

IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION: Appeal from Judgment of the High Court of Solomon Islands (Brown J)

COURT FILE NUMBER: Civil Appeal Case No. 27 of 2007 (On Appeal from High Court Civil Case No 20 of 2007)

DATE OF HEARING: Tuesday 8th July 2008

DATE OF JUDGMENT: Friday 18th July 2008

THE COURT: Williams JA
Goldsbrough JA
Adams JA

PARTIES: ACTING ATTORNEY-GENERAL
-V-
JOE POROIWAI
AND
SIR PETER KENILOREA

ADVOCATES:

Appellant: S. A. Woods & J. Muria for the appellant
Respondent: A. Nori for first respondent
C. Baker for second respondent

KEY WORDS: Constitution – Ombudsman - Committee advice to Governor-General

EX TEMPORE/RESERVED:

ALLOWED/DISMISSED: (1) Appeal dismissed with costs.
(2) On summons of second respondent: Summons dismissed. Order the Acting Attorney-General pay applicant's costs.

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JUDGMENT OF THE COURT

This appeal raises questions relating to the appointment of an Ombudsman pursuant of the provisions of the Constitution of Solomon Islands.

Relevantly the Constitution provides:

- “96 (1) There shall be an Ombudsman, whose office shall be a public office.
(2) The Ombudsman shall be appointed by the Governor-General acting in accordance with the advice of a committee consisting of the Speaker, the Chairman of Public Service Commission and the Chairman of the Judicial and Legal Service Commission.

97 (1) The functions of the Ombudsman shall be to:-

- (a) enquire into the conduct of any person to whom this section applies in the exercise of his office or authority, or abuse thereof;
- (b) assist in the improvement of practices and procedures of public bodies;
- and
- (c) ensure the elimination of arbitrary or unfair decisions.

.....

99. Parliament may make provision for such supplementary and ancillary matters as may appear necessary or expedient to give effect to the provisions of this Chapter”.

The Court was informed that the Parliament had not made any relevant additional provisions pursuant to section 99.

The position of the Ombudsman became vacant on 31 August 2006, and in consequence an advertisement was prepared by the Public Service Office (Affidavit of Karen Qalokale of 26th April 2007).

Relevantly that advertisement provided:

“6. Qualifications:

1. Academic

Bachelor in Law or Bachelor in Administration/Management.

2. Experiences

Applicants should have wide experience in the field of Investigations, Conflict Resolutions, Mediation, Administration and Management, Senior Police background, Public Service Senior Administration and Management level, Background in conflict Resolution, Management, Finance, and who are familiar with Government procedures and practices and the interpretations and use of Laws are essential. Fluent in public speaking and prepare to take up challenges. Must work independently without political affiliations.”

Six persons responded to that advertisement and three were shortlisted for interview by the Committee. The Committee determined that the first respondent should be appointed

to the position of Ombudsman and advised the Governor-General of that by letter dated 9 November 2006. That letter named each six of the applicants and the three who were shortlisted for interview. It then went on to say that the shortlisted candidates were interviewed by the Committee on 8 November 2006. The letter concluded by saying:

“It is therefore our pleasure in pursuant to section 96 (2) of the Constitution to advise Your Excellency to appoint Mr Joe Poroiwai as the new Ombudsman for Solomon Islands.”

The first respondent was not a holder of a degree either in law, administration or management. He relied on his experience over a number of years in order to qualify himself for the position. In broad terms his employment background was as follows. Between 1976 and 1982 he had been a Clerk or Assistant Administrative Officer in the Ministry of Education and Cultural Affairs and Ministry of Employment, Youth and Social Development. Then from 1982 to 1990 he was an Administrative Officer in the Ministry of Provincial Government. From 1990 to date he had been the Principal Investigating Officer in the Ombudsman’s Office. He could therefore be said that he was well versed with the duties and procedures of the Ombudsman.

The initial response from the Governor-General indicated that he was disposed to appoint first respondent to the office of Ombudsman (letter 10 November 2006). Subsequent to that the Governor-General received a communication (not specified) from the former Ombudsman who had been an unsuccessful applicant for the new position and also correspondence (unspecified) from the Prime Minister. In consequence the Governor-General wrote on 23 November 2006 to the Acting Attorney-General “to seek your legal

opinion and advise as how to proceed in terms of response to the matters raised therein.” The response of the Acting Attorney General was by way of letter dated 14 December 2006 which relevantly stated:

“Initially the position I took was for your Excellency to endorse the appointment by virtue of this section and for the complainant to seek redress through the normal legal process. However, in the light of new information which suggested that the process in which the Committee identified the successful applicant to the post is fraught with allegations of unfairness, bias, undue process and irregularities I have now decided to withhold the preparation of the instruments for appointment until I have reassessed the situation thoroughly.

