SC1939

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCM NO. 28 OF 2016

JACK KARIKO
First Appellant

POLI IFINA
Second Appellant

MEKEO GAULI
Third Appellant

NJSS APPEAL TRIBUNAL
Fourth Appellant

THE INDEPENDENT STATE OF PNG
Fifth Appellant

V

TOM KORUA
Respondent

Waigani: Kirriwom, Batari & Toliken JJ

2017: 28th June

2020:29th April

***APPEAL** – Judicial Review Application –termination of employment – grounds for judicial review - grant of application –review of - appeal grounds – whether in compliance with proper grounds of appeal – decision making process – whether in compliance with right to remain silent – caution against self-incrimination – lack of – whether in breach of Constitution s. 37 – reasons for decision – lack of – means no reasons for decision – Appeal dismissed.*

Facts

The respondent who was employed as security supervisor of National Court in Goroka was charged with committing a serious disciplinary offence of soliciting bribes from subordinate workers to help expedite payment of their outstanding claims and termination benefits. There was evidence of pay officer in the salary section being paid and accepting bribes from former workers to fast-track processing their claims. The respondent was found guilty and recommended for dismissal to the Judicial Council while the pay officer who was alleged to be the instigator and who allegedly received bribes remained employed. Respondent appealed the Secretary's decision to the Appeal Tribunal. The Tribunal dismissed his appeal and recommended dismissal to the Council. Council upheld the recommendation of the Tribunal and confirmed the Secretary's decision.

The respondent sought judicial review of the Secretary's decision. At the judicial review hearing, where the respondent was for the first time being represented by legal aid, the court directed that all three decision-makers, namely, the Secretary, the Appeal Tribunal and the Judicial Council be included as parties by appropriate amendment to the pleadings and be served all documents. Pleadings were amended, except for the Fifth appellant who was represented, First, Second, Third and Fourth Appellants caused no appearance nor were they separately represented and matter proceeded to hearing.

The review was grounded on denial of natural justice and excessiveness of penalty of termination of the respondent who was a whistle-blower while the instigator of the bribery scam in the pay section remain employed being unreasonable according to *Wednesbury* principle.

Trial judge upheld the review and ordered reinstatement of the respondent.

The appellants appealed arguing, inter alia, that the trial judge erred in law and in facts in arriving at his decision when questioning the decision of the inferior tribunal instead of the process.

Issue

1. Whether the trial judge erred in law and or in fact when he reached his decision?
2. Did the appellants discharge the onus of showing that the trial judge had fallen into error?

***Held*:**

1. Trial judge did not fall into any error and neither did the appellants demonstrate any appealable error on the part of the trial judge, as such the appeal is dismissed.

2. Failure by the respondent to serve documents following amendment to the pleadings

upon the First, Second, Third and Fourth Appellants as ordered by the judge in the lower court was a serious breach of procedural justice and fairness and tantamount to denial of fair trial, but no issue was taken of it on appeal to this Court, as such no miscarriage of justice resulted therefrom.

3. Failure by the Judicial Council to give reason or reasons for its decision confirming the Secretary's decision to terminate the respondent amounted to error of law and denial of natural justice.

   Applied and followed Mission Asiki v Manasupe Zurenuoc & The State [2005] SC 797

4. There is no procedural fairness where the process under the Administrative Orders (O. 10.33) was not complied with when charging the respondent with serious disciplinary offence before the matter came to the Secretary.

5. The right to silence and right against self-incrimination is a fundamental process in our justice system that extends to disciplinary matters of criminal nature.

   Adopted and applied SCR No. 2 of 1990; re s.333 Income Tax Act 1959 (Amended) [1991] PNGLR 211

6. Failure by the Secretary and the Appeal Tribunal to appreciate the total effect of the statements from the five former security officers and the respondent, all pointing to Allan Tukar as the person who took the bribes, when recommending termination of the respondent to the Judicial Council amounted to unreasonable decision in the *Wednesbury* sense.

   Applied Associated Provincial Picture Houses Ltd v Wednesbury Corporation Ltd [1948] 1 KB 223.

