Fiji

Ratu Epenisa Seru Cakobau v. Fijian Affairs Board

High Court
Fatiaki J.
27 May 1988

Administrative law—natural justice—right to be heard—whether public servant must be afforded a right to be heard before being interdicted without pay.
Employment law—suspension without pay—lack of hearing—whether employee suspended without pay has right at common law to be heard before such suspension.
Contempt—conduct which frustrates and renders decision of court ineffective—such pre-emptive action can amount to contempt.
Pleading and practice—injunction—application for equitable relief—defendant voluntarily discontinued the very matters for which injunction sought—whether injunction may issue despite futility.

The plaintiff, an employee of the defendant Board, was also the son of a high chief of the province of Tailevu. In April 1988, he caused to be published in the *Fiji Times* a statement referring to the title of "Tui Viti". The statement prompted the Secretary for the Fijian Affairs Board to write to the plaintiff. The memorandum purported to lay charges against the plaintiff. He was at the same time advised that, pending a decision of those charges, he was suspended from the performance of his duties without pay, and that during the period of suspension he was not permitted access to official premises of the Board or official documents.

This was an *inter partes* application by which the plaintiff sought an injunction against the defendant Board to restrain the Board, its servants, and agents from further acting upon and/or implementing its decision to interdict the plaintiff without pay together with the prohibition on the plaintiff of access to premises of the Board.

HELD:

(1) The standing orders of the Fiji Affairs Board contain no standing order which expressly authorizes the suspension without pay of an employee of the Board who is charged with a disciplinary offence. Such a suspension without pay would, in any event, attract the rules of natural justice with the result that the plaintiff would have been entitled to a hearing before the interdiction without pay. Statement of Megarry J., in *John* v. *Rees* [1970] Ch. D. 345 at 397, applied.

(2) No inherent power exists at common law or arises under statute for an employer to suspend an employee without pay whilst the employer is undertaking a disciplinary investigation against the employee. No such "administrative measure" can be inferred as a matter of convenience in disregard of the rules of natural justice, or where there is no suggestion of theft by the employee, or a divulgence of confidential records or

information, or a loss of confidence by fellow employees adversely affecting the continued proper functioning of the employer. Similar consideration would apply to the employee's exclusion from his employer's premises even as a temporary measure. *Birss* v. *Secretary for Justice* [1984] 1 N.Z.L.R. 513 applied; *Dixon* v. *Commonwealth* (1981) 55 F.L.R. 34 approved; *Lewis* v. *Heffer* [1978] 1 W.L.R. 1061 doubted.

(3) Such a power is not a *necessary* adjunct to the existing disciplinary provisions under the defendant Board's standing orders.

(4) The Court will not stand idly by and permit litigants to usurp the function of the Court by unilaterally taking steps pending a decision of this Court that ultimately frustrate and render its decisions ineffective. The due administration of justice requires that once the dispute has been submitted to a court of law, the parties should be able to rely on there being no usurpation by any other person of the function of that Court to decide the dispute according to law. Such pre-emptive conduct, which is calculated to prejudice such a requirement or to undermine public confidence that it will be observed, is contempt of court. Statement of Lord Diplock in *Attorney-General* v. *Times Newspapers* [1973] 3 All E.R. 54 at 72 applied.

(5) The Court may, in its discretion, refuse injunctive relief where impossibility of compliance or futility is certain and the grant of such relief is pointless.

Observation per Fatiaki, J.:

The Court is entitled in this interlocutory to expect *firstly*, that the defendant Board will not between the date of hearing the application and the delivery of this decision knowingly do anything which *vis-à-vis* the plaintiff and the Court is either unlawful in the sense of being in contempt or would pre-empt or render futile the Court's decision in the matter; *secondly*, that in the absence of any acceptance by the plaintiff of the defendant Board's decision to interdict him that that interdiction should remain subsisting to enable the Court to vindicate the plaintiff in his refusal to accept it; and *thirdly*, that the defendant Board would not presume to advance to a finality, disciplinary proceedings it had already commenced against the plaintiff when the question of the finality of the proceedings was an issue before the Court for determination.

Other cases referred to in judgment:

Attorney-General v. *Times Newspapers Ltd.* [1974] A.C. 273, [1973] 3 All E.R. 54, [1973] 3 W.L.R. 298

Birss v. *Secretary for Justice* [1984] 1 N.Z.L.R. 513

Dixon v. *Commonwealth* (1981) 55 F.L.R. 34

John v. *Rees* [1970] Ch. D. 345, [1969] 2 W.L.R. 1294, [1969] 2 All E.R. 274

Lewis v. *Heffer* [1978] 1 W.L.R. 1061, [1978] 3 All E.R. 354 C.A.

