IN THE HIGH COURT OF SOLOMON ISLANDS

EDDIE KAKAI, JULIA BAKEUA AND DANNY SIKOU -V- ATTORNEY GENERAL, UNDER SECRETARY OF PUBLIC SERVICE DEPARTMENT, PUBLIC SERVICE COMMISSION AND PERMANENT SECRETARY OF MINISTRY OF LANDS & HOUSING.

Administrative Law – termination by Public Service Commission – reliance on finding of misconduct in office – whether error on the record.

Judicial Review - right to be heard – whether right to include right of oral submission in all circumstances – facts amounting to allegation of misconduct not in dispute – what amounts to failure to be heard.

These three were dismissed by the Public Service Commission after their appeal against that award by the delegate following findings of misconduct in office whilst they were employed by Lands & Housing. They came to court alleging that they were not given an opportunity to be heard. The facts appear from the reasons for judgment.

Held: 1. The applicants have failed to demonstrate they have been denied procedural fairness.
2. Whether a person should be afforded a right to be orally heard is a matter for the tribunal with power to discipline but there is no automatic right in all cases.
3. The facts of this case clearly demonstrate the applicants have had their written submissions before the decision maker before an award of punishment was made, and that such submissions have not altered throughout the history of the case.
4. The applicants submissions clearly afford the decision maker the right to find misconduct which is contumelious and which is serious misconduct in terms of the Regulations.
5. The award of termination of employment was with in power.

Cases cited: *R –v- Immigration Appeal Tribunal; Ex p. Khan Mahmud (1983) 1 QB 793.*

Michael Ipo for the Applicants
Attorney General with Anika Kingmele

Date of Hearing: 7 June 2004
Date of Judgment: 25 June 2004

Summons

Brown PJ: These three applicants were public servants and employees of the Department of Lands and Housing when terminated on the 31 October 2002 by the Public Service Commission for alleged misconduct in office. The misconduct was that of converting government moneys to their own use. Following rejection of their appeal against such termination the three applicants have brought proceedings seeking declarations that the termination was unlawful in that it breached section 10(8) of the Constitution and further that the Commission exercising delegated powers in reliance on the Public Service Regulations 1989, was *ultra vires* such powers. The various respondents are

represented by the Attorney who appeared with Mrs Kingmele. Mr Ipo appeared for the three applicants. I must say the proceedings suffered from an absence of form or process if the court were

to have regard to the provisions of the Crown Proceedings Act (cap. 8) but the matter went to trial anyhow.

The evidence of the parties

In support of the summons of declarations the applicants relied on the one affidavit filed on their behalf in these proceedings, an affidavit by the applicant Eddie Kakai sworn on the 17 November 2003. In that affidavit Mr Kakai deposed to circumstances leading up to disciplinary proceeding instituted against these persons by their Department Head. I believe it is important for a better understanding of the facts to reproduce part of the applicant's affidavit in full. In that affidavit it is not made clear who the other two plaintiffs were but on the material read by the Attorney, the court accepts the presumption they were also public servants who were terminated because of conduct stemming from these incidents.

1. *I am one of the applicants in this matter and duly authorized to depose these affidavits on our behalf.*

2. *From October 1998 to February 2001, I was posted to the Solomon Island National Population Census projects as a seconded Cartographer.*

3. *At the end of the project, items no longer needed or useful to the project are either thrown away or collected by the staff if they were useful in any way in one's own field.*

4. *I then collected three diazo rolls that could be used useful for dyeline prints in our own cartograph division.*

5. *I consider these as a private property of my own and when returning back to the Ministry after my secondment I also brought with me the said diazo rolls.*

6. *As a result of turmoil, sufferings and hardships encountered by the Public Servants in various Departments after the ethnic tension due to the Government financial constraints where salaries have been delayed, I offered to use my diazo rolls to supplement our deteriorating state of needs.*

7. *Our two colleagues at the lithographic section who were responsible for the printing of such dyeline copies were duly informed of our plans and intentions.*

