N1226

PAPUA NEW GUINEA

[NATIONAL COURT OF JUSTICE]

OS. 78/94 (R)

BETWEEN: MARK KOVE
(Applicant)

AND: THE SECRETARY, DEPARTMENT OF WEST NEW BRITAIN PROVINCE
(First Respondent)

AND: THE DEPARTMENT OF WEST NEW BRITAIN PROVINCE
(Second Respondent)

Rabaul : INJIA, AJ
1994 3rd, 6th June

Judicial Review - Administrative action of Government Departmental Head in dismissing an employee - Application for leave for judicial review - Application filed more than 4 years since date of dismissal from employment in the Public Service - Whether leave should be granted notwithstanding that the prescribed time limit of four (4) months has expired - Relevant consideration under the National Court Rules, O 16 r 4(1), (2) discussed - Leave refused - National Court Rules, O 16 rr 3, 4.

Judicial Review - Leave - Ex parte - Observations on whether Counsel for the Respondents should be granted leave to appear to make submissions and rely on an affidavit filed by the Respondent - National Court Rules, O 16 r 3(2).

Cases Cited:

Kekedo -v- Burns Philip (PNG) Ltd [1988-89] PNGLR 122.
Diro -v- Ombudsman Commission of Papua New Guinea [1991] PNGLR 153.
Amadio Pty Ltd -v- The State & Others [1992] PNGLR 218.
Ila Geno and Others -v- The Independent State of Papua New Guinea, SC 447 dated 27th - 29th July 1993.

J. Mika for the Applicant
G. Powell for the Respondent

6 June 1994

INJIA, AJ: This is an application for leave to apply for judicial review of a certain decision made by the First Respondent dismissing the applicant from his employment as a Clerk with the Division of Health of the Second Respondent. The application is made pursuant to Order 16 Rule 3 of the National Court Rules 1987 (hereinafter referred to as "the Rules"). Should leave be granted, the applicant intends to apply for the following relief:-

1. *An order of certiorari to remove to this Court the said decision of the First Respondent made on 29 September. 1988 for the purpose of quashing it..*

2. *A declaration that the applicant's dismissal was unlawful.*

3. *An order that the Respondents pay to the applicant his salary and wages and entitlements "during and owing to him since his dismissal"*

The applicant provides four (4) grounds on which the relief is sought. These grounds are set out in paragraph 3 of the Verified Statement of Facts (hereinafter referred to as the "Verified Facts"). They are:-

"Grounds on WHICH RELIEF IS SOUGHT"

(a) *That the Respondent had acted wrongly and abused its powers under the Public Services (Management) Act 1986 in charging the Applicant under Section 48(3) of the said Act.*

(b) *That the Respondents had acted in access (sic) of or abused its jurisdiction in that the First Respondent failed to exercise its discretion under Section 48(3) of the Public Services (Management) Act 1986 not to dismiss the Applicant.*

(c) *That the Respondent failed to comply with the principles of natural justice in that the First Respondent (sic) decision to dismissed (sic) the Applicant was vindictive and baised. (sic)*

(d) *That the Respondents acted in access (sic) and abused its powers when the First Respondent took up the Applicant's motor-vehicle accident in 1987 as a serious accident which in actual fact was a minor accident and do not warrantly (sic) the dismissal of the Applicant."*

The Applicant has quiet properly sought relief under Order 16 of the Rules. The Applicant complains of the abuse of or the breach of disciplinary procedures prescribed by the Public Service (Management) Act 1986 (hereinafter referred to as the "Management Act"). The relief to be sought in the substantive application fall within the principles enunciated by Kapi, DCJ, in ***Kekedo -v- Burns Philip (PNG) Ltd*** [1988 - 89] PNGLR 122 at 124:-

> *"The circumstances under which review may be available are where the decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuse its powers.*
>
> *The purpose of judicial review is not to examine the reasoning of the subordinate authority with the view to substituting its own opinion. Judicial review is concerned not with the decision but the decision-making process."*

But the Applicant does not have a right to seek a review of such decision. It must first obtain leave of the court. The question or whether or not leave should be granted is discretionary Some of the relevant factors which the court may take into account in deciding this issue are as follows:-

1. *The Applicant must have sufficient interest in the matter to which the application relates: Order 16 Rule 3(4).*

2. *The Applicant must have exhausted other legal or administrative appeal or review procedures or avenues for redressing the wrong:- e.g. Order 16 Rule 3(3).*