7. The right of a person accused and charged with committing a serious disciplinary offence of criminal nature to be fully informed of the allegations against him is premised on the right to be heard (*Constitution* s.59) and the right to remain silent (*Constitution* s.37(10) and (4)(a)) and cross-examination of his accusers is an integral part of that process.

   Considered Kevi v Teaching Services Commission [1997] N1535.

8. The NJSS Act gives discretionary power to confirm, annul or vary the Secretary's decision to both the Appeal Tribunal (s.19 (2)) and the Judicial Council (s.19(5)).

Cases Cited:
Papua New Guinea Cases

Air Niugini Ltd v. Beverley Doiwa [2000] PNGLR 347
Chief Collector of Taxes v. Bougainville Copper Limited (2007) SC853
Fly River Provincial Government v. Pioneer Health Services Ltd (2003) SC705
Godfrey Niggints v Henry Tokam & 2 Ors [1993] PNGLR 66
Hari John Akipe v Rendle Rimua (2018) N7381
Henry Kwan v Collin Bining (2014) N5836
Jimmy Lama v NDB Investments Ltd (2015) SC 1423
Kekedo v Burns Philip [1988-89] PNGLR 122
Kevi v Teaching Services Commissions (1997) N1535
Mission Asiki v Manasupe Zurenuoc & The State (2005) SC 797
Public Curator v Kibi Kara (2014) SC 1420
Riddler Kimave v Poevare Tore (2013) SC 1303
Sir Arnold Amet v Peter Charles Yama [2010] PNGLR Vol. 2, 87
The State v Joseph Fron (2011) N4552

Overseas Cases

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Counsel

Mr M. Kipa, for the Appellants
Mr B. Geita, for the Respondent

DECISION

29th April, 2020

1. **BY THE COURT**: This appeal by way of Notice of Motion is against a decision of the National Court at Goroka where the Court granted the respondent his application for judicial review with consequential reliefs.

Background

2. The respondent, Tom Korua was employed by National Judicial Staff Services (NJSS) from 2007 as Security Supervisor based at Goroka. In 2014, he allegedly solicited and/or received bribes from former security officers on several occasions so that their entitlement claims could be fast-tracked. On

6/1/2015 NJSS Secretary Jack Kariko charged Tom with a serious disciplinary offence under s. 14(h) of the *National Judicial Staff Services Act* 1987(the *Act*).The respondent conceded either receiving from or directing former security officers to give or make cash deposits into personal accounts of pay-roll officers based in Waigani. He denied receiving any personal benefits. Based on witness statements, the Secretary considered the charges proven and recommended the penalty of dismissal to the Judicial Council (Council).

3. The respondent appealed the Secretary's decision to the NJSS Appeals Tribunal (Tribunal). On 13/11/2015 the Tribunal dismissed the appeal and confirmed the Secretary's decision. By letter dated 24/6/2016, the Secretary informed Tom Korua, the Council had confirmed the decision of the Tribunal. The respondent then sought a judicial review of the decisions of the Secretary, the Tribunal and the Council in the court below on the grounds of:

a) Ultra vires: Breach or abuse of procedure or process in that the decision of the Secretary was ultra vires the provisions of *Orders 10.28* and *10.39* of the *NJSS Administrative Orders*.

b) The Secretary and legal officer breached natural justice when they did not follow the procedure or process for charging an officer under *Orders 10.28, 10.29* and *10. 39* of the *NJSS Administrative Orders*.

4. Upon review, the first ground was dismissed. The primary judge decided the remaining ground in favour of the respondent and quashed the termination decision. The court also ordered immediate reinstatement of the respondent to his position in the NJSS. On 19/10/2016 the appellants filed this appeal.