I agree with your statement that if the appointment is made in a hasty manner pending clearance of the allegations now put before you, it may be seen to be done in the weight of impartiality and natural justice. In my opinion, your Excellency can only exercise your powers under section 96 (2) of the Constitution on the assumption that the process of identifying the successful applicant was made in accordance with due process.”

The Acting Attorney-General prepared a memorandum to the Permanent Secretary of Ministry of Public Service dated 15 January 2007 recommending that the post be readvertised. It is not clear whether or not that was communicated to the Governor-General. Then on 17 January 2007, the second respondent wrote to the Governor-General a letter in which he referred to the unfortunate delay in making the appointment; it was pointed out that it was now some three months after the Committee had advised the

Governor-General in accordance with the Constitution of its recommendation. The letter went on to say:

“In the event, and in fairness of all stakeholders, including your high office, I intend to seek a High Court declaration to the effect that the Committee’s mandatory advice to Your Excellency to appoint Mr Joe Poroiwai as the new Ombudsman for Solomon Islands under section 96 (2) was constitutional.”

By originating summons filed 29 January 2007 the first respondent sought the following declarations:

- “1. Whether the Governor-General has the discretionary power to refuse or ignore the advise of the Committee established under section 96 (2) of the Constitution (“Committee”) upon being advised by the said Committee that the Plaintiff/Applicant should be appointed as Ombudsman of Solomon Islands;
2. If the answer to 1 therein is in the negative, whether the Plaintiff/Applicant should be appointed by the Governor-General as the Ombudsman of Solomon Islands for the reasons that -
 - (a) he was the candidate selected by the Committee; and
 - (b) following his selection, the Committee had advised the Governor-General to appoint him to the post of Ombudsman as required under section 96 (2) of the Constitution;

3. Whether the requirements carried in the advertisement for the post of Ombudsman in Public Service Vacancy Notice No. 35/06 – Ombudsman in about the middle of about 2006 that a candidate applying for the said post shall have the academic qualification of Bachelor of Laws and Bachelor of Public Administration degrees were constitutionally required;
4. If the answer to 3 is in the negative, whether the Committee herein referred acted lawfully and constitutionally in ignoring the said academic requirements and by proceeding to advise the Governor-General to appoint the applicant as Ombudsman who lacks those academic qualifications?”.

By further originating summons filed on 6 February 2007 the second respondent sought a declaration “that the advice of the Committee regarding the post of Ombudsman to His Excellency the Governor-General pursuant to section 96 (2) of the Constitution was valid and lawful” and a further declaration “that the proposed readvertising of the post of Ombudsman is unlawful”.

In a letter from Governor-General to the second respondent of 12 December 2006 the following paragraph appeared:

“the Hon. Prime Minister alleges that one of the prerequisite qualifications on the advertisement, is that, applicants must be qualified lawyers. Mr Joe Poroiwai

may not be a qualified lawyer. Much of the work of the Ombudsman deeply involves the law. He must thus be a lawyer. See copy of the advertisement.”

The second respondent replied to that by letter dated 12 December 2006 relevantly stating:

“However, I wish to advise that the suggestion that the person holding the post of Ombudsman of Solomon Islands must hold a legal qualification was not overlooked by the responsible Committee under 96 (2) of the Constitution.

It was our view moreover, that neither the Constitution nor the Ombudsman (Further Provisions) [cap. 88] require or demand legal qualification for the post.

On that basis, we reminded ourselves of the fact that historically, officers who had held that position since its inception in 1981 to 2001 possessed no legal qualification. The fact that the immediate former Ombudsman is a legally qualified person was personal to himself rather than a constitutional or legal condition of the appointment.”

Then in a further letter from the second respondent to the Governor-General of 3 January 2007 the following was said:

“In case the Hon. Prime Minister was of the view that the Committee had no regard to qualifications, nothing could be further from the truth, except that in their view the post does not constitutionally or legally, require legal qualification.

Historically, since the full realization of the office in 1991 it was held successfully by no less than three officers who had no legal qualifications. In any case, there is a separate post for a legal officer in the Ombudsman's establishment."

The summons of the first respondent came on for hearing before Brown J on 5 July 2007. It was then agreed that the summons of the second respondent would await the decision on that brought by the first respondent. For reasons published on 12 July 2007 Brown J answered question 1 "No", question 2 "Yes", and held it was not necessary to answer the remaining questions.

