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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.173/83

605

BETWEEN DONALD JAMES NICHOLSON of
Flat 1, 49 Searell Road,
Papanui, Christchurch,
Student

Applicant

A N D REVIEW COMMITTEE
established by Section
51A of the Hospitals Act
1957 for the purpose of
carrying out certain
functions prescribed by
that Act and having its
office at Wellington

First Respondent

A N D NORTH CANTERBURY HOSPITAL
BOARD a Hospital Board
constituted under the
Hospitals Act 1957 and
having its office at
Christchurch

Second Respondent

Hearing: 9 April 1984

Counsel: P.J. Bartlett for Applicant
N.W. Williamson for First Respondent
N. Till for Second Respondent

Judgment:

131 MAY 1984

JUDGMENT OF ROPER J.

This is a motion for review of the decisions of the Review Committee (established by s.51A of the Hospitals Act 1957) and the North Canterbury Hospital Board (the Board) concerning the termination of the Applicant's employment as a trainee psychiatric nurse at Sunnyside Hospital. The First

Respondent was content to abide the Court's decision and Mr Williamson was given leave to withdraw.

Mr Nicholson, who was then 24, commenced employment with the Board on the 8th April 1980, and on the 28th October of that year was convicted in the District Court at Christchurch on charges of cultivating and being in possession of cannabis. He was fined a total of \$500. Dr Begg, the Medical Superintendent at Sunnyside, and Mr L.B. Thomas, the Principal Nurse, discussed the convictions with Mr Nicholson and formed the view that his employment should be terminated. Their recommendation to that effect was accepted by the Board's Medical Superintendent in Chief and its Health Services Committee. On the 26th November 1980 this letter was sent to Mr Nicholson:-

" North Canterbury Hospital Board
SUNNYSIDE HOSPITAL

26 November 1980

Mr Donald James Nicholson,
Trainee Nurse,
SUNNYSIDE HOSPITAL

Dear Mr Nicholson,

I am directed by the Medical Superintendent-in-Chief of the North Canterbury Hospital Board, to inform you that after reviewing the circumstances of your recent conviction on drug related charges, the Board has decided that your services as a trainee nurse and employee of the Board be terminated as of 28.11.1980.

Should we receive your notice of resignation prior to that date, this would be acceptable.

In the event of your dismissal taking effect, you have a right to appeal to the Board.

Yours faithfully,

J.A. Begg
Medical Superintendent"

Mr Nicholson gave notice of complaint pursuant to s.51C(1)(b) on the 4th December with the intimation that he would be represented by the Public Service Association, and the presumption that the review would be before the Board. The hearing of the complaint took place on the 22nd December and the minutes indicate that it was a meeting of the "Appeal Committee" with those present being Mr C.F. Whitty (Chairman), Mrs J.M. Aitken, Professor D.W. Beaven, Mrs L.C. Gardiner and the Chief Executive (Mr Parker). An apology was received from a Mr D.H. Lawrence. Mr J.M. McKenzie represented Mr Nicholson who was also present. According to the minutes Mr McKenzie challenged the jurisdiction of the Appeal Committee to hear the appeal maintaining that the Arbitration Court was the proper forum, and that as the Board had dismissed Mr Nicholson it was disqualified from hearing the appeal. The Chief Executive then explained that as Mr Nicholson had applied for a review of the decision under s.51C of the Act it was proper for it to be considered by the Appeal Committee. Mr Nicholson and Mr McKenzie then withdrew from the meeting. The Appeal Committee then heard evidence from Dr Begg and Mr Thomas. The minutes contain this summary and decision:-

"Summary

It was agreed that Mr Nicholson's first ward assessment showed him to be an able trainee nurse. However, his attitude towards the law relating to the use of drugs made him unsuitable for employment as a trainee nurse. Because of his attitude he could not be employed within certain areas of the hospital, and therefore would not be able to satisfy the curriculum requirements to complete his training. His conviction for drug offences meant that he could not be recommended, in terms of the Nurse's Act 1977, Section 19 for registration as being of good character and reputation, and a fit and proper person to be registered.

