

Burrows (112) Ltd

X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.29/83

552

IN THE MATTER of Part I of the Judicature
Amendment Act 1972

BETWEEN

NICOLE ATARETA POANANGA
of Flat 7, 29 Sentinel
Road, Herne Bay, Auckland,
Union Official

APPLICANT

AND

STATE SERVICES COMMISSION
a statutory body constituted
by the State Services Act
1962

RESPONDENT

Hearing	20 March 1984
Counsel	C J Hodson and P J Bartlett for Applicant D P Neazor, Q.C. Solicitor-General and R M Elliott for Respondent
Judgment	28 May 1984 29 May

JUDGMENT OF DAVISON C.J.

BACKGROUND

Nicole Atareta Poananga ("the applicant") was employed in the Public Service with the Ministry of Foreign Affairs. On or about 4 May 1982 the State Services Commission ("the Commission") acting under s 37 of the State Services Act 1962 purported to transfer her to the Department of Scientific and Industrial Research, the transfer to take effect from 5 May 1982.

The grounds for the transfer as set out in a letter from the Chairman of the Commission were in the following terms:

" The Secretary of Foreign Affairs, Mr Norrish, has advised me that over recent months your personal views have been in sharp conflict with the policy of the Ministry and

No Special Consideration

Appeal
rejected
[1985] 2 NZLR

the situation has now been reached where the incompatibility of views makes your continued employment in the Ministry of Foreign Affairs untenable. "

The applicant did not comply with the direction to transfer.

On 26 May 1982 the Commission dismissed the applicant forthwith pursuant to s 39 of the Act on the grounds that she had failed to comply with the direction to transfer and to adduce any valid or sufficient reason justifying such non compliance.

Subsequently, discussions took place and letters passed between the applicant and the Commission with a view to a possible revocation of the applicant's dismissal. However, the Commission by letter dated 19 August 1982 informed the applicant that the decision to dismiss her under s 39 of the Act would stand.

THE PROCEEDINGS

The applicant seeks a judicial review of the decision of the Commission transferring her from the Ministry of Foreign Affairs to the D.S.I.R. pursuant to s 37 of the Act, and the decision of the Commission dismissing her from the Public Service pursuant to s 39 of the Act.

The grounds on which the applicant seeks relief as set out in her statement of claim are:

para 12. That the Commission has exercised its power of transfer under section 37 of the Act invalidly for the reason that such power was used in substance as a disciplinary measure against her and/or as an attempt to secure her resignation from the Public Service and was therefore exercised:

- (i) For an improper or irrelevant purpose, and/or
- (ii) In such manner as to nullify the disciplinary provisions in the Act, thereby defeating her statutory rights and remedies and abrogating procedural safeguards.

para 13. That the Commission also exercised its power of transfer under section 37 unfairly and therefore invalidly in one or more of the following respects:

- (i) it failed before making its decision to inform her that the permanent head of her Department had alleged that her personal views had been in sharp conflict with the policy of the Ministry of Foreign Affairs (as intimated in the letter dated 4 May 1982 from the Commission);
- (ii) it failed prior to the transfer or dismissal to give her the opportunity to answer such allegations as were being made against her;
- (iii) it failed to provide her with any specific instance or instances of her views either conflicting with the policy of the Ministry or making her continued employment in the Ministry untenable.

para 14. That in consequence of the invalidity of the Commission's decision to transfer the applicant, its decision to dismiss her was without foundation in law and was therefore also invalid.

para 15. That, in addition, the Commission exercised its power of dismissal under section 39 of the Act unfairly and therefore invalidly for the reason that, having given the applicant the reasonable expectation that her purported dismissal would be revoked, it failed either:

- (i) Upon apprehending that it might not revoke such dismissal, to give her any opportunity to be heard by it before making a final decision in that regard; or
- (ii) Upon making such decision, to set out adequately its reasons and/or to give reasons which are sustainable.

The Commission in answer to the applicant's case pleaded in its statement of defence:

- (a) That it validly exercised its power of transfer under s 37 of the State Services Act 1962.

- (b) That it validly exercised its power of transfer under s 37 and denied that it was under any legal obligation to take the steps set out in para 13 of the statement of claim (ante)
- (c) That its decision to transfer the applicant was valid as was its decision to dismiss her.
- (d) That it denied that it was under any duty to act fairly in relation to the power of dismissal under s 39.
- (e) That if it was under a legal obligation to act fairly in relation to the exercise of its power of dismissal against the applicant pursuant to s 39 of the Act and if such legal obligation to act fairly imported an obligation to give the applicant an opportunity to be heard by it before making a final decision in relation to dismissal then the Commission did afford the applicant an adequate opportunity to be heard by it before making a final decision in relation to dismissal.
- (f) That if the Commission was under an obligation to act fairly in relation to its power of dismissal under s 39 and if such obligation imports a duty to set out adequately its reasons and/or to give reasons which are sustainable then it did so.

DECISION

I propose to deal with this matter by taking in order the various grounds upon which the applicant seeks relief and considering them along with the relevant evidence and legal submissions made by counsel.

A. WAS TRANSFER DISCIPLINARY OR ADMINISTRATIVE?

There are three sections of the State Services Act 1962 which confer upon the Commission the power to transfer employees from one branch of the Public Service to another. They are:

Section 37 dealing with what may be called administrative transfers.

Section 38 dealing with security transfers.

Section 58(6) relating to disciplinary transfers.

The types of transfer relevant to this present case are administrative transfers and disciplinary transfers.

Section 37(1) (Administrative transfers) provides:

" The Commission may transfer any employee, whether on promotion or otherwise, from one position in any Department of the Public Service to a position in the same or any other such Department, whether or not the transfer involves a change of location; and, except as otherwise provided in this Act, there shall be no right of appeal against any such transfer.

