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NZLR

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

(2)

A 61/85

HIGH PRIORITY

859

IN THE MATTER of the Judicature Amendment Acts of 1972 and 1977

BETWEEN SUSANA YAWA HILL

Applicant

A N D NORTHLAND HOSPITAL BOARD

First Respondent

A N D HEALTH SERVICE APPEAL BOARD

Second Respondent

Hearing: 16 and 17 June 1986

Counsel: G M Illingworth for Applicant
Amanda Kennedy and Cynthia Sparling for First Respondent

Judgment: 18 June 1986

ORAL JUDGMENT OF HILLYER J

This is an application for judicial review of four decisions - three made by the first respondent, the Northland Hospital Board, and one made by the second respondent, the Health Service Appeal Board. The Health Service Appeal Board was represented by Mr Smith who appeared before Smellie J when the matter was called on a Judicial Conference on 5 May 1986. Mr Smith advised that the Appeal Board, as a judicial body, would abide the decision of the Court and he was given leave to withdraw and excused from attendance at the substantive hearing.

I have therefore heard argument only from Mr Illingworth for the applicant and from Ms Kennedy for the first respondent over the last two days.

The decisions sought to be reviewed are as follows:

> " 1. Decision by an officer or officers of the First Respondent made on or about the 26th day of July 1984 to direct the Applicant to relinquish her position as a Charge Nurse pending an investigation of misconduct alleged to have been committed by the Applicant.
>
> 2. A decision by an officer or officers of the First Respondent made on or about the 27th day of July 1984 to suspend the Applicant from her position as a Charge Nurse.
>
> 3. A decision of the First Respondent made on or about the 6th day of August 1984 to dismiss the Applicant from the position as a Charge Nurse.
>
> 4. A decision of the Second Respondent made on or about the 22nd day of November 1984 to refuse to direct that the Applicant be reinstated in her position as a Charge Nurse. "

Applicant came originally from Ghana in Africa. She was employed by the first respondent but was dismissed from that service on 6 August 1984.

When the matter came before Smellie J evidence was put before him that applicant was suffering considerable hardship, that her husband aged 61 was retired and that the maintenance of herself and her husband, and to a lesser extent her father, brothers and sisters in Africa, is dependent upon her capacity to earn. She and her husband were existing on a welfare pension. They had been obliged to sell their home and had decided they must return to the United Kingdom where Mrs Hill hopes to get employment that will enable her to support herself and her husband, and to send some aid to her family in Ghana.

His Honour noted that the application was important because the outcome could affect her prospects of obtaining a position in the United Kingdom. For that reason he granted a fixture at the next sitting in Whangarei and it is for that reason that the matter came before me on Monday and Tuesday of this week, 16 and 17 June.

At the close of the submissions however, when I was considering whether I should reserve my decision because the matter was one of some complexity, I was advised by Mr Illingworth in response to my enquiry, that his client's situation was no better, indeed it was worse, and that it was desirable that a decision should be given without delay. It was suggested that the applicant would suffer further hardship if she had to wait beyond the end of the week. It was apparent that if I had reserved my decision and had to give it in writing, I would have been unable to do so for at least three weeks and perhaps more, and I therefore agreed to give a decision this morning.

Applicant was employed by the Northland Hospital Board as a Charge Nurse in the Kaitaia Hospital on 17 August 1981. Over a period there were certain complaints made against her and in particular, by the beginning of 1984, the matter had got to the stage where the Principal Nurse was writing to the Chief Nurse indicating that there were problems in the hospital in relation to the applicant's carrying out of her duties as a Charge Nurse. Those

duties were duties in which a considerable degree of responsibility was being exercised and a considerable degree of control of other staff necessary.

The complaints related to the applicant's relationship with other members of the staff and the Principal Nurse at the Kaitaia Hospital was advised by the Chief Nurse of the Northland Hospital Board that she should speak to the applicant and warn her that her work performance should improve.

A letter was written on 8 May 1984 from the Chief Nurse to the Principal Nurse at Kaitaia Hospital in which the following clause appears:

> " I suggest you see Mrs. Hill in the presence of Mrs. Rathbone and give her a verbal warning that if her work performance does not improve this could lead to a written warning. "

It was in that climate that the Principal Nurse received a written complaint on 24 July 1984 from Dr McKay, a medical officer at Kaitaia Hospital, alleging that applicant had altered the labelling on a bottle of drugs and that this action may have resulted in a number of staff administering incorrect medication to patients. That letter was clearly written in relation to what the doctor considered was a very serious matter and it also referred to the doctor's view that the applicant was not carrying out her duties satisfactorily.

The allegation was made that the wrong drug could have been administered because the label on the bottle of drugs had been altered and that this could have had serious consequences.