8. *In the first week of February 2002, the Soltai workers and a physical planner were in Honiara to pursue their land matters regarding Noro cadastrals.*

9. *They were here for the sole purpose of drawing up of their surveyed plots in Noro to further effect registration of their land.*

10. *While working on the said task, they asked for the topo-cadastral plans of the whole Noro township.*

11. *To cover the whole Noro township it would require 66 printed diazo maps at $25.00 per copy and this would total up to $1650.00. This according to them was too expensive, as they did not have enough cash at hand at that time to pay for the same.*

12. *Since it was too expensive for them and they cannot afford to pay, I then make mention about my private diazo rolls and I made an offer of them to use it at $15.00 per copy.*

13. *The Soltai personnel was quite happy with the offer, hence, we made an agreement that they would use my diazo rolls at $15.00 per copy. The total cost of 66 diazo prints would therefore amount to $990.00 instead of $1650.00.*

14. *However, since the Soltai worker has to pay for the said copies from his own pocket and be reimbursed later by the company so he needed some form of a receipt. To satisfy the Soltai personnel, we just picked up the old and used receipt and invoice books that were stashed away at the back of our Telekom switch room and gave it to them.*

15. *The money collected was shared equally amongst five of our working colleagues, namely Frank Kauhiona, Susan Ofu and three of us. Another colleague of ours who missed out on ant share then reported the matter to the fourth respondent rather than to our Divisional Head as required under the Government General Orders. Whilst five of us shared the money amongst us, only 3 of us were implicated and reported on and the other two were deliberately left out.*

16. *On the 18th of February 2002, we made a written report to the fourth Respondent's office of our doings. We cannot annex the said his report herein as it was not found despite diligent searched in our personal files when we asked for its retrieval. We believe the said report must have gone missing.*

17. *On the 25th February 2002, suspension letters dated 25/2/02 were issued to three of us from the fourth respondent thru the Surveyor General after the matter was reported to him. The Surveyor General, nevertheless, had categorically denied any knowledge of the mater being reported to him until a meeting held by the Policy Management Regulation team on the 18/08/2003. Annexed hereto and marked **"EK1""EK2"** and "**EK3**" are the true copies of the letters.*

18. *On the 6/3/02, we submitted a follow-up letter dated 6/3/02 to the Public Service Office through fourth Respondent but attention to Mr Eddie Ene to reconsider our suspension on half pay to reinstate back to full pay whilst on or*

*under investigation. No response was ever come back. Annexed hereto and marked "**EK4**" is the true copy of the letter.*

19. *On the 28th August 2002, the chairman of the Internal Investigation Committee namely Eddie Ene issued letter dated 28/8/02 to us requesting us to attend interviews on the following days 9th, 10th and 11th Septembr 2002. I myself would attend the interview on following days 9th and the said Danny and Julie on 10th and 11th respectively. Annexed hereto and marked **"EK5" EK6**: and **"EK7"** are the true copies of the said letters.*

20. *Without due notice or any explanation from the Chairman of the Investigating Committee the scheduled interviews were either cancelled or postponed. Nevertheless, on the 9th September 2002 fearing been punished for the alleged misconduct, I avail myself at the Public Service office at 8 am to 12 noon.*

21. *Later on the afternoon of the same day I caught up with Mr Joseph Pinita who is the Internal Investigating Officer in the Department of Lands & Survey and confirmed to me that he was also being notified at the last minute of the cancellation of the said interviews but no reason was also given to him.*

22. *On the 31st October 2002, the second Respondent in his letter dated 31/10/02 then terminated our appointment with the Public Service. Annexed hereto and marked "EK" "EK9" and "EK10" are true copies of the said letter.*

23. *It must be noted at the time our termination, the terms of the Public Service Commission has since been expired. No commission or body for that matter existed at that time.*

24. *The new Commission was only appointed in mid June 2003.*

Further as a consequence of the termination the applicant by letter dated 8 November 2002 appealed to the Permanent Secretary for a review of the finding and award of termination. A further appeal was lodged by letter dated 25 July 2003. None of these appeals were successful and the fact of the appellant's termination was confirmed.

