

IN THE COURT OF APPEAL ON APPEAL
FROM THE SUPREME COURT OF THE
REPUBLIC OF VANUATU

APPEAL CASE NO.2 OF 1993

BETWEEN : PUBLIC SERVICE COMMISSION

- Appellant

A N D : BILL WILLIE

- Respondent

JUDGMENT OF THE COURT (GIBBS, LOS AND DOWNING JJA)

Mr Coombe and Mr Aru for the Appellant
Mr Hakwa for the Respondent

The Respondent Bill Willie was an officer of the Public Service. In 1992 he held the position of Director of Postal Services. It appears that he was an exemplary public servant. On the 13th of March 1992 he was given notice that he was compulsorily retired. The notice was signed by Mr Jacob Thyna under power delegated to him by the Public Service Commission and, so far as its terms are material, read as follows :-

"I am writing to advise you that under the powers of the Public Service Commission delegated to the Director of the Public Service Department under the law the Director of Public Service decided in accordance with section 3 A(2) of the Public Service (Amendment) Act No.2 of 1985 to offer you early compulsory retirement with effect from 14 March 1992.

The Director of Public Service agreed to pay you 3 months salary in lieu of notice and that your last day of service with the Government of Vanuatu will be 13th March 1992".

It should perhaps be mentioned that section 3 A(2) of the Public Service (Amendment) Act No.2 of 1985 is now section 4 of the Public Service Act whose provisions will later be mentioned. On the 21st of August 1992 the Respondent commenced proceedings in the Supreme Court challenging the validity of his compulsory retirement. The proceedings were heard by the Learned Chief Justice who made a declaration that the premature retirement of Mr Willie was void and in law a nullity and granted certain other relief. This appeal is brought from that decision.

The case for the Respondent took as its basis the provisions of article 57 of the Constitution. That article reads as follows :-

- "(1) Public Servants owe their allegiance to the Constitution and to the people of Vanuatu.
- (2) Only citizens of Vanuatu shall be appointed to public office. The Public Service Commission shall determine other qualifications for appointment to the Public Service.

- (3) No appointments shall be made to a post that had not been created in accordance with the law.
- (4) The Prime Minister or the Chairman of a Local Government Council may, exceptionally, make provision for the recruitment of staff for a specified period to meet unforeseen needs.

In urgent cases, the Public Service Commission may, after consulting the Ministers responsible for finance and public administration, make such a decision instead of the Prime Minister.

- (5) For as long as their posts exist, public servants shall not be removed from their posts except in accordance with the Constitution.
- (6) Public Servants shall be given increments in their salary in accordance with the law.
- (7) Public Servants shall leave the Public Service upon reaching retirement age or upon being dismissed by the Public Service Commission. They shall not be demoted without consultation with the Public Service Commission.
- (8) The security of tenure of Public Servants provided for in sub-article 5 shall not prevent such compulsory retirement as may be decided by law in order to ensure the renewal of holders of public offices."

The general purposes of article 57 are clear, although the provisions of sub-article 8 occasion some difficulty. The article has the dual purpose of requiring public servants to remain politically neutral, and at the same time of protecting them from political interference. It is highly desirable, in any society, that the members of the Public Service do not allow political affiliations to influence their duty to the Government of the day in the service of the Nation and that they should not be removed or suffer any other disadvantage for purely political reasons. The Constitution seeks to give effect to that ideal.

Article 57 (5) is intended to ensure that public servants have security of tenure for as long as their posts exist. That is made clear, not only by the words of that provision, but also by article 58, which makes an exception in the case of personal political advisers of the Prime Minister and Ministers and allows senior public servants in Ministries to be transferred to other posts of equivalent rank. A similar policy is revealed by article 60 (4) which protects the Public Service Commission from outside interference. Article 57 (8) provides an exception to the general rule that a public servant has security of tenure. It permits compulsory early retirement subject to two conditions. First the retirement must be "decided by law". Secondly the purpose of the retirement must be to "ensure the renewal of holders of public offices". The Learned Chief Justice found that neither of those conditions were satisfied in the present case.

The only statute law on the subject of compulsory retirement is

found in section 4 of the Public Service Act which reads as follows:-

- "(1) Notwithstanding anything to the contrary contained in this Act or in any other law for the time being in force, for the purpose of ensuring the renewal of holders of public offices within the Public Service, the Commission after consultation with the Prime Minister may compulsorily retire any officer from the Public Service.
- (2) Notice of compulsory retirement shall be given by or on behalf of the Commission in writing to an officer to whom sub-section (1) applies.
- (3) The notice referred to in sub-section (2) shall state the day on which the officer to whom it is given shall be retired and shall be not less than 3 months after the date on which the notice is given to the officer."