Decision

It was the unanimous decision of the Committee that a recommendation be made to the Finance Committee that Mr Nicholson's appeal be

dismissed, and his dismissal from employment with the Board be confirmed."

On the 14th January 1981 the Finance Committee of the Board resolved that the Appeal Committee's decision be confirmed, and Mr Nicholson was sent this letter:-

" NORTH CANTERBURY HOSPITAL BOARD
16 January 1981

Mr D.J. Nicholson,
6 Huxley Street,
CHRISTCHURCH 2

Dear Mr Nicholson,

COMPLAINT AGAINST DISMISSAL

Further to your interview with the Appeal Committee of the Board on 22 December 1980, I wish to inform you that, following your formal withdrawal from the meeting, the Appeal Committee noted the comments of your representative regarding the jurisdiction of the Committee. The Committee then proceeded in your absence to reconsider the decision that you be dismissed, as requested in your letter of 4 December 1980.

After full consideration of the circumstances of your dismissal, the Committee was unable to find sufficient grounds on which to upset its original decision. I have to advise, therefore, that the Board has confirmed your dismissal from employment as a Trainee Nurse, with effect from 28 November 1980.

It was agreed that, should you so request, you may receive a copy of the Ward Assessment Report which was completed shortly after your dismissal from the Board's employ.

Pursuant to Section 51C of the Hospitals Act 1957, you may if you wish to pursue your complaint further, forward your complaint to the Minister of Health, within fourteen days of your receipt of this letter.

I have sent a copy of this letter to Mr J.M. McKenzie for his information.

Yours faithfully,

R.I. Parker
CHIEF EXECUTIVE"

Mr Nicholson duly informed the Minister that he wished to pursue the matter further (as required by s.51C(1)(c), and in accordance with the Review Committee's procedure it, and Mr Nicholson, were provided with a statement from the Board on the 2nd March setting out the reasons for the dismissal and the procedures that had been followed up to that time. On that same date a full meeting of the Board adopted the Finance Committee's decision that the Appeal Committee's decision be confirmed.

The matter came before the Review Committee on the 14th May 1981. Mr Nicholson attended with his advocate Mr F.C. Wevers of the Public Service Association. As a result of issues raised by Mr Wevers as to the validity and jurisdiction of the various committees of the Board, and because a case raising similar issues was then before the High Court, the Review Committee reserved its decision with leave granted to make further submissions in writing. Both parties provided further submissions.

In a majority decision of the 7th September 1981 the Review Committee disallowed Mr Nicholson's complaint.

I turn now to the legal issues which can be conveniently dealt with by adopting Mr Bartlett's headings.

1. To what extent was the Board entitled to delegate to a Committee its duty under s.51C(1)(b) to reconsider the Applicant's dismissal.

s.51C, so far as is relevant, provides:-

" 51C. Employees to have right of complaint against dismissal -

(1) Where any Board dismisses or has served a notice purporting to dismiss from its employment any employee who is for the time being under the jurisdiction of the Review Committee and that employee is aggrieved by the dismissal or notice, the following provisions shall apply:

- (a) The employee may prepare a complaint in writing setting out his grievance and forward it to the Board within 14 days after the date of dismissal or, as the case may be, within 14 days after the date on which the notice of dismissal was given:
- (b) As soon as practicable after receiving the complaint, the Board shall reconsider the dismissal or notice of dismissal, and may, after considering such evidence and representations as it thinks fit, either confirm or revoke the dismissal or notice of dismissal, and, on so doing, shall forthwith notify the complainant of its decision:"

It was common ground that the only statutory power of delegation relevant to the present enquiry is to be found in s.44(1) of the Act (as substituted by s.2(1) of the Hospitals Amendment Act 1980). It reads:-

