IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 2 OF 1992
(High Court Judicial Review No. 14 of 1989)

BETWEEN:

ANURADHA CHARAN — APPELLANT

-and-

PUBLIC SERVICE COMMISSION
RAMEND PRASAD
TOKASA BUINIMASI — RESPONDENTS

Mr. G. P. Shankar for the Appellant
Mr. Daniel Singh for the Respondents

Date of Hearing : 4th November, 1993
Date of Delivery of Judgment : 19th November, 1993

JUDGMENT OF THE COURT

In 1989 the appellant was working in the Ministry of Health and had, by that time, been in the civil service for 21 years. The last eight years had been in the Ministry of Health at Executive Officer level (ADO5). During her service, she had obtained a number of qualifications, most recently a Diploma of Health Management at the University of the South Pacific awarded in December 1988 and a certificate of Safety, Health and Hygiene at the Government Training Centre the same month.

In November 1988 vacancy notices for fifteen posts at administrative officer level (ADO3) were published in the Public Service Circular 22/88. The appellant, clearly feeling she was due for promotion, applied for all fifteen but was unsuccessful.

This appeal relates to proceedings arising from two of those posts; 1105/88 Administrative Officer (Training Division) Ministry of Health, and 1106/88 Administrative Officer, Police Department, together with a further vacancy, Administrative Officer, Ministry of Mineral Resources, caused by the transfer of the person appointed to 1105/88.

The appellant was notified on 18th April 1989 that the Police Department position had been awarded to the third respondent, Tokasa Buinimasi. The Ministry of Health post was filled on 8 March 1989 by the sideways transfer of the second respondent, Ramend Prasad, who had already been holding an ADO3 post in the Ministry of Mineral Resources. It is not revealed on the papers exactly when or how the appellant was informed of this but, on 20th April 1989, she wrote applying for the vacancy caused by his transfer. This had been advertised on 31st March in the Public Service Circular as vacancy 135/89. The next day, 21st April, she asked the Secretary, Public Service Commission, to reconsider Mr. Prasad's posting but was advised the decision was final. This led to correspondence in which she warned that she would apply to the Court for Judicial Review. The appellant's application for 135/88 was also unsuccessful and the post was re-advertised on 2 May as vacancy 199/89. On 13th July 1989 Taito Waqavakatoga was appointed. Although referred to by counsel for the appellant more than once as the fourth respondent, Mr. Waqavakatoga is not and never has been a party. This could be because his position was only ascertained after the proceedings had commenced and as a result of an Order that the

first respondent, the Public Service Commission (PSC), should produce a number of files - a decision about which we will comment later.

The correspondence with the PSC about judicial review was the first warning ripple of a veritable tide of papers that has since threatened to swamp the Court. Whilst we accept this reflects the depth of the appellant's sense of grievance, we cannot avoid the comment that the effect has been to obscure the main issues by a continuous and increasing repetition of irrelevant material.

By 15th May 1989 application for leave to seek judicial review was filed and it was granted on 19th. The substantive application was filed on 23rd May for four orders of mandamus and one of certiorari.

The orders of mandamus were to order the PSC:

(i) to "freeze" vacancies 135/89 and 199/89

(ii) to transfer Mr. Prasad back to his precious position in Mineral Resources

(iii) to promote the appellant to 1105/88, or alternatively,

(iv) to promote the appellant to 1106/88.

The order for certiorari was to order the PSC to quash the appointment of Mrs. Buinimasi to post 1106/88 as a necessary preliminary to the fourth order of mandamus.

With the exception of the first order of mandamus, these orders could not be made by the Court. The order for certiorari may have been sought if the Court had been requested to quash the order which was the form in which it had been drafted when leave was sought from Palmer J.

