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Buckenburg v Johnston

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

C.P. NO: 634/87

[redacted]

UNDER the Judicature Amendment Act 1972

Part One

BETWEEN ROGER H BUNCKENBURG

Plaintiff

584

A N D WILLIAM BRUCE JOHNSTON

First Defendant

A N D THE SCOUT ASSOCIATION OF NEW ZEALAND

Second Defendant

Hearing: 7 February 1991

Counsel: D R Broadmore for plaintiff
Lucinda Hubbard for first defendant
G J Burston for second defendant

Judgment: 19 APR 1991

JUDGMENT OF JEFFRIES J.

Before the Court are proceedings for judicial review issued by plaintiff against William Bruce Johnston in his capacity of District Commissioner for the Wellington West District of the Scout Association of New Zealand, which itself is named as the second defendant. The plaintiff at the material times before his suspension and termination of his Warrant of Appointment as a Scout Leader in circumstances to be outlined, was Scout Leader with the Karori West Scout Group.

Plaintiff seeks orders from the Court pursuant to remedies contained in the Judicature Amendment Act 1972 to set aside the decision of the second defendant to terminate the warrant

and to reinstate the plaintiff's warrant as a Scout Leader with the Karori West Scout Group.

Plaintiff was by letter dated 23 June 1986 notified by first defendant that his Warrant of Appointment as a Scout Leader was suspended. The letter itself gave no reasons but recorded only the act of suspension. When a person is suspended the procedure to be followed is set out in a document entitled Policy Organisation and Rules of The Scout Association of New Zealand. It was accepted by all parties that the procedure governing a suspension is contained in rule 47 of POR. By that rule a District Commissioner who has suspended any person must inform the Area Commissioner and supply all relevant information. The Area Commissioner then arranges a full enquiry as soon as practicable. The suspended person must be informed of the enquiry. By letter dated 4 July 1986 plaintiff was advised that a hearing into his suspension would take place on 10 July 1986. By a further letter dated 7 July 1986 plaintiff received his first notice of reasons for his suspension. A hearing took place before a Committee of Enquiry on 10 and 22 July 1986. On 19 September 1986 plaintiff was advised by the National Secretary the Area Commissioner had recommended that his Warrant of Appointment be terminated and he proposed to accept it. Pursuant to Rule 47(f)(iii) he should have been advised within 7 days of the conclusion of the enquiry the suspension is withdrawn or of a recommendation for termination. A recommendation for termination may be objected to within 21 days of the notice. Such a notice was given to the second defendant by letter dated 2 October 1986 from his solicitors.

The second defendant decided to rehear allegations against plaintiff's conduct and it set up a Committee of Enquiry which conducted the rehearing on 10 and 11 April 1987. This second hearing came about because submissions had been made to the second defendant that there had been procedural deficiencies in the enquiry established by the Area

Commissioner and that in effect was accepted by the second defendant which held a second hearing. The decision of the second defendant was to terminate the Warrant and he was so advised by letter dated 15 July 1987. No reasons were given for the termination.

The first cause of action is contained in paragraph 15 of the statement of claim in the following terms:

> "15. THE procedures adopted by the First and Second Defendants in dealing with the suspension and subsequent termination of the Warrant of the Plaintiff, were unfair and breached the rules of natural justice.
>
> PARTICULARS
>
> (i) Although the Plaintiff was suspended by letter dated the 23rd day of June 1986, it was not until he received a letter dated the 7th day of July 1986, three (3) days before the hearing into the matter, that he was advised of the allegations made by the First Defendant against him.
>
> (ii) The first enquiry held into the allegations made by the First Defendant against the Plaintiff neglected or refused to allow the Plaintiff to present all the evidence which he wished to present to rebut the allegations.
>
> (iii) Notwithstanding the provisions of Rule 47(f)(iii), the Plaintiff's suspension was not withdrawn within seven (7) days of the conclusion of the enquiry nor was a recommendation for the termination of his appointment, with a full report, forwarded to the National Headquarters of the Second Defendant.
>
> (iv) Notwithstanding the breach by the Second Defendant of Rule 47(f)(iii) the Second Defendant failed to deal with the allegations against the Plaintiff until the 10th and 11th days of April 1987, some ten (10) months after the Plaintiff's suspension.
>
> (v) Notwithstanding the delay occasioned by the Second Defendant in dealing with the allegations against the Plaintiff the First Defendant did not supply the Plaintiff with details of the allegations to be raised at the second hearing on the 10th and 11th April 1987 until the 7th day of April 1987.

