

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

CIVIL APPEAL NO. ABU0043 OF 2005

(High Court Civil Action No. HBC. 66/2005L)

BETWEEN:

NARAYAN REDDY

(f/n Raja Reddy)

MAAN SINGH

(f/n Sabir Singh)

NITYA NAND CHETTY

(f/n Subram Chetty)

AYGA RAM SHARMA

Appellants

AND:

PERMANENT SECRETARY FOR EDUCATION

First Respondent

AND:

MINISTRY OF EDUCATION

Second Respondent

AND:

ATTORNEY GENERAL OF FIJI

Third Respondent

Coram:

Ward, President

Scott, JA

McPherson, JA

Date of Hearing: 19 March 2007

Counsel:

S.K. Ram for the Appellants

Ms M. Rakuita]

J. Lewaravu]

for the Respondents

Date of Judgment: 23 March 2007

JUDGMENT OF THE COURT

[1] The Appellants are the Controlling Authority and Manager of Kavanagasau Secondary School. The school, which was founded in 1975 was described in the High Court as "Hindu in character". Its 88 foundation members appear to be Hindus and clause 20(ii) of its Constitution provides that:

"The school Head and the school Vice Principal shall be always a Hindu who will be the choice of the Board of Governors."

[2] The Education Act (Cap.262- the Act) defines two types of school. "Aided School" is a school aided by way of a recurrent grant of out of public funds. A "Government School" is a school maintained out of public funds and controlled by the Ministry of Education. There also exist in Fiji private schools, that is, schools which receive no financial assistance at all from the Government. It was conceded by the Appellants that Kavanagasau is an "Aided School" and that although the foundation members contribute to the school's fabric and upkeep most, if not all, the teachers salaries are paid by the Ministry.

[3] In about June 2001 the position of Head of School (or Principal) fell vacant. The position was advertised by the Ministry. The body of the advertisement was as follows:

"To administer a ED3C secondary school, offer professional guidance to the staff and teach.

Qualifications: Qualification as for HOD[1] post and at least 5 years in ED5E or 4 years competent service with a superior assessment in the ED4 or 2 years in ED3A or B grades or equivalent based upon standard rating scale. Completed 3 years rural service or attained a superior assessment in the past 3 years. Where relevant, hostel management experience preferred. Contribution of Fiji education beyond in the immediate school environment and the ability to communicate effectively on education issues with the wider community and recognized leaders in Education would be an added advantage. Potential to advance to higher posts."

- [4] in October 2001 the Ministry sent the School Manager details of four applicants for the position. The school was asked to nominate three qualified applicants in order of priority. The Ministry's letter concluded by advising the Manager that if a management recommendation was not received then it would be presumed that the school did not wish to make a nomination for the vacancy and that "the appointee would have the approval of the management."
- [5] The school replied to the Ministry and "strongly" recommended Satya Nand, its current Vice Principal and acting Principal. The school pointed out that Mr Nand had been teaching at the school for the past 22 years. He was academically qualified for the position and had a wealth of experience in the day to day running of the school. He had demonstrated good leadership while working along with his colleagues.
- [6] In December 2001 the Ministry asked the school to reconsider its nomination. The Ministry was minded to appoint another applicant, Semesa Takirua: "The performance ratings of the two officers [were] similar for the last three years but Mr Takirua is on a substantially

higher grade than Mr Satya Nand". Mr Takirua was, however, not a Hindu.

- [7] In December 2001 the school wrote back to the Ministry and advised that its Board had met to reconsider the nomination. The school stood by Mr Satya Nand. It was stressed that the school was:

"run by the Indian Community therefore it is ethically correct to have an Indian person heading the Institution as a Principal".

- [8] In April 2003, over two years after the previous correspondence, during which time Mr Nand had continued to act as Principal, the Ministry gave the school a choice: either accept Mr Takirua whose emoluments would be paid by the Ministry or find another qualified person whose emoluments would have to be met by the school.

- [9] In May 2003 the school, in a letter apparently signed by its entire committee, again recommended Mr Satya Nand and asked the Ministry to reconsider. Just under one year later, in April 2004 the Ministry officially posted Mr Takirua to the school and advised the school that it had done so.

- [10] Shortly after receiving the Ministry's advice the school wrote to the Ministry telling it that there would not accept Mr Takirua and again asking the Ministry not to send him to the school.

