

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0038 OF 1996
(Judicial Review No. HBJ0016 of 1994)

BETWEEN:

THE PUBLIC SERVICE COMMISSION
and THE PERMANENT SECRETARY FOR EDUCATION

APPELLANTS/APPLICANTS

-and-

EPELI LAGILOA

RESPONDENT

Mr. S. Kumar for the Appellants
Mr. I. Fa for the Respondent

Date and Place of Hearing : 12 November 1996, Suva
Date of delivery of Judgment : 12 November 1996

DECISION

On 28 June 1996 Pathik J. granted the respondent an order of certiorari to quash a decision of the Public Service Commission dismissing him from the public service and ordered that he be reinstated forthwith on full salary and be paid arrears of salary back to the date of the dismissal order. The applicants have appealed against those orders. They sought from Pathik J. a stay of them pending the hearing and determination of the appeal. He refused to grant it. They now renew their application, to this Court.

Generally an appellate court will not stay effect being given to a judgment under appeal unless the appeal will be rendered nugatory if it does not do so. Most commonly that

occurs if, because the respondent is impecunious, money paid pursuant to judgment cannot be recovered if the appeal succeeds. An appeal may also be rendered nugatory if for any other reason there is a real risk that the appellant cannot be restored to his original position (Commissioner of Taxation v The Myer Emporium (1986) 160 CLR 220).

In the present case there is evidence that the respondent is impecunious. However, the Fiji Teachers Association, a registered trade union, has undertaken that, if the appeal succeeds, it will pay to the government the full amount of salary and arrears of salary paid to the respondent pursuant to Pathik J's orders. That being so, justification for staying those orders does not exist. Accordingly I am not willing to order a stay.

It is not necessary for me to consider further the application for a stay order. I will say only that, if I had needed to do so, I should have had to consider whether the applicants had shown that there was a reasonable prospect of the appeal succeeding. Mr. Fa presented strong arguments that there was not. As it is unnecessary for me to express a view on that, it is better that I do not do so.

Mr. Kumar submitted that the second applicant had no authority to pay salary to the respondent because he is not a member of the public service, having been dismissed. I cannot accept that that is so. Pathik J. quashed the decision to

dismiss him; accordingly he has not ceased to be a member of the public service. To make that abundantly clear His Lordship expressly ordered the respondent's reinstatement. Until the appeal is heard and determined, in the absence of a stay being ordered, Pathik J.'s orders remain effective and will continue to be so thereafter unless the appeal succeeds. The second applicant does not, therefore, lack authority to pay the respondent either salary as it accrues due hereafter or arrears of salary to date.

The application for the stay of Pathik J.'s orders is refused. The respondent should be paid the arrears of salary forthwith, without any further delay, and between now and the hearing and determination of the appeal should be paid salary as it accrues and becomes payable.

Mr. Fa asked for the applicants to be ordered to pay the respondent's costs of these proceedings. However, the willingness of the union to undertake to reimburse the government money paid to the respondent if the appeal succeeds was not made known to the applicants or the Court before the hearing of the application to-day. Had that occurred, the applicants might well not have proceeded with their application. In the circumstances I consider that each party should bear its own costs of the proceedings on the application.

I. R. Thompson

I. R. Thompson
Justice of Appeal