The Principal Nurse, Miss Poppe, discussed the circumstances with the Hospital's Medical Superintendent, Mr P E Dryberg, and then contacted the Northland Hospital Board's Acting Chief Nurse, Miss Grogan to discuss the matter and to seek advice. Miss Grogan suggested that the matter should be investigated by herself together with a Dr Maxwell, the Medical Superintendent in Chief of the Northland Hospital Board. It was arranged that Miss Grogan and Dr Maxwell would visit the Hospital on the following day, a Friday, 27 July 1984, to investigate the matter.

In the meantime, pending the investigation, Miss Poppe was instructed to remove applicant from her immediate responsibilities while the matter was being investigated. It was suggested that the applicant should be redirected temporarily to an alternative area of work.

On 26 July, shortly after applicant reported for work at 8 am, the Principal Nurse interviewed her in the presence of Mrs Rathbone, the Day Supervisor at the Kaitaia Hospital, and instructed applicant that she was to be relieved of her charge nurse duties on a temporary basis. She was not to dispense any medication until the matter had been investigated by Miss Grogan and Dr Maxwell on the

following day. Applicant was to work in the Day Care Centre in the Kaitaia Hospital in the meantime.

Applicant told the Principal Nurse that she would not comply with those instructions and went back to the ward where she was normally employed. There were then apparently some attempts to place the control of the medical ward in the hands of the Senior Staff Nurse on duty that day. In the light of applicant's refusal to comply with the verbal instructions given, a letter was written by the Principal Nurse and handed to applicant later that day. The letter was as follows:

> " I have been instructed by the Medical Superintendent-in-Chief and the Chief Nurse to relieve you of your responsibilities as a Charge Nurse and to instruct you that you are not to administer or check any medication until the matter has been investigated and resolved tomorrow morning. "

Later in the day the Principal Nurse again spoke to the applicant. Applicant confirmed that she had received the written instructions but reaffirmed that she would not comply with them. At about 3:30 that afternoon Dr Dryberg, the Medical Superintendent, discussed the matter with Miss Poppe, the Principal Nurse, Mrs Rathbone and the applicant. He says that he understood that the transfer to the day care ward was to be a temporary reassignment pending investigation of Dr McKay's complaint and that he very clearly and fully explained the probable consequences of her failure to comply, first with an instruction from the Principal Nurse and secondly with an instruction from the Chief Nursing Officer. He says he

explained that this would be viewed as a serious act of insubordination. He says that applicant continued to refuse to comply with the instructions and returned to the medical ward.

Applicant worked in the medical ward until her rostered finishing time. On Friday 27 July applicant reported for work at the medical ward at 8 am and commenced carrying out her normal duties in that ward. Miss Grogan and Dr Maxwell arrived at the Kaitaia Hospital at about 9:30 am and with Miss Poppe interviewed the applicant at about 11 am. There were initial discussions about the mislabelling of the drug bottle and the applicant denied that the handwriting on the drug bottle altering the name of the drug in the bottle, was hers.

Miss Grogan then referred to the instructions she had given the Principal Nurse that applicant should be relieved of her responsibilities and transferred to another area pending investigation by herself and the Superintendent in Chief of the allegation. She asked applicant to reconsider her refusal to comply with those instructions. She says that she asked applicant on at least two occasions to reconsider her stance but applicant declined to do so.

Dr Maxwell then spoke to the applicant. He says that he very thoroughly explained to applicant the possible consequences of her refusal to accept the instructions to transfer to the day care ward pending investigation of Dr McKay's allegations, including the possibility of

dismissal, but applicant continued to refuse to obey the instructions of the Chief Nursing Officer.

Applicant was then asked to retire for a period of ten minutes so that she could reconsider her decision. At the end of that ten minutes the applicant did not return to the interview room and Dr Maxwell says it was necessary to recall her. She was asked whether she had reconsidered her decision and she said that she had not changed her decision and would not comply.

In anticipation of such a reply a letter had been prepared which was as follows:

> " This is to inform you that you are hereby suspended from duty pending further instruction from the Northland Hospital Board on the grounds of insubordination.
>
> You are required to state in writing to Miss Poppe Principal Nurse Kaitaia Hospital by 12 mid-day on Monday 30th July 1984 whether you admit or deny the truth of this offence and to give such explanation as will enable proper consideration to be given. "

That letter was handed to applicant by the Acting Chief Nurse, Miss Grogan in the presence of Dr Maxwell and Miss Poppe. After being given an opportunity to read the letter applicant was instructed by the Chief Nurse to get out of her uniform and to leave the Board's premises. But applicant refused to do so and left the room to return to the medical ward.

At 1:30 pm that day Mrs Rathbone went to the medical ward and found the applicant writing ward reports. She was

instructed by Mrs Rathbone to allow the Senior Staff Nurse on the ward to finish the report and to leave the ward. Applicant said she would not because she had been given advice to stay on. It appears that she had telephoned her solicitor, Mr Manning of Messrs Fortune Manning & Company, Solicitors, Kaitaia, who was unable to see her that afternoon but made an appointment to see her on the following Monday.

