

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

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CIVIL APPEAL NO. ABU0032 OF 1997S
(High Court Civil Action No. HBJ 0009/96)

BETWEEN:

MARIO NAGALES PADUA

Appellant

AND:

PUBLIC SERVICE COMMISSION

Respondent

Coram: The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Mari Kapi, Justice of Appeal

Hearing: Tuesday, 16 February 1999, Suva

Counsel: Mr M. Raza for the Appellant
Mr D. Singh for the Respondent

Date of Judgment: Friday, 26 February 1999

JUDGMENT OF THE COURT

The appellant, a Medical Practitioner, was employed by the Government as a Medical Officer in the Ministry of Health in 1994 under a three-year contract made between him and the Secretary of the Public Service Commission on behalf of the Government. His employment at Labasa Hospital was terminated on 13 March 1996 and in June of that year he sought leave under Ord. 53, r.3 to apply for Judicial Review of that decision, citing a number of grounds in support of request for a declaration that it was null and void and for other relief. Pain J. heard the application on 14 November 1996 and in a considered decision delivered on 6 May 1997 he refused leave.

As this was an interlocutory application (see Charan v Suva City Council (CA Civil Appeal No.29 of 1994)) the leave of the Judge of the High Court or of the Court of

Appeal was required to bring an appeal: Court of Appeal Act (Cap.12), s.12(1)(f). On 24 October 1997 Pain J. refused an application for such leave, and the appellant then sought leave from a single Judge of this Court under s.20(a). This was heard and refused on 7 May 1998 by Thompson J A. Under that section (now repealed and replaced by s.9 of the Court of Appeal (Amendment) Act 1998) the appellant was entitled, following such refusal, to have the matter determined by the Court as duly constituted for the hearing of appeals. (The former s.20(a) applies to these proceeding by virtue of s.18(3) (e) of the Interpretation Act (Cap.7)). The appellant accordingly filed a motion on 12 May 1998 seeking the leave of this Court to appeal against Pain J.'s refusal to grant leave to apply for Judicial Review. Counsel had no objection to the Court consisting of only two members, the President having certified on 25 January 1999 that it was impracticable for him to summon a Court of three Judges for this purpose. Counsel also agreed that if this Court granted leave it should proceed to determine the appeal.

Three grounds were set out in support of the application for leave to appeal. Two of them claiming that such leave was unnecessary can be rejected immediately: they resulted from a misunderstanding of S.12(1)(c) of the Court of Appeal Act conferring a right of appeal on a question of law from a decision of the High Court in the exercise of its appellate jurisdiction. This is not such a case. In the third ground it is alleged that the respondent Commission

'acted on bad faith in making false allegations against the Applicant to terminate his appointment influenced by the false and biased report of the Medical Superintendent in denial of natural justice without giving him any hearing and making false allegations that the allegations made against the Applicant were disclosed to him and he was counseled.'

The appellant also relied on the matters set out extensively in his affidavit filed on 20 April 1998 contesting allegations of misconduct and incompetence made against him in affidavits filed on behalf of the respondent.

In refusing leave Pain J. referred to R v Berkshire Health Authority [1985] QB 152 in which the Court of Appeal held that where the relationship between the parties was based on a contract it was governed by private law, and that the public law remedy of judicial review was not available. However, he acknowledged that he was bound by this Court's decision in Korovulavula v. Public Service Commission (CA No.6 of 1994: judgment 23 August 1994) dealing with a contract containing virtually identical terms. The Court held that as a statutory body created to carry out public functions, the Commission was obliged to act in good faith and in accordance with the general purposes of the statute for the public good in exercising its discretion to invoke the termination provisions of the contract. After a brief review of the evidence he concluded that the appellant could not raise a sufficiently arguable case that the Commission's decision to exercise its rights was not made in good faith and for the public good.

The relevant provisions of the contract of employment are:

Cl.2(1)(e): The officer will be subject to the provisions of the Fiji Public Service Decree 1990, Public Service Commission (Constitution) and Statutory Regulations, 1990 and the General Orders of the Government relating to officers in the service of the Government for the time being in force except in so far as any of those provisions are only applicable to officers on the permanent staff or are varied by the terms of this Agreement, and to the Financial Regulations and Departmental Instructions now in force or as from time to time amended.

- Cl.8(b) Without prejudice to the provision of paragraph 10 (relating to dismissal) Government may terminate this Agreement..... (b) at any time by giving in lieu of the notice aforesaid [i.e. 3 month's notice] one month's basic salary.*
- Cl.10 If after reasonable inquiries the appropriate Service Commission is satisfied that the officer has been guilty of misconduct or a breach of any term of this Agreement the officer may be summarily dismissed and upon such dismissal all rights and advantages reserved by him under this Agreement shall cease and he will be required to refund to Government the whole or such portion as the Government may decided of the cost of the passages paid in respect of himself, his wife and children (if any) under the terms of this Agreement by the Government etc.*

On 13 March 1996 the Commission wrote to the appellant as follows:

TERMINATION OF APPOINTMENT

The Public Service Commission, after considering the complaints raised against you for unethical conduct and unsatisfactory performance has decided at its meeting of 06 March 1996 that your appointment in the service be terminated forthwith.

