

MUYAWA LIUWA v THE ATTORNEY-GENERAL (1982) Z.R. 39 (S.C.)

SUPREME COURT.

GARDNER, AG.D.C.J., BRUCE-LYLE , J.S. AND MUWO, AG.J.S.

23RD JUNE ,1980 AND 17TH DECEMBER, 1981

(S.C.Z. JUDGMENT NO. 20 OF 1982)

APPEAL NO. 3 OF 1979

Flynote

Administrative law - Civil Service - Government White Paper - Effect of - Whether capable of revoking an establishment circular.

Headnote

The appellant appealed against a preliminary High Court ruling in a claim for salary. He claimed entitlement to salary and emoluments as applicable under a scale contained in an establishment circular which was revoked by another circular. The latter circular became effective after the date of promotion of the appellant since the promotion was retrospective. The question was whether the original establishment circular had been revoked by a Government paper issued long before the latter circular.

**Held:**

- (i) Government papers are a statement of the Government's intentions which invariably lead to enactments to put into effect those intentions. A Government Paper can not revoke an establishment circular and merely indicates that it is the Government's intention in the next circular to do so.

**Case cited:**

Shanzi v United Bus Company of Zambia Limited (1977) Z.R. 397.

For the appellant: M. F. Sikatana, Veritas Chambers.

For the respondent: A. G. Kinariwala, State Advocate.

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Judgment

**GARDNER, AG. D.C.J.:**

The appellant appeals against a preliminary ruling of the High Court in a claim for salary by the appellant. The appellant was appointed to the Civil Service (Local Conditions) on 19th September, 1965, as an Executive Assistant Grade II-I / Executive Officer Grade II-I, Division II, on the salary scale B6/3 (£408-£1,220), entering the scale at £468 per annum; his incremental date being fixed as the 1st of October. At that time the salaries applicable had been revised following the report of the Hadow Commission on 25th March, 1964, and were set out in Establishment Circular No. B202 dated 15th October, 1964. The salary scales were termed "Hadow", and those applicable, before the operative date were referred to as "pre - Hadow".

The new scales had the effect of reducing salaries in the Local Civil Service and, in order to compensate existing officers for such reduction, personal allowance was added to the salary under the new scale so that it equalled the salary under the pre - Hadow scale. On 9th July, 1966, the Permanent Secretary (Establishment) indicated, in a letter of that date, that those candidates who completed a course in Public Administration in Ireland in September, 1965, should be regarded as having been appointed as Executive Assistant/Executive Officer, Grade II-I, with salary at the rate of £750 per annum in the pre - Hadow scale B5/3/, £545-£1,855 with effect from 19th September, 1965. The appellant was one of such officers and thus the appellant, who entered the scale at £468, received a further £282 as personal allowance, making a total of £750 which was the rate under the pre - Hadow scale.

On 3rd April, 1967, the appellant was promoted retrospectively to the rank of Executive Officer Grade III - Senior Executive Officer Grade II with effect from 1st September, 1966. The post of Executive Officer Grade II attracted a salary in the scale B 4 and the appellant's basic salary was then increased to £760.

Prior to the appellant's promotion a number of circulars had been issued which dealt with promotion, and the first circular B202 dated 15th October, 1964, read, in part, as follows:

"(2). An officer in the Local Civil Service who is promoted will have his personal allowance reduced by an amount equal to one-third of the increase in his basic salary which he receives on promotion and annually thereafter his personal allowance will be reduced by an amount equal to one-third of his annual increment. These amounts should be calculated to the nearest £1."

Subsequently, Establishment Circular No. B 275 dated 23rd June, 1966, was issued and read, in part, as follows:

"In many cases it has been found impracticable to apply the arrangement for reduction of personal allowance detailed in Establishment Circular No. B 202 of the 15th October, 1964, and Establishment Circular No. B 222 of the 27th January, 1965, and after further consideration of this matter it has been decided

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that all previous instructions about calculation of personal allowance when officers serving on Local Conditions are promoted should be cancelled and replaced by the following rule which will be effective from the 15th October, 1964:

*Promotion Rule*

Where an officer who became eligible for personal allowance on conversion to the salary scale for a post falling into Division I or Division II under the provisions of Establishment Circular No. B 202 of the 15th October, 1964, is promoted to another post he will be paid salary in the Local Conditions salary scale in force for that post on the 14th October, 1964. For these purposes the Local Conditions salary scale in force on the 14th October, 1964, will be called the "old scale" and will be the salary or salary scale set out under the head "Gross Emoluments Existing L.O.S. Scale" in the relevant Table of allowances in Establishment Circular No. B 202 of the 15th October, 1964, without regard to any figures enclosed in brackets."