By notice of motion dated 15 June 1990 application was made to amend something not specified and to add further relief and, on 29th November 1990, leave was granted by Jayaratne J "to add and argue further relief and declaration". It set out the following declarations:-

> *"(1) (a) that the transfer of the second Respondent Ramend Prasad to the said advertised vacancy No. 1105/88 for the post of Administrative Officer (Training Division) in the Ministry of Health from the Department of Mineral Resources in the Ministry of the Land and Mineral Resources, creating the purported vacancy in the Department of Mineral Resources, blocking the promotion of the applicant to the said post in the Ministry of Health; and*
>
> *(b) promotion of the executive officer Mr Taito Waqavakatoga in the said purported so created vacancy in the Department of Mineral Resources in the Ministry of Land and Mineral Resources, depriving the promotion to the Applicant; amounts to the transfer of the said advertised vacancy for the post of the Administrative Officer (Training Division) from the Ministry of Health to the Department of Mineral Resources in*

the Ministry of Land and Mineral Resources is contrary to the regulations and ultra vires.

(2) *that in view of the qualifications and experience required for the relevant said advertised vacant post of the Administrative Officer (Training Division) of the Ministry of Health and that of the applicant having attained, the applicant was better suited person for the said post than the second Respondent.*

(3) *that the decision of the Commission to restrict transfer of the Applicant, and others having attained the Diploma in Health Management, out of the Ministry of Health was calculated and motivated to deprive the Applicant promotion <u>is irrational and procedurally improper</u> in the light of transfer of the second Respondent to the said advertised vacancy No. 1105/88, blocking her promotion.*

(4) *that the decision of the Commission in transferring the second Respondent to the Ministry of Health, and/or transferring of the said advertised vacancy No. 1105/88 for the post of the administrative officer from the Ministry of Health to the Department of Mineral Resources in the Ministry of Land and Mineral Resources is ultra vires and of no effect and the applicant was entitled for promotion to the said post in terms of order 53 there being no other complainant against the said decision of the Commission.*

(5) *that the third Respondent, having no mandatory three years' service in the grade of an executive officer, was not eligible to apply to the said post and her said promotion to the said advertised vacancy No. 1106/88 in the Police Department in the Ministry of Home Affairs was irrational and*

procedurally improper, contrary to the regulations and is ultra vires.

(6) that there being no other complainant against the decision of the Commission in the terms of the application under Order 53 the applicant is entitled for promotion to the said advertised vacancy No. 1106/88 in the place of the 3rd Respondent.

(7) that the applicant is entitled for increment in terms of such said promotion in line of seniority.

(8) and any other or further order or declaration that the Honourable Court think fit to grant."

We feel the wording of these was most unfortunate. The declarations sought were largely meaningless or irrelevant to judicial review and they included matters of argument that the Court should not have allowed to be included.

The first claims the appointments of Prasad and Waqavakatoga were contrary to regulations without specifying which regulation. The second is irrelevant as it is not the question of the appellant's suitability but the process of selection that is the subject of review. The third appears to suggest mala fides and procedural impropriety without saying how or why this is so. The fourth is simply meaningless and like the fifth raises ultra vires without specifying why. The sixth also is incomprehensible.

We cannot understand how the learned Judge could have allowed such material to be added. He could and should have

disallowed it. It is not for the Court at the hearing to have to search around trying to give meaning to what is being requested and then see if the presumed meaning affords any basis for relief. Neither is it fair to the other side to have to prepare to meet a case that is not specified clearly or at all.

It should be remarked that this order arose from papers and proceedings where the appellant was represented (and continued subsequently to be represented) by her husband who had no right of audience. Equally remarkable, there is no suggestion in the record that counsel for the respondents ever applied to have the applications struck out.

The result was that the matter was to go for hearing on the basis of a number of orders that could not be made and the declarations on which we have just commented.

In the meantime, the Registrar, on a summons for directions heard on 4 July 1990, made the following orders apparently with the consent of both parties.