Section 58(6) (Disciplinary transfers) which applies only after a disciplinary charge laid against an employee has been admitted or proved, provides:

" If the truth of the charge is admitted by the officer concerned, or if the Commission after consideration of the reports relating to the charge and any reply or explanation furnished by the officer, and after such further investigation or inquiry (if any) as it considers necessary, is satisfied as to the truth of the charge, it may, after taking into account the Service record of the officer, impose one or more of the following penalties -

- (a) Caution and reprimand the officer:
- (b) Order to be deducted by way of penalty from the salary of the officer such sum not exceeding \$400 as it thinks fit:
- (c) Transfer him to other duties:
- (d) Reduce the rate of salary of the officer (with or without a consequent reduction in grading):
- (e) Dismiss the officer from the Public Service."

The essence of the applicant's complaint is that the Commission whilst purporting to transfer her from the Department of Foreign Affairs to the D.S.I.R. administratively under s 37 of the Act, has in truth transferred her as a disciplinary measure without first implementing the disciplinary provisions of the Act - secs 56 and 58 - and has punished her without a hearing of charges against her and without her being found guilty of such charges.

Offences with which employees may be charged are set out in s 56:

"Every employee commits an offence against this Act who -

- (a) By any act or omission fails to comply with the requirements of this Act or of any regulation thereunder or of any official instruction given under the authority of the Commission or of his permanent head:
- (b) In the course of his duties disobeys, disregards, or makes wilful default in carrying out any lawful order or instruction given by any person having authority to give the order or instruction, or by word or conduct displays insubordination:
- (c) Is negligent, careless, 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 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) Improperly uses for private purposes any information acquired by him as an employee of the Public Service:
- (h) Absents himself from his office or from his official duties during hours of duty without leave or valid excuse, or is habitually irregular in the time of his arrival or departure from his place of employment:

- (i) Is guilty of any improper conduct in his official capacity, or of any other improper conduct which affects adversely the performance of his duties or brings the Public Service into disrepute."

The applicant claims that on the evidence before the Court the Commission could have charged her with offences under the foregoing provisions (a) (b) (d) and (i) and that before it transferred her from the Department of Foreign Affairs it should have first charged her with offences and found her guilty of one or more of them. The argument advanced in support of her case went so far as to claim that whenever conduct or shortcomings of an employee can give rise to disciplinary charges constituting offences as set out in s 56 then no transfer should be made until such time as charges have been laid, heard and determined. In other words, it was said that if conduct or shortcomings on the part of an employee may constitute a disciplinary offence then he or she must be charged, otherwise no administrative transfer under s 37 can properly be made.

I do not accept that such is the case. Sections 37(1) and 58(6) apply to two quite different situations. Section 37(1) is directed to the best performance of or the efficiency of the Public Service. Section 58(6) on the other hand, is directed to the correction or disciplining of an officer of the Public Service.

An examination of the Act as a whole commencing with the long title indicates the place of s 37(1) in the scheme of the Public Service Act. The long title refers to the Act as one -

" To provide for the appointment of a State Services Commission, to assist in the performance of their duties, and in respect of the Public Service to ensure that their members are impartially selected, fairly remunerated, administratively competent, and imbued with the spirit of service to the community. "

Part III of the Act which is concerned with Conditions of Employment in the Public Service deals with appointments and promotions - secs 26-35; Transfers and Terminations - secs 36-40; Remuneration, Classification and Grading - secs 41-52; and Code of Conduct - secs 53-60. The transfer provisions for administrative purposes in s 37 are quite separate and distinct from disciplinary transfers resulting from the commission of offences under secs 56 and 58. Transfer of an officer to other duties is one penalty which may be imposed under sec 58(6) but it does not follow that in every case a transfer is to be regarded as penal and therefore as requiring that the officer be first charged and found guilty under s 58 before the transfer can be implemented. It becomes a matter in each case of deciding what was the motive or purpose for which the transfer was made and whether the transfer can be justified as an administrative transfer. Merely to accept statements that the transfer was not for disciplinary purposes or that it was made for administrative purposes under s 37 is not sufficient. The Commission is not entitled to make what is in effect a disciplinary transfer - one to punish the officer for an offence - under the guise of an administrative transfer under s 37: see Lindsley v Public Service Commission (High Court, Auckland, A.61/62, 9 August 1962, Turner J.); Jobbins v State Services Commission (High Court, Auckland, A.29/79, 22 February 1980, McMullin J.); also Merricks v Nott-Bower [1964] 1 All ER 717, 720.

The test to be applied in deciding whether the Commission has made a transfer for administrative or for disciplinary purposes is that of "substantial purpose": see Thompson v Randwick Corporation (1950) 81 CLR 87, 106; Lindsley v Public Service Commission (ante) and Wade, Administrative Law p 390. This matter is also discussed in more detail in my judgment in Bullen and Anr v State Services Commission (High Court, Wellington, A.40/84, 18 April 1984).

In Thompson v Randwick Corporation the High Court said:

" All that we mean is that the Council is not exercising its powers for the purposes for which they were granted but for what is in law an ulterior purpose. It is not necessary that this ulterior purpose should be the sole purpose...But in our opinion it is still an abuse of the Council's powers if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its re-sale. "

It is necessary now to examine the evidence to see whether actions or shortcomings on the part of the applicant which could have been the subject of disciplinary charges under s 58 formed a substantial motive or purpose for ordering her transfer in the sense that the transfer would be unlikely to have been ordered if the matters which could have been the subject of disciplinary charges had not been taken into account.

The applicant joined the Public Service in 1977 and was posted to the Ministry of Foreign Affairs. According to Mr Norrish, the Secretary of Foreign Affairs, she was not posted overseas until after 18 months to 2 years because of doubts that were held about her judgment, work performance and commitment to the job. In January 1979 she was sent on a relieving assignment to Canberra for three months during which time her performance at the post was commented upon as varying with the degree of interest she had in the respective projects.

It was on her return to New Zealand that the Ministry, according to Mr Norrish, began to experience problems with the applicant which Mr Norrish considered to be a political awakening having its outlet in a new aggressiveness and a pursuing of policies in conflict with those of the Ministry.