Legislation referred to in judgment:

Fijian Affairs Act, cap. 120, section 10(b)

Public Service Act, cap. 74

Other sources referred to in judgment:

Public Service Commission (Constitution) Regulations

Spry, *The Principles of Equitable Remedies* (3rd. ed., 1984)

Standing Orders of Fijian Affairs Board

Counsel:
V. Parmanandam for the plaintiff
Q. Bale for the defendant

Court's Order:
As an alternative to the grant of the injunction, the Court awarded the plaintiff damages to be assessed if not agreed.

FATIAKI J.:

Judgment:
By this *inter partes* application, the plaintiff seeks an injunction against the defendant Board in the following terms:

> An injunction restraining the Defendant its servants and agents from further acting upon and/or implementing its decision to interdict and suspend the Plaintiff's salary together with the prohibition upon the Plaintiff of access to the premises of the Board and Provincial Councils.

In support of his application the plaintiff has filed an affidavit and annexed various correspondence between himself, his solicitor, and the Board. The Board, although served with the relevant papers on 4 May 1988, had not filed an affidavit in reply by the time the matter came up for hearing on 16 May 1988.

However, at the hearing of the application, the Board was represented by counsel who fully argued the Board's case based largely on matters of law, the facts in the case not being disputed by affidavit evidence.

Also at the hearing a copy of the defendant Board's standing orders of 19 December 1977 made pursuant to section 10(b) of the Fijian Affairs Act, cap. 120, and a letter dated 30 April 1988 were put in by consent for the assistance of the court.

If I might refer very briefly to the relevant undisputed facts adduced in evidence. The plaintiff is an employee of the defendant Board, holding the position of an Assistant Roko Tui in the province of Tailevu. In his personal capacity he is the son of Ratu Sir George Cakobau a high chief of the province of Tailevu.

On or about 20 April 1988 the plaintiff caused to be published in the *Fiji Times*, a statement referring to the title of "Tui Viti" in response to various news items that had been earlier published about the title.

On 21 April 1988 the Secretary for the defendant Board, reacting to the published statement, wrote a memorandum to the plaintiff in the following terms:

> I have seen and read your statements regarding the Title "Tui Viti".
> In this article you have questioned the abilities of both the Prime Minister (Ratu Sir K.K.T. Mara) and the President (Ratu Sir P.K. Ganilau) to lead this country. Further you have also, in the same article, questioned/ridiculed the Minister for Fijian Affairs.
> These are disciplinary offences within the meaning of the Board's Standing Orders and you are accordingly charged as follows:

1 THAT you EPENISA SERU CAKOBAU, being employed in the Fijian Affairs Board as an Assistant Roko of Tailevu Province did on 20th April, 1988 improperly conduct yourself in a manner likely to bring the Board into disrepute in that you caused to be published articles capable of attracting criticisms of lack of discipline in the Board's administration contrary to Standing Order 22(i).

You are required to give me your reply to these charges on or before 13 May, 1988. *Pending a decision of these disciplinary charges and your replies thereto, you are hereby interdicted from the performance of your duties; you will not receive salary during this period of interdiction.*

You are also reminded that during this period of interdiction, you are not permitted to enter official premises of the Board and Provincial Councils nor have any access to official documents.(My emphasis)

It is clear on the face of the memorandum that a disciplinary charge was being laid against the plaintiff requiring his explanation pursuant to the defendant Board's standing orders.

As the relevant standing orders regarding discipline are of importance in this case I set them out below:

PART 6—DISCIPLINE

22. An officer commits an offence for the purpose of disciplinary proceedings who:
    (a) by any wilful act or omission fails to comply with any official instructions given under authority of the Board or the Secretary;
    (b) in the course of his duties, disobeys, disregards, or makes wilful default in carrying out any lawful orders or instructions given by any person having authority to give the order or instruction or by work or conduct displays insubordination;
    (c) is negligent, careless, slovenly, indolent, inefficient or incompetent in the discharge of his duties;
    (d) behaves in a manner calculated to cause unreasonable distress to other employees or to affect adversely the performance of their duties;
    (e) uses intoxicating liquors or drugs to excess or in such manner as to affect adversely the performance of his duties;
    (f) improperly uses or removes property or stores for the time being in his official custody or under his control, or fails to take reasonable care of any such property or stores;
    (g) otherwise than in the proper discharge of his duties directly or indirectly discloses or for private purposes uses any information acquired by him either in the course of his duties or in his capacity as an employee;
    (h) absents himself from his office or from his official duties during hours of duty without leave or valid excuses, or is habitually irregular in the time of his arrival at or departure from his place of employment;
    (i) *is guilty* of any improper conduct in his official capacity or *of any improper conduct which* is likely to affect adversely the performance of his duties or *is likely to bring the Board into disrepute.*(My emphasis)
23. Controlling officers will report in writing to the Secretary should in their opinion disciplinary action be necessary.

24. On receipt of such report the Secretary will inform the officer in writing of the alleged offence and require a written explanation from the officer concerned within 21 days.
25. The Secretary may then, after such enquiry as he may deem necessary, decide on such disciplinary action as he may deem necessary. This may involve reprimand, deferment or stoppage of increments, demotion or dismissal, suspension, fine or surcharge.
26. An officer who has been disciplined may appeal to the Board.

It is clear that the disciplinary procedure laid down in the defendant Board's standing orders envisages four stages:

1. that a report be written by a controlling officer to the Secretary who is, by definition, the Permanent Secretary for Fijian Affairs and Rural Development (standing order 23);
2. that the Secretary on receiving the report must inform the employee of the disciplinary offence he is alleged to have committed and call upon him to tender a written explanation to the offence within 21 days (standing order 24);
3. that after receiving the employee's written explanation, the Secretary may conduct such enquiries as he sees fit, and decide on what penalty, if any, should be imposed (standing order 25);
4. that the officer has a right to appeal to the defendant Board from any disciplinary decision imposed by the Secretary.

The penalties that may be imposed are listed as follows:

> . . . reprimand, deferment or stoppage of increments, demotion or dismissal, suspension, fine or surcharge.

It is clear, by its absence, and counsel for the Board concedes this, that there is no standing order which expressly authorizes the interdiction without pay of an employee of the Board charged with a disciplinary offence.

The interdiction was unilaterally imposed and was of uncertain duration. By its expressed terms it deprived the plaintiff of his right to work, his right to salary or wages, and any legitimate expectations he may have as an officer of the defendant Board. As was stated by Megarry J. in *John* v. *Rees* [1970] Ch.D. 345 at page 397:

> ... suspension is merely expulsion *pro tanto*. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Accordingly, in my judgment the rules of natural justice prima facie apply to such process of suspension in the same way that they apply to expulsion.

However, the Secretary for the defendant Board purported to do just that, and counsel for the Board forcefully argued he was entitled to do so as an "administrative measure" and under the inherent powers of an employer undertaking a disciplinary investigation against an employee. He was unable to cite any authority for such a proposition nor has it been suggested that there is an established, well-known, and unquestioned practice in use by the defendant Board in its past dealings with its employees charged with disciplinary offences.

Nevertheless, the dictum of Lord Denning M.R. in *Lewis* v. *Heffer* [1978] 1

W.L.R. 1061 at page 1073 does lend some judicial recognition to such a right. However, I would respectfully adopt the dictum of the High Court of Australia in *Dixon* v. *Commonwealth* (1981) 55 F.L.R. 34 at pages 43 and 44 where it is said:

> The comment of Lord Denning M.R. to the effect that his Lordship was unaware of a suspension having been questioned on the ground that the person concerned must be given a prior opportunity of defending himself on the actual charge seems to us, with respect, not relevant to the real question involved on this aspect of the present appeal. That question, as we see it, is whether the person involved is entitled to be heard or not on the ultimate question whether the charge is or is not made out, but on the question . . . namely, whether or not he should be suspended as an interim step. Be that as it may, the decision in *Lewis* v. *Heffer* is distinguishable from the present case in that there was not involved any loss of salary during the period of suspension. Indeed, Lord Denning's general remarks . . . are expressly related to a case where the suspension pending enquiry is "on full pay".

I am not minded to accept that such a power in an employer exists in common law or arises under statute. Nor am I satisfied that such "administrative measures" can or should be inferred as a matter of convenience in disregard of the rules of natural justice, or, in a case such as the present, where there is no suggestion of theft by the employee *or* a divulgence of confidential records or information *or* a loss of confidence by fellow employees adversely affecting the continued proper functioning of the defendant Board, such as to merit or warrant his exclusion from his employer's premises even as a temporary measure.