> *"1. that the Public Service Commission tender into Court a week before the hearing on 9 August 1990 the records, reports and minutes, pursuant to the Public Service Commission Circular No. 25/88 dated 30.8.88, of the promotion of the following officers as Administrative Officers Namely:-*
>
> *(a) Tokasa Buinimasi (Mrs)*
> *(b) T. Waqavakatoga (EDP 17421 J)*
> *(c) T.N. Din (Mrs)*
> *(d) Ambika Nanda (EDP 16067)*

2. *that the Public Service Commission also tender into Court a week before hearing on 9 August 1990 the personnel files of the Officers namely:-*

   (a) Ramendra Prasad (EDP 11638 E)
   (b) Tokasa Buinimasi
   (c) T. Waqavakatoga (EDP 17121 J)
   (d) T.N. Din (Mrs)
   (e) Ambika Nanda (EDP 16067)

3. *that the Applicant or her representative be allowed to inspect the documents and files so tendered into Court before hearing date.*

4. *that the Director of Personnel and the deponent of the affidavits filed on behalf of the Respondents be available for further examination at the substantive hearing day on 9.8.90 before the Court."*

The record unfortunately does not show the arguments advanced that persuaded the Registrar or counsel for the respondent of the propriety of ordering disclosure of these documents including, as they do, confidential documents relating to three people who are not parties, two of whom are not even mentioned in any order, declaration or other relief sought. That the documents were produced is apparent from the record and the material filed subsequently by the appellant but, by notice of motion dated 3rd April 1991 she sought the following direction:

"*(1) a number of documents, files of personnel, records were sought for production in the court which has not been produced.*

(2) without the aforesaid documents having been dealt with the applicant feels insecure to file written submission as they are of the nature needs examination.

(3) the applicant had sought oral examination of the deponent of the affidavits filed in this review on the ground that the said deponent did not have the delegated authority to avow those affidavits on behalf of the Commission.

(4) applicant further seek an order for stay of the said post of administrative officer in the Police Department now advertised as vacancy No. 13/91 in the P.S.C. Circular number 02/91, on which post the 3rd Respondent was promoted and now subject to this judicial review, until this matter is dealt with by this court."

This application did at least result in the Judge pausing to reflect on the position the case had reached. As a result, he delivered a judgment on 25th June 1991 refusing the orders sought. Part of this appeal relates to his refusal to allow oral examination and his references to the production of documents.

The parties had already agreed to have the application heard on written submissions. Lengthy submissions were filed by the appellant but nothing was filed by the respondent despite a direction by the Judge to do so. In a case so laced with irrelevancies by the appellant, submissions by the respondent may well have eased the Judge's burden. However, he contented himself with simply remarking on their absence and took no further steps over the respondent's failure.

Judgment was given on 13 December 1991. The Judge refused to make the orders of mandamus "as the circumstances have now

changed and the order cannot be implemented". Apart from the filling of vacancy 199/88 and a substantial lapse of time it is not clear what other circumstances had changed since the original application was filed in May 1989. The prayer for an order of certiorari was refused "as there are no grounds to interfere with the legality of the decision to promote Mrs. Tokasa Buinimasi to the Police Department". He finally concluded; "Taking the totality of the relief sought by the applicant in the application, there is no merit in the application and it stands dismissed."

Notice of appeal was filed on 23rd January 1992 and runs to four pages of largely irrelevant material. On 16th June 1993 an application was heard by the Resident Judge of Appeal for leave "to add, rely on and argue the following grounds of appeal". Leave was granted in terms that the appeal hearing was to be limited to those grounds and fresh submissions on them.

In keeping with the trend of the case so far, those new grounds consist of five pages of largely repetitive and irrelevant material. The appellant's submissions consist of thirty seven pages of similarly repetitive argument and has inspired fourteen pages of submission in reply. In case the appellant's submission should be found wanting and despite the Resident Judge's order, she starts her submissions by seeking to adopt also the thirty one pages of earlier submissions to the High Court.

We feel we should record that one of the only bright spots in this whole sorry tale was the manner in which Mr. Shankar for the appellant presented the appeal on her behalf. He was clearly well prepared and showed an impressive knowledge of the papers in the case. As a result it has been possible to extract the grounds he wishes to pursue from the irrelevancies. We have recorded these with the concurrence of counsel as amounting to the following four 'grounds' and we will deal with the appeal on that basis.