There followed a series of incidents involving the applicant. I shall refer to each of them only briefly.

(a) THE TAHITI VISIT

In 1979 the applicant was a member of the New Zealand delegation to the South Pacific Conference in Tahiti led by the Minister of Tourism, the Hon W. E. Cooper. Mr Norrish concluded from reports made to him that the applicant had pursued her own interests at the expense of those of the New Zealand Government to the point that Mr Norrish felt that her performance was harmful to New Zealand.

The applicant was made aware that her actions were not those expected of a New Zealand representative and had caused embarrassment to the Ministry and the delegation.

(b) SOUTH PACIFIC FESTIVAL CO-ORDINATING COMMITTEE

In March 1980 the applicant was nominated by the Ministry to be one of its representatives on the above Committee. The convenor was Mr Hamish Keith. On 6 March 1980 Mr Keith wrote a formal letter of complaint to the Secretary of Foreign Affairs that the applicant pursued policies that were not those of the Ministry and which caused conflict and dissension within the Committee.

The applicant replied to that complaint and on 25 August 1980 Mr Norrish wrote to her and said:

" Your own account of what happened does suggest to me, however, that the approach you adopted was too assertive and rather unbending. It seems that you were determined that your view of what was 'most effective and appropriate' for New Zealand's participation in the Festival was the one that should prevail, regardless of what other people may have thought. Similarly your performance at the SPC Conference and the way you responded to your proposed secondment to the Department of Maori Affairs displayed a resolve to do your own thing, come what may. That may be fair enough in some contexts. Strength of conviction can be an admirable quality. But public servants are not in the business of pushing their own personal view. They can help to formulate policy and may certainly help to implement it. But they must necessarily

give way if there is any suggestion of a conflict between what they think and what the Government thinks; and they must generally be prepared to take into account the legitimate views of the other departments or private bodies with which they deal. It would be quite counter-productive not to do so. I think that you would do well to accord more recognition to these basic facts about the workings of government in your approach to your own work in the Ministry, which I regret to say has been disappointing in its overall standard of performance. "

(c) MEMBERSHIP OF MANA MOTUHAKI POLITICAL PARTY

As spokesperson for the above Party, the applicant criticised the Minister of Maori Affairs, Mr Couch, in a letter to the "Evening Post". On 10 March 1982 she was cautioned by Mr Norrish about her actions. Mr Norrish said:

" While as a public servant you are permitted to play a full part in the political life of the country, there are certain factors of which I believe you should be aware.

As a public servant you are expected not to indulge in activities which affect your ability to carry out your duties, or which might tend to bring the Public Service into disrepute. The Public Service in New Zealand has a reputation and tradition of political neutrality. You should take care to ensure that your political activities do not damage that reputation and tradition.

Furthermore, I should draw your attention to Regulation 38 (and in particular paragraph (3) of the Public Service Regulations 1964). Paragraph (3) reads as follows:

' If any employee holds or is elected or appointed to any office in a voluntary association and the Permanent Head or the Commission is of the opinion that the duties of the office conflict with the due and proper discharge of his duty as an employee of the Public Service, the Commission may call on the employee to resign the office.'

I trust that you will bear these points in mind. "

(d) THE FILM "THE MAORI"

During April 1982 the media carried reports of a rift within the Ministry over the merits of a documentary film called "The Maori". The Assistant Secretary spoke to the applicant about an alleged leakage of material from the Ministry relating to that film. The applicant denied being responsible for the leakage. Mr Norrish, however, without naming the applicant, wrote to the "Evening Post" on 3 May 1982 about the leakage.

(e) THE RECRUITMENT LETTER

On 10 April 1982 and 21 April 1982 the applicant and another officer wrote to the "Evening Post" and "Auckland Star" respectively a letter about the recruitment of and place of Maoris in the Public Service in a manner which suggested disagreement with Government policies. The applicant was spoken to by the Assistant Secretary and told that the letters had caused embarrassment to the Ministry. According to the Assistant Secretary, on being told that she had made no effort to check the veracity of her allegations and on being shown that they were wrong, the applicant's response was "I shall not apologise. I got a good debate going and that is useful. If this is the only way to get management interested in our cause then I will do it."

(f) THE LETTER TO RECRUITS

On 28 April 1982 the applicant circulated to a Ministry Induction Course a paper on the Ministry's attitude to bi-culturalism which Mr Norrish considered highly misleading and destructive.

As a result of that reply given to the Assistant Secretary by the applicant relating to the recruitment letter, Mr Norrish concluded:

" That the applicant would take no heed of requests to disassociate her personal beliefs and political activities from her duties as an Officer of the Ministry and that her activities would continue to cause harm and embarrassment to the Ministry. By this stage I had formed the opinion that there had been a consistent pattern of behaviour on the applicant's part which had seen her move gradually into a set of positions which

were inconsistent with her continued, effective deployment as a Foreign Service Officer. In spite of warnings, counselling and advice over several years from her controlling officers about her disappointing work performance and her relationships with her colleagues, the need for circumspection in her private political activities, and her pursuit of personal interests at the expense of those of the Ministry of Foreign Affairs and the Government, the applicant chose not to modify her behaviour. I accordingly requested the Chairman of the State Services Commission on the 28th day of April 1982 to arrange the transfer of the applicant and suggested that she might benefit from being located in another Department where she could pursue her political and personal beliefs without harm to the ongoing activities of the organisation she was working for. "

Dr Probine, the Chairman of the Commission, thereupon wrote to the applicant on 4 May 1982 in these terms:

" The Secretary of Foreign Affairs, Mr Norrish, has advised me that over recent months your personal views have been in sharp conflict with the policy of the Ministry and the situation has now been reached where the incompatibility of views makes your continued employment in the Ministry of Foreign Affairs untenable.

I have, therefore, decided that you will transfer immediately to the Department of Scientific and Industrial Research and you are to report for duty there, on the 10th floor of the Charles Fergusson Building, at 9.00 am tomorrow morning. You should report to Mr Wilson Bailey, Director of Administration.