An affidavit of the respondents deposed to by one Nancy Legua, the Secretary to the Public Service Commission was read in support. The Secretary particularized the material relevant to the termination of all three. That material included the extract of minutes of the 11 July 2003 meeting of the Commission which deliberated on the three officers appeal and upheld the finding of serious misconduct in office and the award of a penalty of termination. As well there is a copy minute to STC/PS (apparently copied to Bakeua.J and Sikou.D) with reference to Kakai E. That minute addresses the alleged misconduct in office, reciting that the author, MRC/PSD on the 8 October 2002 received a file 1/2002 relating to allegations about the three named officers (these applicants) received a sum of $990 from Soltai Company officers and the money was not paid to the cashier. It further recited the fact of charges having been laid (following an earlier investigation) on the 28/02/02. The charges related to money obtained from Soltai Company on account of a Government treasury receipt, money converted to their own use. The minute recites that the 3 officers responded

to the charges on 29 February 2002. The response confirmed the facts alleged in the charges. Two other officers made statements independently confirming the facts. An investigation committee was appointed by the Permanent Secretary. It was decided not to proceed with the proposed interviews

of the three officers on advice of the Attorney. As a result reasons were given for the authors opinion that the conduct amounted to serious misconduct and the recommendation for termination. Those reasons clearly set out the responsibilities of officers concerned with public moneys, the Financial Instructions breached and the improper use to which the money obtained was put, private purposes of the individuals.

Argument of counsel

Mr Ipo in his submission for the applicants relied in the first instance on section 10(8) of the Constitution.

S.10(8) – "*Any court or other adjudicated authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established or recognized by laws and shall be independent and in partial and where proceedings for such a determination are instituted by any person before such a court as other adjudicating authority or other adjudicating authority that person shall be given a fair hearing within a reasonable time.*

Mr Ipo was at pains to point out that the interview (referred to in the applicants' affidavit) scheduled for early September 2002 was cancelled and asserted that cancellation amounted to failure to give a fair hearing in terms of section 10(8). Mr Ipo failed to adequately identify the civil right alleged to have been breached. Mr Moshinsky for the respondent pointed Blackstones Law Dictionary where "civil right" is defined as "right such as belonged to every citizen of the state or country or in a wider sense to all each inhabitants and are not connected with the organization or administration of government. They include the rights of property, marriage, protection by the laws, freedom of contract, trial by jury etc.".
In this case the employment of the applicants is govern by the Public Service Act and Regulations under the Act. In the circumstances it may be assumed that "protection by the laws" would encompass the terms of the Public Service Act and its Regulations for Mr Ipo did not develop the argument to suggest that the Act or some part was unconstitutional. His argument on the Constitution fails. These persons clearly are governed by incidents of the Public Service Act which afford them, on its face, protection of law.

The claim then is commonly described as one calling for administrative review and falls within the common law.
Mr Ipo relied on a supposed breach of the *audi alteram partem* rule which he suggested may be formulated in terms set out by Lord Denning M.R in *Hanson –v- Church Commission for England* anor (1977)2 WLR 848 at 855 where the Master of the Rolls said "*it is one of the cardinal principles of natural justice that a matter should not be decided adversary to a man unless he has had a fair warning of the case against him and a fair opportunity of dealing with it*".
Mr Ipo referred me to a number of other cases dealing with principles of natural justice although he did not highlight any particular principle or factors which he considered should apply in this case. He concluded by suggesting that these applicants had not been afforded a fair hearing in that they

had not been given the opportunity to be heard. He particularly pointed to the failure of the Commission to hold the interviews as arranged.