Section 4 makes it clear that to comply with that section the Commission (or its delegate, see section 9) must give to the officer whom it is intended to retire notice in writing stating the day on which the officer shall be retired. The day so stated must be not less than 3 months after the day on which the notice is given.

The notice in this case quite clearly did not satisfy that requirement. The day on which the Respondent was to be retired was the day on which the notice was given. The purported retirement accordingly did not satisfy the law and for that reason was not in accordance with the Constitution.

Mr Coombe, on behalf of the Appellant, advanced a number of arguments in an attempt to avoid the consequences of this failure to comply with the requirement of the statute. First he submitted that the sole purpose of the provision is to ensure that the officer intended to be retired gets not less than three months' salary from the time he is informed of his early retirement and that since in fact the Respondent was paid the salary that purpose was satisfied. He pointed out that under section 5 of the Public Service Act the retired officer is entitled to severance pay at a rate which he submitted is generous, although it is not quite clear how this fact is relevant to the requirement that at least 3 months' notice should be given. It may be agreed that one purpose of this requirement is to ensure that the officer receives salary for at least three months but it cannot be assumed that that is its sole purpose. The time during which the notice runs allows the officer to adjust himself to the prospect of retirement and also gives him an opportunity to challenge the proposed retirement before it takes effect. Whatever the purposes of the provision its terms are clearly mandatory. It unambiguously requires three months' notice as a condition of compulsory retirement and three months' notice was not given.

Mr Coombe submitted that the situation was saved by section 37 of the Interpretation Act which provides as follows :-

"Where any form is prescribed by an Act of Parliament a

document which purports to be in such form shall not be void by reason of any deviation therefrom which does not affect the required substance of such document or which is not calculated to mislead."

He submitted that section 4 (3) of the Public Service Act in effect prescribes a form, namely a notice specifying a day not less than three months after the date on which the notice is given, and that the deviation from this requirement did not affect the substance of the matter. This argument cannot be accepted. Section 37 has no application whatever to a case such as the present. Section 4(3) of the Public Service Act did not prescribe a form; it required that certain action should be taken. The words of section 37 which referred to "any deviation which does not affect the required substance of such document" obviously referred to a departure from the prescribed form of a document which does not affect the substance of the document itself. These words are not apt to refer to a departure from a statutory requirement, not being a prescribed form, even if it has no substantial consequences in fact.

Mr Coombe further relied on the decision of the English Court of Appeal in Brindle v H W Smith (Cabinets) Ltd [1973] 1 ALL ER 230. In that case an employee was on the 21st February given a months' notice which expired on the 24th of March. Later on the 21st February the employer told the employee not to return to work. It was held that the employee was taken to be dismissed on the 24th of March - the date when the notice expired and terminated the legal relationship between the parties - and was therefore entitled to claim compensation under an Act that came into operation on the 28th of February. This decision provides no assistance to the Appellant's argument. In that case the relationship of employer and employee continued until the period of notice expired even though the employer had told the employee to leave the employment before that time. In the present case the notice took effect on the day on which it was given.

Finally Mr Coombe submitted that the Supreme Court has no jurisdiction to enquire into the validity of the dismissal. In support of this submission he placed reliance on Article 60(4) of the Constitution which provides as follows :-

"The Commission (that is the Public Service Commission) shall not be subject to the direction or control of any other person or body in the exercise of its functions".

Quite clearly that provision is intended to protect the Public Service Commission from outside interference - particularly political interference. It is not intended to prevent either the Courts or the Parliament from exercising their respective powers in a way which would affect the Commission in the exercise of its functions. It certainly does not have the effect of ousting the jurisdiction of the Courts in a proper case. It was also submitted that the decision to force early retirement merely puts an end to a contractual relationship and is therefore not subject to review as an administrative decision. That argument is insupportable. If an officer has been retired in a manner that amounts to a breach of the law and the Constitution that officer has a remedy.

In the present case the retirement was not made in accordance with the law or the Constitution. It was therefore as the Learned Chief Justice held null and void. That is enough to dispose of the case. However it seems desirable to deal briefly with the other issues discussed by the Chief Justice and further argued before us.