You are being transferred under Section 37 of the State Services Act 1962 and you will retain your present grading (007.103) and salary, and you will be designated Assistant Advisory Officer. "

Counsel for the applicant based his submission that the Commission had exercised the power of transfer for disciplinary reasons on the following points:

1. The allegations against the applicant if true were capable of supporting charges under s 56.
2. The transfer appears to have been the culmination of a history of warnings and cautions involving the Permanent Head of the Ministry of Foreign Affairs himself, including the giving of a formal written caution.
3. The request made by Mr Norrish to the Commission for the transfer of the applicant was made on the same day as her circular to new recruits - 28 April 1982.
4. The direction to transfer was given on the day following Mr Norrish's letter to the "Evening Post" about the leak of information concerning the film "The Maori" namely, on 4 May 1982.
5. The abrupt and peremptory nature of the transfer.
6. The fact that the transfer brought to an end the applicant's career in the Ministry of Foreign Affairs.

GROUND\$ FOR CHARGES?

Counsel for the applicant submitted that there was evidence justifying charges against the applicant under four provisions of sec 56. I now consider those submissions:

s 56(a) Failing to comply with the Act, Regulations or instructions of the Commission or the Permanent Head.

Regulation 42 prohibits an officer giving out official information except in the course of duty. It was suggested that the applicant could have been charged in relation to the information allegedly given out relating to the film "The Maori". The evidence, however, at best does no more than establish as a possibility that the applicant was responsible and would not support a charge.

s 56(b) Disobeying or making wilful default in carrying out any lawful order or instruction.

The lawful instructions allegedly disobeyed were:

1. Those contained in the letter of 25 August 1980 not to push personal views in conflict with Government policy.
2. The instruction contained in the letter of 10 March 1982 about the need for separation of applicant's official and political activities.

There may be some grounds for laying charges under this head but they may be difficult to establish.

s 56(d) Behaving in a manner calculated to cause unreasonable distress to other employees or to affect adversely the performance of their duties.

It was suggested that the applicant played a big part in creating dissention within the Ministry surrounding the film "The Maori". The evidence, however, does not establish that the applicant leaked the information concerning the film and there appears little evidence that she otherwise created dissention.

s 56(i) Improper conduct in an official capacity.

This it was said could relate to the applicant's conduct involving the South Pacific Arts Festival, the criticism of Mr Couch in the "Evening Post", the letters to the "Evening Post" and the "Auckland Star" regarding recruitment policies, the leaking of information regarding the film "Maori", personal views in direct conflict with the Ministry.

Some of these events might perhaps form the basis of charges although the evidence in relation to them does not appear strong.

Although I have traversed the applicant's submissions relating to the laying of charges it should be noted that under s 58 -

First that the Permanent Head must "have reason to believe" that any officer has committed an offence to which s 56 applies; and

Second that the Permanent Head "may" serve the officer with a written copy of the charge against him.

There is no evidence that Mr Norrish ever directed himself to the question of whether or not there was reason to believe that the applicant had committed an offence under s 56.

The reason given by Dr Probine, the Chairman of the Commission, in his letter of 4 May 1982 for directing the transfer of the applicant was -

" Over recent months your personal views have been in sharp conflict with the policy of the Ministry and the situation has now been reached where the incompatibility of views makes your continued employment in the Ministry of Foreign Affairs untenable. "

The transfer was directed in accordance with s 37 of the Act.

In his affidavit Dr Probine said:

" That on the 28th day of April 1982 following discussions between us, the Secretary of the Ministry of Foreign Affairs requested the State Services Commission to arrange the transfer of the applicant.

That during the next few days thereafter the Commission was fully briefed by the Ministry of Foreign Affairs as to the background to the request inclusive of details of the applicant's career with the Ministry.

That I also conferred in this matter with the Deputy Chairman of the State Services Commission and took the view that the applicant had considerable ability and good qualifications and I was anxious that she should not be lost to the Public Service. Nevertheless I considered that in the interests of the efficiency of the Public Service it was desirable that she should

work in a Department where no conflict would arise between Departmental duties and her personal beliefs and political activities. The latter factors indicated that she was not a suitable person to be employed in the Ministry of Foreign Affairs. At no time did I recommend disciplinary proceedings against the applicant. Likewise, at no time did I endeavour to use transfer as a means to secure the applicant's resignation. From my personal experience in the Department of Scientific and Industrial Research, I believe that it would provide suitable and worthwhile employment for the applicant notwithstanding that her qualifications were in arts and not science. "

In considering whether or not a substantial purpose for the transfer was disciplinary in the sense that I have earlier referred to, the facts that no charges were laid against the applicant; that the letter of transfer refers to s 37; that Dr Probine considered that the transfer was necessary in the interests of the efficiency of the Public Service and that at no time did he recommend disciplinary proceedings against the defendant are themselves not conclusive of the transfer having been made for administrative purposes and not for disciplinary ones.

The Court must endeavour to look behind the expressed words of the persons concerned and endeavour to ascertain the real purpose or motive for the transfer. Perhaps the best picture of events leading up to the applicant's transfer can be obtained from a reading of the various letters and memoranda produced over the period of the applicant's employment as exhibited in the affidavits of the applicant and Mr Norrish. They certainly, in my view, justify the opinion expressed by Dr Probine in his letter of 4 May 1982 to the applicant that her personal views had been in sharp conflict with the policy of the Ministry to the point where that incompatibility of views was at least a matter of considerable embarrassment to the Ministry. It was that incompatibility of views which, in the words of Dr Probine, made the applicant's "continued

employment in the Ministry of Foreign Affairs untenable" and brought about her transfer. I have no doubt that the opinion expressed by Dr Probine - which was also the opinion held by Mr Norrish - was the reason for the applicant's transfer. Was that a proper reason for the Commission to act under s 37 and transfer the applicant to the D.S.I.R?