If she was advised by Mr Manning to refuse to obey the orders of her superiors in that way it appears that there was a misunderstanding between Mr Manning and applicant. I do not know what the position was in that regard.

Later that day applicant attended a staff meeting in the ward. On the following Monday applicant reported for duty in the medical ward at 8 am in defiance of the letter of suspension and verbal instruction given to her. On being advised of this the Committee Secretary of the Kaitaia Hospital called applicant to his office and advised her that she must comply with the instructions given to her. It appears that he went so far as to say that if the applicant did not leave the premises the Police would be called to put her off.

Finally, at about 9:30 that morning, applicant left the hospital premises.

A letter dated 30 July, in reply to the Chief Nurse's letter of 27 July, was received by the Principal Nurse saying:

> " I acknowledge your letter of the 27th July and note that I am suspended from duty for insubordination.
>
> I deny the truth of this offence and will see my solicitor about the matter. "

By a letter of the same date Messrs Fortune Manning & Company wrote to the Acting Chief Nurse saying that they had been consulted by the applicant, that the letter of 27 July from the Acting Chief Nurse had been handed to them, and noting that the applicant had replied in writing as required, denying the truth of the offence. The letter goes on:

> " The offence, however, has not been made clear to her and Mrs Hill does not understand exactly what she is supposed to have done wrong. "

It appears that the offence there referred to was the offence of insubordination referred to in the letter of 27 July. The letter from the solicitors then goes on:

> " We have discussed the matter fully with Mrs Hill and the first thing which became apparent was that Mrs Hill had a firm belief that if she left her Ward this would prejudice her case and it was not until she saw Mr Bodger [the Committee Secretary, Kaitaia Hospital] this morning that it was made clear to her that the contrary applies and that her 'offence' was in not going off duty - a pur misunderstanding. The writer has this afternoon spoken with Mr Bodger about the matter and it appears he also firmly believes the 'offence' is due to the above misunderstanding.
>
> We trust that the 'offence' can be viewed in the light of the above and disposed of accordingly. "

It appears that the offence was understood by the solicitor and applicant to be the not going off duty and it is said by the solicitor that that was a "pure misunderstanding". However the letter then goes on to say:

> " It appears to us that the real matter at issue concerns Mrs Hills position as a Charge Nurse ... "

The letter goes on to say that no-one had made a clear statement of what applicant was doing or had done wrong. Clearly that was a reference to the dissatisfaction that had been expressed earlier about applicant's performance as a Charge Nurse.

Amongst the documents put in by agreement was a report on applicant's performance of her duties. This clearly had been seen by the applicant who had written on it that the problem was with the people she had to deal with, not with herself. But those matters were not the matters that were being referred to at this stage.

When this case was first called before me I was surprised to gather that there was to be no cross-examination of any of the deponents of the half a dozen or so affidavits that had been filed on behalf of the first respondent or of the applicant on the two affidavits filed by her. It appeared to me that there were matters of credibility involved and I indicated to counsel that it would be very difficult for me to determine questions of fact where there was a conflict of evidence, solely on affidavit evidence.

Both Mr Illingworth and Ms Kennedy however assured me that questions of fact were not in issue in the hearing and that each had consciously taken the decision not to seek to cross-examine the witnesses. As the case has progressed I have had cause to consider that there were questions of fact which were in issue between the parties and I have experienced some difficulty in ascertaining the facts in the light of the fact that I have not had the benefit of seeing and hearing the witnesses. It is however, as indeed it was at the time the action commenced, too late to seek such assistance now. I merely mention that I have had to do the best I can to ascertain the facts in those circumstances.

On 6 August 1984 the Northland Hospital Board had its regular monthly meeting. One of the items on the agenda was a recommendation made that applicant be dismissed from the Board's service on the grounds of her insubordination. The Board had before it a letter dated 30 July to the Chief Executive of the Hospital Board from Dr Maxwell, the Superintendent in Chief. That letter set out the history of the matter and concluded that the applicant was quite clearly told twice that her general performance was not under question but that they were looking into a specific incident, and that others had to be interviewed in relation to the changing of the label on the bottle of drugs as well as herself. It concluded:

" Mrs Hill's subsequent action in returning to her ward when under suspension and after receiving specific instructions not to do so, became grounds for serious concern, unrelated to the matter under investigation. As a result of her action, the situation was made worse than it needed to be and must raise, in my view, the question of her ability to exercise a proper degree of judgment, both on her own behalf and in the interest of her charges.

Mrs Hill received ample assurance that she was being asked to relinquish ward responsibilities for a temporary period only while the method of drug handling was investigated.