- [11] During the next two months several meetings were held between the school and the Ministry. The school took the position that its constitution required the Principal to be a Hindu. The Ministry, relying on sections 38(2)(a) and 140(b) of the 1997 Constitution, on section 23 of the Act and on section 15 of the Public Service Act 1999, took

the view that the law required promotion within the Public Service to be made on the basis of merit. Mr Semesa Takirua was, in the Ministry's view, the more meritorious applicant.

[12] In March 2005, after negotiations had reached stalemate and after the Ministry gave notice to Mr Satya Nand that he was to be transferred away from the school, the school began legal proceedings. The Originating Summons sought four declarations:

- (1) That the Ministry was not permitted to appoint a Principal to the school "in contradiction" to its constitution.
- (2) That the Ministry had to "consider and accede to the wishes of the School before appointing a Principal."
- (3) That Mr Takirua could not be appointed (by the Ministry) as he was not a Hindu and was not acceptable to the school.
- (4) That the Ministry had to take into consideration the culture and religion of a school when appointing a Head Teacher; and must ensure such appointment is not in contradiction to the culture and religion of the school.

[13] In his affidavit in answer, the Ministry's Chief Executive Officer deposed that Mr Takirua had been assessed "as the most suitable, qualified and meritorious applicant for the position." He exhibited copies of a comparative merits analysis of Mr Nand and Mr Takirua which had been prepared for use by the Public Service Appeal Board. That analysis compared the careers of the two candidates in terms of qualification, length of service, relevant experience and annual confidential report rates. The analysis concludes:

"[Mr Takirua] edges Mr Nand in terms of seniority in grade and years of service."

- [14] The High Court at Lautoka dealt with the case before it with commendable promptness and concision. It agreed with an earlier judgment of the High Court at Lautoka, Ministry of Education v. Rajendra Patel and Ors (HBC 153/4 L) and held that since the Principal of the school was a public officer for the purposes of section 23 of the Act it was the Ministry which had the authority to make the appointment. Therefore, the school had "no role or function" in the matter. The Originating Summons was dismissed.
- [15] On appeal, Mr Ram advanced several arguments on behalf of the school. He suggested first, that section 3 of the Act provided that children were to be "educated in accordance with the wishes of their parents". In the present case, the parents wished their children to be educated at a school which had a constitution which required the Principal to be a Hindu; therefore the parents had the right to have a Hindu appointed as Principal of their children's school.
- [16] We are unable to accept that submission. In our view, section 3 merely states a general principle and one which is conditional upon the requirements for "efficient instruction and training and for the avoidance of unreasonable public expenditure." We agree with Mr Lewaravu that section 3 embodies the principle of choice but it does not confer a right to choose that which is unavailable or prohibited.
- [17] Mr Ram next referred us to section 11 of the Act. The section is as follows:

"Religious Instruction in Schools

11-1 Provision for religious instruction may be made in any school provided that teachers shall not be compelled to give or to be present at such instruction against the dictates of their conscience.

11-2 If the parent of any pupil requests that such pupil be wholly or partly excused from attendance at religious instruction in the school, the pupil shall be excused from such attendance wholly or partly as the case may be."

[18] Mr Ram suggested that, properly interpreted, this provision afforded parents the right to have their children given the religious education of their choice. We do not agree. The right to freedom of religion and religious teaching is one of the fundamental freedoms guaranteed in section 35 of the 1997 Constitution. We do not read section 11 as also protecting that freedom, rather we read it as a protection *against* religious instruction being given against the wishes of parents. Since it is not necessary for religious instruction in a school to be given by the Principal of the school or that the Principal of a school be of the same religious persuasion as the person actually giving religious instruction, we are satisfied that neither section 11 of the Act nor section 35 of the Constitution provide support for the school's position.

[19] Mr Ram also referred us to Part (VI) of the Act. While accepting that section 23 of the Act gives the Ministry the power to appoint a publicly funded public officer as Principal of the school, he suggested that the appointee had to be acceptable to the school management since otherwise the smooth and efficient management of the school would be impossible. We accept the general good sense of Mr Ram's

submission but do not accept that the schools Controlling Authority established under Part (VI) has any power to veto the appointment of a public officer Principal in fact chosen by the Ministry.

[20] Mr Ram's final suggestion was that the United Nations 1989 International Covenant on the Rights of the Child which, inter alia, provides that "the best interests of the child shall be the primary consideration" was a part of that body of international law to which the Courts in Fiji must have regard under the provisions of section 43(2) of the 1997 Constitution. We agree with that submission but are not persuaded that those rights would be breached by a failure to adhere to the terms of the school's constitution.

