provisions relating to appeals against disciplinary action by a First Division Officer in the act.

4. If the answer to question three is 'No' what would be the outcome on such an appeal, as the Board is bound by the Act

The subject-matter of this special case arises through disciplinary action having been taken by the Chief Secretary against Baron Waqa, the Secretary for Education, and a First Division Officer. He was found guilty of an offence by the Chief Secretary and then transferred and demoted. Baron Waqa appealed to the Board against the decision of the Chief Secretary.

The Chief Secretary

The powers conferred on the Chief Secretary and the Board ultimately are derived from the Constitution itself which under Article 2(1) is the supreme law of Nauru and by Article 2(2) a law inconsistent with the Constitution is, to the extent of the inconsistency, void.

Provision is made in the Constitution (Article 25(1)) for a Chief Secretary who shall be appointed by Cabinet. Under Article 25(4), the Chief Secretary has such powers and functions as the Cabinet directs and as are conferred on him by the Constitution or by law.

Article 68, however, is specific as to the powers vested in the Chief Secretary with regard to the Public Service.

Article 68 reads as follows:-

- (1) Except as otherwise provided by law under Article 69, there is vested in the Chief Secretary the power –
 - (a) to appoint, subject to clause (3) of this Article, persons to hold or act in offices in the Public Service;
 - (b) to exercise disciplinary control over persons holding or acting in such offices; and
 - (c) to remove such persons from office.
- (2) The Chief Secretary may, by instrument in writing under his hand, delegate to a public officer power to exercise disciplinary control over persons holding or acting in such public offices, other than offices referred to in clause (3) of this Article, as the Chief Secretary specifies in the instrument and such delegation is subject to such conditions, if any, as the Chief Secretary specifies in the instrument.
- (3) The Chief Secretary may not exercise his power under paragraph (a) of clause (1) of this Article in relation to the office of a person in charge of a department of government and such other offices as are prescribed by law except in accordance with the approval of the Cabinet.
- (4) The Chief Secretary shall report to the Cabinet on such matters relating to the exercise of the powers under this Article as are prescribed by law at least once a year and the Cabinet shall cause a copy of the report to be laid before Parliament.

Under this article he has the power to appoint, with one exception, the power to exercise disciplinary control, and to remove persons from office. The exception is made in Article 68 (3) with regard to the appointment of a person in charge of a department, that is, a first division officer, or other officers prescribed by law which requires the approval of the Cabinet.

Such exception, it should be noted, does not apply to the exercise of disciplinary control or removal from office of First Division Officers by the Chief Secretary. That is a clear implication to be drawn from the words of Article 68. This is reinforced by sections 79, 82 and 83 of the Act.

The Chief Secretary, however, may only suspend a first division officer on salary unless the Cabinet otherwise directs (S. 80 of the Act), and any charge or suspension of a first division officer is to be reported in writing by the Chief Secretary to the Cabinet.

In 1983, a question had arisen upon a motion seeking an order of prohibition whether the Chief Secretary could continue disciplinary proceedings against the plaintiff, a first division officer, on account of the terms of the then S. 96 of the Public Service Act 1961-1979. Under that Act, where the officer was charged did not admit in writing to the charge, ' the charge shall be determined in the manner prescribed by the Cabinet. Cabinet had made no prescription as to the proceedings. The learned Chief Justice there determined that this provision relating to Cabinet in the Public Service Act 1961-1979 was ultra vires as being in contravention of Article 68 (1)(b) of the Constitution. It was therefore void under Article 2 (2). (Clodumar v Chief Secretary [1985] LRC (Const.) 1123). It is to be noted that this provision is no longer in the Act, and the Chief Secretary has the full power to administer disciplinary control over all public officers.

The Public Service Appeals Board and the Right to Appeal

The Public Service Appeals Board is established under Article 70 of the Constitution.

It is necessary to set down certain of the provisions contained in this Article as they represent, in fact, the kernel of this decision –
70 (6) Except where an appeal lies to the Police Service Board under Article 69, an appeal lies to the Public Service Appeals Board from a decision to remove a public officer from office or to exercise disciplinary control over a public officer at the instance of the public officer in respect of whom the decision is made.

70 (7) The Public Service Appeals Board shall exercise and perform such other powers and functions as are conferred on it by law and shall, subject to this Constitution and any law, regulate its own procedure.

70 (8) Except as otherwise provided by law, no appeal lies from a decision of the Public Service Appeals Board.

A first division officer is a public officer in terms of the Constitution (Article 8(1)).

