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BETWEEN : **SGT SAIMONE FIFITA** - **Appellant**

AND : **THE POLICE BOARD** - **Respondent**

M. Kaufusi for the Appellant

S. Sisifa for the Respondent

J U D G M E N T

[1] This is, so far as I am aware, the first appeal to the Supreme Court from a decision of the Police Board following the commencement of the Tonga Police Act 35 of 2010. It may therefore be helpful to set out the relevant provisions of the Act.

[2] Section 32 of the Act establishes a Police Employment Committee and subsections (2)(a) to (f) define its functions. Subsection 2(b) is the power to promote members of the Police Service.

[3] Section 33 provides that the members of the Committee shall be the Commissioner of Police and two police officers appointed by the Minister following recommendation by the Senior Executive Committee.

[4] Section 35 establishes a Police Board. This consists of a Chairman, nominated and appointed by the Chief Justice, a senior legal

practitioner and a Privy Councillor. Section 38 sets out the procedures to be followed by the Board. Section 38(2) is plainly a drafting error and may be disregarded. Section 38(4) should however be noted: it requires the Board to keep records of its meetings. Section 40 requires the Tonga Police to "provide the secretarial services to the Police Board to enable the Board to carry out its functions in an efficient and effective manner."

[5] Section 82, which provides for reviews of decisions of the Employment Committee by the Board is as follows:

"82 Reviewable decisions

- 1) Subject to subsection (2), this Division applies if:
 - a) the Police Employment Committee makes a decision about a person's:
 - i) appointment, probation, promotion or transfer under Division 3; or
 - ii) breach of discipline under Division 4; and
 - b) the person is dissatisfied with the decision.
- 2) (not applicable)."

[6] The first occasion on which the Board was convened to hear an application for the review of a decision of the Employment Committee seems to have been in March 2011 when the Appellant herein filed a request as provided by section 83. Unfortunately, no record of the meeting or of the second meeting held in May 2012 has been located. It seems that secretarial services were not supplied by the Police as required by section 40. In these circumstances the parties and the

Court have had to rely on submissions made by the Appellant to the Board, the judgment of the Board dated 10 May 2012 and a notice of appeal to this Court filed on 22 May 2012.

[7] On about 9 March 2011 the Employment Committee decided to promote Lance Corporal Fifita to the position of Inspector, Training Services. The Appellant and two other applicants were unsuccessful.

[8] The Employment Committee acted on the recommendations of an interview panel which was the body which actually interviewed the candidates. According to the Board's judgment, background papers were provided to the Board which reveal the criteria used by the interview panel and the scores achieved by the candidates. Again, according to the judgment, all three members of the interview panel agreed that L-Cpl. Fifita was the preferred candidate. This recommendation was forwarded to the Employment Committee "which endorsed and made the decision on 2 March 2011 to appoint L-Cpl. Fifita to the vacant position with effect from 8 March 2011."

[9] The Board's decision was to affirm the decision of the Employment Committee and it is against that decision that the Appellant now appeals.

[10] Appeals to the Supreme Court from the Board's decision are governed by section 85(3) of the Act which provides that:

"the person may appeal the Board's decision within 14 days after it has been notified to the Supreme Court of Tonga but only on a ground of law or for a breach of the rules of natural

justice; but otherwise a decision of the Board is final and not subject to appeal or review by any Court of Law.”

[11] Mr. Kaufusi filed five grounds of appeal on 22 May 2012. Summarized they are as follows:

- “1) the Board erred in holding that Section 82 of the Act did not accord the complainant, the Appellant herein, locus standi to request the Board to review the Employment Committee’s decision;
- 2) the Board erred in not finding that the Appellant was the more meritorious candidate in terms of section 31 of the Act;
- 3) the Board erred in not accepting that there is no provision in the Act for the appointment of an interview panel and the Employment Committee had no power to delegate its duties to such a panel;
- 4) the Board erred in not accepting the relevance of section 20;
- 5) the Board erred in not accepting that the Commissioner’s failure to publish and make available promotion standards as required by Section 29 rendered promotions made in the absence of such standards unlawful.

