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DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN SIVIL)

RAYUAN SIVIL NO. D-01-75-2010

10

ANTARA

CHE OMAR BIN CHE MAT ... PERAYU
(NO. K/P: 570225-03-5525)

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DAN

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1. JUMAAH TATATERTIB PERKHIDMATAN AWAM
NEGERI KELANTAN BAGI KUMPULAN
SOKONGAN GRED 1 HINGGA 26.

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2. JUMAAH ULANGBICARA TATATERTIB
PERKHIDMATAN AWAM NEGERI KELANTAN
BAGI KUMPULAN GRED 1 HINGGA 26.

3. KERAJAAN NEGERI KELANTAN ... RESPONDEN-RESPONDEN

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(Dalam Perkara Mahkamah Tinggi Malaya di Kota Bharu)
Permohonan Bagi Semakan Kehakiman No: 25-39-2007

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Dalam Perkara Mengenai Permohonan
Untuk Suatu Perintah Certiorari Untuk
Membatalkan Keputusan Oleh
Responden-Responden Yang Telah
Membuat Keputusan Membuang Kerja Ke
Atas Pemohon Dan Keputusan Tersebut
Telah Dimaklumkan Pada 12-09-2007.

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Dan

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Dalam Perkara Aturan 53 Kaedah 2
Kaedah-Kaedah Mahkamah Tinggi 1980
Dan Atau Aturan 92 Kaedah 4 Kaedah-
Kaedah Mahkamah Tinggi 1980.

5 Coram:

Low Hop Bing, JCA
A. Samah Nordin, JCA
Mohd. Hishamudin Yunus, JCA

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JUDGMENT

15 **[1]** This is an appeal by the appellant against the decision of the Kota Bharu High Court dismissing his application for a judicial review to quash the decision of the first and second respondents pursuant to Order 53 rule 2 of the Rules of the High Court 1980 (“RHC”).

20 **[2]** The facts are fairly straight forward. The appellant, an employee of the third respondent, was at the material time attached to the District Office of Pasir Putih, Kelantan, as a settlement officer. On 5.12.2006 the first respondent issued a show cause letter to the appellant on two charges
25 for alleged breaches of discipline under Regulation 4(2)(d), (g) and (j) of the State of Kelantan Public Orders (Conduct and Discipline) Regulations 1996 (“1996 Regulations”) with a view to dismissal or reduction in rank. Unless otherwise stated, reference to any regulation hereafter refers to the
30 regulation under the 1996 Regulations.

5 **[3]** Regulation 4(2) states that an officer shall not –

(d) conduct himself in such a manner as to bring the public service into disrepute or to bring discredit thereto;

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(g) be irresponsible;

(j) be negligent in performing his duties.

15 **[4]** The appellant was given twenty one days to make his written representation to exculpate himself of the charges against him. After considering his written representation the first respondent informed the appellant of its decision to dismiss him and that he had fourteen
20 days to appeal to the Disciplinary Appeal Board against the said decision, which he did. His appeal was dismissed by the Appeal Board on 26.8.2007.

[5] With the leave of the court, the appellant then filed
25 an application for a certiorari to quash the decisions of the first and second respondents as being null and void on the grounds of delay in instituting the disciplinary action against him, non-compliance of regulation 28, denial of opportunity to make an oral representation and failure to

5 transmit the record of proceedings to the second respondent. It was dismissed by the High Court with costs. The appeal before us is based on similar grounds.

[6] The appellant's contention was that the first charge
10 against him was in respect of his alleged conduct, responsibility and neglect in the discharge of his duties as a settlement officer in the year 1999. The second charge was in respect of his alleged conduct, responsibility and neglect of duties as a settlement officer in the years 2002
15 and 2003. The show cause letter was only issued on 5.12.2006. Since there was a long delay in issuing the said letter it was prejudicial to him as he had great difficulty in recalling the events relating to the said charges. Learned counsel for the appellant relied on **M**
20 **Sentivelu R Marimuthu v Public Services Commission Malaysia and Anor** [2005] 3 CLJ 785, where the Court of Appeal had allowed the appellant's appeal and set aside the decision of the disciplinary authority in dismissing him from his post, *inter alia*, on the ground of delay. In that
25 case, the original appellant, a postal clerk (deceased), was dismissed by the disciplinary authority on the charge that he had unlawfully withdrawn monies from the accounts of 16 account holders between January 1977 and May 1977. The show cause letter was only issued in