Her response to this request was to regard it as a personal attack, although she was clearly told that others senior and junior to her may have been at fault. Her action in persisting in office was totally unacceptable. "

Also before the Board was the letter dated 27 July from the Acting Chief Nurse to the applicant and a letter dated 31 July from the Acting Chief Nurse to the Chief Executive. That letter first set out the history relating to the alternation of the label on the bottle of drugs and then referred to the suspension on the grounds of insubordination. It concluded:

" My investigation of the drug error is complete and I believe that Mrs. Hill did alter the label on the bottle of Hydrocortisone and that as a result of this, a number of tablets Hydrocortisone 20mgs were administered incorrectly as Prednisone 20mgs.

She said:

In considering these alternatives, I view the behaviour resulting in suspension as separate from that of the alteration of the drug label. However the former would not have occurred had the latter not been under investigation. The incidents must therefore be considered together and along with previous concerns about Mrs. Hill with which the Board is already familiar, lead me to believe that she is not suited to the position of Charte Nurse, nor does she have the ability to discharge the duties of that office in a satisfactory manner.

> If alternative duties and demotion to Staff Nurse were to be considered, I must advise that such action could still result in Mrs. Hill being left in a situation of sole responsibility, for example, on night duty. As her professional judgment is open to question and is likely to remain so, I could not support such action.
>
> I am therefore left no alternative but to recommend that Mrs. Hill be dismissed. "

Also before the Board was applicant's letter of 30 July and the letter from Messrs Fortune Manning & Company referred to.

After consideration the Board resolved:

> " That Mrs S.Y. Hill, Charge Nurse, Kaitaia Hospital be dismisssed from the Board's service with effect from 6th August 1984. "

That decision was conveyed to the applicant by letter datred 6 August 1984 from the Chief Executive as follows:

> " Further to the letter dated 27 July 1984 from the Acting Chief Nurse I have to advise that my Board, at its meeting on 6 August 1984, resolved that as a result of your insubordination you be dismissed from its service with effect immediately.
>
> Your letter dated 30 July 1984 and that of your solicitors, Fountain, Mountain & Co., dated 20 July 1984, were considered by the Board.
>
> I have arranged to have your final pay forwarded to you shortly.
>
> You are reminded that you have the right of appeal in terms of Section 37 of the Health Service Personnel Act 1983. Any such appeal must be lodged with me within 14 days of receipt of this letter. "

Applicant appealed against that decision pursuant to s 37 Health Service Personnel Act 1983 to the Health Services Appeal Board.

Section 37 provides that where any employer dismisses an employee from its employment, the employee may appeal against that dismissal and the matter is then referred to a legal reconsideration committee. The reconsideration committee attempts to effect a settlement. If no settlement can be reached the matter then goes to the Appeal Board. Section 37(4) of the Act then continues:

> " Where an appeal is referred to the Appeal Board under subsection (1)(d) of this section and the Appeal Board is satisfied that the appellant was unjustifiably dismissed, it may direct the employer concerned to do all or any of the following things:
> (a) To reimburse to the appellant a sum equal to the whole or any part of the remuneration lost by him:
> (b) To reinstate him on his former position or in a position not less advantageous to him:
> (c) To pay compensation to him. "

In the statement of the Northland Hospital Board's case to the Appeal Board, the Board set out the history of the matter as it understood it, and then said that it had received the recommendation that applicant be dismissed on the grounds of her insubordination and had done so. It said quite clearly that the reson for its decision was the insubordination and not any other basis which was made clear by the letter of 6 August 1984 sent by the Chief Executive to applicant which said that the dismissal was "as a result of your insubordination".

The Appeal Board heard the appeal on 30 October 1984 and had the advantage, which I have not had, of hearing a number of the witnesses give evidence before it, in particular the evidence of the applicant. Some of the

evidence came before the Appeal Board in the form of written statements which were received in evidence pursuant to the provisions of the Act. The Chairman however indicated that the fact that the evidence was in that form would be considered when determining the weight which should be placed on those submissions.

In a careful decision delivered on 22 November 1985 the Appeal Board set out the history of the matter and referred to four matters which it said called for some further thought. The Appeal Board commenced its decision with a reference to a decision by Roper J in Nicholson v Review Committee (unreported, 9 April 1984). The Board said that the learned Judge had said "it was not the function of the Review Committee to consider questions of delegation by the hospital board, quorum, and the like." The Appeal Board said that Roper J was of the view that questions relating to the validity of the Hospital Board's proceedings which had no bearing on the particular appellant's grievances arising from the resons for his dismissal, could and should have been resolved by review by the High Court in the first instance before the matter got to the review committee. The Appeal Board said, however, that the parties had agreed that the proceedings before the Appeal Board did not relate to the validity of the Hospital Board's proceedings and were directed to the question whether or not applicant was justifiably dismissed.