1. *The learned Judge should have allowed cross examination of the deponents because disputes of substance were revealed in the affidavits requiring cross examination on the following points:*

(a) *whether the decision to transfer Mr Prasad sideways was made by the proper authority;*

(b) *whether the Director of Personnel had been properly delegated power to swear the affidavits in the proceedings or to make decisions about promotions and transfers;*

(c) *whether there are different procedures for common user posts and departmental posts.*

2. *The learned Judge referred to perusing files but did not reveal which were perused and which points were taken into consideration in reaching his decision.*

3. *The evidence establishes that the appellant was qualified for appointment and the person appointed to the position in the Police Department, Mrs. Buinimasi, was not qualified and therefore the appointing authority was required to appoint the appellant.*

4. *There was a failure to follow proper procedures and/or lack of bona fides demonstrated in:*

(a) *the sideways appointment to the Health position of a person who had not applied;*

(b) *the appointment to the Police position of a person who was not qualified;*

(c) *the withdrawal and non-republication of an advertisement for the position;*

(d) *the filling of the post in Mineral Resources by a person who was not qualified.*

We consider even these points overlap considerably and are far from clear but can only say that, in comparison with the material from which they were derived, they are distillations of remarkable clarity. We shall deal with them in that order.

The application for oral examination was refused by the Judge in his interim judgment on 25 June 1991 in the following words:

> *"As for the oral examination of the deponents, I cannot accede to the request as affidavits are amply sufficient for the determination of the Judicial Review....."*

It is clear that, by Order 53 rule 8, the Court may grant interlocutory relief including an order under Order 38 rule 2(3) for oral examination of the maker of any affidavit in the proceedings. However, this has only been allowed in exceptional circumstances in judicial review proceedings. Recent cases suggest there is a trend to allow oral examination more easily than previously but such a course must still be regarded as exceptional. The danger of interlocutory proceedings of this nature is the tendency to prolong proceedings that are, by their very nature, intended to be expeditious and the risk that it leads to the temptation to decide matters of fact that are not relevant. Many recent cases whilst admitting the need for some relaxation of the old strict rule warn of this risks. In O'Reilly v Mackman (1983) 2 AC 237 @ 282 Lord Diplock pointed out:-

> *"It may well be that ..... it will only be upon rare occasions that the interests of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review. The facts, except where the claim that a decision was invalid on the ground that the statutory tribunal or public authority that made the decision failed to comply with the procedure prescribed by the legislation under which it was acting or failed to observe the fundamental rules of natural justice or fairness, can seldom be a matter of relevant dispute upon an application for judicial review, since the tribunal of authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in Edwards v. Bairstow [1956] A.C. 14, 36; and to allow cross-examination presents the court with a temptation, not always easily resisted, to substitute its own view of the facts for*

> *that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament."*

Lord Diplock then went on to state that leave to cross examine deponents should be allowed whenever the justice of the particular case so requires.

It is important the Court is fully and accurately informed of the material that was before the decision making body at the time the decision impugned was made but a Court allowing cross examination must be careful to avoid the temptation to step from the consideration of that to examination of the merits of the decision.

The whole tenor of the affidavits and submissions filed by the appellant demonstrates that she based her case on the assumption that every difference of view between herself and the Commission must be resolved on the basis that the Commission was wrong. We feel sure the learned Judge must have seen that there was a real danger that, once cross examination was permitted, it would become a detailed scrutiny of the merits of the decision. The order for discovery had led to exactly that situation. However, he was under a duty to consider the application and he clearly did.

Mr. Shankar directs our attention to three points that he feels demonstrate the need for such examination.

The first is the references to the sideways transfer of Mr. Prasad in the affidavits of the Director of Personnel, Taito Waradi. In his first affidavit sworn on 31st July 1989 he states it was "an administrative decision taken in response to a request from the Permanent Secretary of Health....." In his affidavit of 7th November 1989 he states "regarding the question of sideways transfer..... it is a decision taken by the Secretariat rather than the Public Service Commission and as such is purely administrative...." Those statements are suggested to be contradictory and to demonstrate a change in his evidence. We disagree.