Grounds of Appeal

5. The appeal grounds drafted in long and unwieldy fashion are numerous. These may be condensed into six grounds and fairly rephrased as follows:

a) **Grounds 1& 2**: The primary judge exceeded settled principles governing judicial reviews when his Honour strayed into making findings of facts and further erred when he found against the weight of the evidence that the respondent only assisted his subordinates

and did not receive bribe monies.

b) **Ground 3, 4 & 9**: The primary judge misapplied the Wednesbury principles when he failed to consider the respondent's case on its own facts and instead, considered extraneous matters to conclude there was disparity of penalty between the decision to dismiss Tom and *"no punishment"* against Allan Tukar who had denied receiving bribes and was not before the court.

c) **Ground 5**: The primary judge erred when he commented, the Tribunal's finding on soliciting will not be the subject of the review but then made contradictory finding that Allan Tukar took the bribes.

d) **Ground 6 & 7:** The primary court erred in holding Tom was not given a fair hearing before the Tribunal as he did not have the opportunity to cross-examine the witnesses as part of natural justice and wrongly applied the principles in,*Kevi v Teaching Services Commission* (1987) N1535, to the facts of this case.

e) **Ground 8**: The primary judge considered irrelevant matters when he held, the report was tainted when it reached the Secretary as Tom was not informed of his right to remain silent under s. 37 of the *Constitution*.

f) **Ground 10:** The primary judge misread and misapplied the discretionary powers of the Tribunal under s. 19(2) of the *NJSS Act* as if to say it is mandatory on the Tribunal to vary or amend the Secretary's decision.

Relevant matters against the merits of this appeal.

6. We make these further observations at the outset to demonstrate other pertinent shortcomings of the grounds of the appeal and the futility of this case.

7. On pages 95 to 99 of the Appeal Book, the primary court granted the respondent (plaintiff then), his application to amend the application for review to include determinations at the three levels of the process and the utility of the tribunal decision. The court then ordered, the amended pleadings with all supporting documents be served on the Judicial Council and further that Council to be separately represented at the hearing of the review application.

8. We also note, the Appeal Book included fresh evidence and submissions on matters not pleaded in the original Order 16 Statement. This possibly resulted

from the amendment to the originating process.

9. The Appeal Book does not include proof of service of the amended application for judicial review. Indeed, the plaintiff's lawyer conceded not having effected service of the amendments on the State and the Judicial Council as ordered. The trial judge having initially raised that issue then considered service on the Solicitor General lawyer on ground, sufficient compliance.

10. With respect, service of the amendments with fresh supporting documents on the agent lawyer cannot amount to adequate service because of the specific orders of the primary court.

11. In essence, the orders for specific service underpinned the right of the parties to be heard. There were relevant matters raised that would have been peculiarly within the information, knowledge and possession of the NJSS parties which counsel representing the State may have not been or fully briefed on. Indeed, in making the orders for separate representation for the Judicial Council, the trial judge had no doubt acknowledged the fresh matters the Council ought to be properly heard on. Furthermore, O. 8 r. 58 of the *National Court Rules*, provides in mandatory terms, that the party making the amendment must serve the parties on whom the original document was served, on the same day of the amendment. The plaintiff failed to comply with these requirements.

12. Ordinarily, the hearings following no or inadequate service will be considered highly irregular. The lack of service will invariably result in denial of natural justice as the opposing party would not have had the opportunity to be properly informed of what to defend.

13. In this case, the lack of service of the amended documents on the NJSS appellants were critical against the respondent (plaintiff then). Those procedural irregularities can lead to substantial miscarriage of justice.

14. The appellants did not raise the issue of competencyof the primary court review proceedings on the grounds of lack of service of the amended pleadings in this appeal. Furthermore, accepting that the issues we have averted to were not raised in the primary court, the appellants missed the opportunity to seek leave of

the court and show exceptional reasons why they should be heard on the fresh matters without first raising the issue in the Court below. See *Fly River Provincial Government v. Pioneer Health Services Ltd* (2003) SC705*; Chief Collector of Taxes v. Bougainville Copper Limited* (2007) SC853; *Sir Arnold Amet v Peter Charles Yama* [2010] PNGLR Vol. 2, 87.

15. By conduct, the appellants plainly missed the plot in this case. The lacklustre attitude towards the seriousness of an appeal by a dismissed employee is apparent on the lack of proper representation of the NJSS management and the Judicial Council at the judicial review hearings. Then in this appeal, from the face of the records, the appellants failed to see the serious implications of lack of service we averted to earlier. They also failed to see the serious implications of orders for compliance by the Judicial Council and separate representation of the Council as ordered by the primary court. The in-house lawyers clearly failed to see the significance of protecting the interests of the Court Administration. The end result is the costly exercise in this appeal that is mounted on superficial knit-pickings of issues that lapse into insignificance as we will demonstrate.