They referred to the decision in Auckland City Council v Hennessey (CA 178/81 decision 29 March 1982; 82 NZ Ct Arb 699) in which the Court of Appeal said:

> " It is plain, and the contrary was not suggested, that the word 'unjustifiably' in s.117(1) of the New Zealand Act [Industrial Relations Act 1973] is not confined to matters of legal justification. If it were so the section would add only a claim to reinstatement to the law. In the context of s.117 we think the word 'unjustified' should have its ordinary accepted meaning.
>
> Its integral feature is the word unjust - that is to say not in accordance with justice or fairness. A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness.
>
> It follows that a dismissal may be held unjustifiable where the circumstances are such that justice or fairness requires that the employee should have an opportunity, which he has not been afforded, of stating his case. Whether such circumstances exist will depend upon the facts of the particular case including such matters as the nature of the employment and the occurrence that gives rise to dismissal.
>
> The instant case involved the employer ascertaining a course of events from witnesses. That feature and the findings of the Arbitration Court about provocation and that 'there was room, however, for argument as to whether his actions were excusable' all indicate that Mr Hennessey should in fairness have been heard before he was dismissed. "

The Court of Appeal was, of course, dealing with one aspect of the meaning of the word "unjustifiably". A decision may be unfair, either because it was procedurally arbitrary or because it lacked good cause, and the word is frequently used in legal matters to mean that a person who is justified in doing something is entitled to do it. For example, in this Court last week I was presiding over a trial in which the defence of self-defence was raised and the Act provided that everyone was justified in using, in

the defence of himself or another, such force as in the circumstances as he believed them to be, it was reasonable to use.

There are, therefore, two aspects to the meaning of the words "justifiably dismissed" in the section of the Health Service Personnel Act. First, was there good cause for the dismissal. Secondly, were proper procedures followed.

After their full consideration of the evidence that came before it the Appeal Board concluded that there was a degree (though only a relatively minor degree) of injustice or unfairness. They said, however, that they did not consider that the degree or extent of injustice or unfairness was such that they ought to direct the Hospital Board to reinstate the applicant in her former position or in a position not less advantageous to her, nor did they feel that the degree or extent of injustice or unfairness was such that they ought to direct the Hospital to reimburse applicant for any remuneration she may have lost. In the Board's opinion the correct course to follow was to direct payment of a relatively modest sum by way of compensation. In that regard they thought the sum of $1000 would be appropriate and they directed the Hospital Board to pay that sum to the applicant. They indicated also that the Hospital Board should meet the actual and reasonable personal accommodation and travelling expenses incurred by the applicant.

Before me Mr Illingworth commenced by submitted that the action of the Hospital Board in dismissing the applicant was the exercise of a statutory power of decision under the Judicature Amendment Act 1972, and that as such it was reviewable by this Court. Section 49(1) of the Hospitals Act 1957 is as follows:

> " Subject to the provisions of this Act and of the Health Service Personnel Act 1983, and subject to any instructions given by the commission, a board may from time to time engage or appoint such employees (including acting or temporary or casual employees,) as may be necessary for the efficient performance and exercise of its functions, duties and powers within the limits of the resources available, and may at any time remove any such employee from office or employment. "

Ms Kennedy endeavoured to suggest that the action was merely one of an administrative nature and that the matter of the applicant's dismissal would be one item on a Board meeting agenda which would contain a host of other matters concerning the administration of the institutions under the Hospital Board's care. She accepted that there was a duty on the Board to act fairly but suggested that it was not necessary for the Board to act as a commission of inquiry. She submitted that if it were held that the decision of the first respondent to transfer, dispense or dismiss were required to be brought into the ambit of a quasi-judicial body, this would create a new terror on lay board members and would serve to cripple the administrative functions of the first respondent in the proper running and maintenance of Hospital Board services.

I wish to make it quite clear, as indeed it is made clear in the decision of the Court of Appeal in Marlborough Harbour Board v Goulden (1985) 5 NZAR 449, that there would be very few cases in which there were any relationships of employment, public or private, to which the requirements of fairness had no application and that that requirement of fairness was a requirement which covered the necessity to permit any person concerning whom a decision was being made as to whether that person should be dismissed, to put forward his or her side of the story.

I note that in that case the Court referred to s 45 of the Harbour Boards Act which imported a right to a full hearing de novo and that the existence of that right might make the Court reluctant to grant relief until the statutory appeal remedy had first been exhausted.

I do not think there is any question but that the right to dismiss was the exercise of a statutory power of decision and that the maxim "audi alteram partem" applied in this case.

Mr Illingworth, however, took his submissions back earlier than the actual dismissal and submitted as implicit in the challenge to the first decision of which review is sought, that the suspension of the applicant was a decision which also could be reviewed. He quoted Chitty on Contracts (24th ed) at para 3575:

> " There is no generally implied contractual right on the part of employers to suspend employees without pay on disciplinary grounds ... disciplinary suspension cannot be justified by reference to the employer's contractual right to dismiss for misconduct. "

That quotation however was a reference to what has been referred to in Lewis v Heffer [1978] 1 WLR 1061 at 1073 where Lord Denning MR said:

> " Those words apply, no doubt, to suspensions which are inflicted by way of punishment: as for instance when a member of the Bar is suspended from practice for 6 months, or when a solicitor is suspended from practice. But they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a government department or in a business house: and a man may be suspended on full pay pending enquiries. "