Next it is suggested cross examination was necessary to determine whether Mr. Waradi had been properly delegated power to act for the Commission. He deposed to his authority to swear the affidavit and the only passages in the affidavits before the learned Judge suggesting that was incorrect are found in paragraph 21 of the appellant's affidavit of 29th November 1990:

> *"21. THAT I further raise the issue of the authority of the Director of Personnel deposing affidavits on behalf of the Commission when he is a public officer and the power to promote is vested under the section 6 of the Public Service Commission Decree 1988 to the Commission nor has he deposed the Commission has delegated the authority to him to swear the said affidavits on their behalf."*

and similar assertions in her affidavit of 3rd April 1991.

The deponent answered this paragraph in his affidavit of 28 February 1991:

> *"23. THAT I deny the allegations contained in paragraph 21 of the said Affidavit, state that the Applicant has only sought to raise this issue at this late stage and that as a practical matter the Director of Personnel is the appropriate person to swear the affidavit because he has knowledge of and access to the personal files of all civil servants and I state further that the Applicant has accepted the previous affidavits sworn by Taito Waradi without querying their status."*

The suggestion in para 21 that the Director has not deposed to his authority to swear an affidavit is clearly incorrect. The reference to the power to promote is simply part of the challenge to his authority to depose on behalf of the Commission. It does not challenge his exercise of such a power and neither is it suggested anywhere in the affidavits of either side that he personally made any of the decisions to promote.

Finally, the suggested difference between common user and departmental appointments was not mentioned in any of the affidavits of the appellant or those upon which cross examination was sought. In those circumstances the learned Judge was right to refuse leave to cross examine.

He no doubt also had well in mind the passage in the appellant's affidavit of 29 November 1990 stating her reasons:

> *"20. THAT for the aforesaid reasons I have sought to examine the deponent, the Director of the Personnel to justify his reasons given in his affidavits when the facts are quite contrary to his deposition."*
> (emphasis added)

The second "ground" deals with the reference by the learned Judge in his final judgment to perusing personal files. The passages occur on pages 5 and 8 of the judgment.

At page 5 he states:

> *"The applicant in her affidavit of 3.4.1991 commenced pressing for oral examination of the deponents of the affidavits and the production of personal files of officers which was replied to by Paula Ramasima of 2.5.1991. My own Ruling dated 25.6.1991 Put an end to the request of the applicant reserving for myself the right to call for and peruse any relevant personal files if the necessary arose for the purpose of the Judgment."*

He then passes on to refer to the absence of written submissions by the respondents; a matter he returns to on page 8:-

> *"No written submissions were submitted by the state for my consideration. Had they done so, both contrasting facts and law would have certainly enabled me to get at the resolutions more speedily. Nevertheless its absence has in no way affected my findings. I have gone to the extent of calling for the personal files from the P.S.C. for my own perusal. That is the reservation made in my previous ruling and it is also the request made by the attorney."*

Whilst we can easily appreciate the concern of the appellant at the content of this unhappily worded passage, its true and less sinister meaning may be discovered by reference to the earlier ruling. In that, he had considered the request of the appellant for documents, files and records in order to prepare the submissions in the case.

> *"Perusing the file, I find a bundle of documents already in the file referring to various personal files, records and other documents ..... The affidavit of the applicant dated 29.11.90 clearly reveals the fact that she has had a look at the documents she wants produced once..... In the affidavit dated 21.2.90 I find an annexure 'B' which refers to 42 documents. The paragraph 55 of the affidavit further reveals the fact that they were available for inspection at the Civil Registry at the time the affidavit was drawn up..... The applicant has deposed .... she feels insecure to make the written submissions unless the Court examines them. The Court will not have an uneasy feeling on that front. The documents had once come in and gone back for the obvious reasons that they are very important personal files of officers. I would not expect them to be stored in the court house indefinitely. Furthermore, the applicant has quoted chapter and verse from no less than 42 documents. If the necessity arises, as they were once produced, I can call for it for my inspection and perusal."*

We consider the last sentence is the reservation referred to in his later judgment and makes it clear the documents referred to are only those already produced.