16. Crucial procedural aspects of the judicial review proceedings in the court below are clearly lost to the appellants either by design, ignorance or they were simply unaware of.

17. The first was/is the apparent absence of the reasons for decision by the Judicial Council in upholding the decision of the Tribunal. The law is settled, that public authorities and officials vested with the power to make decisions which affect substantial rights, interests and welfare of other officers and their families are accountable to the public to give reasons for their decisions. The requirement to give reasons is also essential for good management and common-sense principles of fairness: *Godfrey Niggints v Henry Tokam & 2 Ors* [1993] PNGLR 66 (Amet CJ).

18. Where no reason is given, the inescapable conclusion is, that the decision lacked any good reason.This Court has also stated, the failure to give reasons is an error of law and a denial of natural justice: *Mission Asiki v Manasupe Zurenuoc & The State* (2005) SC 797 (Jalina J, Cannings, Manuhu JJ).

19. In *Sir Arnold Amet v Peter Charles Yama*[2010]PNGLR Vol. 2, 87 the

Supreme Court (per Salika DCJ (then), Batari J)stated at pp. 94-95:

> *"The duty to give reasons is a necessary part of the duty of a public official to accord natural justice to persons affected by the decisions of those public officials. That duty is essential to the observance of the rules of natural justice as held in, Ombudsman Commission v Peter Yama (2004) SC 747 (Injia DCJ, Sakora, Sawong JJ)."*

20. In this case, the primary judge correctly noted a pertinently important defect in the appeal process at page 223 of the Appeal Book namely, the absence of the Judicial Council's decision. The plaintiff was merely informed of the purported decision of the Council by a letter from the NJSS Secretary.

21. It is plain then that the Council had no reason for confirming the decision of the Tribunal. Therefore, the NJSS Secretary's letter of 24 June 2016 to the respondent was legally flawed and a breached of procedural fairness.

22. The second significant procedural defect was the breach of NJSS Admin Order 10.33 which requires a Manager, where a serious offence has been committed, to consider the seriousness and nature of the offence before referring the matter to the Secretary in writing. The requirement is in mandatory terms. There is no evidence of that process being followed in charging Tom Korua. At page 223 of the Appeal Book, the primary judge concluded, this procedural breach effectively made the disciplinary charge, legally flawed.

23. The trial judge also correctly found the matter was tainted when it came to the Secretary. The substance was of a criminal nature. Under Admin Order 10.35, the Secretary had the discretion to refer the matter to police for criminal prosecution. And before him for determination, the Secretary had a self-incriminating statement obtained from the respondent without a caution in direct breach of the right to remain silent. The self-incriminating statement was likely to end up in criminal prosecutions. His Honour correctly noted, the procedure to warn a person is fundamental in our system of justice.

24. In *The State v Joseph Fron* (2011) N4552 Batari, J echoed that sentiment

against self-incrimination as follows:

> *"10. I pause here to deal with an important procedural issue of witness self-incrimination that arose during the trial. Judas Kone gave self-incriminating testimony as an accomplice. Despite caution, he continued unheeded to thoroughly implicate himself. The risk of self-incrimination for him is real and appreciable. In practice, the judge or counsel usually warns a witness who is about to enter the danger zone if the incriminating tendency is apparent: R v. Gray [1965] Qd R 373; R v Turner [1966] QWN 44. Here the witness stands to be charged with the same offences of conspiracy and arson on his admissions.*
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> *11. Privilege against self-incrimination is akin to the right to silence. For that reason and for his own protection against self–incrimination under s 37 of the Constitution, he was cautioned by the Court. On this point, it is instructive to heed and follow what the Supreme Court in, SCR No 2 of 1990; Re s333 Income Tax Act 1959 (Amended) [1991] PNGLR 211 (Kidu CJ, Kapi DCJ, Amet J, Hinchliffe J, Salika J), stated:*
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> > *'Another fundamental right in the criminal process, either prior to being charged, after being charged or at the time of trial is the right to silence and right against self-incrimination, which are embodied in s 37 (10), and reinforced by s 37 (4) (a). A procedure which compels or obliges an accused person to file a "defence" prior to the trial in court or to give "further and better particulars of the defence" or to give "discovery" or to "answer interrogatories" is in contravention of the right to silence and right against self- incrimination. Such procedural requirements relate to civil suits and are foreign to a criminal prosecution.'"*
> >
> > *(Underlying added).*

25. The trial judge there had to caution a witness who was about to give self-incriminating evidence. To that point, the witness had not been charged with any offence. The warning was necessary to inform him of his right to silence and his right against self-incrimination.