A suspension on full pay pending the determination of an enquiry is not a disciplinary suspension and in my view such suspension comes within the rule set out by Professor Wade, that such a power may reasonably be delegated. He said, in Administrative Law (5th ed 1982) at page 319:

> " An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no-one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the Courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as ultra vires action taken by agents, sub-committees or delegates, however expressly authorised by the authority endowed with the power. "

Mr Illingworth was attacking the decision to suspend initially made for the purpose of investigating the alteration on the drug bottle on the basis that there was no power to delegate such authority. But in de Smith, Judicial Review of Administration Action (4th ed) at page 298, the learned author says:

> " A discretionary power must, in general, be exercised only by the authority to which it has been committed. It is a well known principle of law that when a power has been confided to a person in circumstances indicating that trust has been placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another. This principle, which has often been applied in the law of agency, trusts and arbitration, is expressed in the form of the maxim delegatus non potest delegare ... the widespread assumption that it applies only to the sub-delegation or delegated legislative powers and to the sub-delegation of other powers delegated by a superior administrative authority is unfounded. It applies to the delegation of all classes of powers, and it was indeed originally invoked in the context of delegation of judicial powers. "

However that principle, in my view, applies only to the disciplinary type of suspension and not the type of suspension that was first imposed in this case.

Mr Illingworth went on to say that there were a number of matters that were being considered in relation to the applicant's activity as a Charge Nurse and that the applicant was not advised of these before being dismissed. However in my view the dismissal was solely in relation to the insubordination and was specifically confined to the refusal by the applicant to cease work so that the investigation could be carried out. The Appeal Board came to the conclusion that it was made quite clear to the applicant that she was being asked to transfer from the medical ward to the day care ward for a temporary period only, while an investigation was conducted into the allegation which had been made against her. The Appeal Board concluded that applicant had offered no reasonable

excuse for failing to comply with it. They accepted that open and deliberate defiance to obey a lawful and reasonable instruction given by a person in authority clearly amounted to misconduct of a degree which may justify instant dismissal.

The rules of natural justice were set out by Cooke J in Daganayasi v Minister of Immigration [1980] 2 NZLR 130:

> " Perhaps it is as well to repeat some points that by 1980 have become fairly elementary. The requirements of natural justice vary with the power which is exercised and the circumstances. In their broadest sense they are not limited to occasions which may be labelled judicial or quasi judicial. Their applicability and extent depends either on what is to be inferred or presumed in interpreting the particular act ... or on judicial supplementation of the act when this is necessary to achieve justice without frustrating the apparent purpose of the legislation ... in order to stress that there are some legally enforceable elementary standards not confined to the exercise of powers like those of Courts but that they do not necessarily call for a procedure at all close to Court procedure, the English Courts have tended for more than a decade to use the term 'fairness' instead of or as an alternative to natural justice ... For New Zealand the most authoritative decision is that of the Privy Council in Furnell v Whangarei High Schools Board ... with the well known statements in the majority judgment ... that natural justice is but fairness writ large and juridically, fair play in action. "

The question therefore that I have to determine is whether, in the proceedings before the Hospital Appeal Board, there was "fair play". I have come to the conclusion that where the issue involved was so narrow, ie, the continued refusal of the applicant to accept the instructions of those in authority over her, the requirement of the audi alteram partem rule was fulfilled

by her being asked in the letter of 27 July 1984, to reply in writing and to give an explanation, coupled with her denial, and the letter from her solicitors, amounted to a sufficient opportunity to put her side of the matter before the Board.

The number of different circumstances that can arise when a body such as the first respondent is making a statutory power decision is such that no one rule can be laid down. I am conscious that in some cases a full hearing with cross-examination and evidence being given by both sides would be the only adequate way to determine the truth of a matter, such as might require the dismissal of an employee. But where the facts refer to so precise an allegation as was made in this case, in my view adequate opportunity was given to the applicant to put her case before the Hospital Appeal Board.

de Smith at page 196 says:

> " In the absence of clear statutory guidance on the matter, one who is entitled to the protection of the audi alteram partem rule is now prima facie entitled to put his case orally; but in a number of contexts the Courts have held natural justice to have been satisfied by an opportunity to make written representations to this deciding body, and there are still many situations where a person will be able to present his case adequately in this way. "

The continued refusal by the applicant to obey the orders of so large a number of her superior officers, coupled with the absolute necessity in a hospital for rigid discipline, makes the case analogous to the situation in

the Armed Forces. In that regard, in R v Grant [1957] 2 All ER 694, the Courts Marshall Appeal Court, comprising Lord Goddard CJ, Burne and Devlin JJ, said:

> " Everybody knows what insubordination means. It means a refusal to subordinate oneself to authority, and it does not follow that a mere failure to obey an order amounts to insubordination. One would not say either in military or civilian circles that that was so. A schoolboy might be told he was not to go to a certain place to buy sweets at a shop, and if he disobeyed the order it does not at all follow that he would be insubordinate or that it would be proper to call him insubordinate. So, too, if a soldier was told that he was not to go to a place described as out of bounds, he might disobey the order and be guilty of disobedience, but it could hardly be said he was insubordinate merely because he did it. If, however, he met an officer who said: 'Turn back, you are going where you ought not to', and the soldier said: 'I intend to go on and I will go on', then he is showing he will not subordinate himself to military authority and he becomes insubordinate. "

Mr Illingworth submitted that an employee was not bound to obey an order if it was unreasonable. He referred to the statement of law in Halsbury (4th ed) Vol.16 para 641:

> " An employee's wilful disobedience to the lawful and reasonable instructions of his employer justifies summary dismissal if the disobedience is so grave that it goes to the root of the contract of employment. An employee is not, however, bound to obey instructions to do something not properly appertaining to the character or capacity in which he was hired; and instructions which involve a reasonable apprehension of danger to the employee's life or person are unlawful and the employee is justified in refusing to obey them. "

Here, however, the employee was not being required to do something not properly appertaining to the capacity in which she was hired. The reference in that statement was

to a case in which a person was hired as a lace buyer and was then required to do something quite different. He was held entitled to refuse to do that quite different job. I cannot therefore, accept that there was any justification for the applicant refusing the lawful commands of so superior an officer as the Medical Superintendent in Chief of the Northland Hospital Board.

Mr Illingworth specifically said that he did not submit that there was any unfairness in the hearing before the Appeal Board. He did however submit that in a number of matters the Board did come to the wrong conclusion and that evidence which was now before me justified my holding that the Appeal Board erred and that the decisions made against the applicant should be set aside.

He pointed first to a passage on page 2 of the decision of the Appeal Board where the Board said:

> " It is important to be clear that Mrs Hill was not dismissed because she altered the label on the bottle. An investigation was commenced to determine the truth or otherwise of the allegation but it was never completed. "

He pointed to the report dated 31 July which was before the Hospital Appeal Board in which the Acting Chief Nurse had said that she had completed her investigation of the matter relating to the alteration of the label on the drug bottle. That however ignores the fact that the important finding of the Appeal Board was that the dismissal was not the cause of the alteration to the label.

Mr Illingworth further pointed to a comment at para 15 of the Appeal Board's decision:

> " In the light of the evidence adduced however, we do not think that Mrs Hill was, or could have been, under any misunderstanding as to the reasons for her suspension. "

Mr Illingworth referred to documents that had subsequently been discovered relating to the applicant's carrying out of her duties as a Charge Nurse. However those have nothing to do with the essential question which was before the Board, and which was the question considered by the Board, namely, had the applicant been guilty of insubordination and should the applicant be discharged because of that.

Mr Illingworth then referred to a further section of the Appeal Board's decision as follows:

> " It seems to us that it was made quite clear to Mrs Hill that she was being asked to transfer from the medical ward to the day care ward for a temporary period only, while an investigation was conducted into the allegation which had been made against her. In our view there was nothing unlawful, or improper, or unreasonable in that request and we do not consider that Mrs Hill has offered any reasonable excuse for failing to comply with it. "

He submitted that on the evidence now available the conclusion that there was nothing unlawful or improper or unreasonable in the request made to the applicant was not correct.

I have heard nothing that would make my finding, that the request to transfer to the day care ward for a temporary period only, was unlawful, improper or unreasonable.

Mr Illingworth then went on to refer to Dr McKay's letter of complaint and to the question whether the applicant was allowed a sufficient opportunity to read it. The Appeal Board said that even if there had been some difficulty in the applicant reading that letter initially, the matter was corrected later in the day when the Medical Superintendent arranged to have the letter shown to the applicant so that she could read it. That appears to be a reference again to the question of the labelling of the drug bottle or to the activity as a Staff Nurse which was not the question that was being considered.

Mr Illingworth submitted that although it was the fact that the applicant was not to lose any pay or entitlement during the period of the temporary transfer, this was not clearly explained to her. The Appeal Board said that such a matter did not appear to be of importance. They said:

> " However, she herself did not raise any question as to her pay and entitlement during the term of the temporary transfer, either prior to or during the discussion with Mesdames Grogan and Poppe, and Dr Maxwell on 27 July. It is our clear impression from the evidence that this was not a motivating factor, nor one which had any significant bearing on Mrs Hill's refusal to comply with the instruction which had been given to her. "

As well, I note that in the letter of 26 July 1984, when the applicant was first instructed by the Principal Nurse to go to the day care ward, the instruction was not to administer or check any medication "until the matter has been investigated and resolved tomorrow morning." That

was a period of one day which does not appear to me to involve the applicant in considering that she was going to be losing pay. I do not believe that matter occurred to her.