In the course of his reasons Brown J, specifically referring to the term "shall" in s.96 (2), said that "the power of appointment does not afford a right in His Excellency to seek advise on independently exercise a judgment". On the hearing of the appeal all parties agreed that when s.96 was invoked the Governor-General had a right to seek advice from the Attorney-General on a matter appropriate to his decision. That is clearly correct.

Brown J was highly critical of the advice given by the Acting Attorney-General in the letter of 14 December 2006. As he pointed out the allegations contained therein were "wholly unsubstantiated". Indeed on the hearing of the appeal counsel for the appellant Acting Attorney-General withdrew any allegation or implication that the decision of the Committee was "fraught with unfairness, bias, undue process and irregularities."

The argument for the appellant focused on the advertisement and the contention that it makes the holding of a Bachelor degree in law, administration or management a

condition precedent of appointment. It was generally conceded by all that the Constitution imposed no such qualification and that is clearly correct.

It was said by counsel for the appellant that persons who did not hold such academic qualifications could have been deterred from applying. There was no evidence that anyone in fact had been so deterred.

In the circumstances it is necessary to have close regard to paragraph 6 of the advertisement. The required "qualifications" are divided into "academic" and "experiences", but significantly they are not made conjunctive. There is no reason why the two components should not be read disjunctively. That is made clear by noting that no one applicant could possibly have all the particulars given under the "experiences" heading. If an applicant held one of the specified degrees then the qualifications box could be ticked. If not, that box could be ticked if the applicant established "wide experience" in one or more of the areas specified in the second paragraph.

Here the first respondent had such experience in the field of investigations and public service management, and was familiar with government procedures and practices. It is significant most of that experience was gained in the office of the Ombudsman. It would not have been unreasonable for the Committee to conclude in the circumstances that he had the necessary qualifications though he was not the holder of a bachelor degree.

The letters of 12 December 2006 and 3 January 2007 from the second respondent, the Chairman of the Committee, to the Governor-General indicate that the Committee in fact approached the issue of "qualifications" in that way. At all times the assertion that a

degree was made a mandatory requirement was no more than a "suggestion" by persons who were not members of the Committee. Clearly the Committee had regard to the terms of the advertisement and was satisfied the first respondent had the necessary qualifications.

Once it is accepted that the Committee had a proper basis for concluding that the first respondent had the necessary qualifications there was no valid reason for the Governor-General not to act on the advice of the Committee. In the circumstances it is not necessary for the Court to consider whether there were any circumstances in which the Governor-General could decline lawfully to act on the advice of the Committee. Given the matters outlined herein the Governor-General is constitutionally obliged to appoint the first respondent to the position.

Although it is clear from the material before the Court that the Committee had a proper basis for concluding that the first respondent had the necessary qualifications for appointment as Ombudsman, two additional points should be noted. First, this Court does not mean to suggest that the Committee was bound to accept the qualifications proposed by the Public Service Office, or for that matter by any other person. It was for the Committee to determine what are the appropriate qualifications for appointment as Ombudsman and for the Committee to decide whether any particular person is appropriate to be appointed. Nor, we feel bound to say, is it for the Governor-General to refuse to act on the advice of the Committee because he or she thinks that the person proposed for the appointment does not satisfy the required qualifications for appointment.

Against that background it would be preferable to answer questions 3 and 4 on the summons as follows:-

3. There is no constitutional requirement that a candidate for the position of Ombudsman be the holder of any Bachelor degree.
4. The Committee acted lawfully and constitutionally in appointing Joe Poroiwai as Ombudsman though he was not the holder of any bachelor degree.

Further, given the way Question 1 was framed, and in the light of what is written herein, the question does not call for a specific answer. Against the background of what is said herein the substantive answer given to Question 2 at first instance should remain.

The critical declaration made by Brown J. was as follows:-

“.... the applicant is the person lawfully and constitutionally entitled to be appointed to the office of Ombudsman by the Governor-General in accordance with that advice of the Committee dated 9 November 2006 pursuant to s.96 (2) of the Constitution.”

The first respondent is clearly entitled to a declaration in those terms and the appeal against him should be dismissed with costs.

Counsel for the appellant challenged the locus standi of the second respondent to seek the relief which he did in his summons. Given the terms of s.96 (2) of the Constitution the

Chairman of the Committee clearly had locus standi to seek the Court's assistance in having its recommendation implemented. There is no need to make any order on that summons and it should be dismissed, but the appellant should be ordered to pay costs.

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Williams JA
Vice President

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Goldsbrough JA
Member

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Adams JA
Member