The effect of this circular was to provide that on promotion there would be no reductions in either

basic salary or personal allowances, and officers would receive on promotion the amount payable under the pre - Hadow scale which, in the case of the appellant, would have been £1,250, made up by £760 basic salary and £490 personal allowance. At the time of the issue of Establishment Circular No. B 275 the Commission under the Chairmanship of F. J. Whelan, J. was sitting to review the grading structure and salaries of the Civil Service. Para. 3 of Circular No. B 275 read as follows:

"(3) The promotion rule set out in para. 1 of this circular may be varied at a later date, in the light of the findings and recommendations of the Grading Structure and Salaries Commission, and it must be emphasized that officers who benefit under the provisions of this circular will not necessarily retain this benefit if revised rules are introduced and they are promoted after the date of introduction of the revised rules."

The report of the Whelan Commission was published on 22nd September, 1966, and at p. 59 it read:

"exceptions and snags revealed themselves and, seemingly in despair the pre - Hadow scheme of reduced personal allowances was abandoned, and authority was issued for all Local Civil Service officers drawing personal allowances to continue to draw these, in full, on promotion." (a, reference to Establishment Circular No. B 275).

The Commission went on to observe (at para. 60):

"(60) The issue of this authority considerably increased the number of local officers on full pre - Hadow scales and made it inevitable

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that the distinction between officers on pre - Hadow and those on Hadow scales would be perpetuated unless some attempt was made to combine the two sets of scales."

The Commission recommended a single salary structure, and new rates were set out in a schedule.

In a Government White Paper No. 2 of 1966 published on 21st November, 1966, the Government adopted the recommendations with the following reservations:

"Narrowing the gap:

3. The effect of accepting the Commission's proposals, would be a widening rather than a narrowing of the gap. Although the percentage addition to existing local salaries decreases progressively as salaries increase, the monetary gain at the higher levels is substantially greater. The Government has decided therefore, to adjust the proposed salary scales in accordance with the policy of narrowing the gap between the lower and higher income groups.

11. In pursuance of the Government's policy of narrowing the gap between the lower and higher income groups and in the light of financial limitations, the salary scales recommended by the Whelan Commission will have to be adjusted accordingly. Consequently, the provisions of Establishment Circular No. B 275 of the 23rd June, 1966, will not be implemented."

On 23rd December, 1966, Establishment Circular No. B 304 was published and the new "Whelan" salary scales were set out in conversion tables to take effect on 1st January, 1967.

The letter informing the appellant of his retrospective promotion, which was dated 3rd April,

1967, was written after the introduction of the new Salary scales, and the retrospective promotion, with effect from a date before 1st January, 1967, salary scales came into effect, has given rise to this litigation. The appellant maintains that on 1st September, 1966, the retrospective date of his promotion, the provisions of Establishment Circular No. B 275 were in effect and that therefore he should not only receive salary at the rate of £1,250 per annum from 1st September, 1966, to 1st January, 1967, but he should also enter the new salary scales at the next point above £1,250, and the conversion to the new scale should be governed by that figure, resulting in an entitlement to £1,368 per annum in accordance with Establishment Circular No. B 301, Appendix B, Conversion Rule 2, which provides as follows:

"2. Officers in receipt of personal allowance:

(1) If the officers' personal maximum is equal to or lower than the maximum of the new basic salary scale for the post, he will convert to the new salary scale at the point first above the total of his existing salary and personal allowance and will retain his existing incremental date (adjusted, where necessary, to the first day of month).

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(2) If (1) is not applicable, the officer will retain his existing total emoluments. The cases of all officers in this category will be examined with a view to absorbing their salaries into the new salary structure, but officers are assured that their personal maximum will not be reduced as a result of conversion to the new scales.

For these purposes, personal maximum means the basic salary plus personal allowance, if any, to which an officer will be entitled when he attains the maximum of the scale for the post in which he is serving on the 31st December, 1966."