(vi) The allegations, or grounds for suspension, put forward by the First Defendant for consideration by the Second Defendant at the hearing on the 10th and 11th of April 1987 covered numerous matters not raised by the First Defendant at the time he suspended the Plaintiff and which could have played no part in his decision to suspend the Plaintiff.

(vii) The allegations made by the First Defendant against the Plaintiff and contained in the First Defendant's grounds for suspension were made maliciously by the First Defendant.

(viii) To the extent that the First Defendant's grounds for suspension incorporated matters which were not raised by him at the time of his suspension of the Plaintiff, they should not have been considered at the hearing by the Second Defendant.

(ix) At the hearing of the First Defendant's grounds for suspension by the Second Defendant, the Second Defendant dismissed the allegations raised by the First Defendant which had formed the basis of the First Defendant's case against the Plaintiff at the first enquiry.

(x) At the hearing on the 10th and 11th of April 1987 the Second Defendant heard and accepted evidence of matters which had occurred subsequent to the Plaintiff's suspension by the First Defendant.

(xi) The Second Defendant did not give a decision for some three (3) months following the hearing of the allegations on the 10th and 11th April 1987 notwithstanding that the Plaintiff remained suspended throughout that period of time.

(xii) The Second Defendant failed to give reasons for its decision to terminate the Warrant of the Plaintiff as a Scout Leader and subsequently refused to provide the Plaintiff with reasons for that decision.

The second cause of action is contained in paragraphs 18 and 19 of the statement of claim in the following terms:

"18. BY letter dated the 15th July 1987 the Second Defendant advised the Plaintiff in respect of the grounds for suspension presented by the First Defendant as follows:

1. Failure to take counsel or advice from District Commissioner - not upheld.

2. Failure as (sic) refusal to co-operate with Scouting Personnel - upheld.

3. Unfit by reason of unreasonable and irrational behaviour - upheld.

19. NO reasons were given by the Second Defendant for the findings and no credible evidence was presented to the Second Defendant upon which such findings could be based."

The remedies sought by the plaintiff are as follows:

"WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE FIRST AND SECOND DEFENDANTS AS FOLLOWS:

(a) An Order by way of review setting aside the First Defendant's suspension of the Plaintiff made on or about the 23rd day of June 1986.

(b) An Order by way of review setting the decision of the Second Defendant made on or about the 15th day of July 1987, terminating the Warrant of the Plaintiff of a Scout Leader. (sic).

(c) An Order directing the Second Defendant to reinstate the Plaintiff's Warrant as a Scout Leader with the Karori West Scout Group.

(d) The costs of and incidental to these proceedings."

Conduct Of Plaintiff Under Examination

I now set out briefly the conduct of plaintiff that led to his suspension in June 1986. The first defendant is by occupation a senior technician and is the manager of the Audio Visual Centre at Wellington Teachers' College. He has been involved in the Scout Association now for 26 years holding various posts. At the material time he was the District Commissioner of the Wellington West District. Mr Johnston holds various scouting awards and is regarded by the Court as an experienced participant in the movement.

Mr Johnston became the DCWWD in July 1984 and in that capacity was required to authorise trips for Scouts organised and conducted by plaintiff in his capacity as Scout Leader

with the Karori West Scout Group. It should be mentioned here plaintiff is an air traffic controller, holds a commercial pilot's licence, and has been involved in leadership positions in the Scout movement for about 24 years. He also is an experienced participant in the movement. The events which led to plaintiff's suspension surround applications for permits to take a group of scouts on South Island trips. Mr Johnston had known of plaintiff but had had relatively little to do with him prior to 1985. For some years prior to Mr Johnston's appointment Mr Bunckenburg had taken a scout group on trips to the South Island and under the rules he had first to obtain an activity permit. In mid-1985 Mr Bunckenburg approached Mr Johnston to execute the permit for the May 1986 trip. Prior to this application Mr Johnston had received 2 letters from other Scout Leaders in the District expressing reservations about Mr Bunckenburg's trips. A specific point of concern was ratio of adult leaders to boys. Mr Bunckenburg was to be the only adult on the trip and the 1986 group was to consist of 10-12 boys. It was thought in the movement for the trips contemplated, broadly speaking involving adventure activities, the ratio of adults to boys should be 1:6. The principal reason is safety in emergency but there were others making 2 adult leaders at least a desirable practice. There had also been expressed disquiet by other leaders at the selection of participants for the trips.