" (1) Any Board may from time to time appoint standing or special committees, consisting of 2 or more persons, for any of the following purposes:

- (a) The management of any institution under the control of the Board:
- (b) The management of, and the operation of a bank account for, a canteen in a hospital:
- (c) The regulation and management of, or for enquiring into and reporting upon, such matters as the Board thinks fit:-

and may from time to time, either generally or particularly, delegate to any such committee -

- (d) Subject to paragraph (e) of this subsection, any of the powers or duties conferred on the Board by this Act except the power to -

- (i) Borrow money; or
- (ii) Make a bylaw; or
- (iii) Institute an action:

- (e) In accordance with section 4 of the Public Bodies Contracts Act 1959, any power of the Board to enter into a contract."

Quilliam J. had occasion to consider this subsection in the unreported case of Tweddle v. The Nelson Hospital Board (Wellington Registry No. 546/81; Judgment 11 June 1982). In that case the Board had appointed a standing committee designated as an "Appeal Committee", with no indication of any particular powers or duties being conferred. Quilliam J. felt it a reasonable inference that reconsideration of dismissals under s.51C(1)(b) came within its scope, but that the power given by s.44(1)(c) was the only one which could conceivably apply in the circumstances of the case before him. He then said:-

" The Appeal Committee purported to make a final decision. That decision was notified to the complainant. Some days later it was reported to the Board which simply received the report and did not profess to endorse it or pass any resolution of its own. I am unable to accept that the Appeal Committee had any such power of decision. The Board would, I think, have been entitled to appoint the Appeal Committee to enquire into the circumstances of the dismissal and report to it so that the Board could then make its own decision, and it could also have delegated its power of making a decision, but it has not purported to do so."

(The underlining is mine.)

Mr Bartlett submitted that in the present case the only power that could apply to both the Finance and Appeal Committees (and perhaps not the latter) was that contained in s.44(1)(c), "for enquiring into and reporting upon"; while Mr Till argued that the extended power in paragraph (d) applied; and that brings me to the next issue.

2. Has the Board delegated its duty to reconsider under s.51C(1)(b) in whole or in part to the Finance or Appeal Committees.

I shall deal first with the Finance Committee. The constitution and powers of this committee are prescribed by Ordinance 98 of the Board's Standing Orders, and the only power that could have relevance in this enquiry is contained in O.98(d)5 which reads:-

"5. Administration of awards, industrial agreements and hospital employment regulations, determination of rates of pay, applications for leave of absence and all other matters relating to the conditions of employment of the Board's staff."

Apart from that the Finance Committee, in common with other committees, has this power under Ordinance 88:-

"88. In the case of any matter which would ordinarily be the subject of a recommendation by a Committee to the Board, but which, in the opinion of the Committee, is of such urgency as to require immediate action to be taken, the Committee shall have power to act, but shall include in its report to the Board the action taken."

The question is whether the power under O.98(d)5, and in particular the power to deal with "all other matters relating to conditions of employment" can be regarded as a delegation to exercise "any of the powers or duties conferred on the Board by this Act" in terms of s.44(1)(d), and in particular the power to reconsider under s.51C(1)(b). In short, is there "a delegation of the power of making a decision" referred to by Quilliam J. in Tweddle.

I agree with Mr Bartlett that a power to deal with "matters relating to conditions of employment" does not give the power to reconsider a dismissal in terms of s.51C(1)(b) where the enquiry is not into "conditions" but whether the

employee should be employed at all. It is true, as Mr Bartlett submitted, that the functions of the Finance Committee are basically administrative in nature and it is inconsistent with that role that it should be regarded as having a judicial function in regard to individual employees. In Tweddle Quilliam J. held that a "reconsideration" under s.51C(1)(b) involved a judicial function and with respect I agree. Mr Till argued that the Finance Committee's position was saved by recourse to Ordinance 88 in that the Nicholson reconsideration was a matter of urgency and in the final result the Finance Committee's decision was reported to and ratified by the Board on the 2nd March 1981. I do not regard Ordinance 88 as being of any assistance. The right to "reconsider" was not within the Finance Committee's power whether as a matter of urgency or otherwise and in the result it was not that committee which reconsidered - it was the Appeal Committee.