3. *The Applicant must have an arguable case.*

4. *The application must be made without undue delay. The time limit prescribed by the Rules in an application for leave to apply for an order of certioran is four months from the date of the decision: Order 16 Rule 4(2). However, the Court may grant leave notwithstanding that the four months has expired: See Order 16 Rule 4(1).*

5. *The Applicant must comply with the procedures set out in Order 16 Rule 3(2) and 3(3), that is, as to the mode of commencing proceedings and service of the documents on the Secretary for Justice respectively.*

In the instant case, it is clear that the Applicant has sufficient interest in the matter because the decision complained of directly affects him. It is also clear that he has exhausted the personnel review procedures under the Management Act in that the Public Services Commission ("PSC") has reviewed his matter twice. On the last occassion, on 22.11.88, the PSC made its final decision on the review.

This leaves me to consider the other three factors. I will dea with the 5th, 4th and 3rd factors in that order. In relation to the 5th factor, it is clear to me that eventhough the Applicant has complied with Order 16 Rule 3(2), he has not complied with Order 16 Rule 3(4). There is no evidence before me that the Secretary for Justice or Secretary for the Department of Attorney General, as it is known now, has been served with the Originating Summons and Verified Statement. Indeed, the Applicant has not made any mention of it at all. The requirement under Rule (3)(4) is mandatory. I consider this application to be pre-mature and would dismiss it on this ground alone. However, I do not intend to do this at this stage without looking at the 3rd and 4th factors because to do so might perhaps be too simplistic or to treat the remaining two grounds as devoid of merits.

In relation to the 4th factor, (undue delay), I wish to first set out a brief summary of events in chronological sequence:-

1. *On 2.9.87, Applicant was convicted by Kimbe District Court on a charge of driving a government vehicle, Mazda Bus ZGM 113, on a public street without due care and attention contrary to S 17(2) of the Motor Traffic Act Ch. 243.*

2. *On 30.9.87, Secretary of the department, Mr. W. Padio, dismissed the Applicant. The dismissal was based on the said conviction and S 48(2) of the Management Act:- i.e. the conviction relates to the duties of the office of the Applicant.*

3. *On 2.10.87, the Applicant filed an application for review of the decision by the PSC.*

4. *On 15.4.88, the PSC made its decision. It found that the Secretary erred in, inter alia, charging the Applicant under S 48(2) of the Management Act. The PSC* ***recommended*** *the Secretary to revoke its decision and re-charge him under S 48(3) of the Management Act:- i.e. the conviction does not relate to the duties of the office of the Applicant.*

5. *On 16.5.88, Secretary Padio charged the Applicant under S 48(3) of the Management Act.*

6. *On 17.5.88, in accordance with the recommendation of the PSC, Secretary Padio, revoked his decision of 30.9.87.*

7. *On 20.5.88, the Applicant, in writing, replied to the charge.*

8. *On 26.5.88, Secretary Padio decided to dismiss the Applicant for reasons set out in his memorandum (see Appendix "H" to the Verified Statement.*

9. *On 27.5.88, Secretary Padio dismissed the Applicant under S 48(3) of the Management Act..*

10. *On. 8.6.88, the Applicant filed a further application for review by the PSC.*

11. *On 22.11.88, the PSC decided to reject the application because it found that Secretary Padio had not erred this time, both on procedure and penalty.*

12. *On 10.1.89, the new Secretary of the Province Mr. J.L. Maza (Acting) advised the Applicant of the PSC's decision.*

13. *On 23.6.89, the Regional Branch of the Public Employees Association ("PEA") wrote to Secretary on behalf of the Applicant, requesting him to revoke his decision of 27.5.88 and to re-open the matter.*

14. *On 15.9.89, the new Secretary of the Province, Mr. U. Giru (Substantive), wrote to PEA and rejected the latter's request and advised him to take the matter to court. A copy of this letter was sent to the Applicant directly.*

15. *On 25.10.89, the PEA wrote to the PSC seeking a review of Secretary Giru's decision not to re-open the case*

16. *On 4.1.90, the PSC wrote to the PEA refusing to take up the latter's request because its powers were "only recommendatory in nature". The PSC advised the PEA to take the matter to court..*

17. *On 18.3.94, the Application filed this application.*

18. *On 3.6.94, the application heard this application and adjourned the matter to today for decision.*

The Applicant concedes that the prescribed time limit of four months has long expired. Taking the PSC's decision of 22.11.88 or Secretary Maza's letter of 10.1.90 to the PEA as the date of the final decision, some 4 1/2 years have gone by without the Applicant instituting any proceedings to seek leave. It is submitted for the Applicant that not withstanding the expiration of the prescribed time limit, I still have the discretion to grant leave because the Applicant has satisfactorily explained the delay. It is submitted that the time spent in taking up the matter with the PSC by the Applicant directly or through the PEA was the cause of the delay.