Mr Bunckenburg attended at Mr Johnston's house for the permit to be signed. Mr Johnston raised the above difficulties with Mr Bunckenburg but the latter was intransigent and simply demanded the DCWWD's signature. It also emerged at that encounter the financing of the trips may not have been strictly according to the Association's rules and practice. Mr Bunckenburg refused to disclose who was financing the trip. After this somewhat angry exchange that, according to Mr Johnston, contained threats from Mr Bunckenburg, the former withheld permission and said he would consult other

senior leaders. On this occasion Mr Johnston relented and gave permission. It would appear the trip itself was conducted satisfactorily.

A short while after the May 1986 trip Mr Bunckenburg approached Mr Johnston to sign a permit for the May 1987 trip. The exchange between the 2 was a repeat of the disputes of the previous year but resulted in a complete disruption and ultimate suspension of Mr Bunckenburg as a Scout Leader. For 1987 10 boys were to go but Mr Johnston stood firm on the ratio point. Again Mr Johnston consulted others after lengthy explanations to Mr Bunckenburg which he had refused to accept. On one occasion Mr Bunckenburg in Mr Johnston's presence during an argument became palpably emotionally disturbed at his inability to move Mr Johnston to sign the permit. Mr Johnston said the point had been reached where he was concerned about Mr Bunckenburg's suitability as an adult Scout leader in the Scouting movement and this transcended any specific concern that he held about the actual trips themselves. It would seem Mr Johnston never signed the permit for the 1987 trip but exercised his discretion and suspended Mr Bunckenburg. The reason why Mr Johnston considered it desirable in the interests of the movement for Mr Bunckenburg's warrant to be suspended were that he refused to take advice from his District Commissioner and that his suitability as a Leader was gravely in doubt given the course of conduct exhibited by him in relation to his yearly trips. Apart from giving evidence along the lines outlined above before 2 enquiries, that embraced Mr Johnston's part in the affair.

<u>July 1986 Enquiry</u>

In accordance with POR an enquiry was held in July 1986. It was presided over by the Zone Commissioner for the Wellington Metropolitan Zone, Mr C H Webber, and he was assisted by 2 other senior Scout Leaders. The letter of 7 July 1986 signed by Mr Webber gave extensive information to Mr Bunckenburg of

his rights and contained the following details of the terms of reference for the enquiry:

> "In accordance with Rule 47 of POR you are advised that the terms of reference for the enquiry are;
>
> "1 To examine the reasons for the suspension of the Leader's warrant held by Mr Roger Bunckenburg, Scout Leader, Karori West Scout Group by Mr Bruce Johnston, District Commissioner, Wellington West Scout District on 23 June 1986.
>
> 2. To examine the principal reason given by the Commissioner for the suspension, that is the failure of Mr Bunckenburg to accept counsel from Mr Johnston on the conduct of his scouting activities within the district.
>
> 3. To examine the difficulties in communication between Mr Bunckenburg and the District Commissioner and his assistants, and in particular, the alleged dispute on personal issues between Mr Bunckenburg and Mr Johnston.""

As to 3 above, Mr Johnston in his affidavit in these proceedings denied any feelings of animosity towards Mr Bunckenburg or that the suspension was motivated by personal dislike or grievance. He acknowledged Mr Bunckenburg held feelings of animosity towards himself.

The result of the July 1986 enquiry at which several others gave evidence beside Mr Johnston was a recommendation made to the second defendant that Mr Bunckenburg's warrant be terminated. This letter of result to plaintiff was not sent until 2 October 1986 and therefore was not a timely notice within the rules. Plaintiff formally objected to the recommendation which resulted in a de novo hearing in circumstances now to be outlined.

April 1987 Enquiry

Before the hearing which commenced on 10 April 1987 a further document headed "Roger Bunckenburg Grounds for Suspension"

was served on him. He was at this stage represented by a solicitor who also received a copy of the notice. The headings for the grounds were as follows:

"(a) Failure/Refusal to take counsel or advice from District Commissioner

(b) Failure/Refusal to co-operate with Scouting Personnel

(c) Unfit by Reason of Unreasonable and Irrational Behaviour."