In accordance with Clause 8(b) of your Agreement of Service you will be paid one month salary in lieu of this notice and will also be required under Clause 10, to refund to Government, 1/3 of the cost of passage paid in respect of yourself, wife and your children in transporting you to Fiji for commencement of duties under this Agreement of Service'.

It is uncertain from the terms of the letter whether the Commission intended to terminate the contract under cl.8(b), or to exercise its right of summary dismissal under cl. 10, since both are mentioned in the second paragraph. The references in the first paragraph to the appellant's conduct suggest it had in mind cl.10. However, we incline to the view that the payment of salary in lieu of notice renders it a termination

under cl.8(b) rather than a summary dismissal under cl.10, and that clause was invoked to support a claim for refund of expenses. On this approach it may be arguable that the appellant is not liable for those because they can only be claimed on dismissal for misconduct.

For the appellant Mr Raza submitted that the provisions of the Public Service Commission (Constitution) Regulations 1990 were incorporated under cl.2(1)(e) of the contract, and that the Commission had not complied with the procedural safeguards in Reg.40 in the way it dealt with the complaints it received about the appellant. The termination of his employment was clearly based on those complaints, having regard to the statement in the first paragraph of the letter quoted above. However, this Court in Korovulavula pointed out that Reg.26 (c) of those Regulations expressly provides that where an officer is employed on contract, his employment is to be terminated in accordance with its terms. Far from incorporating those Regulations, cl.2(1)(e) of the contract specifically excludes those that are varied by the terms of the agreement. Clauses 8(b) and 10 of the contract constitute such a variation, the former giving an unfettered right to terminate on payment of one month's salary, while cl.10 entitles the Commission to summarily dismiss for misconduct or breach if satisfied thereof after reasonable enquiries. Accordingly, none of the provisions relating to the Fiji Public Service provides any public law "underpinning" of the contract to give the appellant a remedy in that field.

The further submission that the complaints should have been referred to the Medical Council under the Medical and Dental Practitioners Act (Cap.255) takes matters no further for the appellant. There is nothing in the contract expressed or implied

requiring such a course as a pre-requisite for termination or dismissal. Nor can a plea based on a failure to accord natural justice by giving the appellant the opportunity to answer the complaints succeed, in view of the unfettered power to terminate given in cl.8(b), or of the right of dismissal for misconduct after "reasonable enquiries" in cl.10. Such a failure might be relevant, however, in determining whether any enquiries made under cl.10 were reasonable, but only in private law proceedings. Nevertheless, in some circumstances it might have a bearing on the question of good faith discussed below.

We agree with Pain J.'s conclusion that the Appellant's only hope of succeeding in judicial review proceedings is on the narrow ground that the Commission was not acting in good faith and in the public interest when it decided to exercise its discretion to invoke the termination clauses in the contract, and the appeal is advanced on that basis, as set out in the third ground of appeal quoted at p.2 above. Essentially the appellant relies on two matters - namely, the Commission's reliance on false allegations and reports inducing the termination of his employment; and breach of natural justice in not giving him the opportunity to answer them.

As to the first of those matters, he claims that the Commission was influenced by the false and biased reports of the Medical Superintendent of Labasa Hospital. There were copies of two from him to the Permanent Secretary of Health dated 2 March 1995 and 20 November 1998 annexed to the respondent's affidavit of 10 July 1996. They set out the appellant's background and refer to wide ranging complaints and criticisms by staff about his professional incompetence and poor case management, the second one concluding with a recommendation that his employment be terminated as early as possible. In his affidavits the appellant gave explanations of his conduct and

criticised other comments in the reports.

The second matter relied on - breach of natural justice - consists of allegations by the appellant that he did not receive details of the complaints until after he had commenced his judicial review proceedings, and he denied statements in the Medical Superintendent's reports that he had been warned and counselled about those on many occasions.

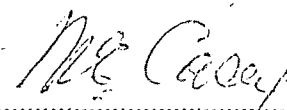
Mr Raza pointed out that the appellants' wife (a medical practitioner also employed by the Commission) brought successful judicial review proceedings against it arising out her dismissal at the same time. However, the facts in that case were markedly different and it can afford no precedent or other guidance to the way this application should be decided.

In an application for leave to appeal and to apply for judicial review the Court is not concerned to determine the merits, but it must be satisfied that if the facts disclosed in the material before it are established, the applicant would have an arguable case for the remedy sought.

Despite the careful analysis made by Pain J. and counsel's submissions on behalf of the Commission, we consider that the appellant could make out an arguable case that the Commission was not acting in good faith in a full hearing of his allegations about error and bias by the hospital authorities, and in the light of its failure to hear his explanations, or to make independent enquiries into the complaints against him.

Accordingly we have concluded that leave to appeal should be granted and that the appeal should be allowed, with the consequence that the appellant will have leave to apply for judicial review.

- Result:
1. Leave to appeal granted, and appeal allowed.
 2. The decision of the High Court of 6 May 1997 is set aside and the appellant is given leave to apply for Judicial Review.
 3. The decision of Thompson J. of 7 May 1998 is set aside.
 4. Appellant to have the sum of \$1,000 for costs together with disbursements to be fixed by the Registrar if the parties cannot agree.



Sir Maurice Casey
Presiding Judge



Sir Mari Kapi
Justice of Appeal

Solicitors:

Messrs. Raza & Associates, Suva for the Appellant
Office of the Attorney-General Chambers, Suva for the Respondent