Section 37 does not itself spell out the circumstances in which transfers may be ordered. The Commission is given unrestricted power of transfer so long as the transfer is made for the purposes of the Act and not for disciplinary purposes which are specially provided for in s 58. The purposes of the Act are set out in the long title earlier referred to and include "promoting the efficiency of the State Services".

If circumstances establish that an officer has personal views in conflict with the views of her Department and acts in accordance with those views then the smooth running of the Department and its efficiency are likely to be impaired. There were clear warnings given by Heads of the Ministry to the applicant that her attitudes and actions were unacceptable. The letter of 28 August 1980 from Mr Norrish to the applicant spelt that out in the plainest terms as also did his letter to her of 10 March 1982.

In view of the attitude of the applicant, I am satisfied that there were good grounds for Dr Probine coming to the view, as he did, that the efficiency of the Ministry of Foreign Affairs would be improved by the transfer of the applicant to another Department.

I am further satisfied that notwithstanding that the applicant claims, and no doubt feels, that she was transferred as a punishment for disciplinary reasons, that such was not a substantial purpose or motive for the transfer.

In order for the applicant to succeed on her application for review under this head she must show, and the onus is on her, that the Commission has used its power of transfer under s 37 for an improper purpose. It is not

enough to point to the facts and say that the Commission might or could, if it had been so minded, have charged her with a disciplinary offence under s 56 and therefore as it did not do so there was no right to transfer under s 37.

It may well be that the applicant might have been charged with one or more offences under s 56, and if convicted a transfer would be one penalty which might have been imposed. But, at the same time, the conduct of the applicant impaired the efficiency of the Ministry and did justify a transfer under s 37.

It is in this situation that the Court must determine whether a substantial purpose for the transfer, in accordance with the principles I have earlier referred to, was to discipline the applicant or to promote the efficiency of the Ministry.

There is no doubt the Commission wanted to get the applicant out of the Ministry of Foreign Affairs. In doing so it transferred her to another Department at her existing grading and salary. In those respects she was not punished. The transfer of the applicant by the Commission in this case has not been shown to be motivated by punishment. Substantially, the problems experienced by the Department with the applicant were due to her personality and personal interests and such are not matters justifying disciplinary measures. General unsuitability for work in a particular Department is not chargeable as an offence under s 56. Transferring the applicant to another Department where her personal interests are unlikely to interfere with the operations of that Department is no doubt a step to promote better efficiency and operation of the Ministry of Foreign Affairs. She is not being transferred because she may have committed an offence or even for the reason that the Commission seeks to discipline her in a general way.

On the evidence, I am satisfied the transfer was properly made for purposes of the efficiency and smooth operation of the Public Service under s 37 of the Act. The

applicant has failed to satisfy me that a substantial purpose for the transfer was to discipline her. In reaching this conclusion I have not been unmindful of the observations of Gresson J. in Deynzer v Campbell [1950] NZLR 790 at 827. But those views followed a finding that a statement on behalf of the Commission that the action was taken "solely on the grounds of the efficiency of the Public Service" were "a mere verbal nicety" since the reason for the Commission's action was one of the grounds for disciplining the officer.

It becomes, however, a matter for decision in each case as to whether a substantial purpose for the transfer is disciplinary or whether the Commission has properly put aside consideration of disciplinary action where such might be taken and transferred an officer for administrative reasons of efficiency which can be justified: see Lindsley v Public Service Commission (ante).

To hold that in every case where conduct of an officer might be the subject of a charge under s 56 there must be a hearing under s 58 before a transfer can be ordered would be quite unreal where the Commission has not acted for the reasons which might be the subject of that charge but for entirely different and justifiable reasons. So, too, where disciplinary considerations did not play a substantial part in motivating the transfer.

B. WAS s37 POWER UNFAIRLY USED?

The applicant in her statement of claim alleged that in exercising its power of transfer under s 37 of the Act the Commission was obliged to act fairly but that it failed to do so in that -

- (a) It failed before making the decision to transfer her to inform her that the Permanent Head had alleged her personal views had been in sharp conflict with the Ministry policy.
- (b) It failed to give her an opportunity to answer such allegations.

- (c) It failed to provide her with any specific instances of the allegations.

For the respondent it was submitted that a requirement of "fairness" and a right to be heard should not be read into s 37.

I have previously dealt with this matter in Bullen & Anr v State Services Commission (ante) at p 43 and held that s 37 gives to an officer no right to be heard before a decision to transfer him is made by the Commission.

I do, however, wish to refer briefly to the judgment of Richardson J. in Fraser v State Services Commission (Court of Appeal, Wellington, CA 28/83, 21 December 1983) where at p 2 he set out the governing principles to be applied:

" First, the conceptions which are indicated where natural justice is raised are not comprised within certain hard and fast and rigid rules (Furnell v Whangarei High Schools Board [1973] 2 NZLR 705; Wiseman v Borneman [1971] AC 297). The requirements of natural justice must depend on the subject matter under consideration and the circumstances of the particular case. Where they find it necessary to do so in order to ensure that the procedure is fair in all the circumstances, the courts will supplement a procedure laid down in legislation and will do so by reference to those requirements. Second, in determining whether an opportunity to be heard must be given before a decision potentially adverse to the person is made, it is necessary to consider the scheme and context of the governing statute. One does not start by assuming that what Parliament has done is unfair. The supplementation of the statutory procedure in that respect is warranted where and because the express provision is insufficient to achieve justice and to require additional steps would not frustrate the apparent purpose of the legislation."

It is the second of these principles which has particular application in the present case.

Parliament has not provided for any right of an officer to be heard under s 37. There is no doubt good reason for that. Where a transfer is ordered for administrative reasons to promote the efficiency of the Public Service, the decision as to what is necessary is the prerogative and responsibility of the Commission to decide and it will not be helped in its decision by an officer appearing before it and arguing that his transfer is not justified for such purpose. An officer is, however, given a right to be heard under s 39(1) to justify his non-compliance with a direction to transfer by giving some valid and sufficient reason therefor.