One other pertinent fact to be noted is that, in the letter dated 3rd April, 1967, which promoted the appellant retrospectively, there was a reference to the promotion of another officer with effect from 1st February, 1967, "in the scale A5-3 (Whelan)". The later promotion was subsequent to the implementation of the new scales on 1st January, 1967, and it follows therefore that the "Whelan" salary scales must apply. In the promotion of the appellant no specific scale was mentioned and we agree with the learned trial judge's finding that for the period between 1st September, 1966, to 1st January, 1967, the existing salary scales should apply and thereafter, the "Whelan" scales would take effect. In the event the learned trial judge found that the salary scales as laid down by Establishment Circular No. B 202 and the conversion rule contained therein applied to the appellant on 1st September, 1966, that is to say, the appellant, who was receiving £468 basic salary plus £282 personal allowance should, on promotion to a post which attracted £760 basic salary, have his personal allowance reduced by an amount equal to one-third of the increase his basic salary which he received on promotion. As I have said, the appellant's argument is that Establishment Circular No. B 275 was in force on 1st September, 1966, and therefore the salary scale of the appellant on promotion should have been calculated in accordance with the pre-Hadow scale without reduction.

The learned trial judge gave as his reasons for arriving at his finding the fact that para. 11 of Government Paper No. 2 of 1966 provided that Establishment Circular No. B 275 "Will not be implemented". He found that these words in the least indicated that as from the date of publication of the Government Paper, that is 21st November, 1966, the promotion rule referred to in that circular ceased to have effect. He pointed out that the decision to promote the appellant was made subsequent to the issue of the Government Paper and asked the rhetorical question "Can it be then said that it was the intention of the Government, through its Establishment Division, in making the promotion retrospective to 1st September, 1966, to revive, with regard to the plaintiff

(appellant) the second promotion rule applicable on that date?"

The learned trial judge further pointed out that para. 3 of Establishment Circular No. B 276 clearly indicated that the second promotion rule was an interim measure pending the Whelan Report and that in paras. 3

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and 11 of the Government Paper the necessity to "narrow the gap" was stressed. He commented that clearly the return to the pre - Hadow scales was ultimately against Government policy.

In the course of his further comments the learned trial judge said that he could not find any circular which specifically revoked a previous circular and that the old salary scales might still prove applicable in cases, such as the appellant's, of retrospective promotion, were it not for the fact that, in his own words, "Establishment Circular No. B 275 was specifically revoked by no less an instrument than a Government Paper". He found that the fact that the appellant's promotion was retrospective, in consideration no doubt of the appellant's duties and services, was in no way conclusive as to the Government's intention in the matter. The learned trial judge said that after the specific revocation of the second promotion rule he did not see that it could be revived in respect of the appellant other than by express words.

Mr Sikatana, on behalf of the appellant, argued that Establishment Circular No. B 275 was in force on 1st September, 1966, which was the effective date of the appellant's promotion, and the Government Paper No. 2 of 1966 was no more than a statement of intent which could not affect promotions which had taken place prior to its publication and indeed, as it was only a statement of intent, it could not take effect at all except by way of Government Circular. He pointed out that Government Circular No. B 304, which was published as a result of the recommendations contained in the Whelan Report and in the Government Paper, acknowledged that personal allowances were applicable in some cases and effectively abolished them by providing an entirely new scale of basic salary without allowances. In reply, Mr. Kinariwala, for the Attorney-General, argued that Establishment Circular No. B 275 was in fact revoked by the Government Paper, and if it was not so revoked it was effectively revoked by Establishment Circular No. B 304. He maintained that, when the appellant was notified of his promotion, Establishment Circular No. B 304 was in existence, so it was the intention of the Government that the appellant should be promoted on the lower scale calculated in accordance with the promotion rule in Establishment Circular No. B 202. Mr Kinariwala conceded that if he was not successful in this argument the salary of the appellant should have been £1,250 per annum from 1st September, to 31st December, 1966. He argued further that when Establishment Circular No. B 304 came into operation on 1st January, 1967, it impliedly revoked Establishment Circular No. B 275 having regard to the stated Government intention of narrowing the gap. Finally, both counsel asked this court to determine at what stage the appellant should enter the Whelan scale under the provisions of Establishment Circular No. B 304.

I have considered the history of the various Establishment Circulars, the comments of the Whelan Commission and the Government Paper. I agree with the Whelan Commission's remarks that exceptions and snags revealed themselves in attempts to implement some of the Establishment

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Circulars and it was necessary to make an attempt to combine the two sets of scales. I have no

difficulty construing Establishment Circular No. B 275 as having provided at the date of the appellant's promotion, that is 1st September, 1966, that the previous promotion rule in Establishment Circular No. B 202 was cancelled and that promotions should be governed by the pre - Hadow scale which effectively provided that on promotion an officer would be entitled to the full pre - Hadow scale for the promotion rank without any deductions relating to basic salary or personal allowances. I have no doubt that had the appellant been in fact promoted on 1st September, 1966, he would have been entitled to £1,250 per annum in accordance with the pre - Hadow scale.