26. The right to silence and the right against self-incrimination involves a process whereby, a person being interviewed or requested to make a statement concerning a matter of a criminal nature, must be cautioned at the outset against making self-incriminating statements irrespective of whether the person will be charged or not. That fundament process in our system of justice extends to disciplinary matters of criminal nature. The person being interviewed or from whom information is solicited for the purpose of laying disciplinary charges of a criminal matter are entitled to be warned against self-incrimination at the outset.

27. In this case, the statement solicited from the respondent concerned fraud and soliciting bribes from NJSS security officers so that their claims could be fast-tracked by paymasters at Waigani finance office. He was not warned that his responses might be used against him. The security men were also not cautioned. The actions of the first and second appellants were in serious breach of the right to silence. Hence, the statements used by the Secretaryagainst the respondent were substantially tainted, as the trial judge held.

28. The primary judge also made a pertinent point, that the appeal process being mounted upon the materials given to the Tribunal and the Tribunal's written decision means that if the Tribunal's decision is flawed, then the Council's decision is similarly flawed. His Honour then pointed to several procedural deficiencies, (two which we have covered), the full impact of which makes this appeal a total farce.

29. Other than dismiss the appeal now and for completeness, we will show briefly why the grounds of appeal lacked substance.

Incompetent Appeal grounds

30. It is trite law that leave is required where grounds of appeal raise issues of

fact alone. In this case, in so far as the grounds of appeal raise matters of fact alone, it is apparent from the face of the records, the appellants did not seek leave in respect of those findings in a separate application for leave to appeal. The grounds which raise findings of fact only are 1, 2, 3, 4, 5 and 9. These grounds also suffer from incontestably scanty and superficial knit pickings. The grounds knit-picked issues, that fall into insignificance upon a wholesome scrutiny of the proceedings and reasoning processes supporting the outcome of the judicial review application.

31. These grounds are incompetent for the foregoing and reasons that follow.

Grounds 1 & 2: **Evidence on soliciting bribery**

32. The appellants submitted, the primary judge committed error of fact and law when he found, *"Respondent did not receive any benefit for the bribes offered but did so to assist his subordinates,"*which amounted to findings of facts contrary to judicial review principles and in making such findings against the weight of the evidence.

33. The respondent's submissions are that the decision the trial judge arrived at was consistent with the circumstances of the case.

34. We consider, that besides being incompetent, the grounds also lacked merit. At page 211 of the Appeal Book, the primary judge held, *"Dismissal was excessively severe where the officer did not receive any benefit for the bribe offered but did so to assist his subordinates who were properly due salary and end-of-employment entitlements."* His Honour reached that conclusion after reviewing the decisions of the Secretary and the Tribunal.

35. Both authorities made a fundamental error in the decision-making process. In recommending the dismissal penalty, the two authorities failed to appreciate the total effect of the statements from five former security officers and Tom Korua, all pointing to Allan Tukar as the person who took the bribes. On the other the hand, the Tribunal decision at page 70 para 14 of Appeal Book referred to a bare denial by Allan Tukar.

36. The clear evidence on the face of the records which the Secretary and the

Tribunal overlooked or ignored was, that Allan Tukar took the bribes in order to facilitate the final entitlements for the five retired security men. Allan Tukar was the principal instigator. He was the mind behind the scam and still employed at the time Mr Korua's employment was terminated. The appellants failed to appreciate the lesser role of the respondent as a "middleman", cum a "whistle blower" to assist his former subordinates.

37. The trial judge did not make any findings of facts. The appellants misunderstood the role of the reviewing judge in having to look at the evidence and findings of facts from direct evidence or inferences to confirm if the decision reached, followed proper application of due process. This ground is dismissed.