Mr Moshinsky argued to the contrary that there had been no demonstrated breach of section 10(8) because in fact the applicants had been afforded a fair hearing. He said that the applicants written

submissions clearly indicated no denial or breach of the *audi alteram partem* rule for that on a reading of the applicant's affidavit they had been effectively afforded a succession of opportunities including the right of appeal which they exercised by way of written submission in their appeal letter of 8 November 2002. Mr Moshinsky said that absence of oral testimony in the circumstances is not determinant of the breach of the right to be heard for written submissions are adequate in a case such as this. Mr Moshinsky pointed to the Public Service Regulation 1998 particularly Regulation 48 which provides that an officer suspected of misconduct must be given not less than 7 days to respond of the charge but the oral response (together the right to be accompanied by a friend or an official representative of the office's Trade Union) is to be provided only if he so requests. There is no specific provision in the Regulation governing appeals to the Commission making mentioned of a right to an oral hearing. The contention of the Respondent is that the obligation on the Commission **is to act fairly** when it determines an appeal from a decision of an officer exercising delegated powers under Regulation 58. That same obligation to act fairly rests on the delegate.

I should say that from reading the evidence of the applicants in the affidavit filed in support and the various attached documents there is no suggestion that the applicants explanations have changed materially during the cause of the various written submissions to the appropriate authorities leading up to the termination and afterwards on appeal.

Mr Moshinsky relied on the exposition in DeSmith, Woolf and Jowell "Judiciary Review of Administrative Actions" 5th Edit. 438 where the authors say "*the two questions in every case is whether the decision maker acted fairly in all the circumstances and therefore written representations may be sufficient in a particular case although the nature of the right or interest affected would normally indicate that an oral hearing was necessary*".

Findings on the evidence

On a close reading of the applicant's affidavit it can be seen from paragraphs 15 and 16 that the applicants made a written report on the 18 February 2002 when it became apparent they were under investigation. Whilst the applicant says no copy of that report has been kept there is no suggestion on his evidence that the terms of the report differ in any material respect to the facts set out in his affidavit.

So after that, on the 25 February 2002 suspension letters issued and as a consequence, on the 6 March a second submission by follow-up letter of that date to the Public Service office, was sent. On the afternoon of the 9 September 2002 Eddie Kakai spoke with a Mr. Joseph Pinita, the Internal Investigating Officer in the Department of Lands and Survey.
It is reasonable to presume that this officer was a party to this investigation for he had also been involved in the proposed interviews. Whether or not the applicant at that time opened on the circumstances surrounding these disciplinary proceedings with Joseph Pinita cannot be said with any accuracy for the affidavit is silent on that aspect. In any event on the 31 October 2002 the various applicants' appointments were terminated.

So on those occasions, letters were written and on the 9 September 2002 one of the applicants had an opportunity to discuss orally with the Internal Investigating officer the circumstances of these charges. It is difficult to say, in the lead up to the letters of termination, that at least the applicant Eddie Kakai did not have "a reasonable opportunity to be heard" in the circumstances that I have enumerated. Clearly the applicants followed the establish procedure, by, on the 8 November 2002

submitting appeal letters to the Permanent Secretary of the Public Service Department. A reading of the first part of the letter confirms the factual aspects of the alleged misconduct as set out and reflect the matters in the affidavit that I have reproduced above.

It is clear then that there has been, as Mr Moshinsky says, no challenge to any of the factual matters on which the Commission has based its findings and decision to terminate. Where the appeal did not involve a contest of fact and nothing fresh in that regard was submitted in the letter of the appeal, it is difficult to accept Mr. Ipo's argument that *fair process* has not been afforded these applicants. In these circumstances, they have had a fair hearing in the sense understood by Lord Denning, above. They have put their case in writing; there is no issue to be taken over the factual matters, the only issue is over the award of termination. Clearly oral testimony cannot further the applicants case before the Commission since the facts are not in issue. The Commission has faced various alternate penalties but settled on that of termination which is within the Commissions power. So the failure of this particular opportunity to orally address the investigator cannot be said to amount to *an absence of an opportunity to be heard* when these persons have had their factual explanations before the tribunal at that juncture.
One point I should make is that at the time the appeal was heard a Public Service Commission was in existence and consequently by virtue of dealing with the appeal in this fashion, validated the findings of the earlier delegate.
For these reasons I am satisfied these various applicants have had "a reasonable opportunity to be heard", and the decision maker has acted fairly by having their explanations before it when settling on an award of punishment.
The applicants were aware of the allegations of misconduct which amounted to a disciplinary offence for that their written submissions have consistently addressed the factual matters which form part of their affidavit in this court; matters in the knowledge of the original decision maker and the Commission on appeal.
When this court, as a court of last review, stands back and looks to see whether procedural fairness has been afforded these three, I am satisfied this is so. Again when this court on these facts, asks itself whether these three may have had a legitimate expectation of a different outcome I must say that the misconduct is apparent, it is contumelious and no legitimate expectation can arise on these facts.