In looking at the Appeal Board's decision I am of the view that it is part of a total dealing with the applicant's relationship to the Hospital Board and I consider that even if there was some minor unfairness as the Appeal Board appeared to consider, that should be looked at in the context of dealing with the whole problem, including the determination of the Appeal Board. The Appeal Board, it seems to me, was meticulous in searching out any possible unfairness which might have inadvertently been involved in the Board's actions in relation to the applicant and had come to the conclusion that such unfairness as there was could be compensated by the payment of $1000.

The main finding that the Appeal Board made was that there was open and deliberate defiance of a lawful and reasonable instruction. If I had come to the conclusion that there was some minor degree of unfairness in the actions of the Hospital Appeal Board, which I do not, I would have considered that in the exercise of my discretion on this motion for review, having regard to the careful and sympathetic approach of the Appeal Board, no further action was necessary.

In coming to that conclusion I have in mind the decision of the Judicial Committee of the Privy Council in Calvin v Carr [1980] AC 574, where their Lordships referred to the decision of Megarry J in Leary v National Union of Vehicle Builders [1971] 1 Ch 34. They referred to an eloquent passage in which Megarry J said:

> " If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? As a general rule ... I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body. "

Lord Wilberforce said at page 593:

> " In their Lordships' opinion this is too broadly stated. It affirms a principle which may be found correct in a category of cases: these may very well include trade union cases, where movement solidarity and dislike of the rebel, or renegade, may make it difficult for appeal to be conducted in an atmosphere of detached impartiality and to make a fair trail at the first - probably branch - level an essential condition of justice. But to seek to apply it generally overlooks, in their Lordships' respectful opinion, both the existence of the first category, and the possibility that, intermediately, the conclusion to be reached, on the rules and on the contractual context, is that those who have joined in an organisation, or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect.
>
> In their Lordships' judgment such intermediate cases exist. In them it is for the court, in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association.

At page 594:

> Pillai v Singapore City Council [1968] 1 WLR 1278 was a case of administrative bodies concerned with the dismissal of an employee. The decision of the Board against the employee was put on cumulative grounds: first that the employee was

> not entitled to require that the rules of natural justice should be observed in proceedings leading to his dismissal: secondly that the rules of natural justice, if applicable, had not been breached: thirdly that if the rules of natural justice had been breached at first instance, the defect was cured on appeal. There had been a rehearing by way of evidence de novo which cured the initial defect.
>
> Their Lordships regard this as a decision that in the context, namely one of regulations concerning establishments procedures, justice can be held to be done if, after all these procedures had been gone through, the dismissed person has had a fair hearing and put his case. It is thus an authority in favouring the existence of the intermediate category, but not necessarily one in favour of a general rule that first instance defects are cured by an appeal. Their Lordships are also of opinion that the phrase 'hearing of evidence de novo', though useful in that case, does not provide a universal solvent. What is required is examination of the hearing process, original and appeal as a whole, and a decision on the question whether after it has been gone through the complainant has had a fair deal of the kind that he bargained for. "

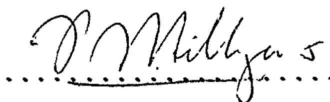
Their Lordships then went on to consider cases from a number of different jurisdictions and in particular referred to the New Zealand case of Reid v Rowley [1977] 2 NZLR 472. They said:

> " The decision was that an appeal to a domestic or administrative tribunal does not normally cure a breach of natural justice by a tribunal of first instance so as to oust the jurisdiction of the courts to redress such breaches, but that the exercise of such a right of appeal is a matter that may be taken into account by the courts in considering the grant of discretionary remedies. ... In general their Lordships find that the approach of that case is in line with that sought to be made in this judgment. It may be that the court adopted a more reserved attitude as regards the effect, after a denial or breach of natural justice at first instance, of a full examination on appeal. In one passage it is said:
>
> > " ... the conferment of wide powers on a domestic or statutory appeal tribunal, including power to rehear the evidence orally, is not enough to insulate the appellate jurisdiction automatically from the effects of a failure of natural justice at first instance. " (page 482)

> Their Lordships agree, and have given their reasons for concluding, that in this field there is no automatic rule. But they do not understand the Court of Appeal to be subscribing to a view that cases of 'insulation' or 'curing', after a full hearing by an appellate body, may not exist: on the contrary Cooke J expresses the opinion that the court, in the exercise of its discretion, when reviewing the domestic or statutory decision, should take into account all the proceedings which led to it, the conduct of the complaining party and the gravity of any breach of natural justice which may have occurred. This, though perhaps with some difference in emphasis, is their Lordships approach. "

On that authority I consider that I am entitled to look at the totality of the decisions made by the Principal Nurse, the Chief Nurse, the Board and the Appeal Authority, and I am of the view that the applicant has had, in the words of the Privy Council, "a fair deal".

The application is therefore dismissed. I am advised that the applicant is on legal aid. There will therefore be no order as to costs.



P G Hillyer J

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