The omission of any right to be heard under s 37 and the right to be heard expressly given under s 39 is significant. Further, the intent of the appeal right given under s 64(1)(f) in the case of s 37 transfers is also significant. Both s39 and s64(1)(f) are indication that the only opposition which can be voiced to a transfer is that it will cause "extraordinary personal hardship" as provided for in s 64(1)(f), or that there is some valid and sufficient reason for not complying with the transfer as provided for in s 39. Statutory provisions under which persons can be dismissed or subjected to disciplinary penalties, transfer with pay reduction, or suspension with or without pay, are to be looked at quite differently from s 37. Such cases may well justify a Court deciding that there is a right to be heard. The Act itself has so provided where it sets out in s 58 the procedures to be followed before penalties which involve punitive measures can be imposed. The penalties named there are -

- (a) Caution and reprimand;
- (b) A monetary penalty not exceeding \$400;
- (c) Transfer to other duties;
- (d) Reduction in salary and grading;
- (e) Dismissal.

The fact that special provision is made for a hearing under s 58 but no provision is made for a hearing under s 37 except for the right of appeal on the grounds of extraordinary personal hardship is a further indication that Parliament did not consider it "unfair" that an officer be given no right to a hearing before being directed to transfer under s 37.

C. 'DISMISSAL UNDER s 39

The factual circumstances relating to applicant's dismissal were these:

On 4 May 1982 the applicant was asked to attend at the Commission. She invited Mr Simpson, senior industrial officer with the N.Z. Public Service Association Incorporated to accompany her. At that meeting she was handed a letter signed by Dr Probine transferring her to the D.S.I.R. and advising her to report there for duty at 9 a.m. the following day. Mr Simpson sought a deferment of the transfer and as a result the applicant was told that she need not report to the D.S.I.R. for duty until 6 May 1982.

On 5 May 1982 Mr Simpson wrote to the Commission and asked for specific instances of applicant's personal views being in sharp conflict with the policy of the Ministry as stated in Dr Probine's letter of 4 May 1982 and he also asked that the applicant remain on leave with pay meantime. The same day the Commission replied to Mr Simpson's letter and confirmed that the Commission expected the applicant to report to the D.S.I.R. on 6 May 1982 at 9 a.m.

On 6 May 1982 Mr Simpson wrote to the Commission and advised that the applicant was unable to report to the D.S.I.R. that day because she was absent on sick leave and a medical certificate was enclosed. Mr Simpson also advised that he regarded the applicant's transfer as invalid. The Commission replied on 7 May 1982 denying the transfer was invalid.

Medical certificates were received by the Commission covering the period up until 23 May 1982. As at 25 May 1982 the applicant had not reported to the D.S.I.R.

and on 26 May 1982 the Commission met and resolved to send to her a letter notifying her of its decision to dismiss her pursuant to s 39 of the Act. That letter was duly sent. Subsequently, a further medical certificate was received late on 27 May 1982 covering the period up to and including 30 May 1982. The applicant did not report to the D.S.I.R. on 31 May 1982.

On 31 May 1982, not having received from the Commission the information sought as to the instances where applicant's personal views were in sharp conflict with the Ministry, Mr Simpson wrote to the Commission and said:

" We cannot regard this as a valid transfer under Section 37 until we have some statement in justification of your bald claim. Consequently we do not regard Ms Poananga to be an employee of the Department of Scientific & Industrial Research and she remains, as far as we are concerned, an employee of the Ministry of Foreign Affairs. She does not propose to report for work at the D.S.I.R. and she does not propose to embarrass the Ministry of Foreign Affairs by reporting for work there.

I would be glad to know what you propose to do in this circumstance. "

On 11 June 1982 the Commission wrote to the applicant in the following terms:

" On 4 May 1982 the Commission served notice on you requiring you to transfer to the DSIR. On 25 May 1982 the Commission determined that you should be dismissed from the Public Service upon the grounds that you had failed to comply with that direction to transfer. A letter to that effect dated 26 May 1982 was sent to you at the address given in the official records held by Foreign Affairs. The Commission has since received advice that you may no longer be resident at the address stated on that letter.

Since that time the Commission received, on 27 May 1982, a further medical certificate via the PSA indicating that you were resident (at least temporarily) in Auckland and that you were unfit to return to duty until 30 May 1982.

You did not report for duty on the following Monday (31 May) nor subsequently. Furthermore you did not report your absence or the reasons for absence to the DSIR as required. The Commission has noted that at no time since 4 May 1982 have you contacted DSIR or the Commission.

Since the Commission took the decision to dismiss you there have been several items appearing in the media. According to these reports you regard the decision to transfer you as having been taken to secure your resignation. Let me assure you that that was not the intention of the Commission. Indeed I believe that you would have been able to make a valuable contribution to the work of the Public Service in the position at the DSIR. If you feel that the Commission has wrongly interpreted your intentions regarding taking up the position with the DSIR or if you mistakenly saw the transfer as an attempt to obtain your resignation and based your actions on this belief, the Commission would be prepared to reconsider its decision to dismiss you.

The matter now rests with you. If you are now prepared to accept the transfer to the DSIR and if you wish the Commission to reconsider its decision to dismiss you I would expect to receive a written response from you to that effect in the very near future.

I feel that I must inform you that there is no right of appeal against any dismissal pursuant to section 39 of the State Services Act 1962. "

As a consequence of that letter, a meeting was arranged for 15 July 1982 with the Commission. The Commission was represented by Dr Probine and Mr Davis, the Secretary. The applicant attended with Mr Simpson.

During the meeting, Dr Probine outlined the events where in the opinion of the Secretary of Foreign Affairs the applicant's views were out of sympathy with the Ministry and where her conduct and her pursuit of her personal views had caused embarrassment to the Ministry.

The applicant denied that the incidents referred to had embarrassed the Ministry or were out of sympathy with Ministry views. There was full and frank discussion. The applicant stated that she felt it decidedly inappropriate to move her to the DSIR, and whether or not the matter had been initiated as a disciplinary transfer she felt it to be simply that. Dr Probine asserted that such was not the case.