When the Constitution refers to a retirement "decided by law" it of course means decided in accordance with law and that requires that the action taken to effect the retirement should comply with whatever legal rules are applicable whether they be statutory or otherwise. In the present case the Learned Chief Justice held that the rules of natural justice were not observed. The rules of natural justice are not excluded by the Public Service Act and therefore they must be observed in a case in which they are applicable. The rules of natural justice are not standardized but depend on all the circumstances of any particular case and it would not be appropriate to attempt any general discussion of them here. However two observations may be made. When it was intended to effect the compulsory retirement of Mr Willie he should have been advised of the fact that his compulsory retirement was under consideration and of the reason why consideration was being given to retiring him. In particular, if it was suggested that he was in any way unfit for his position, or had been guilty of misconduct or impropriety, he should have been informed of the nature of the allegations against him. He should then have been given a full and fair opportunity to be heard before any decision was made compulsorily to retire him. However once a decision had been properly made, the Commission would not have been obliged to give its reasons for making it : see Public Service Board of New South Wales v Osmond [1986] 159 CLR 656 and cases there cited. In the present case the fact that Mr Willie was not given an opportunity to be heard before a decision was made to retire him provided an additional reason for holding that he was not retired in accordance with law.

There remains the question whether the retirement was made for the only purpose which the Constitution allows, namely "in order to ensure the renewal of holders of public officers". As we have already indicated, the meaning of those words presents difficulties. Mr Coombe submitted that the purpose of the constitutional provision would be satisfied simply by the existence of an intention to put a new person in the post of the officer sought to be retired. However the dominate purpose of Article 57 is to secure the tenure of Public Servants. Sub-article 8 must be given an effect consistent with that dominant intention. Perhaps the word "renewal" is used in the sense of "regenerate" or "recover (one's original strength, youth etc...)" and the intention of the section may be to allow the replacement of an officer who by reason of declining health, strength or efficiency can no longer perform his or her duties as satisfactorily as he once could but whose conduct does not warrant dismissal.

Whatever the precise meaning of the sub-article, it appears from the evidence that the purpose of the retirement of the Respondent was an inadmissible one. The evidence shows that the usual procedure regarding retirement was not followed. What occurred was that a letter dated the 27th February 1992 (Exhibit 7) from the Second Secretary in the Ministry of Post and Telecommunications was

sent to the Director of the Public Service Department. The letter submitted a list of 21 names of officers who, it was said, "if continued to be employed would jeopardize the implementation of the Coalition Government policies". All but 3 names had after them initials which are those of a political party. The first name was that of the Respondent and after his name and description appeared the initials "VP". The letter continues :-

"Please note that out of forty (40) civil servants in the Postal Department over half (21) are supporters of VP, MPP and Tan Union. The Ministry considers such an unbalanced proportion unhealthy for the Coalition Government". In reply (Exhibit 8) Mrs Crowby, the Director of the Public Service Department sought more information and a report on the Respondent that she could use as a basis to retire or dismiss him. It does not appear that she received a reply, but on the 13th March 1992 Mr Thyna, who was then Acting Director of the Public Service Department, received a direction (Exhibit 6) from the Acting Prime Minister that certain officers, including the Respondent, be dismissed with immediate effect. It was that letter that decided him to dismiss the Respondent. Mr Thyna also said that he received a verbal report on the Respondent but he would not say what the report contained. He said that the policy was that the Government intended to change certain post holders - he said at first all post holders. It thus appears that the reason for the retirement of the Respondent was that the Respondent was, or was believed to be, a member of a particular political party. Mr Coombe submitted that in the interests of efficiency a Government is entitled to dismiss a senior civil servant who is believed to be closely identified with a political opposition. However the Constitution is design to ensure that public servants, whatever their private political leanings, do not act politically and that while they themselves do not allow politics to affect them they should enjoy a security of tenure that will protect them from loss of office for purely political reasons. The purpose of Mr Willie's dismissal was not that which the Constitution permits.

In conclusion Mr Coombe pointed out that the Respondent had accepted and invested his severance payment and, without availing himself of the procedures for complaint under the Staff Manual, waited 5 months before commencing proceedings. It is not clear what significance is sought to be attached to these facts and in any case it does not appear that the procedures detailed in the Staff Manual would have been open to Mr Willie. It is not suggested that the present proceedings were commenced outside any limitation period and no other legal ground has been suggested for denying relief to the Respondent. The fact that the Respondent received the severance pay has been dealt with by the Learned Chief Justice who declared that any money paid to Mr Willie under the purported termination will be taken as an advance of salary and will be accounted for as such.

For this reasons the appeal must be dismissed with costs.

DATED at Port Vila this 15th day of October 1993.