Grounds 3, 4& 9: **Whether the Wednesbury principleswere misapplied**

38. The appellants contend, the trial judge misapplied the reasonableness test under the *Wednesbury* principles to the punishment imposed on the respondent.

39. The '*Wednesbury principle'* the appellants rely on is laid down in the oft cited case of *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223. Under this principle, the superior court may set aside an administrative or judicial decision if it can be objectively determined to be unreasonable. The test as stated in *Henry Kwan v Collin Bining* (2014) N5836 (Cannings, J) following a host of past precedents is whether, the decision is so unreasonable or absurd, having regard to all the circumstances, no reasonable decision-maker could have made the decision.

40. In, *Hari John Akipe v Rendle Rimua* (2018) N7381 Higgins, J said:

> *The test comes down to whether the decision is or is not one to which any reasonable authority could rationally come. In essence, a decision maker is not empowered to make arbitrary or whimsical decisions.*

41. In *Air Niugini Ltd v. Beverley Doiwa* [2000] PNGLR 347, Amet CJ, referred to the English case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374 in which Lord Diplock described the Wednesbury

"unreasonableness" principle as:

> *"a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

42. We agree with the respondent's contention. The *Wednesbury* test applies to the whole circumstances of the case. The appellants'case has not passed the unreasonableness test as consistently expressed in the cited precedent cases.

43. The trial judge was entitled to consider the whole circumstances under which the Secretary recommended the penalty of dismissal and the failure by the Tribunal and consequently, the Judicial Council,to review the proportionality of the penalty imposed by looking only at the situation of the respondent and by ignoring the situation with Allan Tukar being the principal instigator of the scam. The *Wednesbury* principles was in effect against the appellants' knit-picking contentions. We dismiss this ground.

Ground 5: **Contradictory finding of fact**

44. The appellants submitted, the primary judge erred by looking at the case of Allan Tukar when it ought to have looked at the process and not the evidence.

45. This contention is absurd with no substance in law. The appellants misapprehended the whole of the primary judge's reasoning process. It is clear the Secretary and the Tribunal decisions were arrived at in clear breaches of the legal processes, we have covered earlier. This ground is dismissed.

Grounds 6& 7: Natural justice and right to cross exam witness

46. The appellants' contentions are that the respondent was afforded his right to be heard. He responded to the Charges and was heard at the Tribunal hearing of his appeal. The case of *Kevi v Teaching Services Commissions* (1997) N1535 has no application to this case. It was erroneously relied on by the trial judge.

47. The respondent submits that upon being charged with an administrative breach, he has the right under s. 59 of the *Constitution* to be served witness statements and given the opportunity to respond to those allegations. The failure by the appellants to give Tom Korua the opportunity to test the witnesses' evidence denied him the right to be heard.

48. The trial judge dealt with the issue of right to be heard at pages 221 - 222 of the Appeal Book. At page 222 his Honour stated:

> *"Anyone can make a false accusation which may seem credible. But unless the person accused has the opportunity to confront his accuser and test the accusation by cross-examination, justice is not done. The process of the Secretary's dismissal and the Tribunal's appeal decision and the Council's confirmation are respectively based on this denial of justice".*

49. Persons in authority, administrative bodies, tribunals vested with quasi-judicial powers and the courts are required to disclose all available and relevant information to the accused person. In essence, the procedural requirement for the person facing a criminal charge, or a serious disciplinary offence as in this case under NJSS Admin Order 10.35 to be fully informed of the allegations against him,is premised on the right to be heard (*Constitution* s.59) and the right to remain silent (*Constitution* s.37 (10) and (4)(a)).

50. That process necessarily calls for response(s) from the accused or a person facing disciplinary charges. Cross-examination of the accusers is an integral part of that process. The accused may or may not decide to cross-examine his accusers. In *Kevi v Teaching Services Commissions* (1997) N1535 the right to cross-examine is provided for under the *Teaching Service Act* 1988. Where the process to cross-examine his accusers is not provided for by legislation, it can be implied under s. 59 of the *Constitution* as an integral aspect of procedural fairness under the principles of natural justice.