It is noteworthy that the power to interdict public officers pending a final decision under the Public Service Act, cap. 74 is expressly set out in Regulations 22(1)(a) and 25 of the Public Service Commission (Constitution) Regulations and is exercisable only where "the public interest would be best served" *or* where a criminal charge carrying imprisonment for a year or more has been laid against the employee. Further, by Regulation 26 an interdicted officer shall not have access to any official premises or document nor shall he be paid any salary or compensation unless otherwise directed by the Public Service Commission.

The New Zealand Court of Appeal in *Birss* v. *Secretary for Justice* [1984] 1 N.Z.L.R. 513, when considering the suspension (interdiction) of an officer pending a final determination of disciplinary charges under an equivalent provision of the State Services Act, held (as recorded in the headnote):

> Held: The State Services Act contained no provisions which specified the procedure to be observed in reaching a decision to suspend. In the absence of any clear expression of a contrary legislative intent, the rules of natural justice prima facie applied to suspension from office without salary . . .

I have considered whether such a "power to interdict" might be included in the defendant Board's standing orders by virtue of the provisions of standing order 4 as a matter of necessity.

Counsel for the defendant Board did not appear to consider that such a "power" was contemplated in the "conditions" referable under standing order 4 nor did he rely on it other than to suggest that public servants as part of their "conditions" of

employment are strictly forbidden from "going to or using the press" for want of a more convenient expression.

Counsel for the plaintiff argued that standing order 4 did not apply to the present situation and in any event the defendant Board had clearly waived the order by the terms of its letters of 28 and 30 April 1988.

Having carefully considered the matter I am satisfied that the "conditions" contemplated by standing order 4 relate to "conditions of service" of the kind enumerated in standing order 8 and not to disciplinary procedures in the nature of an interdiction. If I am wrong in this view I would nevertheless hold that such a "condition" is not a *necessary* adjunct to the existing disciplinary provisions under the defendant Board's standing orders 23 to 26.

I note that under section 10(b) of the Fijian Affairs Act, cap. 120, the defendant Board is specifically empowered to make standing orders regulating not only "conditions of service" but also "dismissal".

For the sake of completeness I now deal with the argument by learned counsel for the defendant Board that no final decision has been made or penalty imposed by the Secretary in this matter, i.e., stage 3 of the disciplinary procedure enumerated above had not been reached or completed. Needless to say, counsel for the plaintiff argues the contrary with some justification.

I say with some justification because of the clear statements of the Secretary of the defendant Board in his letter of 30 April 1988 to the plaintiff's counsel. The letter is in the past tense insofar as it relates to the decision, powers, and functions of the Secretary under the defendant Board's standing orders and, furthermore, makes reference to the plaintiff's right of appeal to the defendant Board against the Secretary's decision presumably under standing order 26. One might legitimately ask the logical question: why refer to the plaintiff's right of appeal against a decision if the Secretary did not consider himself *functus officio*, or, if a final "decision" had not in fact already been taken in the matter?

For my part I am disinclined to agree with the submissions of the learned counsel for the defendant Board on this aspect of the arguments before me. An attempt was made to differentiate between the "suspension" penalty envisaged under standing order 25 and the nature of the "interdiction" imposed on the plaintiff.

Counsel for the defendant Board argued that suspension as a penalty involved a permanent loss of continuous service and wages whereas an interdiction did not.

In that regard I note that the interdiction was without pay and of indefinite duration, nor is it stated that the plaintiff will be reinstated upon completion of enquiries and before a final decision is made.

However, any practical effect of such difference in definition could be rendered nugatory by the dismissal or suspension of the plaintiff whilst he was interdicted for then there would be no reinstatement and no wages payable, i.e., the temporary interdiction would be subsumed by and merge with the subsequent penalty imposed.

In any event the injunction sought is to restrain the defendant Board from "further acting upon" its decision to interdict the plaintiff. Such an order recognizes that the defendant Board may have already acted upon its decision to interdict and to my mind would restrain the Board from uplifting the interdiction if it were minded to.

In the circumstances I would be disposed to consider this an appropriate case to grant the plaintiff's application for an injunction in the terms prayed, but for the fact that the defendant Board has by its own volition removed the various matters sought

to be enjoined by the plaintiff in this application. This latter circumstance arose in the following manner.