There then followed discussion as to whether the applicant would transfer. The accounts given by Dr Probine of certain matters relating to the transfer are not altogether accepted by Mr Simpson and by implication by the applicant.

Dr Probine said he asked applicant whether she wished to take up the transfer to the D.S.I.R. because it was only on those terms that she could continue her Public Service career and that was the decision of the State Services Commission. In reply, he said the applicant stated that she would not be taking up the transfer and accepted that as a result she would be dismissed. He accordingly confirmed that the dismissal decision of the Commission would stand.

Mr Simpson said, however, that towards the end of the meeting the applicant said that she had heard nothing which convinced her that the Commission was justified in sending her to the D.S.I.R. Dr Probine's response was to say that it was nevertheless within the powers of the Commission to require an employee to transfer, and he wanted the applicant to understand that if she did not take up the option of the transfer then there would be no option but a dismissal. The applicant said she understood that.

Mr Simpson said that he and the applicant left the meeting on the understanding that the applicant would give further consideration to the matter and advise the Commission promptly.

That version of events does not correspond with that given by Dr Probine as referred to earlier. I

prefer to accept the version of events given by Dr Probine because Mr Davis, the Secretary of the Commission who was present at the meeting, has said in his affidavit:

"I kept notes of what was said at these meetings (29 June 1982 and 15 July 1982) and I confirm the accounts of same as set out in Dr Probine's said affidavit".

At the end of the 15 July 1982 meeting therefore the situation was that the dismissal decision of the Commission would stand.

The following day apparently after further reflection and accepting that the Commission was adamant that its decision to transfer to the D.S.I.R. would stand, the applicant decided to accept that fact and wrote to Dr Probine withdrawing her opposition to the decision to transfer her to the D.S.I.R. But the letter was not an unqualified acceptance of the transfer which was to the D.S.I.R. at Wellington. The applicant asked that she be transferred to the D.S.I.R. at Auckland and advised that it would be impossible for her to commence employment until 2 August 1982.

The Commission considered the applicant's letter and replied on 19 August 1982:

" The Commission considered whether or not its decision to dismiss you should be reversed at its meeting on 19 July 1982 and decided, in the light of all of the information available to it that the decision to dismiss you, pursuant to section 39 of the State Services Act, for failure to comply with the Commission direction to transfer, should stand.

The fact that at this late stage you are prepared to change your mind and transfer to DSIR, preferably in Auckland, does not alter the fact that for some time you have refused to comply with the Commission's direction. "

The applicant in her statement of claim alleges that the Commission exercised its power of dismissal under s 39 unfairly in that having given her a reasonable expectation that her dismissal would be revoked, it failed :

- (a) To give her an opportunity to be heard before making any final decision.
- (b) To give reasons for its decision.

The power of dismissal was exercised pursuant to s 39 of the Act. It provides:

- " (1) Any employee who fails to comply with a direction of the Commission requiring him to transfer from one position or locality to another or to take up an appointment to which subsection (2) of section 37 of this Act applies may be forthwith dismissed or reduced in grading by the Commission, unless he justifies the noncompliance in the opinion of the Commission by adducing some valid and sufficient reason therefor.
- (2) There shall be no right of appeal against any dismissal or reduction in grading under this section:

Provided that nothing in this subsection shall affect the right to appeal against transfer conferred by paragraph (f) of subsection (1) of section 64 of this Act. "

In accordance with that section the Commission was required to give the applicant a fair hearing on the question of whether she had some valid and sufficient reason for failing to comply with the direction to transfer which was the justification for her dismissal.

The letter from the Commission to the applicant dated 11 June 1982 clearly offered her the opportunity for such a hearing. It said:

" If you feel that the Commission has wrongly interpreted your intentions regarding taking up the position with the DSIR or if you mistakenly saw the transfer as an attempt to obtain your resignation and based your actions on this belief, the Commission would be prepared to reconsider its decision to dismiss you. ...
If you are now prepared to accept the transfer to the DSIR and if you wish the Commission to reconsider its decision to dismiss you I would expect to receive a written response from you to that effect in the very near future. "

That letter in three passages, including the two referred to in the passage quoted, emphasised that what the Commission would reconsider was its decision to dismiss the applicant. It commenced by stating that the Commission's decision to dismiss her made on 25 May 1982 was upon the grounds "that you had failed to comply with the direction to transfer". It then went on to state that for the reasons given "the Commission would be prepared to reconsider its decision to dismiss you" and concluded by saying:

" If you are now prepared to accept the transfer to the DSIR and if you wish the Commission to reconsider its decision to dismiss you I would expect to receive a written response..."

Counsel for the Commission submits that that letter made it clear that the issue on which the Commission would hear the applicant was not transfer or no transfer, but whether or not she should be dismissed for not complying with the direction to transfer.

I agree that that is so. I am satisfied that the applicant well knew that. She acknowledged it in her letter to the Commission of 6 July 1982. I cannot believe that the applicant did not also know that she had a right under s 39 of the Act to endeavour to persuade the Commission not to dismiss her if she could satisfy it that she had some valid and sufficient reason for not complying with the transfer. She was throughout being advised by Mr Simpson who was quite familiar with the provisions of the Act, and according to Dr Probine she knew that there was no right of appeal against a dismissal under s 39.

I do not accept the submission of counsel for the applicant that the purpose of the meeting of 15 July was simply to discuss applicant's transfer to the D.S.I.R. It was to discuss her dismissal. But a reading of the affidavits of the applicant, Mr Simpson, Dr Probine and Mr Davis makes it plain that the applicant turned the issue before the meeting into one of whether she should have been transferred to the D.S.I.R. at all, and did not deal with

the real issue which was whether she had some valid and sufficient reason why she should not have been dismissed for not complying with the transfer which was the only issue on which she was entitled to be heard under s 39.