5 October 1984. The High Court dismissed his action for wrongful dismissal. He appealed to the Court of Appeal and succeeded primarily on the ground of delay. The Court of Appeal held that the fact that the General Orders 1980 Chapter D does not prescribe a time limit does not
10 mean that a disciplinary hearing in respect of charges of misconduct brought no matter how long after the event may be held as being procedurally fair. It all depends on the facts of each case. In particular it depends on a number of factors including the nature of the charge, the
15 length of delay and the reasons for the delay. The longer the delay the more difficult it would be for the disciplining body to justify the proceedings against the employee. Sri Ram JCA (as he then was) at page 790 concluded that, "the seven year delay in this case has indeed caused the
20 appellant substantial prejudice especially in the absence of oral hearing".

[7] Next, it was contended that the respondents acted in breach of regulation 28(1) as they failed to consider all
25 the available information in arriving at their decisions. Under regulation 28(1), the appropriate Disciplinary Authority is duty bound to consider all the available information in cases where the alleged breach of discipline has been found to be of a nature which merits

5 dismissal or reduction in rank. Here, the appellant's
contention was that he had been previously investigated
by the police and the Anti-Corruption Agency pursuant to
police reports against him. In the course of their
investigation the police and the Anti-Corruption Agency
10 had interviewed and recorded statements from the
witnesses. However, no charges were preferred against
him. Had the respondents taken these facts into
account, which were within their knowledge, they would
have come to a different conclusion.

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[8] The other ground of appeal was in respect of the
denial of opportunity to make an oral representation. It
was alleged that the respondents knew that their officers
had given statements to the police and the Anti-Corruption
20 Agency and that the respondents had also called the
persons named in the charges against him to give
evidence before them. In view of these circumstances, he
should be given an opportunity to make an oral
representation and to cross examine the witnesses: see
25 **Ang Seng Wan v Suruhanjaya Di Raja Malaysia &
Anor** [2002] 1 CLJ 493, and **Mat Ghaffar Baba v Ketua
Polis Negara & Anor** [2008] 1 CLJ 773. As there was no
oral hearing, he was thus denied the opportunity to make

5 an oral representation as well as to cross examine these witnesses.

[9] The appellant's final ground of appeal was in respect of the notes of proceedings before the first respondent. It was contended that the first respondent was in breach of regulation 13(1), (2) and (3) and regulation 14(1) and (2) of the State Public Service Disciplinary Board Regulations 1974 ("1974 Regulations") in failing to forward the record of proceedings to the Appeal Board.

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[10] The issue whether there was an unreasonable or unexplained delay is a question of facts, which must be viewed in the light of the facts and circumstances of each case. It depends on several factors, including the nature of the charge, the length of delay and the reasons for the delay. But delay by itself may not be a determining factor. In **Public Services Commission Malaysian & Anor v Vickneswary a/p RM Santhivelu (Substituting M Senthivelu a/I R Marimuthu, deceased)** [2008] 6 MLJ 1, the Federal Court in allowing the appellant's appeal and setting aside the decision of the Court of Appeal held that the delay, even if there was one, was not *per se* a ground for holding that there was a procedural unfairness. With respect to learned counsel for the appellant, he

5 omitted to inform this Court that the said decision of the
Court of Appeal which he cited to us had been overturned
by the Federal Court. Thus, the issue of delay advanced
by the appellant before us is without any merit. The
Federal Court also made an observation that the Public
10 Officers (Conduct and Discipline) Chapter D General
Orders 1980 ("General Orders 1980") do not prescribe a
time limit for the institution of disciplinary proceedings.