It should be mentioned each of the allegations stated above was supported by elaboration of the headings and particulars. Also the document gave several references to rule 47 under which authority the enquiry was being conducted. Again he was specifically informed by the document that it would be contended on behalf of the DCWWD that it would be desirable in the interests of the Scouting Movement that his appointment be terminated for the grounds advanced. Grounds (a) and (b) were largely what was alleged at the July 1986 hearing but (c) was in effect a specific investigation of Mr Bunckenburg's alleged conduct when the 1987 activity permit was refused.

The hearing took place on 10 and 11 April 1987 before the Appeals Committee of the second defendant. It consisted of 4 members, all of whom are senior officers of the Association. The Chairman was Mr B K Cunningham, who is a practising lawyer and partner in a Wellington firm. He is the Chairman of the second defendant's 3 standing committees known as the General Purposes Committee, of which the Appeals Committee is a sub-committee. It is appropriate to mention that Mr Cunningham in the affidavit he has filed in these proceedings, gave evidence of his concern at the conduct of the July 1986 enquiry and advised the General Purposes Committee the fairest course for all was to hold a re-hearing before an entirely new panel. He denied that there was any climate of prejudice at the National Headquarters, as alleged by

plaintiff, which body was not involved in the first hearing conducted at area level.

At the hearing the first defendant was represented by a solicitor, as was the plaintiff. A complete record of the proceedings was taken and produced for the purposes of these proceedings. The solicitor for the first defendant commenced the proceedings and called several witnesses in support of the allegations, as well as the first defendant himself. Plaintiff gave evidence and called witnesses on his behalf. Cross-examination of witnesses took place.

By letter dated 15 July 1987 the second defendant advised the plaintiff the essential result of the further enquiry in the following manner:

> "1. Failure to take counsel or advice from District Commissioner - not upheld.
>
> 2. Failure/refusal to co-operate with Scouting Personnel - upheld.
>
> 3. Unfit by reason of unreasonable and irrational behaviour - upheld."

As a result the warrant of plaintiff was terminated. Plaintiff has subsequently sought judicial review pursuant to the Judicature Amendment Act 1972.

Grounds Under First Cause of Action

The grounds have been set out earlier in this judgment. The allegation is that the first and second defendants were unfair and breached the rules of natural justice, and 12 particulars are detailed. More precise reference will be made to those particulars hereafter but first I make some general observations about the issues which form a background against which the Court reaches its decisions.

The Scouting Movement is worldwide and is now approaching a century of educative service mainly to boys. Its principal activities are mobilised around the aim of instituting physical, mental and spiritual development of young people so that they may take a constructive place in society. Those aims are sought to be achieved by provision outside formal educational institutions of gradual and controlled introduction to the vicissitudes of life in an enjoyable, interesting and pleasant environment. The movement has developed within New Zealand a considerable body of experienced and dedicated personnel, the largest proportion of whom are unpaid volunteers interested in scouting as a worthwhile community activity. Importantly, it has a hierarchical structure and by nature of its activities as an educational instrument, discipline at all levels by all participants in the movement is essential to achievement of the goals it has set itself. Discipline in the broadest and positive senses of that word is at the heart of this case.

It was the judgment of the DCWWD, an experienced and capable officer in the movement carrying a good deal of responsibility in the fulfilment of his tasks, that the conduct of plaintiff required him to act and suspend him. A Court examining conduct on judicial review concerned with decision making and procedure keeps a steady gaze upon the duties and obligations resting upon senior personnel whose conduct by these proceedings is under examination. The control of young persons' activities, which to obtain the benefit of the aims of the movement must be allowed to take place within an environment that is balanced between freedom of choice and control, is a demanding task. To take an example from the facts of this case to illustrate the point, I refer briefly to the question of organisation of trips away for groups of young persons. The central aims of such trips include adventure, some risktaking to achieve self esteem, independence and reliability, exposure to new and exciting experiences in necessarily loosely structured environments.

It is an extremely responsible task for which parents and society generally expect those who undertake to provide those activities will do so with proper regard to their obligations and duties.