She chose to raise the issue the way she did and it can not be said that she was not given the opportunity to raise the matters she was entitled to raise under s 39. Counsel for the applicant accepted that the Commission had told the applicant that the ground for her dismissal was non-compliance with the order to transfer. Had it left matters at that, he said, then the onus would have been on the applicant. But he said the Commission gave the applicant the reasonable expectation that her dismissal would be revoked and that expectation remained after the meeting so that she should have been given a further opportunity of being heard to make representations under s 39 of the Act before the final decision confirming her dismissal was made. Reference was made to Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346, 350.

If she had been given a further hearing, the applicant could, it was said, have been expected to put forward such matters as the following:

1. For part of the period following the direction to transfer she was ill.
2. The notice of dismissal dated 26 May 1982 was received towards the end of May.
3. She could not reasonably be expected to attend work at the D.S.I.R. in the face of the notice dismissing her.
4. Accordingly the only period of non-compliance was the period during which she was ill.

I do not accept on the evidence that at the end of the meeting of 15 July 1982 the applicant was given any reasonable expectation that if she accepted the transfer then her

dismissal would be revoked. She had already been offered that and had said she would not be taking up the transfer and accepted that as a result she would be dismissed.

The decision made by the applicant subsequent to the meeting to accept the transfer subject to the conditions stated was an afterthought. She was given at the meeting every opportunity to accept the transfer and to raise any other matters relevant under s 39 to show valid and sufficient reasons why she should not be dismissed but she elected not to do so.

Natural justice requires only that she be given a fair opportunity to advance such matters as are relevant under s 39 as she considered appropriate. She was given the opportunity but elected to put different arguments to the meeting aimed at persuading the Commission to revoke the transfer itself. That was her choice. She did not fail to do so because of any expectations left to her by the Commission.

In any event the matters which it is suggested she might raise on a further hearing were largely within the knowledge of the Commission. I briefly refer to them.

1. The direction to transfer was given on 4 May 1982 to take effect from 5 May 1982. This was deferred until 6 May 1982. The applicant took ill and sent medical certificates to the Commission covering the period up until 24 May 1982. When she did not report on 24 May 1982, or on the two days thereafter, she was dismissed on 26 May 1982. On 27 May the Commission received a further medical certificate that the applicant was unfit for work until 30 May 1982. She did not report that day or subsequently. The facts relating to the applicant's illness were well known to the Commission and taken into account.

2. The applicant says that the notice of dismissal dated 26 May 1982 was not received until towards the end of May. That can have no real bearing upon the matter, however, as even after the expiry of the third medical certificate for the period up until 30 May 1982 the applicant did not report for work so that even though the third medical certificate covered the period during which she was dismissed, that was known to the Commission subsequently. If the applicant could have complained about her dismissal during the period covered by the third medical certificate, she did nothing after the expiration of that medical certificate to disentitle the Commission from again notifying her of her dismissal for not reporting for work. These facts were well known to the Commission.
3. Next, the applicant claims that she could not reasonably have been expected to have attended work at the D.S.I.R. in the face of the notice dismissing her. One would have expected that when the applicant saw that she had been dismissed by letter dated 26 May 1982, and had obtained a medical certificate extending her being off work until 30 May 1982, she would have communicated with the Commission promptly after that medical certificate expired. She did not do so. Had she so communicated with the Commission there is no reason to believe that it would not have acknowledged the medical certificates and excused her not reporting for work earlier and revoked her dismissal. It was no doubt that failure to communicate in any way which caused the Commission to finally adopt the attitude it did.

4. The only period of non-compliance was not only the period during which the applicant was ill. She did nothing after her illness ceased to enable the Commission to cancel the dismissal of 26 May 1982 and allow her to report to the D.S.I.R. when the medical certificate had expired. She was the author of her own misfortune in that respect.

D. REASONS FOR DISMISSAL

The applicant claims she was entitled to be given sustainable reasons by the Commission for upholding her dismissal. The reason given, it was said, was that contained in the Commission letter of 19 August 1982, namely, "that the decision to dismiss you, pursuant to section 39 of the State Services Act, for failure to comply with the Commission direction to transfer, should stand". But that reason was said to be in part at least not sustainable because it overlooks that the reason for the applicant not complying with the direction to transfer so far as the period late May to 19 July 1982 is concerned is that she had received a dismissal notice which had never been formally revoked.

I think it is quite clear that the reasons for dismissal were:

1. As at 26 May 1982 the applicant had not reported for duty as required and had not by that date sent to the Commission a medical certificate to cover any period after 23 May 1982.
2. When the third medical certificate was received on 27 May 1982 covering the period up until 30 May 1982, the Commission could have expected applicant to have reported on 30 May 1982, but nothing further was heard from her. In the face of such inaction there was little point in revoking the dismissal of 26 May 1982 and imposing a new one based on failing to report on 30 May 1982 or thereafter.

The applicant was not at that stage interested in transferring to the D.S.I.R. as ordered nor in reporting to the D.S.I.R. for duty. It was only belatedly, after it became very apparent to her following the meeting of 15 July 1982 that the Commission would not cancel the transfer, that she accepted that fact but tried to have the transfer changed to Auckland.

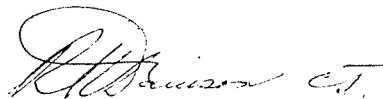
I think the Commission did give adequate reason for the transfer. However, it is not a breach of natural justice for it not to do so: Flexman v Franklin County Council [1979] 2 NZLR 690, 698, 699; R v Awatere [1982] 1 NZLR 644, 646.

CONCLUSION

I am not required in these proceedings to rule on the correctness of the Commission's decisions. All this Court can do is ensure that the decisions have been made by applying the correct principles of law, applying the correct procedures, and observing the principles of natural justice. In the final result, I have a discretion as to whether or not to grant the applicant the relief which she seeks.

This is not an appeal on the merits against the transfer or the dismissal of the applicant. There are no such rights of appeal in the present case.

I have found none of the grounds upon which the applicant seeks a review to have been established and the application is refused. Costs reserved.



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