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

CIVIL APPEAL NO. ABU0010 OF 2004S
(High Court Civil Action No. HBC 50 of 2003S)

BETWEEN:

FIJI PUBLIC SERVICE ASSOCIATION
FIJI NURSING ASSOCIATION
FIJI TEACHERS UNION

Appellants

AND:

PUBLIC SERVICE COMMISSION

Respondent

Coram: Ward, President
Barker, JA
Tompkins, JA

Hearing: Tuesday, 23 November 2004, Suva

Counsel: Mr. H. Nagin for the Appellants
Mr. J. J. Udit and Mr S. Sharma for the Respondent

Date of Judgment: Friday, 26 November 2004

JUDGMENT OF THE COURT

This is an appeal from a refusal by Scott J (as he then was) to grant leave for the appellants to apply for judicial review.

Mr Udit for the respondents raised a preliminary objection that the appellants required leave to appeal and no such leave had been sought or granted. His contention was that the refusal of leave was interlocutory. He relied on the decisions of this Court in ***Suresh Charan v Saiyed Shah***, [1995] 41 FLR 55, and ***Shore Buses Ltd and Ors v Minister for Labour and Industrial Relations***, [1996] 42 FLR 236, both of which used the application approach in order to determine whether or not a particular decision was final or interlocutory. He challenged the decision in ***Jetpatcher Works (Fiji) Ltd v Permanent***

Secretary for Works and Energy and Ors, FCA Civ App 63/03, in which the Court suggested the order approach should be used in future. The latter was a decision in which he had appeared for the unsuccessful party. He advises the Court that he has not sought to have the matter clarified by the Supreme Court.

With his usual scholarship and industry, he submitted detailed submissions. However, we do not consider it appropriate to return to the possible conflict amongst those decisions and we declined to hear the submissions. However, in case the appeal should be incompetent and bearing in mind the suggestion of the Supreme Court in ***Native Land Trust Board v Narawa and Matanabua*** SC App CBV 7/2002S that, generally speaking, the difficulties of classification arising under rules of court regulating appeals to intermediate appellate courts can be overcome by the sensible use of the discretion to grant leave to appeal, we have granted leave.

The application for judicial review related to the procedures adopted by the respondent to introduce a Senior Executive Service within the Public Service under the provisions of the Public Service Act, 1999.

That Act came into force on 1 July 1999 and, *inter alia*, established a Senior Executive Service. Section 9 provides:

> *"9 – (1) This section established a Senior Executive Service.*
>
> *(2) The Senior Executive Service consists of Chief Executives and all employees holding offices designated by the Public Service Commission as senior executive offices.*
>
> *(3) Before designating an office under subsection (1) the Public Service Commission must consult the relevant commission and the Chief Executive of the ministry, department or parliamentary body concerned."*

By section 15, the Public Service Commission, ('PSC') with the agreement of the Prime Minister, may make Regulations which "may make provision with respect to the Senior Executive Service, including the basis on which employees in the Senior Executive Service are to be employed". The right of the PSC to make regulations providing "for

regulating and facilitating the performance of its functions" is specifically granted by s.173(1) of the Constitution.

On 31 October 2003, the PSC, with the agreement of the Prime Minister, made the Public Service (Senior Executive Service) Regulations 2003. The appellants filed an application for leave to apply for judicial review on 25 November 2003. The relief sought was:

> ***"1. An order of certiorari to remove the decision of the Public Service Commission whereby it purported to make the Public Service (Senior Executive Service) Regulations 2003 on the 31 day of October 2003 into this Honourable Court and the same be quashed together with the Public Service (Senior Executive Service) Regulations 2003; and***
>
> ***2. A declaration (in any event) that the Public Service Commission had acted unreasonably, unfairly and irrationally and/or abused its discretion in purporting to make the Public Service (Senior Executive Service) Regulations 2003 and/or exceeded its jurisdiction and/or acted in breach of the legitimate expectations of the applicants and/or acted contrary to the provisions of the constitution of Fiji."***

The respondent filed notice of opposition, seeking to have the application for judicial review dismissed. Following the lodging of written submissions, the case was to be heard on 30 January 2004. On that day, counsel for the appellants told the court that the appellants and the respondent were discussing the matter. The judgment explains:

> ***"[Counsel] suggested that the hearing of the application for leave be adjourned to allow the talks to continue: it was possible that this, and another related matter might be settled. Mr Udit did not object.***
>
> ***I did not grant the application for an adjournment for two reasons. The first was that in the public law remedy of Judicial Review it is theoretically the State which is intervening to right a procedural wrong – there is as was pointed out in R v Environment Secretary ex parte Hackney LBC [1983] 1 WLR 524,538 no true lis between the Applicant and the Respondent. For this reason the wishes of the parties, including a possible wish to adjourn or delay the litigation for whatever private reasons they might have are not relevant to the same extent as in purely private litigation. The second reason was that from the papers before me I had formed a strong preliminary impression that there was no merit in the application."***

The grounds of appeal are that the learned judge erred in law and in fact:

> ***"1. in applying the wrong test at leave stage of the Judicial review;***
>
> ***2. in substantially deciding the matter at leave stage;***
>
> ***3. in not granting an adjournment for parties to try and settle the matter;***
>
> ***4. in wrongly applying the case of R v Environment Secretary, ex parte Hackney LBC;***
>
> ***5. in forming a strong preliminary impression that there was no merit in the application;***
>
> ***6. in not holding that the appellants had been engaged by the Respondents in consultation process throughout and therefore the appellants had legitimate expectations that they would be consulted in the making of the Senior Executive Service Regulations"***

At the hearing of the appeal, Mr Nagin abandoned grounds 3 and 4.

The history of the events leading up the application may be taken from the affidavit of Mr Rajeshwar Singh, the General Secretary of the FPSA which was before the High Court.

The PSC is the employer of all members of the civil service and most of them are members of the appellant unions. The unions have been registered under the Trade Unions Act and are recognised by the PSC for the purposes of collective bargaining. It also appears that General Orders were recognised as a collective agreement in terms of section 2 of the Trade Disputes Act and were registered on 25 July 1973 as the master agreement between the PSC and the public sector unions.

On 14 February 2003, following discussions and consultations between the PSC and the unions, a job Evaluation Exercise Agreement and Terms of Reference for the consultants who would be conducting the exercise for the Senior Executive Service posts

were signed by the Secretary of the Public Service for the PSC and by Mr Singh on behalf of the FPSA.

There followed some correspondence in which the union requested information about the progress of the exercise. A meeting was held on 16 April 2003, chaired by the Secretary of the Public Service, at which representatives of the public sector unions were present. The minutes show that, in a lengthy meeting, the various union representatives raised a number of matters of concern. In particular, the Principal Industrial Officer of the FPSA, expressed concern that, in respect of the Job Evaluation Exercise, the unions were not being consulted. The Secretary of the Public Service advised him that a meeting would be convened between the unions, the PSC and the consultants. It was held on 29 April 2003.

Unfortunately it is clear there were a number of differences between the parties and the meeting was followed by correspondence which reflects the unions' concern at the manner in which the consultants and the PSC were conducting the exercise. In his replies, the Secretary of the Public Service, whilst disputing the unions' claims, adopted a generally conciliatory tone but, by mid-May, it is clear the unions were dissatisfied. It was expressed in a letter from the Confederation of Public Sector Unions on 5 May 2003:

> ***"We write to register our grave concern over the way you have unilaterally decided to plan the operation of the Job Evaluation Exercise without consulting with the unions on very crucial issues. ... The Public Sector Unions will withdraw from the Exercise if specific changes are not incorporated to give the exercise credibility and reliability."***

Similar sentiments were expressed in a letter from Mr Singh to the Chairman of the PSC on 14 May 2003:

> ***"The Commission has been formulating the Senior Executive Services Regulations but it has not consulted the Association which the Commission is required to do. It appears that the Commission has something to hide. Whilst the government preaches transparency and accountability the Commission is acting secretly and has given rise to a dispute."***

On 20 May 2003, the Fiji Public Service Association (FPSA) reported a trade dispute between their members and the PSC. The matters in dispute were stated to be:

> ***"1. The Commission's refusal to discuss, negotiate and conclude an Agreement on the Job Evaluation Exercise for SES group being carried out by Mercer Consulting Group and the completed JEE report of Permanent Secretaries given to the Secretary and the Chairman of the Commission by the Mercer Consultants***
>
> ***2. Refusal by the Commission to engage in consultation to determine samples, receive reports on the progress and recommendations from the consultants on the Job Review Exercise for the Senior Executive Services including the terms and conditions of the Permanent Secretaries***
>
> ***3. Refusal by the Chairman of the Commission to discuss and conclude an Agreement on the completed JEE on Permanent Secretaries and the claim by the Commission that JEE on PSs is privy to the Commission."***

The dispute was accepted by the Permanent Secretary for Labour, Industrial Relations and Productivity and a conciliator was appointed. In the meantime it would appear that at least one further meeting was held between the parties and the consultants.