Two difficulties arise, one of which is the effect of the Government Paper, and one of the retrospective nature of the promotion. In examining the contents of the Government Paper it is noted that para. 11 refers to the Government's policy of narrowing the gap and the decision that the salary scales recommended by the Whelan Commission would have to be adjusted accordingly. The paragraph ends with the words "Consequently the provisions of Establishment Circular No. B 275 of the 23rd of June, 1966, will not be implemented". The learned trial judge read these last words as meaning that the Establishment Circular was revoked *ab initio*. It is significant to note the use of the future tense "will", and I cannot imagine that, had it been the intention for Establishment Circular No. B 275 to be abolished from its inception, the Government would have used the word "will" instead of specific words indicating that the Establishment Circular must be regarded as never having taken effect. Furthermore, although Mr Kinariwala has argued that Establishment Circular No. B 304, which was designed to implement the Government Paper, should be read as having impliedly revoked Establishment Circular No. B 275, there is nothing in Establishment Circular No. B 304 which specifically refers to any previous circular. There is a reference in Appendix B to "officers not in receipt of personal allowances" and "officers in receipt of personal allowances". Such allowances were introduced by Establishment Circular No. B 202, and it is argued on behalf of the Attorney- General that Establishment Circular No. B 275 which cancelled the previous circular was itself revoked by the Government Paper. However, although Establishment Circular No. B 275 stated that the previous Circular should be cancelled, it referred to calculation of personal allowances and indeed to the scale set out in the previous circular. In any view, Establishment Circular No. B 275 when it referred to the "old scale", which was in fact the pre - Hadow scale, acknowledged that the previous circular had arrived at the same figure according to the old scale by adding personal allowances to the basic salaries. By its reference to personal allowances Establishment Circular No. B 275 did not revoke the concept of personal allowances. In fact Establishment Circular No. B 275 continued that concept although it referred to a salary on promotion in accordance with the "old scale", that is to say the pre - Hadow scale. I find that there is no other way in which the effect of Establishment Circular No. B 275 can be construed, because it specifically provided that

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those officers who were to be governed by the old scale should have personal allowances in excess of those officers whose salary was determined by the basic rate of pay set out in Establishment Circular No. B 202. The promotion rule set out in that Establishment Circular was abolished, and in no way can I find that Establishment Circular No. B 304 affected the previous position of the appellant on 1st September, 1966, when Establishment Circular No. B 275 was in operation.

I will deal now with the appellant's argument that the Government Paper was no more than an expression of intent and could not in itself revoke an Establishment circular. I am not satisfied that the Government Paper was itself an instrument which was capable of revoking a previous Government Circular. I take judicial notice of the fact that Government papers or "White" papers, as they are sometimes called, are a statement of the Government's intentions, but invariably they lead to enactments to put into effect those intentions. To say, therefore, that the Government Paper revoked Establishment Circular No. B 275 is incorrect; the use of the words "will not be implemented" in the last three lines of para. 11 indicate that it was the intention of the

Government that the next Establishment Circular, that is No. B 304, there would be no promotion rule as set out in Establishment Circular No. B 275. In the event, Establishment Circular No. B 304 did not provide for any promotion rule and the new scales were presumably drawn up on the basis of the Whelan Commission's recommendation of a single salary structure to absorb all the previous scales as amended in accordance with para. 3 of the Government Paper which stated that the Government had decided to adjust the proposed salary scales in accordance with the policy of narrowing the gap. It was correct, therefore, for the Government Paper to say that the provisions of Establishment Circular No. B 275 would not be implemented and they were effectively abolished for the future when the new scales came into effect on 1st January, 1967. However, in my view, that did not affect the position of an officer who was promoted on 1st September, 1966, when that Establishment Circular was in force.

It has been suggested that in respect of the appellant the Establishment Division could not possibly have intended to revive the second promotion rule applicable on 1st September, 1966, without using express words to that effect. In my view, having regard to the fact that the letter of promotion specifically applied the "Whelan" scale to a fellow officer who was promoted with effect from a date after 1st January, 1967, it could equally be said that it was the direct intention of the Establishment Division to give the appellant the advantage of the promotion rule in existence on 1st September, 1966.