It seems that the use of the word "may" in Rule 4(1) implies that I still have a discretion to grant leave to the Applicant notwithstanding that the period of four months has expired. But then as I have already pointed out, taking Secretary Maza's letter to the PEA dated 10.1.90 as a cut-off point, it is some 4 1/2 years now. The Applicant has not provided any explanation as to why he failed to institute any action within a reasonable time after receiving notice of the PSC's letter of 10 1.90.

On the contrary, I am satisfied on the evidence before me that it would not be appropriate to grant the leave sought by the Applicant. I am satisfied that to grant leave is not only likely to cause substantial hardship to the incumbent Secretary of the Department of West New Britain Province but also it would be detrimental to good administration. In respect to the former reason, I would look no further than the affidavit of the incumbent Secretary of the Province Mr. Sebulon Kulu, sworn on 2.5.94 and filed on 4.5.94. Mr. Kulu says that since January 1989 (the date of the decision to dismiss the Applicant), there has been four (4) different Secretaries of the Province including himself and as such, he is not in a position to answer the claims made by the Applicant against his predecessors. I can appreciate his hardship because some of the allegations raised are directed personally at Secretary Padio. I am told by Counsel for the Applicant that the allegation of vindictiveness and bias are founded on some pre-existing differences between the Applicant and Secretary Padio in which the two men were involved in a fight previously. In my view, it would cause substantial hardship to incumbent Secretary Kulu to answer for the allegations of bias, malice and abuse of statutory discretion directed personally at one of his three predecessors.

I also consider that it would be detrimental to good administration of the Department of West New Britain Province or any National Government Departments for that matter to allow review to be conducted into a decision which was made some 4 1/2 years ago by a Departmental Head who is no longer in Office and who has since been succeeded by three other Departmental Heads. If it were allowed, it would lead to a floodgate of litigants seeking relief for what happened to them years ago. This in turn would create chaos and havoc in the administration of the Department. It could put the administration in a difficult position in defending claims because changes in staff and system of work will no doubt have taken place already in this period:- e.g. the vacancy left by the Applicants' dismissal may have been already filled by another person by now.

It would also be detrimental to good administration to grant leave to an Applicant whose grounds for seeking the proposed relief are similar to the grounds already dealt with by the highest administrative appeal and review body and which appellate body has fairly and adequately dealt with the claims and dismissed the claims as being unfounded or unsubstantiated. That is, the PSC in its decision letter of 22.11.88 decided to affirm the decision of the Secretary. The PSC based its decision on the findings and made the recommendations as set out hereunder:-

"The Commission's recommendation/decision is based on the following findings:-

1. *The discretional power vested on the Secretary by Section 48(3) is unfettered, except in the following situations -*

   i) *where it is obvious that the Secretary has improperly exercised his discretion (eg: he has a personal grudge to grind with an Officer and used his discretion to dismiss the Officer because of this personal grudge).*

   ii) *where it is obvious that irrelevant matters have influenced a decision he has made in the exercise of his discretion.*

   iii) *where it is obvious he has exercise his discretion upon wrong legal principles.*

2. *Returning to this case, therefore, your decision in dismissing Mr. Kove can only be disturbed if it can be seen that your decision has been influenced by any of the three (3) situations in paragraph 1 above.*

3. *Having closely considered Mr. Kove's submission on penalty and your grounds for dismissal, the Commission has come to the conclusion that your decision in dismissing Mr. Kove had not been influenced by any of the three situations referred to in paragraph 1 above.*

4. *Your decision, it inevitably follows, cannot then be competently disturbed and Mr. Kove's appeal must be rejected."*

This leads me to the final factor, that is, the question of whether or not the Applicant has an arguable case. The principles applicable in deciding this issue are set out by the Supreme Court in ***ILA GENO & OTHERS -v- THE STATE***, SC 447 dated 27 - 29th July 1993. The Supreme Court quoted the following passage from Wilson, J in ***NTN Pty Ltd -v- The Board of PTC*** [1987] PNGLR 70 at 74:-