Mr. Shankar further suggested that, if he looked at the files in the privacy of his chambers without counsel present, he needed to state exactly which passages he had considered. That is plainly not correct in relation to these or any other part of the documentary evidence he considered or reconsidered whilst drafting his judgment.

The point raised in the third "ground" is one that has spawned the greatest amount of evidence. The appellant sought to

have the Court below consider and evaluate the information about the qualifications and relative merits of the successful applicants and herself. The learned Judge was wise to avoid being drawn into such an analysis. The point being pursued before us by Mr. Shankar is that, if the appellant was qualified for the post in the Police Department and Mrs. Buinimasi was not, the Commission was bound to appoint the appellant.

That the appellant vehemently believed she was not only qualified for appointment but also the best candidate, is all too apparent from her whole case. That she believes firmly Mrs. Buinimasi is not qualified is equally apparent. We will return to the second matter when considering the last "ground" but, for "ground" three, we need solely deal with the assertion that, if there is only one applicant who fulfils the necessary requirements in terms of qualification under the regulations or other stated requirements, the Commission is bound to appoint.

Nowhere have we been shown a provision of the law to support such a right and, indeed, we would be startled had the appellant been able to do so. Clearly the Commission must observe the proper rules and procedures in seeking and considering applications for vacancies. In so doing they must evaluate evidence of all aspects of the candidates' abilities, qualifications and attitudes. Having done so, they are left with a discretion to decide the suitability of the candidate for the post under consideration. That discretion must include the right to decide, if based on proper grounds, that despite fulfilling

all the stated qualifications, the candidate may still not be suitable. There may be many reasons why a particular person should not be appointed despite suitable qualifications on paper and there is no right of automatic appointment in the event that no other qualified person applies.

The fourth "ground" suggests a failure to follow proper procedures and/or lack of bona fides by the Commission. Four specific matters are raised but it is necessary first to consider the broader aspect. It is undoubtedly a fundamental principle that powers given by law must be exercised reasonably, on good grounds and in good faith. Allegations of bad faith or lack of good faith seem more and more frequently to pepper applications for judicial review. In most cases, what is being alleged is no more than a suggestion the tribunal has acted on improper grounds or unreasonably. Absence of good faith suggests more. It implies actual dishonesty by the authority whose decision is being challenged.

This case is, as has been stated already, brought by the appellant as the result of a very deep feeling of injustice. Her affidavits quote details of the service records of herself and the other applicants. She repeats many times that she considers herself the best candidate and certainly much better qualified than the others. Almost every argument raised, every fact cited and every allegation made starts from the subjective view that she is the best person and, therefore, anything done that is not founded on that concept must necessarily be wrong. Viewed from

such a standpoint it is easy to perceive injustice and lack of good faith. However, we do not feel there is anything in the papers that should have persuaded the learned Judge that the PSC or its individual officers acted without good faith. The burden of showing such an allegation lay squarely in the appellant and she has fallen far short. We shall, therefore, confine our consideration of this ground to the question of whether there was a failure to follow the proper procedures and/or whether the Commission acted unreasonably. As before, we must stress that, if the procedures are properly followed and the manner the Commission exercised its discretion is not unreasonable, we cannot and will not pass on to consider the facts and arguments on which the appellant bases most of her contentions. To do so would be to step well outside the scope of judicial review.

The first complaint in the fourth "ground" relates to the sideways transfer of Mr. Prasad from his administrative officer position in Mineral Resources to the similar post in the Ministry of Health. In her affidavit of 15 May 1989, the appellant states one ground for seeking judicial review is that the effect of sideways transfer to vacancy No. 1105/88 was "blocking my chance of promotion".