Mr Johnston by his conduct accepted the full responsibility entailed in granting permission for the South Island trips. In 1985 he clearly was hesitant, acting not only on his own appreciation of the situation but with complaints about previous years' conduct. He took advice and did not act arbitrarily. He was concerned in 1985 principally with safety, broadly defined, and fairness of selection for the trip. He also had some reservations about financing of the trips and whether the activities undertaken were too heavily weighted to holiday type activity to the detriment of the more sober aims of scouting. Notwithstanding the foregoing, he exercised his judgment, quite clearly with reluctance, and signed the permit.

By 1986 and no doubt after a year's reflection and possibly further information, he stood firm on his central ground that one adult leader should not alone control a group of 10 boys on such a trip. Without dwelling at unnecessary length, that caused plaintiff extreme frustration and to exhibit behaviour which caused Mr Johnston grave concern. He then acted to suspend knowing that decision could and would be challenged, and that he would have to justify his decision before an independent tribunal of experienced persons in the Scout movement.

Following that suspension there were 2 enquiries, one conducted at area level in July 1986 and one rehearing in the full sense of that word before a National Headquarters panel of 4 in April 1987. It is to be noted that there is no specific complaint that the 10 and 11 April hearing itself was unfair or breached the rules of natural justice in the way it was conducted over the 2 days. The attack upon its finding is more concerned with other issues. The enquiries

at area and national level came to the same conclusion that plaintiff was unfit to hold a warrant as a Scout Leader.

The final point I wish to make in these general observations is that there were 2 hearings into basically the same conduct and allegations arising out of Mr Johnston's 1986 suspension notice. When there are 2 separate hearings on the one set of issues there are bound to be significant differences at practically every level of those proceedings. The task at law is not just to identify the differences but to show that those differences contributed materially to the allegation that the plaintiff had been treated unfairly and denied natural justice at the hands of the 2 named defendants.

I turn to the particulars. The first 3 particulars are concerned with the July 1986 enquiry and allege unfairness ((i) and (ii)) and failure to obey rule 47(f)(iii) which constitutes (iii). Particulars (iv) and (v) are allegations of delay between the hearings and late notice, respectively. Particulars (vi) (viii) and (x) are concerned with new material being brought forward for the April 1987 hearing. Particular (vii) is an allegation of malice. Particular (ix) is an allegation largely of fact which will be dealt with. Particular (xi) is about delay and (xii) about failure to give reasons which is the second cause of action as well.

Grounds Under the Second Cause of Action

The grounds and allegations of no reasonable basis for the objected acts of suspension and termination have been set out above.

Plaintiff's Case

The argument in these proceedings of counsel for the plaintiff did not follow strictly the particulars of paragraphs 15 and 18 of the statement of claim but instead approached the case as having 2 limbs which are reflected in the pleadings. The

first limb argued that the steps taken by the first and second defendants from the time of the plaintiff's suspension were procedurally defective both in terms of the second defendant's own rules and in terms of the rules of natural justice. The second limb (which is the second cause of action referred to above) alleges that there was no credible basis for the decisions first to suspend the plaintiff and second to terminate his warrant and that no reason for findings was given. Mr Burston for the second defendant accepted the first defendant's decision to suspend and that of the National Executive to terminate are subject to Court's powers to review under the Judicature Amendment Act 1972. Furthermore he accepted rules of natural justice apply to rule 47 of POR.

I deal with the first cause. It is clear, as I have already forecast, when there is a suspension followed by not 1 but 2 major enquiries into the conduct which brought about the suspension, there is bound to be much material for debate, discussion, argument and fierce confrontation on some of the issues. There were, so to speak, enquiries conducted at 3 stages into human conduct or behaviour, and it necessarily involves conduct and behaviour on both sides of the enquiry once it has begun. There was unquestionably a central figure in the enquiries and that was the plaintiff. He and the DCWWD had clashed in May/June 1986 over field trips for Scouts that had first arisen a year before. The conflict was halted by the superior officer in a hierarchical command structure suspending the junior officer. The issue then for the 2 subsequent enquiries and now for this Court is whether that act was correct. There is, however, a fundamental difference between this Court's function in the overall dispute and that of the acts of suspension and termination which occurred within the second defendant's organisation. This Court is one of review of decisions to ensure that they were arrived at fairly and in accordance with now widely established and understood legal principles. This Court is not in the strictest sense concerned with the merits of the decisions, or in an absolute way the correctness of the

decisions, so long as they were arrived at fairly as that word is understood in this department of the law. This is not an appeal by way of rehearing.