"In exercising it's discretion the court must consider whether the Applicant has an arguable case. In ***Inland Revenue Commissioners -v- National Federation of Self-Employed and Small Businesses Ltd*** *[1982] AC 617. Lord Diplock set out the principles upon which the Court should act and I respectfully adopt them. Lord Diplock said (at 644):*

'If, on a quick perusal of the material then available, the court (that is the Judge who first considers the application for leave) thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the Applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for the relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in the matter has been fully argued at the hearing of the application.' "

In relation to the purpose of seeking leave, the Supreme Court adopted the following statements of Lord Diplock and Lord Scarman in ***R -v- Inland Revenue Commissioners***, ex parte ***National Federation of self-employed and Small Business Ltd*** [1981] 2 WLR 722 at 739: per Lord Diplock:-

"It's purpose is to prevent the time of the Court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending, eventhough misconceived."

Lord Scarman said at 749:-

"The curb represented by the need for an Applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busybodies, cranks, and other mischief-makers."

These passages were approved in ***Olasco Niugini Pty Ltd and Offshore Liquefaction Co Ltd -v- John Kaputin and William Searson, Francis Rowbottom, Charles Yates, Fred Haynes, Gregory Petroleum Advisory Board and Kelvin Energy Ltd*** *[1986] PNGLR 244 at 245."*

In the present case, the Plaintiff has not demonstrated to me that he has an arguable case. Without going into the merits of the case in detail, to begin with, he is already faced with very strong findings and recommendations by the PSC which considered substantially the same issues this Court will be asked to consider on the substantive application. The Applicant does not propose to challenge this decision of the PSC. Therefore, I am entitled to assume that the decision of the PSC is legitimate and valid. Given these findings, the applicant will have a difficult task of proving its four grounds at the substantive hearing.

Also, I would repeat here my earlier observations in relation to the issue of delay. In addition, I would say that by his conduct in remaining silent for some 4 1/2 years, I am entitled to infer that he did not believe that he had a case afterall that was worth pursuing with enthusiasm and vigour within reasonable time. And then when he decided to institute these proceedings, he chose to apply for leave to apply for orders which in my view may not be appropriate on an application for judicial review. He does not propose to apply for re-instatement and damages consequent upon re-instatement. His claim is substantially in the nature of damages in the form of unpaid salary and other entitlements owing as at the date of dismissal and which may be due to him since dismissal. An action for damages would be more appropriately commenced by Writ of Summons. Accordingly, I am of the view that the matter complained of is a trivial complaint of administrative error, if any, and the remedies to be sought in the substantive application are inappropriate or misconceived. As such it would be a waste of the Court's time to conduct a review of the administrative action.

I would now conclude by mentioning one procedural matter. Order 16 Rule 3(2) says that an application for leave must be made ex parte. However, in this case, Mr. Powell has appeared for the Respondents and made submission. He has also filed his client's affidavit, the affidavit of Mr. Kulu, which I have referred to. The Applicant has not taken any objection to Mr. Powell's appearance and the affidavit of Mr. Kulu. I allowed Mr. Powell to address me and to rely on his client's affidavit in defence of the application. I have been assisted by his brief submissions and his client's affidavit in understanding and appreciating the issue of delay.

There is divergence of opinion among Judges of this Court as to whether an application for leave should be made strictly ex parte. Whilst maintaining the strictures of an ex parte hearing to remain, some Judges have granted leave to the Respondents' Counsel to appear only for purposes of making submissions to the Court to assist the Court: ***see Diro -v- Ombudsman Commission of Papua New Guinea*** [1991] PNGLR 153, ***Amadio Pty Ltd -v- The State and Others*** [1992] PNGLR 218. I have adopted that course and granted leave to Mr. Powell to appear on behalf of the Respondents to make submissions. I have also gone a step further to allow Mr. Powell to file his client's affidavit and rely on it

because the evidence contained in that affidavit, as brief as it is, mainly relates to the question of the Applicant's delay in making this application. Furthermore, the remaining part of that affidavit contain submissions on matters of law which are pertinent to the question of delay under O 16 r 4 only. Had it contained evidence relating to the proposed grounds of the substantive application, I would not have accepted the affidavit and relied on it.

For the foregoing reasons, I would refuse the application. I make no order as to costs

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Lawyer for the Applicant : J. M. Mika & Associates

Lawyer for the Respondent : Graham B. Powell