The Director of Resources replied in his affidavit that:

> *"the sideways transfer of the Second Respondent was an administrative decision taken in response to a request from the Permanent Secretary of Health for a substantive post holder with experience who would be able to co-ordinate the training requirements of the Ministry of Health, the*

vacancy having arisen as the result of the resignation of the officer in the position with effect from the 29th day of March 1989, and it was considered that the Applicant having recently completed her Diploma in Health Administration required on the job experience;"

In the further affidavit he added, as quoted already (p.15), that the transfer was a decision taken by the Secretariat and was purely administrative in character.

There is no magic in the description of the decision being administrative in character. The attempt in many cases to distinguish between administrative and judicial decisions and in some way to exclude the former, is a misunderstanding of judicial review. Many administrative acts require the exercise of a discretion and may therefore be subject to the same requirements as more obviously judicial decisions. We feel the Director uses the word administrative simply to describe the type of procedure necessary and not to suggest a different basis for the exercise of discretion. It is clear from the passage set out above that the exercise of the discretion was based on a consideration of relevant matters.

However, if, as the appellant contends, the procedure itself was wrong, the decisions may be nullified as a result. Mr. Shankar in his submissions suggests the appellant was entitled to expect she would receive "a fair play in action" by the Public Commission, that the "criterion directives laid down for promotion" would be followed and that the Commission would

"consider applications on the merits in accordance with the criterion directives and or regulations".

The complaint of procedural failure and unreasonableness is based by him on two grounds, namely, that the Commission itself issued guidelines in its circulars and failed either to follow them or the Regulations and that the powers of the Commission had not been properly delegated to the officers making the decision. These two considerations apply to all four aspects of "ground" four and they can be dealt with together.

The procedures it is alleged had not been followed, appear in the Public Service Circular containing the vacancy notices and in a circulated paper headed "The Appointment and Promotion Process" and dated August 1988.

The particular points are:

1. that the vacancy notice under the heading Qualification stated "Qualification required for appointment as Executive Officer and at least three years' service as an Executive Officer or equivalent....."

It is contended Mrs. Buinimasi had not served as Executive Officer for the required three years. It is necessary to consider the status of requirements specified in the vacancy notice. In general terms administrative circulars do not have statutory force and are not enforceable by judicial review. However, the Courts have frequently held that the public are

entitled to expect an authority to follow guidelines it lays down itself in published circulars. We would agree with that principle but the question still arises how far is the authority bound? How far, having followed the requirements of a circular, is its decision made nugatory by a failure to observe one minor aspect?

It would be unrealistic to attempt to enforce every detail of such circulars. The Court will look at the document and consider whether the authority has followed the principles set out. If it has failed in any particular aspect, it will only negative the whole decision if it makes it unreasonable. If the decision to appoint her was made on a proper consideration of the material, we should not interfere.

The Director of Personnel explains that:

> *"the Third Respondent was considered better-suited for her post in that apart from her personal qualities and qualifications, paragraph 11(3) of the Public Service Commission Regulations 1987 (hereinafter the "Regulations") provided that the Commission "shall ensure that, so far as possible, each level of each Department in the Public Service shall comprise of not less than fifty percent of indigenous Fijians and Rotumans", there being only one ADO3 position in the Police Department, and that the Applicant's seniority in terms of years of service was no longer a relevant factor under paragraph 11(1) of the Regulations as was the case under the Public Service (Constitution) Regulations issued under the Public Service Act Cap. 74 and that the Third Respondent has the requisite three years experience as an Executive Officer having been appointed on the 29th day of October 1985."*

The reference to her experience as an Executive Officer is disputed based on the appellant's analysis of the contents of Mrs. Buinimasi's personal file. It is clear the Commission considered she had the necessary experience. We do not feel we can or should enter into such an analysis of the detail of the decision. It is clear the Commission did follow the correct procedures and we will not interfere with the exercise of their discretion on the basis of a single disputed aspect.

Similarly in relation to Mr. Waqavakatoga it is stated by the Director that the Commission:

> *"was of opinion that he was best able to occupy the position and that it had taken into account the application of the applicant and decided this officer was more experienced and have served in ADO3 and ADO2 posts".*

2. The August 1988 paper defined seniority as being the length of continuous permanent service and, in a specimen application given as an example of how to proceed, there is a requirement to list applicants in order of seniority.

