

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

CIVIL APPEAL NO. ABU0060 OF 2001S
(High Court Civil Action No. JR HBJ0031 of 2000S)

BETWEEN:

ANURADHA CHARAN

Appellant

AND:

PUBLIC SERVICE COMMISSION

Respondent

Coram:

Gallen, JA
Smellie, JA
Ellis, JA

Hearing:

Wednesday, 14th May 2003, Suva

Counsel:

Mr. R. Singh for the Appellant
Mr. K.T. Keteca for the Respondent

Date of Judgment: Friday, 16th May, 2003

JUDGMENT OF THE COURT

The appellant brought proceedings for Judicial Review pursuant to leave seeking the following orders:

- “1. *An Order of Certiorari to remove the said decision of the Public service Commission directing the Applicant to proceed on leave from 18 October, 2000 into this Honourable Court and be quashed.*
2. *Declaration that the said decision of the Commission for the Applicant to proceed on leave is null and void and in contravention of the terms of employment of the Applicant and Improper, unreasonable, unfair, arbitrary and in contravention of the Public Service Act.*

3. *Declaration that the decision of the Public Service Commission in appointing one Mrs Iva Tavai to act on the vacant post of the Principal Administrative Officer from 2.7.99. In the Workforce, Planning and Scholarship Division of the Commission and subsequently provisionally promoting her was:*
 - (i) *In breach of the Public Service Values under Section 4 of the Public Service Act, 1999;*
 - (ii) *In breach of natural justice, made in bad faith and deliberate denial of advancement to the Applicant;*
 - (iii) *In excess of jurisdiction, unreasonable, unfair, arbitrary and in breach of the Applicant's legitimate expectations.*
4. *declaration that the actions of the Public Service Commission is tortious constituting damages.*
5. *An order for damages and costs of the application for judicial review."*

The applicant was first employed in the Public Service in 1967. This lasted until her marriage in 1968. After her marriage she was temporarily employed and then permanently employed again in 1974. Her letter of appointment reads as follows:-

"Memorandum

From: Secretary of the Public Service Commission *PF No. 8775*

To: Mrs. A. Charan, Temp. Clerical Officer Class II

Date:25/11/74

ufs. The Controller of Customs & Excise

Subject: APPOINTMENT ON PERMANENT TERMS

You are hereby appointed as a Clerical Officer, Class II at Customs and excise Department in the Public Service of Fiji with effect from the 1st August, 1974, on the following terms and conditions.

You would receive salary at the rate of \$578 per annum in Level 9 in the scale \$1266 x 60 – 1 506 x 72 - \$1650 x 72 – 1 650 x 72 – 2 082.

Your appointment would be probationary for a period of one year. While on probation or after confirmation in your appointment, your appointment may be terminated by one month's notice on either side or by payment of one month's salary in lieu of notice. You would be liable to summary dismissal in the event of misconduct or insubordination.

You would be subject to the provisions of general Orders, Financial and Stores regulations and Departmental Instructions now in force or as from time to time amended.

You would continue to contribute to the Fiji National Provident Fund in accordance with the Fiji National Provident Fund Ordinance, Chapter 191.

You will be subject to the 1972 Leave and Passage Regulations.

You would be liable to be transferred at any time to any branch or department of the Public Service anywhere in Fiji.

Your attention is drawn to the provisions of the Official Secrets Acts of the United Kingdom of 1911-1920 which apply in Fiji. Extracts from the Acts are printed at the commencement of the Register of Declarations kept in the Department and you are required to sign the register if you have not already done so."

She continued in this employment until 25 January 2001 when she turned 55. Her retirement was compulsory under R14(1) of the Public Service (General) Regulations 1999. Before her retirement she had accumulated leave owing to her. She was required to take some of it before she retired and the balance was converted into cash compensation under General Order 703. She was offered \$687.00 representing 148 ½ days leave. She refused to accept this. She claims that she was entitled to work until she was 60 or alternatively that she was entitled to be considered in employment for the 148 1/2 days after she turned 55 and so past the end of May 2001 when the Legal Notice 54 Public Service Act 1999 came into force which extended the retirement age from 55 to 60. Detailed calculations of the exact date were submitted but the essence of the submission is

captured by the above account. We do not need to refer to the calculations more precisely.

The application for Review was heard by Byrne J. who dismissed the application. The Judge dealt with the application on the basis that determining the retirement date at which the appellant could be required to retire determined the matters before him. He reviewed the legislative chain from the time prior to 1987 when the compulsory retiring age was 60 to the gazetting of Legal Notice 54. The age was lowered to 55 by the Fiji Service Commission and Public Service (Amendment) Decree 1987. That remained the position until the end of May 2001 and at the time of the 55th birthday of the appellant the matter was covered by the 1999 Regulation R14(1). He concluded his reasoning by saying:

“In my judgment the right to retire at 60 only accrues to or is only acquired by a person who has actually turned 60 at the date of commencement of the amendment. In my view this is made clear by Section 48 of the 1983 Pensions Act and also the provisions of the 1990 and 1997 Constitutions which I have mentioned above. In my judgment therefore any pension benefits granted to any person before 10th October 1970 must have been granted by the law in force at the date on which those benefits were granted. It follows that the Applicant is not governed by this provision as in my view she is deemed to have retired at the time when the retirement age was 55 years and she did not retire before 1970. Thus in my view she cannot argue that the rights to receive Pension benefits and to retire at 60 had already been acquired by her.

There is also a contractual factor relevant to this application. The Applicant’s letter of appointment specifically provides that:

You would be subject to the provisions of General Orders, Financial and Stores Regulations and Departmental Instructions now in force or as from time to time amended.”