Pending the delivery of this ruling, and indeed on the same day on which the plaintiff's application for an injunction was heard, namely 16 May 1988, the defendant Board wrote to the plaintiff. The relevant letter, signed by the Secretary of the defendant Board and delivered to the plaintiff's solicitors the following day, was produced to the court by consent. It contains *inter alia* the following two paragraphs:

> 7. The following actions taken against you shall be lifted:
>
> i Your interdiction, effective from today;
>
> ii The suspension of your wages, effective from the date of your interdiction; and
>
> iii The prohibition against your access to Provincial premises and official documents, effective from today.

and:

> 10. You are to report for work back at the Tailevu Provincial Office immediately and to continue in your present office as one of the Assistant Rokos of the Province. The Roko Tui Tailevu is also being notified of this reinstatement by copy of this letter.

The plaintiff's reinstatement received press coverage in the *Fiji Times* of 17 May 1988 and I felt it appropriate to seek the appearances of both counsels for the parties on Wednesday 18 May 1988 to explain the various "developments" that had taken place and to give them an opportunity to advise the Court as to the necessity of it continuing any further upon the plaintiff's application.

I was of course mindful of the seeming futility in granting the plaintiff an injunction to restrain the defendant Board from further acting on a decision that it had, without a court order, discontinued, and which effectively no longer subsisted.

As was stated by the learned author of *The Principles of Equitable Remedies* (1984) at pages 388 and 389:

> Where a plaintiff has established a sufficient probability of a breach of his rights to give rise prima facie to a right to an injunction, two matters *inter alia* may lead to the refusal of relief. In the first place, impossibility of performance may be raised; that is, it may appear that there is either certainty, or at least a substantial prospect, that it will not be within the power or capacity of the defendant to comply with the proposed order of the court. In the second place, it may appear that performance would be futile, that is, that there is either certainty, or at least a substantial prospect, that compliance with the order of the court would not benefit the plaintiff or achieve the purpose for which it is sought.
>
> If impossibility of compliance or futility is certain and the grant of specific relief is pointless, an injunction should ordinarily be refused.... Again, as to futility, it was observed by Long Innes J. that it is "contrary to the practice of the equity court to grant an injunction in cases where the party enjoined can, by is own volition and without committing any wrongful act, at once render the injunction nugatory and futile".

That is not to say, that this Court will stand idly by and permit litigants to usurp the

function of the Court by unilaterally taking steps pending a decision of this Court that ultimately frustrate and render its decisions ineffective. Steps that, I might add, border on the contemptible, albeit that they are professed to be taken in the public interest and in the interests of an opponent in litigation such as to alter the *status quo* to the opponent's advantage. Such pre-emptive actions in future will be met by an award of costs and shall, in suitable cases, be dealt with as a contempt.

Lord Diplock in *Attorney-General* v. *Times Newspapers Ltd.* [1973] 3 All E.R. 54 at page 72 succinctly summarized it when he said:

> The due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; *secondly*, that they should be able to rely on obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based on those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and *thirdly* that, *once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law.* Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court. (Emphasis added)

The Court is entitled in this interlocutory proceeding to expect, *firstly*, that the defendant Board will not between the date of hearing the application and the delivery of this decision knowingly do anything which *vis-à-vis* the plaintiff and the Court is either unlawful in the sense of being in contempt or would pre-empt or render futile the Court's decision in the matter; *secondly*, that in the absence of any acceptance by the plaintiff of the defendant Board's decision to interdict him that that interdiction should remain subsisting to enable the Court to vindicate the plaintiff in his refusal to accept it; and *thirdly*, that the defendant Board would not presume to advance to a finality, disciplinary proceedings it had already commenced against the plaintiff when the question of the finality of the proceedings was an issue before the Court for determination.

Counsel for the plaintiff, however, as he was quite entitled to, continues to seek an injunction of this Court upon the application. With respect to counsel for the plaintiff, this is not a situation where the effect of the injunction is not certain. The injunction in the terms prayed as set out above, seeks to restrain the very three matters that the defendant Board has already voluntarily lifted or discontinued by its letter of 16 May 1988.

In my view to grant the injunction in the terms as prayed by the plaintiff at this point in time would be futile and as a matter of discretion I am reluctant to accede to his application. Nevertheless, an available and I think suitable alternative is to award the plaintiff damages to be assessed if not agreed in lieu of an injunction, together with the costs of this application.