The appellant rightly contends she has considerably more seniority than Mrs. Buinimasi. She takes issue with the statement by the Director in his first affidavit that "the applicants seniority in terms of years of service was no longer a relevant factor under paragraph 11(1) of the Regulations". That assertion was accepted by the learned Judge.

Regulation 11(1) states:-

> *"In considering the eligibility and merit rating of officers for promotion, the Commission shall take into account any relevant person's experience, educational qualification, ability, personal qualities, together with the relative efficiency of such officers".*

We find no substance in her complaint on this aspect. The August 1988 circular clearly defines seniority in order to enable a listing on that basis. Nowhere does it state that is a ground for selection and the Director is correct in saying Regulation 11 does not make it a requirement. However, his use of the word "relevant" is surprising and we cannot accept that seniority is irrelevant to the decision as a whole. It must be a factor that may bear on experience and efficiency.

3. Regulation 11(3) states "Notwithstanding the subregulations 11(1) and (2) of this Regulation, the Commission shall ensure that, so far as possible, each level at each Department in the Public Service shall comprise not less than fifty percent of indigenous Fijians and Rotumans".

That was cited as the basis for appointing Mrs. Buinimasi to the Police Department. The appellant suggests it applies not to each department but to each level in the case of common user posts. Thus, the Commission must strive to maintain at least fifty percent of Fijians and Rotumans, in this case, at ADO3 level throughout the Public Service as a whole.

We feel such an interpretation flies in the face of the plain words that it must be at "each level of each department".

Passing finally to the matter of delegation of powers, the appellant complains that the affidavits of the Director of Personnel do not produce the record of the proceedings of the Commission. In the written submission the matter is put this way:

> *"The Judge was wrong in saying "PSC" made decision. The Public Service Commission not put forward papers or records to show it made decision. The apparent inference to be drawn from the affidavits of Taito Waradi and Paula Ramasima is that these Officer were making the decisions, but the necessary power to do so was not delegated to them because it was not published. It is submitted that question of promotion must as a matter of law be decided by Public Service Commission itself and it could not delegate those powers to its officers."*

We can deal with the matter very shortly. We see no reason to draw the inference referred to. Nowhere in the papers, with the single exception of Mr. Prasad, is there anything to suggest the Commission itself did not make the decision.

The powers of the PSC are prescribed by section 6(1) of the Fiji Service Commission Decree 1988 as the power to make appointments to public offices and to remove and exercise disciplinary control over such officers. The appellant has not demonstrated any provision requiring the Commission itself to make transfers rather than the secretariat or its officers.

The appeal is dismissed. In all the circumstances we see no reason why the respondents to the appeal should be deprived of their costs, and we order accordingly.

Before leaving this case, we feel we should add a further comment.

In a world of burgeoning bureacracy and use of administrative powers by an increasing number of official bodies, judicial review is an essential means of redress. The special procedures are designed for a relatively straightforward and prompt determination of the case. We see an unfortunate and growing tendency by litigants both to seek judicial review in cases more suited to different proceedings and remedies and to submit ever more prolix documents for the Court to consider. This is all too frequently matched by an apparent unwillingness of the Court to take firm control of proceedings particularly at the early stages. Far from limiting the documentation, the Courts also too often order access to documents that should not be disclosed.

In this case, a more careful appraisal by the Judge and Registrar of the papers submitted, the remedies sought and the time being taken to reach the hearing would have benefitted everyone involved. Much of the material before the Court was irrelevant and some, frankly, should never have been the subject

of disclosure. Even at the stage leave was granted, some of the orders sought were not possible. By the time the case reached the actual hearing two and half years later all the orders were impossible to implement. Now, another year further on, the appeal proceedings can fairly be described as virtually irrelevant to the original intention.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

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Sir Peter Quilliam
Justice of Appeal

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Mr. Justice Gordon Ward
Justice of Appeal