The Applicant has also argued that she should first proceed on pre-retirement leave as she has leave to her credit. I consider this argument somewhat strange in that this is the very suggestion the Respondent made to the Applicant but which she rejected. As I am of the opinion that the retirement age for the Applicant is 55 years then the Applicant is entitled to payment in lieu for all benefits and entitlements due to her at the date she attained 55 years.

The Respondent has stated throughout that as the Applicant was not able to take all her leave before she turned 55 the Respondent is ready to pay her immediately a sum in lieu of such leave.

By Legal Notice NO.54 of the 17th of May 2001 the Public Service (General) (Amendment) Regulations 2001 were made and gazetted on the 25th of May 2001. The amendment restores the original retirement age of 60 but as it was made well after the previous amendment it cannot apply to the Applicant but only to members of the service at its commencement date."

The appellant now appeals against that conclusion.

The appellant sought leave at the commencement of the hearing to add and amend grounds.

We gave leave for the appellant to add grounds 2 and 3 of that application which was in the following terms:-

"(1) That the learned Judge erred in law in failing to consider the Appellant application that the Commission acted properly in bad faith and in breach of section 4 of the Public Service Act 1999 and contrary to section 140 of the 1997 Constitution in appointing one Apenisa Matairavula to act in higher position from 26.10.98 in the Ministry of Education depriving the Appellant advancement and promotion when she had replaced him earlier that section on the grounds of his non-performance, and also appointing another officer (Ms Tavai) to another senior post despite her having better merit in terms of qualifications, service and experience as ruled by the Appeal Board, constituting damages.

“(2) That the learned Judge erred in law in holding that the Pension (Amendment) Decree 1989 not made retrospective except from 1st of May 1988 had amended the Appellant’s terms of retirement from 60 to 55 and only applied to those who turned 60 before the commencement that amendment.

(3) That the learned Judge erred in law in holding that on turning to age of 55 the Appellant was not entitled to take her accrued leave but compensation and the subsequent amendment made to the retirement age back to 60 from 1 June 2001 did not apply to the Appellant.”

We could not deal with ground one as we had no material to enable us to do so. It may be, not all matters raised by the original application and leave have been dealt with in the High Court if that is so leave is given to the appellant to raise such other matters in the High Court.

The appellant maintained up until the hearing before us that the 1999 Regulations were ultra vires and void. However in submissions Mr Singh accepted that they were valid but submitted they were not retrospective and therefore did not apply to appellant. He maintained his alternative argument based on the untaken leave.

The basis of the first part of the appellant’s argument was that section 132(2)(b) of the 1990 Constitution applied to this case. That provided:

“132. – (1) The law to be applied with respect to any pensions benefits’ that were granted to any person before 10 October, 1970 shall be the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to that person.

(2) The law to be applied with respect to any pensions benefits (not being benefits to which the preceding subsection applies) shall –

- (a) *insofar as those benefits are wholly in respect of a period of service as a public officer that commenced before 10 October, 1970, be the law that was in force immediately before that date; and*
- (b) *insofar as those benefits are wholly or partly in respect of a period of service as a public officer that commenced after 9 October, 1970, be the law in force on the date on which that period of service commenced,*

or any law in force at a later date that is not less favourable to that person."

This provision is still in force by virtue of s.195(2)(b) of the 1998 Constitution. It is however plain that it protects pension rights but does not address or affect the age of retirement. For this reason we consider the appellant's contention that her right to work until 60 did not survive the 1987 Decree and the 1999 Regulations.

The argument that the 1987 decree and the 1999 Regulations had no retrospective application cannot help the appellant since it is not her accrued rights under the Fiji National Provident Fund which are affected but her retirement age.

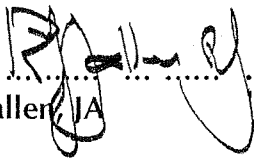
An argument was raised that the appellant had contractual rights which justified a later retirement date. That argument is defeated by the plain words of the statutory and regulatory material from the Pensions Act 1958 on. The Judge in the High Court noted that the conditions of employment made the appellant subject to General Orders "as from time to time amended."

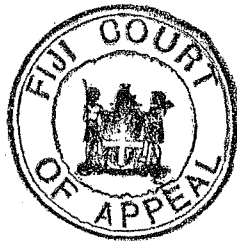
On the other hand we think there may be an arguable case that the appellant is entitled to compensation for loss of pension rights. The argument is that the applicants' pension rights are governed by the Fiji National Provident Fund Act. (Cap.219) which Counsel agree would entitle a person who was able to work after reaching 55 to further contributions to her pension from the State. We do not need to pursue the argument further as the relief sought does not cover pension rights.


As far as the applicant's alternative submission is concerned we are satisfied that her rights are to compensation only for untaken leave and the legislation and regulations fix the date of retirement so that it is not legally possible to extend that employment in the way suggested.

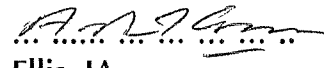
We are satisfied that Byrne J. was correct in his conclusion. The relief sought can accordingly be dealt with as follows:

- (1) The appeal is dismissed.
- (2) If any matters raised by the original application to the High Court have not been dealt with in that Court leave is reserved for the appellant to pursue those matters in that Court.
- (3) There will be no order for costs.


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Gallen, JA




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Smellie, JA


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Ellis, JA

Solicitors:

Messrs. Kohli and Singh, Suva for the Appellant
Office of the Attorney General, Suva for the Respondent