[12] Mr. Sisifa did not attempt to uphold the Board’s Interpretation of Section 83 and I agree. In my view, a person whose application for appointment is unsuccessful is “a person” (Section 82(1)(a)) in respect of whom the Employment Committee has made a decision about his appointment and accordingly he becomes “the person” (one, possibly,

of several) who is entitled to seek review of the decision which went against him. The interpretation adopted by the Board would only permit successful candidates to seek a review of the Committee's decision and I fail to see what the purpose and utility of such an unfair provision would be. Mr. Kaufusi's first ground of appeal is successful.

[13] The second ground of appeal, which is concerned with the respective merits of L-Cpl. Fifita and the Appellant, has to be considered in the light of the limitations imposed by section 85(3). Section 31 of the Act stipulates that promotion shall be "based on merit." According to the Board's judgment, both the Employment Committee and the Board were aware of this requirement and the Board described how the Committee approached the evaluation of the competing candidates' merits: it adopted certain criteria and then applied those to each of the candidates. After following those procedures, the result was a unanimous decision to recommend the Lance Corporal.

[14] Mr. Kaufusi suggested that the Appellant was more senior than the L-Cpl, that he had been the officer-in-charge of the Training Unit for 10 months and that the promotion of the L-Cpl created dissatisfaction among other officers superceded. Mr. Kaufusi was allowed to raise all these matters before the Board but the Board found no reason to question the procedures adopted by the interviewing panel or the Employment Committee and did not find that the conclusions reached were wholly unreasonable or not open to the Committee. The fact that the Appellant is of the view that his application was more meritorious than that of the Lance Corporal does not of itself indicate that the Employment Committee erred.

[15] In my view this ground of appeal does not raise a question of law and neither is any procedural defect revealed. This ground of appeal fails.

[16] The third ground of appeal raises the question of the extent to which the discretionary power of a statutory authority can be delegated and the simple answer to that question is, not at all. It is only the authority upon which the power has been conferred that can exercise that power. But this rule does not prevent the empowered authority from employing agents to assist in the performance of its duties; in, for example, gathering information on its behalf (see *Horder v Scott* (1880) 5 QBD 552). What is prohibited is the *exercise* of the power by an agent on behalf of the authority (see eg. *Allingham v Minister of Agriculture & Fisheries* [1948] 1 All ER 780). As explained in *Administrative Law, Wade & Forsyth 7th Edition p 350*:

“Convenience and necessity often demand that a public authority should work through committees, executive officers and other such agencies. The law makes little difficulty over this provided that the subordinate agencies merely recommend, leaving the legal act of decision to the body specifically empowered.”

[17] It is clear from the Board’s judgment that the interviewing panel did not do more than assess the candidates and then make recommendations to the Employment Committee. The Committee accepted some of these recommendations and rejected others; this was not merely a “rubber stamp” process. In my view there was no legal objection to the Employment Committee proceeding in the way it did. This ground of appeals fails.

[18] The remaining two grounds maybe taken shortly. Mr. Kaufusi next suggested that section 20 of the Act requires the Commissioner to ensure that promotion is effected rank by rank and without "leapfrogging". As I understood Mr. Kaufusi, he suggested for example, that a Sergeant should not be promoted to the rank of Inspector without first being promoted to the rank immediately above him namely Cadet Officer. I can find no support for this suggestion in the provisions of the Act. The promotions of officers involving "leapfrogging" intervening ranks will sometimes be justified: the fact that those who have been by-passed are sometimes unhappy is merely one factor that a wise Employment Committee will take into account. This ground fails.

[19] The final ground of appeal is, in my respectful view, based on a misreading of Part 3 Division 1 of the Act. Sections 28 & 29 provide that the Commissioner *may* determine employment and promotion standards. If determined, they must be published. Sections 30 & 31 are, in contrast, mandatory. In my opinion, the fact that the Commissioner has not yet determined any promotion standards does not affect the validity of promotions made since the commencement of the Act.

RESULT

Ground 1 of the grounds of appeal is successful but grounds 2 to 5 fail. The appeal fails and is dismissed.

DATED: 8 February 2013



CHIEF JUSTICE