I consider now whether the board's power under s.51C(1)(b) was delegated to the Appeal Committee. This committee was set up by the Board following the recommendation of the Finance Committee.

The minutes of the Finance Committee of the 17th May 1972 read:-

"The Secretary reported that members of the staff in both general and psychiatric hospitals now possessed rights of appeal in respect of certain appointments, dismissals and transfers. These appeals were to be decided by the Board in the first instance.

It was resolved that a Sub-Committee comprising the Chairmen of the Board and the three standing committees, plus two other members, be appointed to deal with such appeals as they arose."

And at a Board meeting of the 31st May 1972 this resolution was passed:-

"Clause 64 - Appointment of Appeal Committee:

It was moved by Mr Hay, seconded by Mrs MacGibbon and carried that the proposed composition of the Sub-Committee be approved and that the Chairman of the Board have power to appoint two other Board members, the quorum of the committee to be five."

Mr Bartlett made the point that the Appeal Committee is referred to as a "sub-Committee" in that resolution, but I do not think too much turns on that. In my opinion we have the same position here as Quilliam J. was faced with in Tweddle. An Appeal Committee appointed by the Board whose only power was to "enquire into and report" pursuant to s.44(1)(c). It was argued by Mr Till that the Appeal Committee's powers went further than that and included the power of decision because the Finance Committee's resolution referred to a committee "to deal with such appeals as they arose". The point is arguable but the Board's resolution does not seem to go that far. Even if it could be said that the Board had by inference adopted the Finance Committee's resolution in full I question whether a power "to deal" with a matter, and that is an imprecise term, would extend to a power of final decision, and indeed the Appeal Committee by making a recommendation to the Finance Committee appears to have recognised that it had no final jurisdiction.

I conclude therefore that there was a lawful delegation by the Board to the Appeal Committee to enquire into and report to the Board for the purposes of s.51C(1)(b). In fact the Appeal Committee made its recommendation to the Finance Committee, and it was that Committee which confirmed the recommendation, although some six weeks later the Board adopted the Finance Committee's recommendation but by that time the review proceedings were in train.

I see no basis on which the Finance Committee could assume the power to make the final decision and I do not regard

the Standing Orders as being of any assistance in that regard.

3. Was the Appeal Committee validly constituted.

The point made here is that the Committee met and deliberated in the absence of one of its members, Mr Lawrence. According to the Board's resolution of the 31st May 1972 the Committee comprised the Chairmen of the Board and the three standing committees and 2 members appointed by the Chairman of the Board with a quorum of five. However, on the 12th November 1980 the Board passed a resolution changing its composition to the Deputy Chairman of the Board, the Chairmen of the Finance and Health Services Committees and two other members on rotation which had the effect of reducing the total number on the committee from six to five. However Mr Bartlett submitted that the membership remained at six because the Chairman of the Board was an ex officio member of all committees and sub-committees pursuant to Ordinance 80 of the Board's Standing Orders. Ordinance 85 provides:-

"85. The quorum of any committee appointed by the Board shall consist of at least half plus one of the whole number of members of Committee as constituted. In the event of a quorum not being present at a Committee meeting, such Committee shall proceed with the business on hand and present a minority report for consideration by the Board."