[11] In response to the second ground of appeal,
15 learned counsel for the respondents submitted that the
respondents had in fact considered all the available
information in arriving at their decisions against the
appellant. It had duly complied with the provisions of the
1996 Regulations, including regulation 28. The secretary
20 of the first respondent, in his affidavit in reply,
categorically stated that the disciplinary action against the
appellant was based on the report of his head of
department made pursuant to regulation 35 and denied
that it was as a consequence of the investigation by the
25 police and the Anti-Corruption Agency against the
appellant. He further deposed that the respondents did
not rely or take into account any report or evidence
arising from the police or Anti-Corruption Agency's
investigation. No witnesses were called by the

5 respondents in arriving at their decisions. These facts stand un rebutted. Upon perusal of the appeal record, we find that the appellant's second ground of appeal is wholly unsubstantiated and without any merit.

10 **[12]** There is no express provision in the 1996 Regulations for a right of oral hearing before the Disciplinary Authority. It is clearly stated in Regulation 28(5) that where the appropriate Disciplinary Authority is of the opinion that the case against the officer requires
15 further clarification, it may appoint a Committee of Investigation to look into it. It is the Committee of Investigation that decides, at its sole discretion, whether or not to hear oral representation from the officer: see regulation 28(7)(a). Regulation 28(7) is similar to general
20 order 26(6) of the General Orders 1980. The functions and powers of the Committee of Investigation under the 1996 Regulations are similar to that of the Committee of Inquiry under the General Orders 1980. It had been held that the decision whether or not to hold an oral hearing
25 was at the sole discretion of the Committee of Inquiry. There is no general right to an oral hearing under the General Orders 1980: see **Lembaga Tatatertib Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K. Perumal** [2001] 2 CLJ 525, **Najar Singh v Government**

5 **of Malaysia** [1974] 1 MLJ 138, **Zainal bin Hashim v Government of Malaysia** [1979] 2 MLJ 276.

[13] A fair hearing before an administrative tribunal is not synonymous with a right to an oral hearing. The
10 accused is, however, entitled to know the case against him so as to enable him to correct or contradict it. As Lord Denning in **B Surinder Singh Kanda v The Government of Malaysia** [1962] MLJ 169 said:

15 "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused to know the case which is made against him. He must know what evidence has been given and what statement have been made
20 affecting him: and then he must be given a fair opportunity to correct or contradict them".

[14] We find that in the instant case the respondents have duly complied with the disciplinary procedure laid
25 down in the 1996 Regulations. The appellant understood the charges against him. He was given the opportunity to make written representations to exculpate himself, which he did by way of two separate letters to the first and second respondents respectively. He did not, in addition
30 to the written representation, make any request for an oral hearing. The respondents had in fact considered his representations before arriving at their decisions. In **R**

5 (on the application of **Ewing v Department for Constitutional Affairs** [2006] 2 All ER 993, it was held that, “one is entitled to an oral hearing when fairness requires that there should be such a hearing, but fairness does not require that there should be an oral hearing in
10 every case”. As Lord Brightman in **Chief Constable of the North Wales Police v Evans** [1982] 1 WLR 1155 aptly said:

15 “Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power”.

20 [15] As regards the final ground of appeal, we find that it was just a mere allegation devoid of any merit. Here, his only complaint was that the record of proceedings was not transmitted to the second respondent. It was not
25 because a copy of it was not extended to him. The appellant did not even mention the basis of his complaint in his affidavit. The second respondent, in its affidavit in reply denied the allegations and stated that it had duly considered the appellant’s appeal in affirming the decision
30 of the first respondent. The 1996 Regulations merely require the said proceedings to be transmitted to the

5 second respondent. There is no requirement that a copy
of the record of proceedings be extended to the appellant.

[16] For the abovesaid reasons, we dismissed the appeal
with costs.

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Dated this 27th July 2011

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A. Samah Nordin
Judge
Court of Appeal,
Putrajaya, Malaysia.

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Parties

- 25 1. En. Zainal Abidin bin Mustaffa, for the Appellant
(Tetuan Zainal & Mariani)
- 30 2. En. Khairul Anuar bin Wahab, for the Respondents.
(Pejabat Penasihat Undang-Undang, Negeri
Kelantan).