It would stagger the belief of any adult person if there were not valid criticisms to be made of all participants' conduct to a greater or lesser degree when a disagreement of the proportion outlined already in this judgment occurs. In the mildest of human disagreements people do not always act with cold reason and commonsense. Wrist watches operate predictably and repetitively but human beings do not. The task of the Court is to decide what faults of conduct by defendants are discussion or debating points, and what faults are of substance which could well have brought about unfairness in treatment for the plaintiff entitling legal redress.

Mr Broadmore presented a very detailed argument in his analysis of the conduct under scrutiny. He incorporated in his argument the submissions made to the April 1987 enquiry which were before the Court. Not all arguments and factual matters can be dealt with in this judgment. The main issues must be concentrated upon.

Of central importance in this case was the decision of first defendant to suspend plaintiff in June 1986. It was that act that was and still is the heart of this case. If one could distil the quintessential complaint of plaintiff it is that first defendant should not have suspended when there was a confrontation between them but if he remained convinced of the correctness of his viewpoint simply refused to sign the permit. That was all that was required of him, is the plaintiff's case. I mention here that no witness was called to give evidence or to be cross-examined before me as all parties were content to proceed on the papers. I think there is justification for Mr Broadmore's submission that a parallel can be drawn in this case with the cases on unjustified

dismissal. See Goulden v Marlborough Harbour Board [1985] 2 NZLR 378. A significant difference is that plaintiff's livelihood is not at stake. In his argument Mr Broadmore stated plainly the plaintiff seeks a review of the decision of the first defendant to suspend the plaintiff, arguing that the suspension was unjustified. I think there was substance in Miss Hubbard's argument that the request for review of the first defendant's suspension action was hardly supported by the pleadings. As I understood her argument she did not dispute jurisdiction but said it could only come under particular (i) if at all. I have accepted there is jurisdiction and that it was just sufficiently raised by that pleading so as to go to the merits.

The dispute between Mr Bunckenburg and Mr Johnston began in 1985 and ended a year later. Not a master/servant relationship but more correctly described as a senior/junior officer relationship in a command structure. The question is, did Mr Johnston as senior officer behave within the circumstances as they presented themselves to him unfairly or unreasonably? Was he precipitate, capricious, unfair, overdemanding and unreasonably exploiting his superior position so as to cause Mr Bunckenburg to break down and thereby provide grounds for suspension? I have looked critically at the evidence and bear in mind the quintessence of plaintiff's case referred to above. I call down here the responsibilities resting upon Mr Johnston's shoulders of which I have spoken earlier in this judgment. I do not think it wrong that he should insist on a ratio of about 1:6 adults to boys for potentially hazardous field trips. Hazards are a necessary part of the prescription of the scouting movement for development of certain skills but correlatively there must be exercised great care and caution. In his evidence Mr Johnston gave his reasons for his admittedly arbitrary numbers but those reasons appeal as commonsense. The response of Mr Bunckenburg to his commanding officer's arguments was inappropriate and irrational. I accept in each year the

dispute occurred Mr Johnston did not seek to achieve his ends by simple command without explanation but sought to reach accord by the strength of his arguments on the merits. He gave in in 1985 I suspect mainly because his predecessor had always given permission and he did not wish himself to appear some sort of ogre. In 1986 he would not yield. I add here there were other points which concerned him being selection of boys from the scout district and financial arrangements, including Mr Bunckenburg's refusal to disclose source of funds. Finally it is to be emphasised that Mr Johnston had no powers of termination but only of suspension for which the rules provided an automatic form of review. I conclude therefore the suspension on the evidence before Mr Johnston was justified. I also find there is no evidence to support the allegation in particular (vii) that there was malice on Mr Johnston's part.