51. The appellants have not shown where the trial judge erred as alleged. This ground is dismissed.

Ground 8: **Taking into account irrelevant matters**

52. The appellants' contentions are that the right to remain silent under s. 37 of the *Constitution* does not apply to disciplinary proceedings. So, the trial judge erred in law when he took into account irrelevant matters and concluded, the statements before the Secretary against the respondent were tainted.

53. This ground is misconceived as discussed above. It is dismissed.

Ground 10: Discretionary powers of the Tribunal

54. This ground reads as follows:

> His Honour the learned Primary Judge erred in law and in fact when he found that the Tribunal had committed an error of law in finding that it was not appropriate for it to annul or vary the decision of the First Appellant, although in the view of the learned Primary Judge, *section 19(2)* of the *NJSS Act* gave Tribunal the power to inter alia, annul the decision of the First Appellant, as if to say that it is mandatory for the Tribunal to vary or amend the Secretary's decision, when *section 19(2)*only gives the Tribunal the discretion to either annul, vary or confirm the First Appellant's decision depending on its determination of appeals that are brought before it.

55. It is apparent, the ground is drafted in unwieldy, confusing fashion and makes easy reading difficult. It is one of the numerous grounds that suffer from poor drafting and hence, lacking in clarity, tact, grammatical and legal sense and intelligibility. The appellants have not discharged the duty to file proper grounds of appeal pursuant to O 7 rr 9 (c) and 10 of the *Supreme Court Rules*.

56. It has been settled in numerous Supreme Court case precedents, some we refer to here, that a ground that does comply with these rules in terms of lack of particularity, (*Public Curator v Kibi Kara* (2014) SC 1420); is poorly drafted, vague and confusing (*Riddler Kimave v Poevare Tore* (2013) SC 1303); is lacking in grammatical and legal sense and intelligibility (*Jimmy Lama v NDB*

Investments Ltd (2015) SC 1423) is incompetent and stands to be dismissed. This ground falls into this trap.

57. On the other hand, making some head and tail out of this ground of appeal, the contentions by the appellants are misconceived.

58. The finding of the trial judge on error of law by the Tribunal at p. 224 of the Appeal Book, is crystal clear. On the face of the records, the Tribunal wrongly concluded it was not "*appropriate for this Tribunal to annul or vary the decision of the Secretary.*

59. That statement by the Tribunal appeared to be based on the legal proposition that the Tribunal has no jurisdiction under s. 19 of the *National Judicial Staff Services Act* 1997 (NJSS Act) to hear appeals for non-compliance with due process under the NJSS Administrative Orders and that the respondent's ground of appeal challenging the validity of the Secretary's decision before the Tribunal was incompetent.

60. In the course of the submissions at pp 68 – 69 of the Appeal Book, the respondent made submissions on the severity of penalty and asked for leniency. At page 71 the Tribunal found the dismissal to be the appropriate penalty in the circumstances of the case.

61. Given that scenario, the trial judge quite correctly found, s. 19 (2) of the *NJSS Act* gives the Tribunal the discretion to confirm, annul or vary the decision appealed against. His Honour corrected a legal misnomer that having to decide on the appropriateness of penalty for recommendation to the Judicial Council, the Tribunal lacked the discretion to annul or vary the decision of the Secretary.This ground is dismissed.

Conclusion

62. In conclusion, the circumstances which may permit a judicial review of an administrative decision, action or inaction are where the decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice or reaches a decision which no reasonable tribunal could have

reached or abuses its powers in the decision making process: *Kekedo v Burns Philip* [1988-89] PNGLR 122. The trial judge in this case found the disciplinary charge and penalty imposed on Tom Korua was in breach of legal processes and the rule of natural justice in the decision-making process.The appellants have failed to establish where his Honour committed an error in granting the respondent, his application for judicial review.

63. In the end result, the appeal is dismissed. In regard to the orders of the primary court in the event of this outcome, we did not hear from the parties. We will however make the following orders:

1) The appeal is dismissed.
2) The Orders of the National Court are to take effect forthwith.
3) The appellants meet the costs of the appeal

Fairfax Legal PLN: *Lawyers for the Appellants*
Public Solicitor: *Lawyers for the Respondent*