Under Article 70 (6), all public officers have a right to appeal from a decision to remove from office or from the exercising of some disciplinary control. That right could not be taken away by any legislation other than by an amendment to Article 70 (6) of the Constitution itself.

In Keke v Chief Secretary [1987] LRC (Const.) 979 at 989, Donne Chief Justice makes the position quite clear

a public servants (designated "public officers" in the Constitution) against decisions made under the Public Service Act and I am satisfied that is its purpose

The right to appeal to the Board is now a constitutional right under Article 70 (6) given to the public servants in respect of decisions to remove or discipline. Consequently, any right to appeal given to public servants b under the Public Service Act must be read subject to the Article. There are the Constitution and the other under the Act. The Constitution prevails. A question was posed as to the rights of First Division Officers to appeal, there being no provision in the Act for this. Whatever may have been the position prior to the Constitution, there is now no question that such rights c to appeal exists under Article 70(6).

'The right to appeal to the Board is now a constitutional right under Article 70 (6) Except where an appeal lies to the Police Service Board from a decision to remove a public officer from office or to exercise disciplinary control over a public officer at the instance of the public officer in respect of whom the decision is made.

Procedural Provisions

The special case seeks specific answers in questions two and three as to whether there are any procedural provisions contained in the Act dealing with First Division Officers. It is unclear from the questions as to what is meant by the word 'procedural', but counsel for the Respondent made it clear to the Court that Part VI, Division 3 of the Act in relation to second and third division officers had certain detailed procedures such as appeal by form approved by the Chief Secretary, time for lodgment, proceeding of appeal notice to the Board, fixing of time by the Chairman for hearing, and the Chief Secretary to be respondent. Counsel added that these provisions enable the appellant 'to take' the appeal to the Board, but only in the case of second and third division officers. He distinguished such provisions from those under a general title Division 5 describing proceedings by the Public Service Appeals Board itself as also under Division 6 – Miscellaneous.

The nub of this query is that certain salient procedures relating to second and third divisions officers that is, sections 70 to 77 inclusive do not appear to

contemplated that such deficiency could affect the appeal right of a first division officer guaranteed by the Constitution itself.

20. I understand the problem but it is not insuperable. In Keke v Chief Secretary, Sir Gaven Donne spent some time on the history of the development of the various Public Service Acts which had their origin, before independence, in the Public Service Ordinance. It is highly likely that there was no appeal then, under the Ordinance, for a first division officer who could, if needs be, be dismissed at pleasure. However, whatever be the case, Sir Gaven Donne says, with respect, correctly that 'there is now no question that such rights to appeal exist under Article 70 (6).'

21. The submission that the failure of the Act to provide certain machinery procedural provisions for first division officers indicates that Parliament intended to omit an appeal for such officers to the Board although already provided by the supreme law is clearly incorrect.

22. As to the course that the Board should follow, it is to be noted that the Board may 'regulate its own procedure'. (Article 70 (7). Part VI, Divisions 5 and 6, are not limited to second and third division officers and should be applied generally. As to the machinery procedure provided in Part VI Division 3 of the Act, it is within power of the Board to administer and regulate its own procedure with regard to such matters as are not touched upon with respect to first division officers.

23. In relation to question 4, the Board is bound by the provisions of the Act. However, where the Act is deficient procedurally in relation to first division officers then it may supplement by regulating its own procedure pursuant to Article 70 (7) of the Constitution.

24. At a convenient time, it would not be difficult to effect amendments to the Act to repair the deficiency.

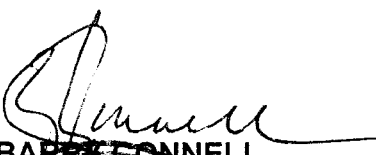
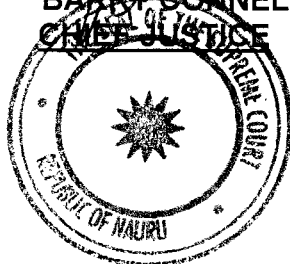
Conclusion

25. I answer the questions as follows:-

1. Yes

2 and 3. There are some provisions contained in Part IV, Division 5 and 6 which can relate to appeal by a first division officer but there are some detailed procedural mechanisms which are absent and only apply to second and third division officers.

4. Whilst the Board is bound to apply the provisions of the Act, it must so regulate its procedure to accord an appeal to a first division officer pursuant to the requirements of the Constitution, Article 70(6).


BARRY CONNELL
CHIEF JUSTICE

2 April '03