In respect of the first limb of the relief sought, Mr Nagin accepted at the hearing before us that there was no right to strike down the Regulations. He agreed that the PSC had the power to make such regulations and that they were not ultra vires the Act. He focussed his submissions on the legitimate expectation of the unions that they would be consulted before such regulations were made. His suggestion that fair trade practices meant that, once a trade dispute had been registered, it should have been resolved before the PSC took steps to implement any of the matters in the dispute.

The failure to consult was the basis for the trade dispute and the failure to allow the resolution of that before proceeding further was another example of the PSC's attitude and determination to proceed without proper consultation. The nature of the collective agreement was that they should be consulted and they were not.

Mr Udit emphasised that there was a clear power to make the regulations provided by the Act and there was no duty to consult before doing so.

The learned judge had, correctly, accepted that was the position:

> *"Mr Udit referred me to Ministry of Finance and Economic Planning and anor v Western Wreckers Ltd (FCA Civ App 63/1991) in which the Court of Appeal cited with approval principles expounded by Megary J in Bates v Hailsham [1972] 1 WLR 1373,1378. The court held that:*
>
> > *'In ... the exercise of legislative power or authority, original or delegated, there is no duty on the body or person exercising [the power] to consult anyone.'*
>
> *This statement is perhaps a little too wide and the position is more accurately stated by Wade in Administrative Law 6th Edition page 573 (also quoted by the Court) who wrote:*
>
> > *'there is no right to be heard before the making of legislation, whether primary or delegated unless it is provided by statute.'*
>
> *As has been seen, the only requirement for consultation incorporated into section 15 of the Public Service Act is consultation with the Prime Minister. That requirement has been satisfied."*

He then concluded:

> *"In this case the Applicants, as it seems to me, are attempting to fetter the PSC's right to make subsidiary legislation which right has been given to the PSC by Parliament. Rights granted by Parliament can not be taken away by the courts. Doubtless it is prudent and sensible policy for the PSC to consult with the Unions before making new rules and regulations affecting their members. In this case such consultation did in fact take place, as is clear from the annexures to Mr Singh's affidavit. The real complaint, seems to be that the consultation process was not as extensive as the unions wished and perhaps the outcome was not as favourable as had been hoped. Neither of these complaints however provides a solid basis for moving for judicial review.*
>
> *In my opinion a motion for judicial review by the applicants would be bound to fail and for this reason the application must be dismissed."*

There can be no argument with the conclusion of the learned judge that the Regulations were made in a lawful exercise of the power under the Act and that there is no duty to consult beforehand. He clearly made his decision to refuse leave on that ground and, it would appear, on that ground alone.

The application for review was expressed to be also on the grounds of procedural unfairness, including the alleged failure of the PSC to respect and act on the legitimate expectation of the unions that they would be consulted. If that expectation was correct, then the unions were entitled to expect full, effective and genuine prior consultation.

Whilst, the learned judge referred to the fact that consultation took place, he limited his finding to the conclusion that the real complaint of the unions was that those consultations were neither as extensive nor as favourable as the unions had hoped. Such complaints would not, as he states, provide a solid basis for moving for judicial review but the application was not simply a statement of discontent as he appears to have decided. His consideration should have been whether there were grounds to support the unions' claim of a legitimate expectation that they would be consulted and that they were not so consulted.

This was an application for leave. There can be no doubt that, at that stage, the judge has the power to refuse leave in cases where it is clear that the application must fail. Had this been an application simply to quash the Regulations, the judge would have been entitled to refuse leave on that ground. However, there was also an application for a declaration on grounds which included legitimate expectation and that, the learned judge, with respect, appears to have overlooked.

We have some sympathy with the judge in this. The courts have frequently criticised the use of compendious, 'catch-all' pleadings characterised by repeated use of 'and/or' and the declaration sought was in that from. Had counsel limited it to the grounds he was ready to advance, his case and the judge's task would have been much clearer.

However, the affidavit of Mr Singh demonstrated the basis upon which the unions claimed the right to be consulted. The claim was not solely based on the powers given by the Act as the learned judge appears to have found but upon the registered collective agreement and, it would appear from the annexures, previously accepted practice.