I wish to spend little time on the July 1986 hearing as it was acknowledged in effect by the second defendant that it did not meet acceptable standards. In particular I think the 7 July letter for a hearing commencing on 10 July was too short a time to be informed of the precise allegations which caused his suspension. However, the details of the allegation against his conduct seemed to conform with what Mr Bunckenburg might have expected arising out of his dispute with Mr Johnston which had then so recently occurred. I do not overlook that the rules in regard to his suspension were not adhered to and he remained in that status until the April 1987 hearings and later. I might also add here that the length of time between advice of result of the July hearing and its subsequent abandonment in favour of a new hearing and it taking place in April 1987 was not unreasonable delay. I accept Mr Cunningham's reasons for the time lapse.

I come to the April 1987 hearing and repeat that the actual conduct of the hearing was not of itself as a judicial exercise questioned. Again the details of the complaint were

not given to him until late but he knew of them in substance and had known for a long time. He was represented by counsel (Mr Broadmore at that hearing) and he accepted the fixture. He could not fairly complain of surprise and disadvantage in preparation. Within the hearing he was given every facility to answer the accusations and to present his own case.

It would seem the main complaint concerned with the April 1987 hearing was what might be called admissibility of material. There is in this Court a complaint that the second defendant received evidence that was not considered by the first defendant at the time of suspension. This complaint is contained basically in particulars (vi), (viii) and (x). To my mind this allegation, which was a central part of plaintiff's case on unfairness, confuses 2 distinct occurrences. The first defendant suspended Mr Bunckenburg as an executive act, not as the result of any kind of hearing as lawyers understand that term. Mr Johnston relied upon his judgment on the material before him to suspend Mr Bunckenburg knowing that a full enquiry into its legitimacy would follow and it did. For myself I do not believe as a matter of fairness or natural justice the enquiry that follows suspension should be somehow absolutely restricted in an evidential sense to material actually before Mr Johnston or to precise knowledge within Mr Johnston's contemplation, at the act of suspension. In ordinary Court proceedings, relevant and admissible evidence may come to any party's knowledge after the event that gave rise to a cause of action and be used by such party. The test is, the "new material" must be relevant to the central issues of the enquiry and it is not inadmissible because it might not have been in the contemplation of one of the actors in the events at a given time. The enquiry is the judicial consideration of the act of suspension and is not to be blinkered by strict rules of what may and may not be considered. If some evidence or material is considered and ought not to have been then that is dealt with as unfair.

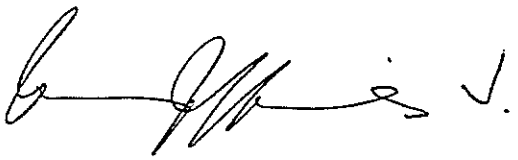
Particular (ix) seems to suggest that because the decision following the April 1987 hearing was not to uphold the allegation that plaintiff failed to take counsel or advice from the District Commissioner which was a central issue at the July 1986 hearing, then somehow there is unfairness. I fail to grasp why that should be advanced as a particular of unfairness. The July 1986 hearing was found not to be satisfactory and plaintiff cannot now use a finding at a later and completely new hearing to suggest some sort of inconsistency with a hearing that has effectively been put to one side without further effect.

Particular (xi) complains of delay in the publication to him of the decision following the April 1987 hearing. I do not think there is substance to this allegation of unfairness.

I turn now to the second limb which embraces particular (xii) of the first cause and the second cause of action. It is basically that the evidence before the April 1987 hearing was insufficient to support the decision to terminate. In my view this ground strays from review to appeal. It is really an attack on the way the Appeals Committee assessed the evidence. Some of the argument in support of this ground challenged the weight the Committee gave to certain evidence and even to the credibility of some witnesses. Those are matters for the Appeals Committee so long as it was acting with procedural fairness and the Court finds that it was.

There is an independent point beside sufficiency of evidence and it is that the Committee did not give a formal decision but advised a result. Rule 47(g) specifically states the National Executive Committee (which body makes the actual termination) is not under an obligation to state reasons. In a situation such as this the common law imposes no duty to state reasons for a decision. See Potter v New Zealand Milk Board [1983] NZLR 621.

The plaintiff's application for review fails and is dismissed. I was informed by Miss Hubbard that her client is not legally aided. I think he is entitled to an order for costs which I fix at $2000 plus disbursements. In the circumstances I make no order for costs in favour of the second defendant.



Solicitor for plaintiff: D Broadmore, Wellington

Solicitor for First Defendant: Kensington Swan, Wellington

Solicitor for Second Defendant: Luke Cunningham Clere, Wellington