Mr Bartlett submitted that there was no conflict between that Ordinance and the Board's resolution of the 31st May 1972 making the quorum five because the Ordinance refers to a quorum of "at least" half plus one, indicating that the Board by resolution could fix a higher quorum. He went on to submit that if there is any conflict then the resolution, being later in time, and presumably passed pursuant to the Board's power to regulate procedure (s.47) must prevail with the result that the Appeal Committee was not properly constituted and its decision

invalid. I think that submission goes too far. Ordinance 85 provides for the case where there is no quorum present and I see no reason why that saving provision should not apply whether the quorum is fixed in terms of the Ordinance or otherwise.

4. Did the Review Committee err in law.

It is alleged that the Review Committee erred in the following respects:-

- (a) in deciding that the power conferred on the Finance Committee by the Board's Standing Orders to deal with all matters relating to conditions of employment authorised the Finance Committee to reconsider a dismissal in terms of section 51C(1)(b) of the Act
- (b) in making a finding that the Finance Committee made its decision to confirm the dismissal of the applicant in terms of clause 88 of the Board's Standing Orders (relating to urgent matters), when there was no, or insufficient, evidence to support such finding
- (c) in deciding that clause 88 of the Board's Standing Orders is capable of being construed in such a way that it empowers the Finance Committee to confirm a dismissal pursuant to section 51C(1)(b) of the Act
- (d) in deciding that the question of the quorum for the Appeal Committee is prescribed by Clause 85 of the Board's Standing Orders.

It follows from what I have already said that my opinion must be that the Review Committee was in error in each of those findings. However that is not the end of the matter so far as the Review Committee is concerned. Section 51C provides for a right of complaint against dismissal by an

employee aggrieved at the circumstances of his dismissal. It is that complaint which the Board must reconsider under s.51C(1)(b), and it is that complaint which an employee can pursue further through the Minister, and, pursuant to ss.51A and F it is that complaint which the Review Committee must enquire into and report upon to the Minister.

I am in agreement with Mr Till that it was not the function of the Review Committee to consider questions of delegation by the Board, quorum and the like. In any event the Review Committee at the relevant time was a lay committee with no legally qualified member. It is my opinion that questions relating to the validity of the Board's proceedings, which had no bearing on Mr Nicholson's grievance arising from the reasons for his dismissal, could and should have been resolved by review by this Court in the first instance before the matter got to the Review Committee. The effect of the procedure actually adopted in this case is that in the result Mr Nicholson has had the opportunity to ventilate his grievance before the Review Committee and his grounds for complaint were considered with some care.

Although there were, as I have found, errors of procedure on the part of the Board, and assuming for this purpose that the Review Committee's errors of law are a basis for an order setting aside its report, I am satisfied that the equitable remedies sought should be refused.

From start to finish this whole enquiry has been bedevilled by fine procedural points and as a result the reasons for Mr Nicholson's dismissal and the nature of his grievances against it have taken second place. According to a report annexed to Mr Wevers' affidavit Mr Nicholson's involvement with cannabis was hardly a chance encounter. It involved possession of 51 plants and 378 seeds. Further, it seems that Mr Nicholson rather dismissed his conviction as being of little consequence and arising from an outmoded law.

It is also relevant that some months prior to his conviction Mr Nicholson had attended a lecture by the Principal Nurse when nurse trainees were told of the Board's policy regarding drugs and the possible consequences if they became involved. Finally, his dismissal was considered by and had the support of the Principal Nurse, the Medical Superintendent of Sunnyside, the Board's Medical Superintendent in Chief, the Health Services Committee, the Appeal Committee, the Finance Committee and the majority of the Review Committee. The dismissal was also confirmed by the Board but I accept that its consideration of the matter must have been little more than a formality. I agree with Mr Till that reinstatement was never a realistic possibility.

The application is therefore dismissed.

A handwritten signature in black ink, appearing to be 'A. J. [unclear]', is written over the text 'The application is therefore dismissed.'

Solicitors:

Macalister Mazengarb Parkin & Rose, Wellington, for Applicant
Crown Law Office, Wellington, for First Respondent
Lane Neave Ronaldson, Christchurch, for Second Respondent