There is no reference in the judgment to legitimate expectation. Having dealt with the application for an adjournment, the learned judge states, at page 4:

> ***"Although the reliefs sought are framed so as also to impugn the PSC's decision to make the Senior Executive Service Regulations it is apparent that the primary objective of the application to move for judicial review is to quash the Regulations themselves."***

He then deals exclusively with the power of the PSC to make regulations and concludes that they clearly did have such a power. Having reached that conclusion, he adds what is no more than a comment about the consultations and the unions' disappointment.

Order 53 rule 3 of the High Court Rules provides that no application for judicial review shall be made unless the leave of the court has been obtained. The rule gives no guidance as to the matters which will be considered when deciding whether or not to grant leave except for rule 3 (5) which requires the court to be satisfied of the applicant's standing in the matter and rule 4 which provides that leave may be refused if the court considers there has been undue delay in making the application.

In England where the rules make similar provision, it has been held that issues of delay and standing should normally be left to the full hearing; ***Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses*** [1982] AC 617. However, the courts in England have considerably extended the grounds upon which leave may now be refused including that the application is frivolous or hopeless, that it is made by mere busybodies, that there is a more appropriate procedure or that the matter is one of private law in which case the court may refuse leave but allow the case to proceed by writ.

The need for leave was explained by Lord Diplock in the **IRC case** at 642:

> ***"The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which***

public officers and authorities might be left as to whether they could safely proceed with administrative action whilst proceedings for judicial review of it were actually pending even though misconceived."

At 643 in a passage which has been accepted by this Court, he continues:

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

In ***Fiji Airline Pilots Association v Permanent Secretary for Labour and Industrial Relations,*** FCA Civ App 59/97, this Court adopted that principle. Similarly in ***Nivis Motor and Machinery Co Ltd v Minister for Lands and Mineral Resources***, FCA Civ App 17/98, the Court found, at page 4:

" Fatiaki J discussed fully the matters raised in the affidavit filed on behalf of the appellant but, although the Minister was represented by counsel at the leave hearing, the judge was not provided with any evidence from the Minister or his officials. On the basis of the appellant's affidavit alone, he was able to hold that an application for judicial review would have no prospect of success and thus refused to grant leave.

We consider that at least two matters raised in the appellant's affidavit called for some evidentiary response from the Minister or his officials before the judge could authoritatively ruled as he did that the appellant should not be granted leave to instigate judicial review on the grounds that it had not prospect of success...
We do not say that these maters are determinative of the appellant's case for judicial review; but they do point to the appellant having an 'arguable case'."

In ***Naidu v Attorney General***, FCA Civ App 39/98 the same passage from Lord Diplock's speech was cited and the Court continued:

"This approach is appropriate when the application for leave is considered with or without a hearing. Although the Rules now provide that the application is not required to be dealt with ex parte, we consider that an opposed determination inter partes should still be the exception rather than

the rule. In the normal course, the application for leave should be dealt with on the papers. Otherwise there is a risk that there will in effect be two hearings (and possibly two appeals), a process which will delay the final resolution, increase the costs and occupy additional court time. Also there is an understandable temptation for the judge to determine the central issue at a stage when all the evidence may not be before the court and that issue may not have been fully argued."

Those remarks are still apposite. However, in the present case, the learned judge was correct finally to determine the first ground of relief sought. The basis for the challenge of the Regulations themselves was clearly unarguable. What he failed to do, however, was to pass on to consider the application for the declaration based on the doctrine of legitimate expectation. Had he done so, he would have seen that there was material which could on further consideration have turned out to be an arguable case for granting the relief sought.

We do not consider whether the case is correct. As we have stated, this was an application for leave. The actual merits of the application would only have been determined at the full hearing following a grant of leave.

However, we share the judge's view that it was clear that the ultimate purpose of this application was to strike down the Regulations. That having now been abandoned, we must consider the practical effect of allowing this appeal and directing that leave be granted to pursue the second ground of relief at this stage.

The Regulations have been brought into effect. The Senior Executive Service has been established and has been operating for more than a year. Most, if not all, of the aims of the appellants when they sought review are now moot. Such a declaration, if it were granted, would achieve nothing and might prejudice the number of senior officers who, for that period of time, have been occupying positions in the public service to which they have been legitimately appointed.

In those circumstances we dismiss the appeal and make no order as to costs.

Order

1. Appeal dismissed.

2. No order for costs.

Ward, President

FIJI COURT OF APPEAL

Barker, JA

Tompkins, JA

Solicitors:

Messrs. Sherani and Company, Suva for the Appellants
Office of the Attorney General, Suva for the Respondent