It has been argued before us on behalf of the Attorney-General, that to hold it favour of the appellant would give rise to a number of claims by other officers, but we have no indication of how such other officers had been treated, nor do we know the number of them. In any event, this court is being called up to construe the intention of the Establishment Division when it made the appellant's promotion retrospective to 1st

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September, 1966, and I am unable to apply the rules of construction any other way. It is common ground that the appellant was promoted to Executive Officer Grade II-I Senior Executive Officer, Grade II, and the conversion table which refers to Senior Executive Officers Grade II commences with an existing salary of £1,275. There is no place in that scale for a Senior Executive Officer Grade II earning less than that sum. The next lower table refers to Executive Officers Grade II-I but does not refer to Senior Executive Officers. Even, taking into account the fact that the new conversion tables did not cover every possible rate of salary, it would appear that when Establishment Circular No. B 304 came into effect, the appellant's status as a Senior Executive Officer was to be recognised.

Bearing in mind that the Establishment Division must have been aware that on 1st September, 1966, the provisions of Establishment Circular No. B 275 were in force, I have no hesitation in finding that it was the Division's intention to promote the appellant to the appropriate scale in accordance with that Circular, namely, £1,250.

With regard to the point in the new scale at which the appellant should enter, I have considered whether or not the appellant falls within the category of an officer "not in receipt of a personal allowance", or an "officer in receipt of personal allowance", as set out in the Conversion Rules, Appendix B of the Establishment Circular No. B 304. I note that the relevant part of Establishment Circular No. B 275 reads, in part, as follows:

"It has been decided that all previous instructions about calculation of personal allowance

when officers serving on Local Conditions are promoted should be cancelled and replaced by the following rule which will be effective from 15th October, 1964:

*Promotion Rule :*

Where an officer who became eligible for personal allowance on conversion to the salary scale for a post falling into Division I or Division II under the provisions of Establishment Circular No. B 202 of 15th October, 1964, is promoted to another post he will be paid salary in the Local Conditions salary scale force for that post on the 14th October, 1964."

The circular then goes on to explain that this salary will be that shown under the heading "Gross Emoluments Existing LCS Scale" in the table of allowances in Establishment Circular No. B 202. In my opinion, this does not entirely cancel Establishment Circular No. 202, and the reference to an officer who became eligible for personal allowances under the provisions of Establishment Circular No. B 209 indicates that personal allowances were to continue to exist but that in calculating the amount to be paid on promotion the figure shown as the pre - Hadow scale should be applicable. For this reason I am satisfied that the appellant, on his promotion, should have been entitled to a basic salary of £760 plus a personal allowance of £490 making a total of £1250 previously referred

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to. I have also considered the effect of para. 3 of Establishment Circular No. B 275 which provides that the promotion rule set out in that Circular may be varied at a later date. The final words of that paragraph which read:

"It must be emphasised that officers who benefit under the provisions of this circular will not necessarily retain this benefit if revised rules are introduced and they are promoted after the date of introduction of the revised rules."

do not apply to the appellant who was promoted with effect from a date prior to the introduction of the revised rules.

I find, therefore, that at 31st December, 1966, the appellant was entitled to a basic salary and personal allowance amounting to a total of £1,250 and he comes within the provision of Conversion Rule 2, Appendix B, as an officer in receipt of personal allowance. I find that the appellant's personal maximum is lower than the maximum of the new basic salary scale, and, under Conversion Rule 2 (1), he should convert to the new salary scale at the point first above the total of his existing salary and personal allowance. That is to say, he should convert from £1,275 to £1,368 from 1st January, 1967.

I would allow this appeal.

In view of the fact that this appeal has determined the issues in the main claim I would award judgment for the appellant for arrears of emoluments from 1st September, 1966, to 31st December, 1966, calculated on the basis that he should have received emoluments at the rate of £1,250 per annum. I would also direct that from 1st January, 1967, the appellant should be treated as having entered the new scale at an annual salary of £1,368, and that judgment be entered for the further arrears of salary resulting therefrom, together with interest (in accordance with the principles set out in *Shanzi v United Bus Co. of Zambia Ltd.*) from 1st September, 1966, until the date of this judgment at the rate of 3 1/2 per cent. I would further order that the appellant should

be awarded costs this court and the court below.

Appeal allowed

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