[21] In our view, none of the matters raised by Mr Ram give an Aided School the right, on the basis of its own private constitution, to overrule the appointment by the Ministry of a public officer as the Principal of the school. At the same time, we take the view that the approach taken by the Ministry on this occasion and the submissions of counsel for the Ministry call for some further comment.

[22] Mr Lewaravu's submissions to us were brief and to the point. The school now accepted that the Principal was a public officer. It followed therefore that the appointment of the officer had, in accordance with the 1997 Constitution and the Public Service Act, to be made on the basis of merit. A merit assessment had been undertaken which had revealed that Mr Takirua was the more meritorious candidate. To refuse to allow Mr Takirua to take up the position to which he was legally entitled would not only result in chaos but would also amount to unfair discrimination against him on the grounds of his religious beliefs.

[23] When we asked Mr Lewaravu how he suggested that the merits of candidates should be assessed he referred us to the requirements of the advertised post and the Ministry's conclusion that Mr Takirua "edged Mr Nand in terms of seniority in grade and years of service." The most important factors, Mr Lewaravu suggested, were the qualifications of the candidates, their work experience, their general skills and their ability to perform at the required level.

[24] While we agree that seniority in grade and in years of service and the other factors listed by Mr Lewaravu are important matters to be taken into account, we do not agree that they are necessarily themselves determinative of the merits of the competing candidates.

[25] Mr Lewaravu referred us to Regulation 5 (1) of the Public Service (General) Regulations 1999 (LN 48/99) but he did not refer to regulations 5(2), 5(3) and 5(4) which are the sub-regulations offering guidance on the matters which should be taken into consideration before appointments are made on merit.

[26] Regulation 5(2) provides that:

"An appointment or promotion may only be made if –

- (a) -
- (b) an assessment has been made of the relative suitability of the candidates for the duties, after interview or using another competitive selection process;
- (c) the assessment was based on the relationship between the candidate's work – related qualities and the work – related qualities genuinely required for the duties;

(d) the assessment focused on the relative capacity of the candidates to perform the duties.”

[27] Regulation 5(3) provides that the following work-related qualities may be taken into account in making the assessment referred to in sub-regulation (5)(2):

- “(a) skills and abilities;
- (b) qualifications, training and competencies;
- (c) standard of work performance;
- (d) capacity to perform at the level required;
- (e) demonstrated potential for further development;
- (f) ability to contribute to team performance.”

[28] Sub-regulation (5) must particularly be noted. It states that:

“Sub-regulation (3) does not prevent any other relevant matter being taken into account.”

[29] In our view the manner in which the Ministry approached the assessment of the competing candidates on this occasion and the general approach advocated before us by Mr Lewaravu placed undue emphasis upon the technical achievements of the candidates and paid insufficient regard to such other factors as the “relative suitability” of the candidates, “work – related qualities genuinely required for the duties” and the “ability to contribute to team performance.”

[30] Sadly, during the pendency of these proceedings, Mr Takirua, who was clearly a candidate of considerable merit, passed away. Mr Nand’s transfer was cancelled and we understand that he has continued to act as the school’s Principal. We think that the fact that the school is a

Hindu school, that the Principal's duties have always involved the organization of Hindu ceremonies and that the school committee very much want the Principal to be a Hindu are important considerations to be borne in mind when assessing the suitability of candidates for the position. With respect, we do not agree with the Judge that the school has "no role or function" in the making of the appointment. The overall aim of the assessment is to find the candidate most suited to the particular position and most likely to make a success of it. This may not necessarily be the candidate whose gradings are the highest or whose years of experience are the longest. It may well be that a candidate who does not score so highly in those areas may demonstrate that, for cultural and religious reasons, he or she is more likely to attract the support of the school, the parents, and the pupils. We are unable to accept Mr Lewaravu's suggestion that there is anything unfair, discriminatory or unconstitutional in approaching the assessment in this way.

Result

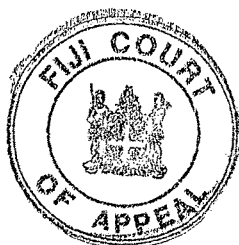
- (1) Appeal dismissed
- (2) No order as to costs

Ward

Ward, President

JA Scott

Scott, JA



H. McPherson

McPherson, JA

Solicitors:

Samuel K Ram Solicitors, Ba for the Appellants
Office of the Attorney General Chambers, Lautoka for the Respondents

D:\WD\WIN\USHA\ABU0043U.05S