The facility to seek redress is the touch-stone of the "*opportunity to be heard*". Judiciary review, developing by decisions founded on the common law precepts, under the Constitution affords that facility and answers the applicant's assertion that they have somehow not been afforded rights under the Constitution. Clearly the right of appeal in termination cases such as this is evidence of a facility provided by the Regulations to satisfy the need for a fair process. Whether it is afforded in each case is a question of fact. But there is no common law obligation to afford the applicants the right to oral argument in every instance. The overseas authorities are to the contrary, requiring a particular finding in particular circumstances. To find such a right in these circumstances would open the floodgates to argument when documentary evidence will illuminate the issues. Memory of things

said is notoriously subjective and would exacerbate difficulties in cases such as these where the procedural steps in the Regulations imply written records.
In the Solomon Islands legislative intervention to attempt to lessen the increasing scope of judicial review as in some other common law jurisdictions, has not taken hold. The Public Service Act and Regulations clearly provide for an avenue of review.

It remains to comment on whether the subjective view of the applicants in so far as the overall process given them in this case affords them a right to complain. Reasons given in the notice of termination illustrate reliance on or sufficient reference to the material of the aggrieved party so that, on an objective test that principle of natural justice has not been shown to have been denied these three. A subjective test is not the appropriate one.
It is difficult to identify any other point in issue apart from the asserted failure to afford these persons the right to be heard. Clearly there is no issue over the factual aspects. There is consequently no right to seek a rehearing by the decision maker unless a clear error of law is apparent. I am not satisfied any such error in law has arisen for procedural fairness has been given them. The award of termination was available on the facts and a penalty provided for by the Regulations relied on by the Commission.

Lord Chief Justice Lane with whom Ackner and Oliver LJJ agreed, in *R –v- Immigration Appeal Tribunal "Exparte Khan Mahmud"* (1983)1 QB790 at 793 1794 said *"speaking from myself I would not go far as to endorse the proposition set forth by Donaldson P that any failure to give reasons means a denial of justice and is itself an error of law. The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties and they should indicate the evidence upon which they've come to their conclusions. Where one get a decision of a tribunal which fails to set out the issue which the tribunal is determining either directly or by inference to set out the basis upon which they reach their determination upon that issue then that is a matter which will be very closely regarded by this court and in normal circumstances will result in the decision of the tribunal been quashed. The reason is this. A party appearing before a tribunal is entitle to know either expressly stated by the tribunal or inferentially stated what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal, in other cases it may not. Secondly the appellant is entitled to know the basis of fact upon which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of especially stating it, in other cases it may not."*

I am reassured by His Lordships' reasons for that the tribunal which decision is here reviewable has approached this case in those terms and thus afforded the aggrieved parties the opportunity to both know the case against them and address it. Where there is the assertion by the applicants about the fact whether or not these three had been able to communicate their grievances, I find that the evidence of the respondents decisive in that regard. The aggrieved persons were afforded adequate opportunity and their explanation was before the decision makers.
The facts deposed to by the applicant clearly show misconduct upon which the Public Service Commission was entitle to act. It is perfectly obvious and described in the Minute which I have referred to earlier, an express reference by the tribunal. The respondent's affidavit directly sets out the material on which the Commission ultimately relied. The applicants have had and had taken the

opportunity to be heard by submitting letters explaining why they acted as they did. Those explanations were unacceptable to the delegate and to the Commission on appeal. The appellants have not shown that they have been denied procedural fairness.

Orders

The summons is dismissed. The applicants shall pay the respondents costs.